# Illinois Cannabis Regulation and Tax Act
## December 2, 2019

In a previous article, we discussed how Illinois has become the 11th state to legalize recreational cannabis. While the Cannabis Regulation & Tax Act ("CRTA") allows employers to adopt zero tolerance or drug free workplace policies, a question arose about whether employers could take an adverse action against employees or applicants who test positive for cannabis without any other indication of impairment while at work. CRTA appears to allow employers to do so, but there was enough ambiguity (along with expanded protections in the Illinois Right to Privacy in the Workplace Act) to suggest some risk for employers taking adverse actions in these situations. Last month, the Illinois legislature passed an amendment to CRTA providing some clarity, and Governor J.B. Pritzker is expected to sign the measure this month.

Previously, a key part of CRTA read as follows:

> Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for… actions, including but not limited to 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 or disciplining or a termination of employment, based on the employer's good faith belief that an employee used or possessed 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.

This section created at least three concerns for employers. First, while it mentioned subjecting employees to drug tests and employees refusing to take or cooperate with them, the section said nothing about whether employers could fire or refuse to hire individuals who failed a drug test for cannabis. Second, the section seemed to suggest that an employer could only take adverse action against an employee when there was a "good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call." Put another way, failing a drug test for cannabis would not seem to be sufficient by itself unless there was some other basis for an employer to conclude that an employee either used or possessed cannabis at work or while working. Finally, the section only protected employers administering "reasonable" drug testing, but there was no explanation as to what was meant by the use of the word "reasonable."

This part of the statute has now been amended to read as follows:

> Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for… actions taken pursuant to an employer's reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to 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.

This language does make things somewhat clearer for employers. First, it is now unambiguous that an employer cannot get sued for taking adverse action (pursuant to its policy) against an individual

who fails a drug test for cannabis. Second, it is now clear that adverse actions like terminations and discipline do not need to be based on a "good faith belief that an employee used or possessed cannabis in the employer's workplace or while performing the employee's job duties or while on call." Violating an employer drug policy, including but not limited to failing a drug test, is itself sufficient justification for such action.

Nevertheless, the amendment does not address arguably the biggest ambiguity for employers: what is a "reasonable" drug policy? The identical term is used in a previous section of the statute allowing employers to adopt "reasonable" zero tolerance or drug free workplace policies. The dilemma is that "zero tolerance" and "drug free" are clear-cut terms. With respect to drug testing, for example, you either test positive or don't. Notwithstanding the amendment, it still remains unclear what type of zero tolerance is "reasonable" and what type of policy is not. The risk to employers, of course, is that administration of an "unreasonable" policy could subject employers not only to violations of CRTA, but also to violations of the Right to Privacy In the Workplace Act.

Ultimately, this discussion about "reasonable" drug policies and drug testing may be more academic than anything. The general consensus within the employment industry is that employers are still free to adopt testing policies that permit firing or not hiring individuals based on any positive test. Even in the face of lawsuits, it is anticipated that this interpretation of the law will prevail.

Amidst this ongoing debate, however, it would not be surprising if some employers forget that the first important question to ask is whether they are even subject to CRTA. That is because there is a big exception built into CRTA: "Nothing in this Act shall 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) 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." Essentially, what this means is that employers do not need to follow CRTA if doing so would cause them to violate other federal, state or local laws or jeopardize a contract with (or funding from) federal and state agencies.

The most well-known examples that come to mind (and specifically referenced in the statute) are U.S. Department of Transportation drug testing requirements for certain safety-sensitive positions, such as driving a truck, operating a ferry or a train, or repairing an airplane. Under these rules, a positive test must result in an individual being removed from a DOT-regulated safety-sensitive function and not returning until completing a series of requirements, including, among other things, testing negative.

Other similar federal requirements exist. For contractors working in the national security arena, the Department of Defense has developed its own set of regulations requiring testing. The Nuclear Regulatory Commission has adopted requirements for commercial nuclear power plants, fuel cycle facilities and other facilities handling nuclear materials. And under Executive Order 12564, all federal

employees involved in "law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of public trust" are subject to mandatory drug testing. Similar requirements exist at the state and local level, such as for law enforcement officers and emergency service providers.

Less well-known requirements are set forth in the rarely discussed Illinois Substance Abuse Prevention on Public Works Projects Act (820 ILCS 265 *et seq.*). Enacted in 2008, this law imposes requirements similar to the DOT requirements on employees who perform work on "public works" as that term is defined in the Illinois Prevailing Wage Act. Employees testing positive must be removed from the project and cannot return until, among other things, testing negative.

So what projects qualify as "public works" under the law? The Prevailing Wage Act defines the term as follows:

> "Public works" means all fixed works constructed or demolished by any public body or paid for wholly or in part out of public funds. "Public works" as defined herein includes all projects financed in whole or in part with bonds, grants, loans, or other funds made available by or through the State or any of its political subdivisions, including but not limited to: bonds issued under the Industrial Project Revenue Bond Act (Article 11, Division 74 of the Illinois Municipal Code), the Industrial Building Revenue Bond Act, the Illinois Finance Authority Act, the Illinois Sports Facilities Authority Act, or the Build Illinois Bond Act; loans or other funds made available pursuant to the Build Illinois Act; loans or other funds made available pursuant to the Riverfront Development Fund under Section 10-15 of the River Edge Redevelopment Zone Act; or funds from the Fund for Illinois' Future under Section 6z-47 of the State Finance Act, funds for school construction under Section 5 of the General Obligation Bond Act, funds authorized under Section 3 of the School Construction Bond Act, funds for school infrastructure under Section 6z-45 of the State Finance Act, and funds for transportation purposes under Section 4 of the General Obligation Bond Act. "Public works" also includes (i) all projects financed in whole or in part with funds from the Department of Commerce and Economic Opportunity under the Illinois Renewable Fuels Development Program Act for which there is no project labor agreement; (ii) all work performed pursuant to a public private agreement under the Public Private Agreements for the Illiana Expressway Act or the Public-Private Agreements for the South Suburban Airport Act; and (iii) all projects undertaken under a public-private agreement under the Public-Private Partnerships for Transportation Act. "Public works" also includes all projects at leased facility property used for airport purposes under Section 35 of the Local Government Facility Lease Act. "Public works" also includes the construction of a new wind power facility by a business designated as a High Impact Business under Section 5.5(a)(3)(E) of the Illinois Enterprise Zone Act. "Public works" does not include work done directly by any public utility company, whether or not done under public supervision or direction, or paid for

> wholly or in part out of public funds. "Public works" also includes any corrective action performed pursuant to Title XVI of the Environmental Protection Act for which payment from the Underground Storage Tank Fund is requested. "Public works" does not include projects undertaken by the owner at an owner-occupied single-family residence or at an owner-occupied unit of a multi-family residence. "Public works" does not include work performed for soil and water conservation purposes on agricultural lands, whether or not done under public supervision or paid for wholly or in part out of public funds, done directly by an owner or person who has legal control of those lands.

Understandably, this definition is not easy to digest. If employers have questions about whether they are working on a "public works" project, they are best advised to consult with their own counsel.

At the end of the day, the CRTA is at the very least a complex and confusing new law that employers must face starting on January 1. It has been our hope that by providing impartial and accurate information we have been able to support companies and clients in their decision-making process. We will continue to be diligent on our information journey and send out updates on this law as it progresses. Please feel free to contact ScreenSafe for further discussion.