

Effect of the New Medical Marijuana Law on Employers in Illinois

By Laura Zaroski, J.D. and Joseph Gagliardo, J.D.



Last year, Illinois passed a “medical marijuana” law that became effective January 1, 2014, known as the Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILCS 130/1, et seq. The Act allows doctors to recommend and certify the use of medical marijuana by patients who are under the doctors’ care for certain qualifying medical conditions, which are listed in the Act. The patient must then register with the Department of Public Health (“DPH”) for status as a medical marijuana patient under the Act. The earliest patients will able to register with the DPH is April 2014, the current deadline by which several Illinois governmental agencies must institute regulations regarding patients obtaining registration cards and regarding licensure for dispensaries and cultivators. However, the exact contours of the regulations surrounding this new law remain to be seen and the details of that law have left some employers in a haze.

Certain rights of employers are affected by the Act, but in other ways, it will be business as usual for employers. Most notably, employers cannot discriminate against a registered patient on the basis of his or her registration (in most cases). This mandate may require employers to reconfigure their drug policies and/or certain provisions in their employee handbooks in order to ensure compliance with the Act. Also, it will require management training to educate managers and supervisors of the new obligations.

Contrary to what you might first think, the Act still permits employers to operate a Drug Free Workplace. Employers are allowed to prohibit possession or consumption of marijuana on their property. Further, the Act specifically allows employers to enforce work rules, give drug tests, and discipline employees exhibiting signs of impairment while at work. Employees beware! The Act is not a license to possess or be “high” at work.

Based upon the rights that employers still retain, it appears inevitable that sticky issues will arise as the Act is implemented and employers struggle with compliance as well as enforcing their own policies. For example, while the Act expressly allows employers to conduct drug testing, what if an employee’s drug test registers marijuana use, but the test cannot differentiate whether that use was hours, days or months ago? Would refusing to hire that individual be okay as enforcement of a Drug Free Workplace or would that decision be discriminating against an individual for his or her “status” as a registered medical marijuana patient? Moreover, the law allows employers to maintain a Drug Free Workplace “provided the policy is applied in a non-discriminatory manner.” It is unclear whether patients will be able to assert disparate impact claims arguing that employers’ facially neutral workplace policies have a statistical impact on their “protected class.” Additionally, the law requires that an employee disciplined for exhibiting signs of impairment must be given an opportunity to contest the basis for the determination, but the law does not provide any guidance as to what type of procedural protection the employee must receive. Finally, it is unclear what, if any, interplay this Illinois law will have with the federal Americans With Disabilities Act.

Unfortunately, we believe that many of the gray areas surrounding the Act will likely be resolved through future litigation. In order to make sure your clients are prepared to deal with the mandates of the new Act, we suggest that you have a lawyer review your policies and procedures and to provide training to your management personnel. Also, ensure that your clients have a robust Employment Practices Liability policy in place that will respond and defend the employers in case they are faced with a discrimination suit in relation to violation of the Act.

This article was authored by:

Laura Zaroski, Esq., VP of Management and Professional Liability at Socius Insurance Services, a wholesale broker, located in the Chicago office. Laura can be reached at 312.382.5373 or lzaroski@sociusinsurance.com

Joseph Gagliardo, Esq., Managing Partner of Laner, Muchin, Ltd., Chicago, Illinois, a law firm specializing in employment practices, assisted by Sara Yager. Joe can be reached at 312.467.9800 or jgagliardo@lanermuchin.com