

# Legalization of Marijuana in Illinois – What Employers Need to Know

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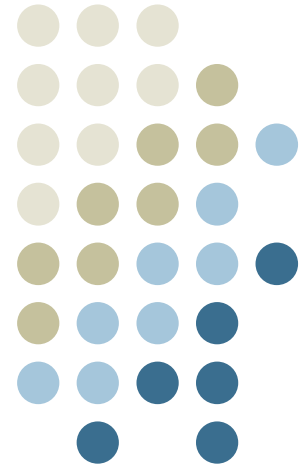
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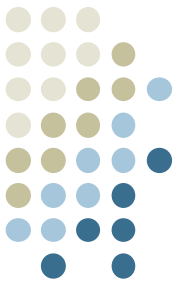
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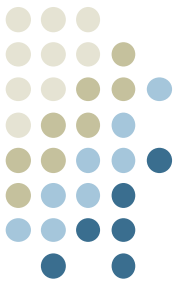
# This Topic is **UNIQUE** to Your Operations and Risk Tolerance!



- You must evaluate what your risk tolerance is and what you (FOR YOUR OPERATION) are willing to tolerate or not tolerate.
- Evaluate your “safety sensitive positions” or other “key” positions. Drug testing policies may have to be tailored (i.e. receptionist vs. forklift operator vs. CFO vs. office clerk).



# Roll Call: State Survey – Adult/Recreational Use



**Lawful in 11 States + DC** – Alaska; California; Colorado; Illinois; Maine; Massachusetts; Michigan; Nevada; Oregon; Washington; District of Columbia; Vermont

**Decriminalized in 14 States (i.e. possession of small amounts result in civil offense, not a criminal offense)** – Connecticut; Minnesota; Missouri; North Carolina; Maryland; Delaware; Illinois; Ohio; Rhode Island; Nebraska; Mississippi; New York; New Hampshire; New Mexico

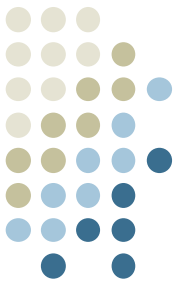
**Misdemeanor in 12 states** – Kansas; South Dakota; Utah; Virginia; West Virginia; Wyoming; Idaho; Tennessee; Kentucky; Wisconsin; Indiana; South Carolina;

*\*\*Excludes local ordinances decriminalizing/reducing penalties for marijuana use/possession.*



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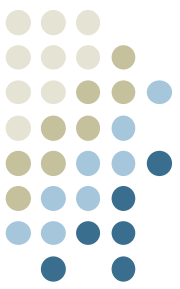
# Use Impacts Effects....



## Effects and Period of Impairment depends on how consumed:

- **Smoking**: Immediate absorption through lungs, peaks in blood within minutes and causes “high” that can last 2-3+ hours.
  - Most behavioral and physiological effects return to baseline levels within 4-6 hours after drug use, residual effects have been shown in behaviors up to 24-48+ hours after use.
- **Eating**: Slower absorption rate over several hours, metabolized in the liver within 1-2 hours and causes a “high” that can last anywhere from 2-8+ hours.
  - Most behavioral and physiological effects return to baseline levels within 9-11+ hours after drug use, residual effects have been shown in behaviors 24-48+ hours after use.



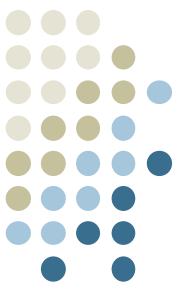


# IL Cannabis Law

## HB 1438 – Cannabis Regulation and Tax Act

- Passed by Legislature June 6, 2019.
- Signed into law by Governor on June 25, 2019.
- 610 pages long. LESS THAN 10 DEDICATED TO EMPLOYMENT.
- Legalizes sale of Cannabis for recreational use January 1, 2020.
- **Regulates and treats Cannabis in a manner similar to Alcohol.**

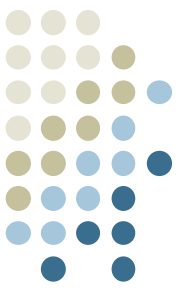




# IL Cannabis Law (Cont'd)

- Illinois Resident and Non-Residents who are **over 21** years old may purchase and use cannabis legally.
- Quantity Permitted –
  - **Medical Cannabis law** – registered users 2 ½ Oz = 70 grams over 14 day period or 5 grams per day.
  - **IL Residents** – 30 grams of flower, 500 milligrams of THC in cannabis-infused products, 5 grams of cannabis concentrate.
  - **Non-Residents** – 15 grams of flower, 250 milligrams of THC in cannabis-infused products, 2.5 grams of cannabis concentrate.



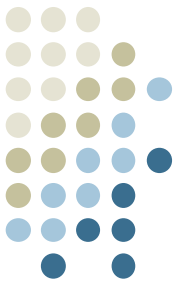


# IL Cannabis Law (Cont'd)

## Section 10-50. Employment: Employer Liability

- **Employers may:**
  - Enforce drug testing policies, including **zero tolerance** and drug free workplace, if applied in a non-discriminatory fashion.
  - Prohibit employees from using, possessing, or being impaired while **in the workplace, performing job or while on call.**
  - Discipline or terminate an employee for violating an employer's employment policies or workplace drug policy.



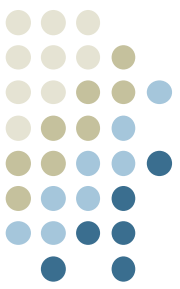


## IL Cannabis Law (Cont'd)

- But... what's ZERO TOLERANCE? It may not mean what some may think it means.
- It's probably NOT “do whatever you want!”





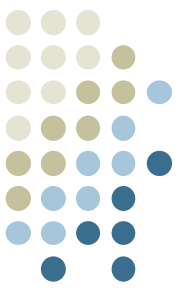


# IL Cannabis Law (Cont'd)

## Right to Privacy in Workplace Act (820 ILCS 55/5)

- Except as provided in Section 10-50 of Cannabis Act, it is unlawful for Employers to refuse to hire, terminate or treat an individual differently based on their use of lawful products off the premises of the employer during nonworking and non-call hours.
- Lawful products means products legal under state law.
- Does not apply to non-profit organizations, that one of the primary purpose is to discourage the use of one or more lawful products.
- **THIS CREATES TENSION!**



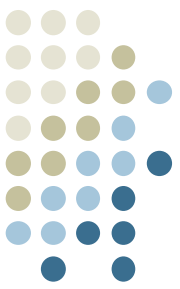


# IL Cannabis Law (Cont'd)

## Right to Privacy in Workplace Act (820 ILCS 55/5)

- (c) It is not a violation of this Section for an employer to offer, impose or have in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' use of lawful products provided that:
  - (1) differential premium rates charged employees reflect a differential cost to the employer; and
  - (2) employers provide employees with a statement delineating the differential rates used by insurance carriers.





# IL Cannabis Law (Cont'd)

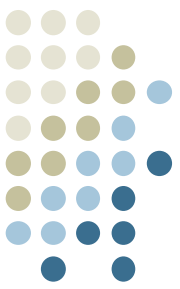
## Right to Privacy in Workplace Act (Cont'd) – Administrative Regulations-56 Ill. Adm. Code § 360.110(g)

- (g) “Lawful Products” shall include, but shall not be limited to:
  - all tobacco products;
  - all alcoholic beverages;
  - all food products;
  - all over-the-counter drugs; and
  - any drugs lawfully prescribed by the employee's own physician.

Provided however, that any use or overconsumption of these lawful products that directly impairs the performance of the employee at the workplace shall not be protected under this Act.



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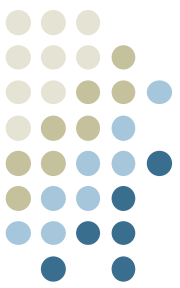
# IL Cannabis Law (Cont'd)

## Conflicting Language!?!?

During the floor debate on the House floor, the following legislative intent was provided...

- “For purposes of legislative intent: Are actions of discipline or termination of an employee by an employer for failing a drug test, including a random test, protected from litigation under this law?”
- Response from the House sponsor was “Yes”.

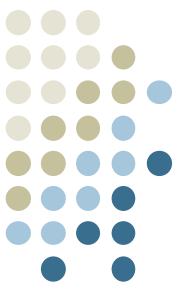




# IL Cannabis Law (Cont'd)

- **Section 10-35 – Limitations and Penalties –**
- (a) Act does not permit any person to engage in, or prevent civil, criminal or other penalties, for engaging in, any of the following conduct:
  - (1) undertaking any task under the influence of cannabis when doing so would constitute negligence, professional malpractice, or professional misconduct;
  - (5) operating, navigating, or being in actual physical control of any motor vehicle, aircraft, or motorboat while using or under the influence of cannabis in violation of Section 11-501 or 11-502.1 of the Illinois Vehicle Code;

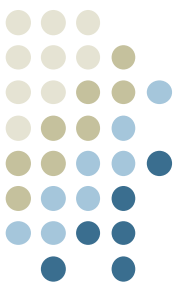




# IL Cannabis Law (Cont'd)

- **Section 10-35 – Limitations and Penalties –**
- (a) Act does not permit any person to engage in, or prevent civil, criminal or other penalties, for engaging in, any of the following conduct:
  - (8) the use of cannabis by a law enforcement officer, corrections officer, probation officer, or firefighter **while on duty**; or
  - (9) the use of cannabis by a person who has a school bus permit or a Commercial Driver's License **while on duty**.

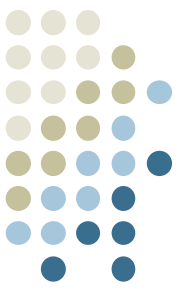




# IL Cannabis Law (Cont'd)

- **Section 10-35 – Limitations and Penalties –**
  - (c) Nothing in this Act shall prevent a private business from restricting or prohibiting the use of cannabis on its property, including areas where motor vehicles are parked.
  - (d) Nothing in this Act shall require an individual or business entity to violate the provisions of federal law, including colleges or universities that must abide by the Drug-Free Schools and Communities Act Amendments of 1989, that require campuses to be drug free.



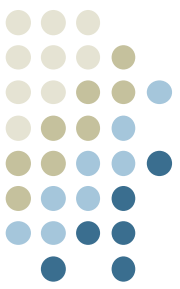


# IL Cannabis Law (Cont'd)

- **“Workplace” – Not just the employer’s building.**
  - Includes any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee's job duties, and vehicles, whether leased, rented, or owned.
  - **“Workplace” may be further defined by the employer’s written employment policy, provided that the policy is consistent with the underlying law.**



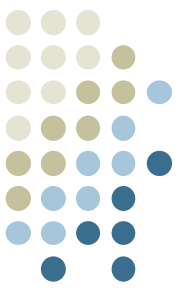




# IL Cannabis Law (Cont'd)

- **“On Call”** when employee is scheduled with at least 24 hours’ notice from the Employer to be on standby or otherwise responsible for performing tasks related to his or her employment, either at the employer’s premises or other previously designated location by his or her employer to perform a work-related task.

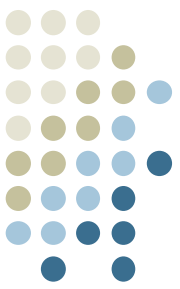




# IL Cannabis Law (Cont'd)

- Language implies that Employers can face civil liabilities and lawsuits based on their decisions or knowledge:
  - Employee may have claim against Employer if adverse employment action was not based on a “good faith belief” of (1) actual impairment; or (2) use/possession while in the workplace, performing job, or on call.
  - Third parties may have claims against Employers for damages/injuries caused by employee if the Employer knew or had reason to know the Employee was impaired.



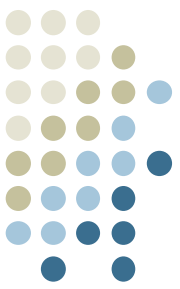


# Legal Exposure and Claims

## Right to Privacy in the Workplace

- **File a complaint with the IDOL** – who will investigate, attempt to conciliate, and then can file civil action to compel compliance.
  - Complaint with the IDOL must be filed “within **180 days** after termination or the complained of incident.” Ill. Admin. Code tit. 56, § 360.120(a) (2002).





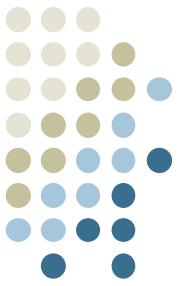
# Legal Exposure and Claims

## Right to Privacy in the Workplace

### • Damages

- Actual damages, plus costs.
- For willful and knowing violation, \$200 plus costs, reasonable attorney's fees and actual damages.

# Cannabis Use and Impairment in the Workplace



What to do if you suspect someone of being impaired or “high” – **EVEN** if they have disclosed they are a registered user.

- Fill out Reasonable Suspicion checklist.
- Follow drug testing procedures.
- **IMPORTANT CHANGE** – before disciplining or taking any adverse action – the law **may require** an employer to provide Employees a reasonable opportunity to contest the basis of the Employer’s determination that the individual was impaired.

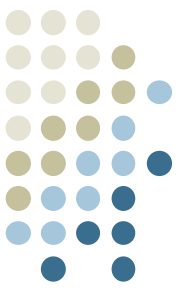


# Cannabis Use and Impairment in the Workplace... (Cont'd)



IL Cannabis Law provides that an employer may discipline and terminate any employee under the following condition: “good faith belief” if “employee manifests specific, articulable symptoms while working that decrease or lessen the employee’s performance of the duties or tasks of the employee’s job position, including symptoms of the employee’s speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. \*\*\*And, the law then provides that IF the employer does discipline on the basis of suspected impairment, then employee must be provided reasonable opportunity to contest.





# Interaction with Federal Law

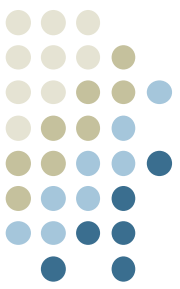
Marijuana is currently a **Schedule 1 Illegal Substance**.

- Dept. of Justice (DOJ) is still prosecuting violations of federal law to enforce certain goals/priorities.
  - DOJ Guidance provides that it will not consider State medical marijuana laws to not conflict with Federal laws/priorities IF strong and effective regulations are enforced.
- Dept. of Transportation and other Federal agencies that enforce employment standards have made clear that a positive drug test for marijuana is still a violation/illegal.
  - If you have Federal contracts, receive federal funding or are regulated by federal agencies that have drug testing requirements, your policies following federal law will not be impacted.



# What about MEDICAL Cannabis... The Law

## “101” – Disability and Medical Exams



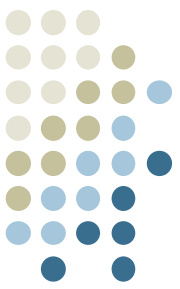
### During Application & Interview Stage:

- The law places strict limits on employers when it comes to asking job applicants to answer medical questions, take a medical exam, or identify a disability (including whether they are under a valid prescription).
- For example, an employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer. An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability). An employer may ask job applicants whether they can perform the job and how they would perform the job, with or without a reasonable accommodation.





# What about MEDICAL Cannabis... The Law “101” – Disability and Medical Exams

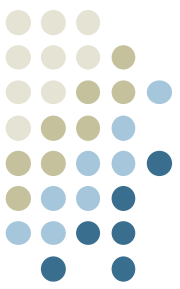


## After a Job Offer For Employment:

- After a job is offered to an applicant, the law allows an employer to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same type of job have to answer the same questions or take the same exam.



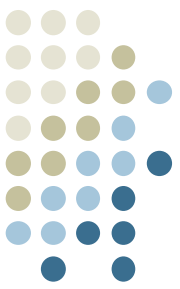
# What about MEDICAL Cannabis... The Law “101” – Disability and Medical Exams



## After Started Working – Current Employees:

- Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation, or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.
  - Includes asking what medication an employee is on...
- Law requires employers to keep all medical records and information confidential and in separate medical files.



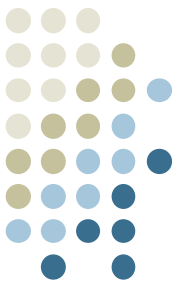


## Bottom Line...

- An employer must be able to demonstrate that an employee's inability or impaired ability to perform the essential functions of his/her job will result in a direct threat to the employee or others.
- Again, overriding theme is a **DIRECT SAFETY THREAT!!!**



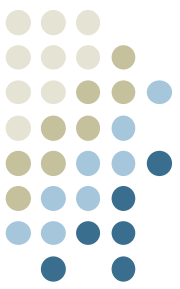
# Medical Marijuana Use and Impairment in the Workplace...Cont'd



The Medical Marijuana Act provides list of symptoms that an employer may use to determine if an individual is impaired, including:

- Decreased or lessened performance of job duties;
- Impaired speech, physical dexterity, agility or coordination;
- Demeanor or irrational or unusual behavior; or
- Negligence, carelessness or disregard for safety of self or others.





# Drug Testing Policy Options...

## Zero Tolerance and Drug Free Workplace Policies

- Helpful if employer has Federal Contracts or subject to federal regulations concerning drug-free workplaces.

## If No federal contracts – Can still use Zero Tolerance and Drug Free Workplace Policies...but there is more risk...

- Treat Medical Cannabis similar to other legal prescription narcotics/drugs with respect to Safety Sensitive positions.
- **Risky areas of drug testing (especially medicinal):**
  - **Applicants during the Hiring stage; and**
  - **Random drug tests**



# Federal Contracts and Federal Regulations

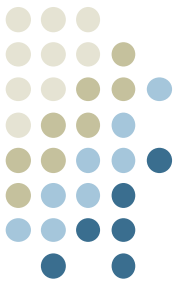


**Even with the Illinois law carve out for federal contracts, employers must **STILL** be careful!**

- The Drug Free Workplace Act (DFWA) only requires federal grant recipients and federal contractors adopt a zero tolerance policy, and certify that their workplaces are drug free.



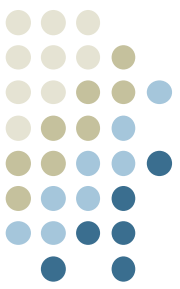
# Changes to Consider in Drug Testing Policy or Procedures



- If prohibiting recreational marijuana, perhaps prohibit similar to alcohol?
- Clarify position on Cannabis and Medical Cannabis. BE CLEAR!
- Clarify position on use/consumption, storage, and timekeeping requirements (i.e. not while working or on breaks).
- Address Impairment. Define Impairment?
- Define “Workplace”.
- Define and Distinguish Safety Sensitive Positions.
- What about a 30 day (or, less) Marijuana Testing Practice?
- Add an EEO Disclaimer.
- Add language that provides the Employee has an Opportunity to Explain before Discipline.
- Testing triggers updated? Specifically, NEAR MISS DEFINED? POST ACCIDENT DEFINED? RANDOM? REASONABLE SUSPICION? ANY OTHER TRIGGERS WARRANTED?



# Educate Employees on Your Position Towards Cannabis

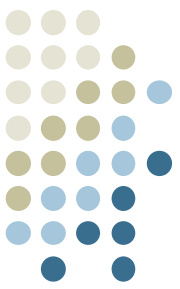


- Provide clear information on the Employer's position of Cannabis in your drug and alcohol testing policy.
- Address Cannabis use and impairment in Safety Training and/or Orientation.
  - Go through the potentially dangerous impairing effects of Cannabis in the workplace.
- Address any changes to policies and procedures.
- Get NEW Acknowledgment to any policy updates.
- Address ADA and reasonable accommodation concerns.





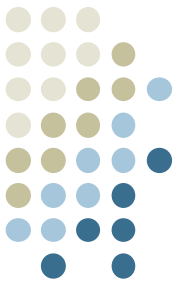
# Educate Supervisors on Policy Changes and Drug Impairment



- Make sure familiar with changes in policies, procedures and any new forms.
- Reasonable Suspicion Training to recognize signs of alcohol/cannabis/other drug use and impairment.
- Address procedure for responding to questions from an employee or applicant.
  - Who is a registered user for medical Cannabis; or
  - About the Company's position on Cannabis.
- Make clear the Confidential Medical nature of employees or applicants that are registered users of medical Cannabis.



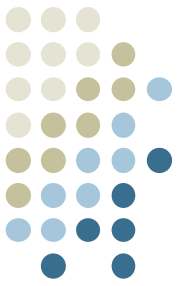
# Education of Employees and Supervisors



- In Training, emphasize:
  - How recreational cannabis use negatively impacts individuals.
  - Safety Threats/Concerns created by Cannabis use.
  - EAP program services (if available).



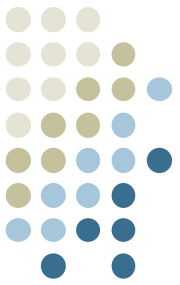
# MAJOR Areas of Potential Legal Challenges



1. REASONABLE SUSPICION TESTING BASED ON ASSESSMENT MADE AND CONDUCTED BY UNTRAINED PERSONNEL, AND FAILURE TO DOCUMENT REASONABLE SUSPICION.
2. AMBIGUOUS POLICY LANGUAGE THAT FAILS TO PROPERLY DEFINE AND ADDRESS WHEN, WHERE, AND WHAT TESTED.
3. NO FORMS OR BAD FORMS.
4. PRE-EMPLOYMENT AND RANDOM TESTING (particularly in NON-safety sensitive positions).
5. INCONSISTENT POLICY IMPLEMENTATION --- UNEQUAL TREATMENT.
6. FAILURE TO OBTAIN INPUT FROM MEDICAL COMMUNITY AND KEY 3<sup>rd</sup> PARTY VENDORS (i.e. collection site, lab).
7. FAILURE TO ADHERE TO ANY COLLECTIVE BARGAINING OBLIGATIONS.



# Thank You!!



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