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HALF-BAKED MEDICAL MARIJUANA LAW LEAVES ILLINOIS EMPLOYERS IN A HAZE

By Jon Vegosen and Seth A. Stern

Illinois' medical marijuana law – known as the Compassionate Use of Medical Cannabis Pilot Program Act – will take effect on January 1, 2014. This does not mean that patients needing medical marijuana will be able to smoke legally come New Year's Day. Regulations will need to be implemented and licensed dispensaries will need to be established and made operational – a process some commentators predict will take until at least mid-2014.

Nonetheless, employers will soon need to consider whether and how to amend their policies and practices in light of the new law. The statute prohibits employers from penalizing employees and applicants because they are registered qualifying patients (RQPs) entitled to obtain medical marijuana (unless federal law applicable to the employer requires the employer not to employ marijuana users). While the law does allow employers to discipline RQPs who show symptoms of being "impaired" while on the job, employers who do so must provide the employee a reasonable opportunity to contest the determination of impairment.

The statute does not require employers to allow RQPs to use or possess marijuana at work or during work hours. Since marijuana remains illegal under federal law, it is questionable whether a court interpreting current law would require an employer to permit marijuana use at work as a "reasonable accommodation" under the Americans with Disabilities Act. Similarly, the Illinois Human Rights Act's anti-discrimination provisions exclude use of "illegal drugs" from the definition of "disability." Substances that are illegal under federal law, but not state law, would likely remain covered by this exclusion.

Confusingly, while barring employers from punishing RQPs for having a medical marijuana prescription, the statute allows employers to implement and enforce non-discriminatory anti-drug policies, including zero tolerance policies. The law permits employers to discipline RQPs for violating such policies. The statute also disclaims any intent to create a cause of action that RQPs may assert against employers who act on a good faith belief that an RQP was impaired at work or used or possessed medical marijuana at work in violation of company policies.

Although some of the Illinois statute's provisions are difficult to reconcile, courts in other jurisdictions, including those with far more permissive medical marijuana laws than Illinois, have held that employers may enforce even "zero tolerance" drug policies against medical marijuana users even when they limit their doctor-ordered marijuana use to non-working hours. While states including Illinois have statutes on

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the books protecting employees' freedom to use lawful substances in their free time, some courts have reasoned that such laws are inapplicable to medical marijuana because marijuana remains illegal under federal law.

A few discussion points follow to summarize the practical effect of the law:

- The medical marijuana law makes fairly clear that it will not impact employers' ability to prohibit employees from smoking or possessing marijuana in the workplace, or to discipline employees who use or possess marijuana at work. Employers that have, in the past, prohibited marijuana use or possession at work should not need to change those policies or practices, although they may wish to make more clear that the same policies apply regardless of whether the employee obtained the marijuana from a doctor or dealer.

- Employers may also continue to prohibit employees from being impaired by medical marijuana at work – for example, an employee who smoked an hour before work, but remains under the influence. Employees disciplined for being impaired, as opposed to smoking or possessing marijuana at work, will need to be given an opportunity to contest the employers' determination that they were impaired. Forthcoming regulations should provide more detail about what this process will look like. Note that a failed drug test might not suffice to indicate "impairment," since marijuana remains in the bloodstream for much longer than the duration of the "high."

- The statute is the least clear regarding employers' ability to prohibit or discipline employees for using medical marijuana outside work at times when their productivity will not be affected, or failing a drug test when such failure is caused solely by medical marijuana. Signs from other jurisdictions where medical marijuana has been legal for years indicate that employers will likely remain entitled to take such measures, but, for now, the language of the Illinois statute sends some mixed signals.

Accordingly, employers wishing to discipline employees who test positive for marijuana, regardless of whether they are RQPs, and regardless of whether they are impaired during work hours, should implement clear and conspicuous policies informing employees of the employer's intention to do so. In light of the statute's ambiguities, and absent controlling precedent from Illinois courts, however, employers should consider whether such a policy is worth the risk of potential claims, including for wrongful termination and discrimination. Employers who do not wish to discipline RQPs for their prescribed marijuana use may still wish to implement policies with respect to impairment by, or possession of, medical marijuana at the office.

Since the Illinois statute expressly prohibits penalizing employees solely based on their status as RQPs, employers may also wish to avoid asking employees and applicants whether they are RQPs, or otherwise investigating whether they are RQPs. That way, if the employer later needs to discipline an employee for marijuana use or impairment at work, there should be no question that the employer is addressing the employee's use, impairment, and/or possession and not merely the employee's RQP status.

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The statute's reach, and its effect on employers, will likely be clarified, to some extent, by forthcoming regulations and future case law. Meanwhile, employers should consider their desired approach to medical marijuana use by employees who are RQPs, and they should begin consulting with legal counsel to adopt appropriate policies and practices.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jon Vegosen 312.701.6860 jvegosen@fvldlaw.com, Seth A. Stern 312-701-6837 sstern@fvldlaw.com, or your regular FVLD contact.

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