



ILLINOIS CANNABIS REGULATION AND TAX ACT

With Governor J.B. Pritzker’s signature on June 25, 2019, Illinois became the 11th state to legalize recreational cannabis. The Cannabis Regulation and Tax Act (“CRTA”) provides, among many other things, that effective January 1, 2020, Illinois residents 21 years of age or older may legally possess up to 30 grams of cannabis flower, no more than 500 milligrams of THC contained in cannabis-infused products, and 5 grams of cannabis concentrate. Possession limits for non-Illinois residents are lower.

Given that most employer drug policies routinely prohibit the use of cannabis, many employers have been left wondering how CRTA will affect their ability to prevent and detect employee drug use. This article will explain how CRTA addresses this issue and various related questions that employers might have about the new law.

Q: Can employers still prohibit cannabis in the workplace?

Yes. CRTA states that employers are not prohibited from “adopting reasonable zero tolerance or drug free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage, or use of cannabis in the workplace or while on call provided that the policy is applied in a nondiscriminatory manner.” Employers may therefore prohibit employees from being under the influence of or using cannabis while: (1) in the workplace, (2) performing job duties or (3) on call.

Q: What does “workplace” mean?

CRTA defines the term “workplace” to include: (1) any building, real property, and parking area under the control of the employer, (2) any area used by an employee while in the performance of job duties, (3) any vehicles leased, rented or owned by the employer, and (4) any area further defined by policy so long as the policy is consistent with CRTA.

Q: What does “on call” mean?

CRTA defines “on call” to mean any time when an employee is scheduled with at least 24 hours' notice by an employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or at some other previously designated location.

Q: What does “under the influence of cannabis” mean?

An employer can show that an employee is impaired by or under the influence of cannabis when the employer has a good faith belief that an employee manifests specific and articulable symptoms while working that decrease or lessen the employee’s performance of his or her job. Such symptoms may include:

- Symptoms associated with speech, physical dexterity, agility, coordination, and demeanor
- Irrational or unusual behavior
- Negligence or carelessness in operating equipment or machinery



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- Disregard for the safety of the employee or others
- Involvement in any accident that results in serious damage to equipment or property
- Disruption of a production or manufacturing process
- Carelessness that results in any injury to the employee or others
- Any other signs of impairment

The Act does not regulate drug testing so a positive test result for cannabis might serve as another sign of impairment, but (as discussed below) it may not be used as the only indication of impairment.

Q: Can an employer discipline or terminate an employee for violating a drug policy?

Yes. Employers may discipline or terminate an employee if he or she violates the employer's employment policies or workplace drug policy. However, if an employer disciplines or terminates an employee for being under the influence of or impaired by cannabis, the employer must provide the employee a reasonable opportunity to contest the basis of the determination.

Q: What does "reasonable opportunity" mean?

CRTA provides no guidance as to what this means. I would advise employers to use the same process they might employ if they were to ask a job applicant to explain troubling information on a criminal background report.

Q: Can an employee continue to conduct drug tests?

Yes. The Act does not prohibit drug testing, but it may restrict what employers can do with positive tests for cannabis. It therefore calls into question whether standard drug tests should screen for cannabis in certain situations, such as in the pre-employment context or as part of a random testing program.

Q: Can an employer discipline or terminate an employee who tests positive for cannabis?

Maybe. Under the Illinois Right to Privacy in the Workplace Act ("RPWA"), employers cannot discipline, terminate or refuse to hire an individual who uses lawful products, such as tobacco or alcohol, off the employer's premises during non-working hours. CRTA expands the definition of "lawful products" under RPWA to include recreational cannabis. This means that an employee who lawfully uses cannabis outside of work and is not impaired by or under the influence of cannabis (during working hours, while on duty or while on call) should not be subject to adverse employment action on that basis alone. In contrast to a blood alcohol test, a positive test for cannabis does not necessarily mean that an individual was under the influence or otherwise impaired at the time of the test. Therefore, employers may not be able to rely solely on a positive test in deciding to discipline or terminate an employee. Other facts might be required to establish that an employee is "under the influence" of cannabis.



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On the other hand, the RWPA creates various exceptions one of which covers the employer provisions of CRTA. These provisions in CRTA say that “[n]othing in this Act shall prohibit an employer from adopting reasonable zero tolerance or drug free workplace policies” provided that such policies are applied in a non-discriminatory manner. The use of the terms “zero tolerance” and “drug free” suggest that employers are still permitted to prohibit *any* use of cannabis – whether on or off duty. Indeed, during the legislative debate on CRTA, the bill’s sponsor acknowledged that employers would still be permitted to terminate an employee who failed a random drug test for cannabis.

Therefore, is not completely clear whether an employer can discipline or terminate an employee solely on the basis of testing positive for cannabis. It may take additional legislation, regulations or litigation to answer this question.

Q: Can’t we just use a drug test that determines whether an employee is “under the influence” of cannabis in the same way we test whether an employee is “under the influence” of alcohol?

Unfortunately, no. Existing drug testing can only detect whether cannabis is in one’s system; it cannot determine the amount of cannabis in one’s system for purposes of determining when an individual used cannabis or whether an individual is presently impaired as a result of such use. Until technology evolves, there is simply no way to test whether an employee is “under the influence” of cannabis in the same way we test for alcohol.

Q: What if an employer is subject to other laws, such as U.S. Department of Transportation regulations, prohibiting any employee use of cannabis?

CRTA does not require employers to ignore their obligations under other laws, expressly stating that it is not to be construed to “interfere with any federal, State, or local restrictions on employment including, but not limited to, the United States Department of Transportation regulation 49 CFR 40.151(e)” nor to impact an employer’s ability to “comply with federal or State law or cause it to lose a federal or State contract or funding.” It is therefore likely the Act will be interpreted to allow employers to continue to maintain employment policies prohibiting any cannabis use where necessary to comply with applicable federal or state law or as a condition of a federal or state contract or funding. This will be the subject of another forthcoming article.

Q: Are there different rules for safety sensitive positions such as in construction, health care or manufacturing?

No. CRTA did not create special rules for safety sensitive positions. If drug use and testing for such positions is not covered by any federal or state law (such as drivers covered by DOT) or any funding or contractual requirements (such as state-funded construction projects), then employers must comply with all the provisions of CRTA and RPWA.



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Q: Are employees covered by a collective bargaining agreement exempt from the CRTA provisions?

No. Some laws, such as the Illinois Wage Payment & Collection Act, do exempt employees covered by a collective bargaining agreement from various statutory requirements, but CRTA does not. Nor does RPWA. Union employees are covered just as much as non-union employees.

Q: Can an employee sue an employer for violating CRTA?

No. CRTA expressly states that employees do not have a private right of action against an employer for:

- Subjecting an employee or applicant to reasonable drug and alcohol testing under the employer's workplace drug policy, including an employee's refusal to be tested or to cooperate in testing procedures.
- Disciplining the employee or terminating employment, based on the employer's good faith belief that an employee used, possessed, was impaired by or was under the influence of cannabis in violation of the employer's workplace policies while in the employer's workplace, performing the employee's job duties or while on call.
- Injury, loss or liability to a third party if the employer neither knew nor had reason to know that an employee was impaired.

However, RPWA does allow employees and job applicants to sue their employers for violations, such as not hiring or terminating an employee for the lawful use of recreational marijuana. Prior to bringing a lawsuit, however, an individual must first file a complaint with the Illinois Department of Labor and attempt to administratively resolve the matter. Remedies that are available to a plaintiff include actual damages, costs, and (if the violation is willful and knowing) \$200 and attorney's fees.

The bottom line is that an employee can sue an employer under RPWA for drug use related issues, but not under CRTA. And if an employee sues an employer for violating RPWA, it is likely that the employee will also allege other bases for wrongful discharge, such as discrimination or retaliation.

Q: What should employers do next?

There is some still uncertainty as to exactly what employers may do to prevent employees from being under the influence of cannabis while working or in the workplace. Nevertheless, employers should consider the following steps to ensure their best efforts toward complying with the new law:

- Working with an attorney to review and, if necessary, revise their current drug policies and practices in advance of CRTA's January 1, 2020 deadline.
- Determining whether to include or consider cannabis in pre-employment drug tests.



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- Reviewing their workers' compensation insurance policies to determine what may be required in terms of drug policies and practices.
- Training managers on how to detect and recognize the signs of cannabis use and impairment.
- Developing procedures for documenting all signs and evidence of potential impairment, including any violations of occupational safety rules.
- Reviewing any employment practices liability insurance policies to ensure coverage for RPWA claims.
- Consulting with counsel before disciplining or terminating an employee who tests positive for cannabis.

Ultimately, as Third-Party Administrators for Drug-Free Workplace Policies, our goal is to keep you informed about this important topic. There are countless articles, white papers, and expert opinions currently surrounding this legislation as to how it will affect employers, unions, contractor associations, and many others. It will take some time, litigation and additional legislation to get clear guidance for employers on how to navigate the new world of legalized recreational cannabis in Illinois, unless it is addressed prior to the law taking effect January 1, 2020.

We at ScreenSafe believe it is imperative to ensure our clients are aware of the language, and the areas that may possibly impact current policies. Nevertheless, we are not lawyers and although we have consulted with our attorney on this matter, ultimately it is your decision on how you would like us to move forward. Please feel free to contact ScreenSafe for further discussion.