

LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN August 2014

Medical Marijuana and Your Workforce - Part III Drug Tests, Zero Tolerance Policies and Unemployment Compensation

This is the final in a three-part series covering the new Illinois Compassionate Use of Medical Cannabis Pilot Program Act and what it means for employers.

Drug Testing

Until the Illinois courts provide more guidance, employers should proceed with caution when a registered patient tests positive for marijuana on a pre-employment or employee drug screening. Since cannabis can remain in the body for several weeks, a positive drug test does not necessarily mean that an applicant or employee is impaired at the time of the test. Employers must be careful not to reject a registered patient's application based solely based on a positive drug test, unless hiring the applicant presents a public safety risk (e.g., security guard or driver positions). Evaluate drug test results for registered patient employees on a case-by-case basis, permitting the employee to explain or contest the basis of a positive test result.

Zero Tolerance Policies and Privacy Laws

Can employers in states legalizing marijuana include marijuana in zero tolerance drug policies? How are privacy rights affected? Many states, including Illinois, forbid employers from terminating employees for lawful activities conducted during nonworking hours (Illinois Right to Privacy in the Workplace Act.)

But if the Illinois courts follow the courts of other states, employers will have more freedom to discipline a registered patient who tests positive for marijuana. The Colorado Supreme Court will soon be considering this issue. Last year, in *Coats v. Dish Network*, the Colorado Appellate Court addressed an employee's claim that his employer fired him illegally for testing positive for legal medical marijuana and violated privacy law protecting his lawful off-duty conduct. The appellate court refused to apply the off-duty conduct statute to help the employee because medical marijuana is illegal under federal law.

The Colorado Supreme Court has agreed to take the case. The decision will directly impact whether employers in Colorado can implement zero tolerance drug policies that include marijuana within their scope. Note also that in states with less-restrictive medical marijuana laws than Illinois, such as California, Oregon and Washington, courts have sided with employers when employees sue over discipline involving medical marijuana.

Unemployment Benefits

One question employers are asking is whether an employee authorized to use medical marijuana under state law can get unemployment benefits if he is fired under a zero tolerance policy for testing positive on workplace drug test.

Until MCPP is actively in force, Illinois employers can look to the Michigan case of *Braska v. Challenge Mfg. Co. and State of Michigan, Dept. of Licensing and Regulatory Affairs*. Rick Braska, a fork-lift driver, was required to take a routine drug test during an examination for an ankle injury. A registered user under Michigan's Medical Marijuana Act due to back problems, he tested positive and was terminated under his employer's drug testing policy.

He sought unemployment benefits. At first, the Circuit Court took his side and found him eligible. The company has appealed, and the Michigan state's attorney general apparently supports the employer's position.

The Michigan Chamber of Commerce filed an amicus brief, arguing that the lower court's decision "puts employers in a no-win situation." It forces employers to either ignore known drug use and jeopardize workplace safety, or discharge those employees and pay their unemployment benefits and, subsequently, higher unemployment taxes."

Advocates of medical marijuana also are speaking out: employees permitted by state law to use the drug should not be denied unemployment benefits for testing positive for the substance on a workplace drug test where, they argue, the workers are not impaired on the job. This may be the key – not simply a positive test but whether there is evidence of impairment.

The Illinois statute contains certain provisions balancing the interests of employers and employees. For example, employers cannot discriminate against or penalize employees or applicants or automatically exclude them from the workforce, for their status as patients registered to purchase medical marijuana, with exceptions if it would cause the employer to violate federal law or lose a federal contract. On the other hand, employers may take an action adverse to the employee on a "good faith belief" that the employee used, possessed, or was impaired by marijuana during working hours or while on the employer's premises.

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This bulletin is an advertisement intended to provide clients and others with general information and is not intended to provide specific legal advice or opinions. Employers and workers seeking assistance with topics addressed in this bulletin or other workplace issues should contact Lori Goldstein at (847) 624-6640 or lori.a.goldstein@gmail.com. Visit www.lorigoldsteinlaw.com for more information about the Law Office of Lori A. Goldstein, LLC, which represents employers and employees.

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