

# Cutting Through the Haze: **Cannabis in the Workplace**

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# Background

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## A Bit of History

- Controlled Substances Act of 1970
  - Federal government officially banned the use of cannabis
- In 1996, California decriminalizes the use of medical cannabis
- In 2012, Colorado and Washington become the first two states to legalize the recreational use of cannabis
- Currently, 33 states allow the use of medicinal and 11 states (plus the District of Columbia) allow or will allow the recreational use of cannabis

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### States where marijuana is legal



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## Illinois & Medical Cannabis History

- On August 1, 2013, Illinois became the 20th state to legalize medical cannabis.
  - Law took effect on January 1, 2014.
- Allows an individual suffering from one of the 40-plus listed illnesses (such as cancer, multiple sclerosis or HIV) to be prescribed a limited amount of cannabis.

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## Illinois & Recreational Cannabis History

- On June 25, 2019, Illinois became the 11th state to legalize recreational cannabis.
  - Law took effect on January 1, 2020.
- Individuals must be 21+ to purchase cannabis.

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## Cannabis Possession & Usage

### Medical Cannabis

- 2.5 ounces (70 grams) of cannabis every two weeks.

### Recreational cannabis

- 30 grams of cannabis flower;
- 5 grams of cannabis concentrate; and
- No more than 500 milligrams of THC contained in a cannabis-infused product.

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## Cannabis Convictions

- Pre-legalization convictions for cannabis-related offenses (under 30 grams) will be eligible for pardons as long as no violent crimes were committed.
- Cases will be reviewed by the Prisoner Review Board.

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# Cannabis & the Workplace

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## How does this law affect employers?



1. Do you have to hire/employ cannabis users?
2. Do you have to allow employees to consume, possess, or use cannabis in the workplace?
3. Do you have to allow employees under the influence of cannabis to continue to work?
4. Can you terminate employees who test positive for cannabis?

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## Medical Cannabis: Pre-employment

### Question No. 1.

No employer **may penalize** a person **solely** for his or her status as a registered qualifying patient unless failing to do so would put the employer **in violation of federal law** or cause it to **lose a monetary or licensing-related benefit under federal law**.



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## Recreational Cannabis: Pre-employment

### Question No. 1.

Except as otherwise specifically provided by law, including **Section 10-50 of the Cannabis Regulation and Tax Act**....it shall be unlawful for an employer **to refuse to hire or to discharge** any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual **uses lawful products** off the premises of the employer **during nonworking and non-call hours**.

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## Recreational Cannabis: **Pre-employment**

### Question No. 1.

#### **Section 10-50 of the Cannabis Regulation and Tax Act**

Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for ....**subjecting an....applicant to reasonable drug and alcohol testing...or withdrawal of a job offer due to a failure of a drug test.**

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### **Practice Problem**

While interviewing Sarah for a secretarial position, you ask her to take a pre-employment drug test. The results show she tested positive for cannabis. When you notify Sarah, she tells you she has a medical condition for which she takes cannabis. You don't want to worry about Sarah coming to work under the influence, so you don't hire her. **Is that legal?**

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## Medical Cannabis:

# Possession, Consumption, and Use

### Questions No. 2 and 3

- Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for:
  - Actions based on the employer's good faith belief that a registered qualifying patient ***used or possessed cannabis while on the employer's premises or during the hours of employment***; or
  - Actions based on the employer's good faith belief that a registered qualifying patient was ***impaired while working on the employer's premises during the hours of employment***.

*Note: If you elect to discipline an employee because you believe he or she was impaired, you must afford the employee a reasonable opportunity to contest the basis of the determination.*

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## Recreational Cannabis:

# Possession, Consumption, and Use

### Questions No. 2 and 3

- Nothing in this Act shall require an employer to permit an employee:
  - To be ***under the influence of or use cannabis*** in the employer's **workplace** or **while performing** the employee's **job duties** or while **on call**.
  - **Signs showing impairment or being under the influence:**
    - Issues with 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.

*Note: If an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the employer must afford the employee a reasonable opportunity to contest the basis of the determination.*

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Cannabis:

## Reasonable Suspicion

### *Steps for handling reasonable suspicion:*

1. Receive and document the complaint(s)
2. Observe the employee and document observations
3. Remove the employee from safety sensitive areas
4. Assess the Situation
5. Meet with the employee to explain findings
6. Prepare transportation and send the employee for testing
7. Wait for test results
8. Determine how to respond to a refusal to test, negative test or positive test

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## Practice Problems

- A few months after you hire Sarah for the secretarial position, she calls in sick. While Sarah's boss searches her desk for a file he needs, he discovers a bag of cannabis in her desk drawer. **Can you discipline or terminate Sarah?**
- Instead of calling in sick, Sarah comes to work exhibiting unusual behavior. She has bloodshot eyes, seems spaced out, is slow to respond when someone is speaking with her, and has been acting very clumsy and careless to the point she has dropped several items and even broke a vase that was on her desk. **Can you discipline or terminate Sarah?**

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## Medical Cannabis: Drug Testing

### Question No. 4.

- Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace ***provided the policy is applied in a non-discriminatory manner.***
- Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.
- Nothing in this Act shall limit an employer's ability to discipline an employee for failing a drug test if failing to do so would put the employer **in violation of federal law or cause it to lose a federal contract or funding.**



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## Recreational Cannabis: Drug Testing

### Question No. 4.

- Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for....**reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test.**
- Nothing in this Act shall be construed to create or imply a cause of action against an employer for subjecting an employee or applicant to **reasonable drug and alcohol testing** based on the employer's **good faith belief** that an employee **used, possessed, was impaired or under the influence of cannabis** in the employer's workplace or while performing the employee's job duties or while on call in violation of the employer's employment policies.



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## Recreational Cannabis: **Drug Testing**

### Question No. 4. Public Employers

- Nothing in this Act prevents a public employer of **law enforcement officers, corrections officers, probation officers, paramedics, or firefighters** from prohibiting or taking disciplinary action for the consumption, possession, sales, purchase, or delivery of cannabis or cannabis-infused substances while on or off duty, unless provided for in the employer's policies.



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## Recreational Cannabis: **Drug Testing**

### Question No. 4. Federal or State restrictions

- Nothing in this Act shall be construed to interfere with any federal, state, or local restrictions on employment including, but not limited to, the **DOT regulation 49 CFR 40.151(e)** or impact an employer's ability to comply with federal or State law or **cause it to lose a federal or state contract or funding.**



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## Federal Contractors & Drug Testing

### Question No. 4. Drug Free Workplace Act

- The Drug Free Workplace Act (DFWA) does not require testing.
  - See *Noffsinger v. SSC Niantic Operating Co., LLC*, 338 F. Supp. 3d 78, 84 (D. Conn. 2018), where the court said the Drug Free Workplace Act does not require drug testing and does not prohibit “federal contractors from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical cannabis outside the workplace in accordance with a program approved by state law.”
- However, some federal contractors may be required to conduct testing due to DOT and FAA regulations. They may also have a clause directly in their federal contract requiring testing.



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## Practice Problems

- Sarah comes to work exhibiting unusual behavior. She has bloodshot eyes, seems spaced out, is slow to respond when someone is speaking with her, and has been acting very clumsy and careless to the point she has dropped several items and even broke a vase that was on her desk. You send her for a drug test, which shows up positive for cannabis. **Can you terminate her?**
- What if Sarah was not exhibiting any unusual behaviors. Instead, she tested positive for cannabis as part of a random drug test. **Could you terminate her then?**

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## Cannabis & Unemployment

*Eastham v. Housing Authority of Jefferson County*,  
No. 09-MR-57 (Ill. App. Ct. 5th Dist., Dec. 2, 2014)

- The court held that employee terminated for admitted drug use while on vacation was eligible for unemployment because:
  - 1) it was not a violation of the employer's drug policy;
  - 2) was not "in the course of employment"; and
  - 3) did not constitute "misconduct" under the IL Unemployment Insurance Act.

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## Cannabis & Workers' Compensation

- The IL Workers' Compensation Act language currently provides that when an employee is "intoxicated" on cannabis, the injury is presumed to be related to the intoxication, rather than work.
- That may change however.
- Consider *Hopkins v. Uninsured Employers' Fund*, 2010 MTWCC 9, WCC No. 2008-2152 (May 4, 2010).
  - In this case, an employee who had smoked cannabis before coming to work was mauled while feeding the bears for work. The court found that Hopkins' use of cannabis was not a major contributing cause of his injuries and thus did not disqualify him from receiving an award of workers' compensation benefits.

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# Practice Pointers

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## Summary

- If an applicant fails a drug test, but is a registered qualifying patient, you cannot revoke the job offer.
- If an applicant fails a drug test, but is *NOT* a registered qualifying patient, you may be able to revoke the job offer.



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## Summary

- If you have a good faith belief that an employee possess or has consumed cannabis in the workplace, take action in accordance with your drug policy.
- If you have a good faith belief that an employee is impaired at work, document that clearly, send the employee for a drug test, and give the employee a reasonable opportunity to contest the basis of that decision before taking an adverse action.



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## Summary, *continued*

- If an employee fails a drug test, which was administered based on documented suspicion of impairment, take action in accordance with your drug policy.
  - Treat a registered qualifying patient just as you would someone who tested positive for other prescription medication (i.e., an opioid).
- If an employee fails a random drug test, termination may be permissible.



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## Final Thoughts: **Steps to Take Now**

- Consider how you want to treat cannabis and the level of risk with which you are comfortable.
- Implement a comprehensive and reasonable substance abuse and testing policy that addresses how cannabis will be treated and have employees receive and acknowledge same.
- Provide your managers with drug and alcohol (including reasonable suspicion) training and have documentation substantiating your reasons for sending someone for reasonable suspicion testing.
- Take all steps necessary to set-up a drug testing program.
- Document all steps related to employees and potential drug and alcohol possession, use, impairment, testing, etc.

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# Questions?

*Thank you for attending!*

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