Thoughts about Illinois Cannabis Legalization: Employment, Education, Equity, and Expungement

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There is a growing litany of issues related to marijuana usage in the United States. The overarching issue for states that pass medical marijuana and recreational marijuana laws is the fact that it remains a Schedule I drug under the United States federal law. This means the United States government views marijuana as a dangerous drug with no medicinal value. Schools and employers generally must therefore balance the issues of federal illegality with the changing permissibility of marijuana usage on a state level.

Marijuana, both medical and recreational, is poised to be a salient issue for employers in Illinois in the near future and is likely to be even more of an issue for schools and school districts. Schools will need to understand all the possible ramifications, both of following the state law and declining to follow the federal law. School districts will need to develop policies that not only deal will allowing students to use medical marijuana in a way that is compliant with state law requirements, but also students' ability to use and bring over-the-counter CBD oil. Similarly, schools will need to develop and follow policies for employee usage of medical and recreational marijuana as Illinois has officially decriminalized marijuana for recreational use.

1. Ashley's Law and its impact on medical marijuana for students in schools

Ashely's Law, originally passed into law in Illinois in 2018, was amended and approved by the governor on August 12, 2019. 105 ILCS 5/22-33. The changes that have been made to the law, with the governor signing SB 455 (now PA 101-370, effective January 1, 2020), are significant for schools. Previously, Ashley's Law did not expressly allow a school employee to administer the marijuana product; instead a registered caregiver would be required come to the school with the product to administer it to the student in question. PA 101-370 changes the requirements for schools and makes the process somewhat more onerous for schools and school employees. As before, Ashley's Law applies to "medical cannabis infused product", which is defined as "food, oils, ointments,

or other products containing usable cannabis that are not smoked." 410 ILCS 130/10(q). Under the changes, schools must allow a school nurse or administrator to administer cannabis products to registered and qualified patients, not only during the school day, but also while the student is on school premises, during any before or after school programming (including transportation), and at school sponsored activities. The statute ensures an administrator or school nurse cannot face criminal prosecution for administering the product, but it does not specifically require that schools have administrators or registered nurses available to administer medical marijuana.

In addition, the changes also allow for a student to self-administer the product if authorized by the school district, under the supervision of a school nurse or an administrator. Before allowing administration by a school nurse or administrator, or before authorizing self-administration, the parent or guardian of a student who is the registered qualifying patient must provide written authorization for its use, along with a copy of the registry identification card of the student (as a registered qualifying patient) and the parent or guardian (as a registered designated caregiver). The written authorization must specify the times where or the special circumstances under which the medical cannabis infused product must be administered. The written authorization and a copy of the registry identification cards must be kept on file in the office of the school nurse. The authorization for a student to self-administer medical cannabis infused products is effective for the school year in which it is granted and must be renewed each subsequent school year.

PA 101-370 further provides that medical cannabis infused products that are to be administered at school must be stored with the school nurse at all times in a manner consistent with storage of other student medication at the school and may be accessible only by the school nurse or a school administrator. The statute also requires that prior to the administration of a medical cannabis infused product under Ashley's Law, a school nurse or school administrator must annually complete a training curriculum developed by the Illinois State Board of Education.

This is not the only bill related to medical marijuana usage that has been changed by the state of Illinois this year. Senate Bill 2023 was also signed into law on August 9, 2019 by Governor Pritzker. 30 ILCS 500/1-10 (via PA 101-363, effective August 9, 2019). This bill adds eleven new conditions that can qualify for medical marijuana prescriptions and allows certain advanced practice nurses and physician assistants to prescribe medical marijuana, rather than solely physicians. Additionally, qualified students cannot be prohibited from having three (3) rather than two (2) registered caregivers. These changes are also important for schools to understand as they may change the number of students that can be considered qualified patients. More students qualifying for medical

marijuana will require more expansive policies and strategies for effective implementation. Schools should get ahead of these changes by drafting and approving policies and plans for student medical marijuana usage. While these changes seem to have large effects at first glance, the implementation of these changes will likely differ little from the previous requirements. These changes have set Illinois apart from the other states who allow medical marijuana to be administered on school grounds by a registered caregiver, so be cautious about looking to other states' precedents without filtering it through Illinois law.

2. Discipline and student use of marijuana

Student use of marijuana may also become an issue as recreational use is decriminalized in Illinois. Many schools both in Illinois and in other states that have decriminalized marijuana wonder what this may mean for their discipline codes. Should marijuana use continue to be treated as a serious violation of the student code of conduct, or should it be likened to alcohol abuse and thus treated in a similar manner? Chicago Public Schools are changing how they classify their discipline codes in order to effectively get to the 'root' of the problem. Hannah Leone, *As pot goes legal in Illinois, Chicago Public Schools lessens penalties for students caught with drugs*, Chicago Tribune, July 2, 2019 at 12:21 P.M., available at https://www.chicagotribune.com/news/ct-chicago-public-schools-marijuana-20190701-tkcu7fxzbrbktebk64zj5v7t2m-story.html. The new policy in Chicago has lessened many of the discipline infractions for various offenses related to marijuana usage. *Id.* One of these is the removal of expulsion as a possibility if a student is caught with marijuana or other drugs. *Id.* This is in line with Chicago Public Schools' policy of restorative justice rather than punishment-based discipline and is another consideration schools ought to consider. *Id.*

When considering implications for schools in Illinois as recreational marijuana becomes legal in the state for those over the age of twenty-one (21), it is helpful to look at other states that have legalized marijuana, such as Colorado. Marijuana has been recreationally legal in Colorado since 2014. However, some attribute this decriminalization of marijuana with an increase in suspensions and discipline infractions for marijuana use in schools, especially in areas that permit recreational dispensaries. David Olinger and Debbie Kelley, *Collateral Impact: Colorado schools on front line as debate swirls over legalization's effect on teens' pot use***,** The Gazette, Apr. 28, 2018, available at https://gazette.com/news/collateral-impact-colorado-schools-on-front-line-as-debate-swirls/article_251b7e53-baf6-5438-a279-7bcd80b5cd0b.html. Whether or not decriminalization has or has not increased student usage is somewhat debated, as some sources report no significant change in juvenile use while other sources find that use has increased and students are beginning to

use marijuana at a younger age. *Id.* Like many issues in modern society, the results seem to vary depending on the source being utilized. Schools within Colorado have also created different policies and responses for marijuana possession or consumption. *Id.* For example, Jefferson County Colorado schools contact the police if as student is found in possession of or having recently consumed marijuana. *Id.* The ultimate decision for whether or not to write a ticket for a juvenile is left up to the individual law enforcement agency. *Id.* Contrarily, Adams County Colorado schools reportedly have a policy of contacting the police for possession though not necessarily for consumption. *Id.* While these types of policies may not be of paramount importance to schools as recreational marijuana is not yet officially decriminalized, they will become more important as schools are forced to understand how this law impacts many different facets of their daily functioning.

In Illinois, we have seen shifts statewide in how we handle student discipline matters relating to marijuana since the enactment of SB100 (PA 99-456) in 2016, which limits the use of exclusionary discipline (suspension and expulsion) to those situations where student's continuing presence in school would pose a threat to school safety or a disruption to other students' learning opportunities (as determined by the Board or its designee on a case-by-case basis), and where the law prohibits most "zero tolerance" policies. As recreational marijuana becomes more easily accessible to students in Illinois, school board and school administrators will have to create policies and procedures that can continually evolve with the changing reality of student conduct and the safety and integrity of the school environment.

3. CBD oil products and student usage

Cannabidiol ("CBD") is a "non-intoxicating molecule found in industrial hemp and marijuana." School and College Legal Services of California, *Legal Update Memo No. 08-2019 – Everything You Never Wanted to Know About CBD (CCD)*, May 30, 2019, available at https://sclscal.org/legal-update-memo-no-08-2019-everything-you-never-wanted-to-know-about-cbd-ccd/. The oil is extracted from the cannabis plant when either the hemp portion or marijuana portion of the plant is processed. *Id.* CBD derived from industrial hemp is usually free of tetrahydrocannabinol ("THC"), but if the CBD is derived from the marijuana portion of the plant then it may contain some THC. *Id.* CBD products containing 0.3% THC are legal under federal law as they are now classified as industrial hemp. The Agriculture Improvement Act was passed by Congress in 2018 and it removed industrial hemp from the Controlled Substance Act and instead made it an agricultural item. 7 U.S.C. § 3319d (c)(3)(E) (2018). This has led to an increase in these types of products being sold over the counter at many different retailers. CBD oil and CBD products are even being sold at Petsmart where animal owners

can now get hemp products for an anxious pet with a prescription. Importantly, CBD is sold primarily as a supplement and not as a medication. Peter Grinspoon, *Cannabidiol (CBD) – what we know and what we don't*, updated Aug. 27, 2019 at 5:21 P.M., available at https://www.health.harvard.edu/blog/cannabidiol-cbd-what-we-know-and-what-we-don't-2018082414476. Supplements are not generally regulated by the Food and Drug Administration ("FDA") currently, which means these CBD products are not regulated by the FDA. *Id.* This can lead to health and safety concerns as there could be additional elements added to the CBD product, or the ingredients listed could be different than those actually in the product. *Id.* It is also important to note that the actual health benefits and side-effects are largely unknown.

While CBD products are sold over-the-counter, there is only one CBD product that is FDA approved.[1] FDA Press Release, Jun. 25, 2018, available at https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms. This product is Epidiolex, which is used to treat rare pediatric seizure disorders. *Id.* Not only are there few products approved by the FDA, but the FDA has even issued a consumer update concerning CBD oil and CBD products. Mike Adams, Marijuana or Hemp: FDA Says Beware of CBD For These Reasons, Forbes, Jul 7, 2018 at 4:57 P.M., available at https://www.forbes.com/sites/mikeadams/2019/07/07/fda-says-beware-of-cbd-for-these-reasons/#723e00fc300d. In many instances CBD oil and products are lauded as a miracle drug. Commercials for these 'supplements' featuring famous athletes are commonplace. Infamously, Rob Gronkowski of the New England Patriots has publicly stated that CBD products have led him to be pain free for the first time in his life. Kyle Newport, *Rob Gronkowski Says He's Pain Free Thanks to CBDMedic, Advocates to Pro Leagues*, Bleacher Report, Aug. 27, 2019, available at https://bleacherreport.com/articles/2851254-rob-gronkowski-says-hes-pain-free-thanks-to-cbdmedic-advocates-to-pro-leagues. The FDA, however, warns that these products have many questions concerning them that remain unanswered. https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis. The FDA has stated that they are largely unaware of many of the health risks

[1] Recent lung disease and deaths linked to vaping have possibly been linked to a contaminant found in THC in marijuana. *See* Lena H. Sun, *Contaminant found in marijuana vaping products linked to deadly lung illnesses, tests show*, Sept. 5, 2019 at 2:53 P.M., available at

https://www.washingtonpost.com/health/2019/09/05/contaminant-found-vaping-products-linked-deadly-lung-illnesses-state-federal-labs-show/?noredirect=on.

and other issues related to CBD products and that many of the possible benefits may be outweighed over time. *Id.* These over-the-counter products are an added issue for schools as they must draft policies both for student and employee usage of these federally legal products.

Best practice with respect to CBD oil products is to treat them as any other over-the-counter medication. In this way schools can prevent students from having these products on campus and can limit the times that students can use them. This practice ensures these products are not over-used and not given out to students who may not understand possible side effects and are given them without the school's knowledge. Schools should draft policies that include CBD oil products as over the counter medications and should take steps that allow for disciplining students who have these products on their person at school, or at school-sponsored events. The process should be similar to the process for disciplining students found with other over-the-counter medications.

4. Employee use of medical marijuana

While any usage of medical marijuana is technically illegal under federal law as marijuana is a Schedule 1 drug without any recognized medical usage-- under state law in Illinois it is permissible. As previously mentioned, Senate Bill 2023, expands the types of ailments that can qualify a person for medical marijuana and allows for nurse practitioners and physicians assistants to prescribe cannabis as well as physicians. 30ILCS 500/1-10 (2019). The bill also gives access to qualified veterans as part of an alternative to opioids program. *Id.* Lastly, the bill expands the medical cannabis program, which was set to expire this year. *Id.* With all of these changes, it is more important now for schools to cultivate and utilize effective policies that will ensure equitable treatment of employees using medical marijuana, without negatively impacting school programming.

The Compassionate Use Act in Illinois specifies that a qualifying patient cannot be denied any right or privilege and cannot be disciplined by an occupational or professional licensing board if they use medical marijuana in compliance with the act in question. 410 ILCS 130/25 (a). However, the Act does not allow possession or usage of cannabis on school grounds or on a school bus, unless it is permitted by the Illinois School Code. 410 ILCS 130/30 2-3. There is no carve-out for an employee to use medical marijuana in the School Code and as such schools may keep medical marijuana users from using the product on school grounds.

In other states, these issues have been litigated with mixed results:

Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326 (D. Conn. 2017). Prospective employee who was diagnosed with posttraumatic stress disorder (PTSD) and who was a qualifying patient under Connecticut's Palliative Use of Marijuana Act (PUMA) brought an employment discrimination action in state court against prospective employer, alleging that her denial of employment based on a positive cannabis result during pre-employment screening test violated PUMA. Prospective employer removed to federal court, and moved to dismiss for failure to state a claim. The court denied employer's motion to dismiss, finding that "a plaintiff who uses marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for that reason." The Court further reasoned:

> Defendant argues that PUMA stands as an obstacle to the [federal Controlled Substances Act ("CSA")] because it affirmatively authorizes the very conduct—marijuana use—that the CSA prohibits. But this argument is overbroad and overlooks the operative provision of PUMA that is at issue in this case: the specific provision of PUMA (Conn. Gen. Stat. § 21a–408p(b)(3)) that prohibits an employer from discriminating against authorized persons who use medicinal marijuana. Plaintiff contends that defendants have violated this particular provision, and plaintiff does not otherwise seek enforcement of PUMA *en toto* or of other provisions of PUMA. Accordingly, I must focus on PUMA's specific anti-employment discrimination provision rather than the statute as a whole, because in preemption cases, "state law is displaced only to the extent that it actually conflicts with federal law," and "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it."

Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181(R.I. Super. May 23, 2017). The court granted summary judgment in favor of plaintiff, finding that the federal Controlled Substances Act did not preempt state law authorizing medical marijuana use, and that a prospective employer's failure to hire the plaintiff based on her status as a medical marijuana user violated state law.

Emerald Steel Fabricators, Inc. v. Bureau of Lab. and Industries, 230 P.3d 518 (Or. 2010). Employer sought review of decision of Bureau of Labor and Industries (BOLI), which concluded that the employer had engaged in disability discrimination when it discharged employee due to employee's medical marijuana use. The Oregon Supreme Court held that:

1. The employer preserved for review its claim that state law did not require accommodation of employee's medical marijuana use because marijuana possession is unlawful under federal law;

2. The employee currently engaged in the illegal use of drugs is not entitled to reasonable accommodation;

3. The provision of Oregon Medical Marijuana Act affirmatively authorizing the use of medical marijuana was preempted by Federal Controlled Substances Act, which explicitly prohibited marijuana use without regard to medicinal purpose; and

4. The exclusion from the definition of "illegal use of drugs" for the "use of a drug taken under supervision of a licensed health care professional" refers to those medical and research uses that the Controlled Substances Act authorizes.

It reasoned:

> If Congress chose to prohibit anyone under the age of 21 from driving, states could not authorize anyone over the age of 16 to drive and give them a license to do so. The state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress (keeping everyone under the age of 21 off the road) and would be preempted. Or, to use a different example, if federal law prohibited all sale and possession of alcohol, a state law licensing the sale of alcohol and authorizing its use would stand as an obstacle to the full accomplishment of Congress's purposes. ORS 475.306(1) is no different. To the extent that ORS 475.306(1) authorizes persons holding medical marijuana licenses to engage in conduct that the Controlled Substances Act explicitly prohibits, it poses the same obstacle to the full accomplishment of Congress's purposes (preventing all use of marijuana, including medical uses).

Wild v. Carriage Funeral Holdings, Inc., 205 A.3d 1144 (N.J. Super. App. Div. 2019). Employee, a funeral director, brought action against employer, alleging that his employment had been terminated because of his medical marijuana usage, and that termination of his employment violated the New Jersey Law Against Discrimination (LAD) because he had a disability, i.e., cancer, and was legally treating that disability in accordance with his physician's directions and in conformity with the New Jersey Compassionate Use Medical Marijuana Act. Employer

moved to dismiss for failure to state a claim. The Superior Court, Law Division, Bergen County, No. L-0687-17, granted motion. Employee appealed, and the Court reversed. The Court reasoned:

> We also reject defendants' suggestion that – at least at this stage – the Compassionate Use Act somehow immunizes actions otherwise potentially violative of the LAD because the Compassionate Use Act expressly declares that nothing about it "shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace." N.J.S.A. 24:6I-14. Plaintiff does not allege the accommodation he sought was the right to use medical marijuana in any workplace. Instead, while generally alleging his disability "required" that he "undergo pain management and needed relief from pain by taking" prescribed drugs, plaintiff also alleged he discussed with Carriage representatives that this pain-management treatment would constitute the taking of "prescribed drugs" during "off-work hours" and through "off-site administration." To rephrase what we said earlier, just because the Legislature declared that "[n]othing in [the Compassionate Use Act] shall be construed to require ... an employer to accommodate the medical use of marijuana in any workplace," N.J.S.A. 24:6I-14, does not mean that the LAD may not impose *434 such an obligation, particularly when the declination of an accommodation to such a user relates only to use "in any workplace." Ibid. Judging this argument solely by reference to the pleadings and the statutes in questions, we repeat that plaintiff did not allege he sought an accommodation for his use of medical marijuana "in [the] workplace"; he alleged only that he sought an accommodation that would allow his continued use of medical marijuana "off-site" or during "off-work hours."

Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015). A terminated employee brought an employment discrimination action against his employer, alleging that his termination based on his state-licensed use of medical marijuana violated the lawful activities statute. The Colorado Supreme Court held that 1) an activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under lawful activities statute, and 2) an employee could be terminated for his use of medical marijuana in accordance with the Medical Marijuana Amendment of state constitution. The Colorado Supreme Court reasoned:

> We still must determine, however, whether medical marijuana use that is licensed by the State of Colorado but prohibited under federal law is "lawful" for purposes of

> section 24–34–402.5. Coats contends that the General Assembly intended the term "lawful" here to mean "lawful under Colorado state law," which, he asserts, recognizes medical marijuana use as "lawful." *Coats,* ¶ 6, 303 P.3d at 149. We do not read the term "lawful" to be so restrictive. Nothing in the language of the statute limits the term "lawful" to state law. Instead, the term is used in its general, unrestricted sense, indicating that a "lawful" activity is that which complies with applicable "law," including state and federal law. We therefore decline Coats's invitation to engraft a state law limitation onto the statutory language.

Roe v. TeleTech Customer Care Mgt. (Colorado) LLC, 257 P.3d 586 (Wash. 2011). After an employer rescinded a conditional offer of employment to a prospective employee because she had failed a drug test, the prospective employee filed a wrongful termination complaint against her employer. Upon granting review, the Washington held that the Washington State Medical Use of Marijuana Act ("MUMA") did not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use. The Washington Supreme Court reasoned:

> MUMA's language and court decisions interpreting the statute do not support such a broad public policy that would remove all impediments to authorized medical marijuana use or forbid an employer from discharging an employee because she uses medical marijuana. MUMA's only reference to employment is an explicit statement against requiring employers to accommodate medical marijuana use. *See* RCW 69.51A.060(4) ("Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment...."). Similarly, the only reference to employment in the 1998 Voters Pamphlet asserted the initiative would prohibit marijuana use in the workplace.
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> … Roe has presented only one public policy argument to support her wrongful termination claim—that MUMA broadly protects a patient's "personal, individual decision" to use medical marijuana. MUMA does not proclaim a public policy that would remove any impediment (including employer drug policies) to the decision to use medical marijuana.

In Illinois, however, the specific language of the statute may – for the present time – prevent successful claims by employees regarding employment policies. The Compassionate Use of Medical Cannabis Pilot Program Act (410 ILCS 130/50) provides:

> Sec. 50. *Employment; employer liability*.
>
> (a) Nothing in this Act shall prohibit an employer from adopting reasonable regulations concerning the consumption, storage, or timekeeping requirements for qualifying patients related to the use of medical cannabis.
>
> (b) Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.
>
> (c) Nothing in this Act shall limit an employer from disciplining a registered qualifying patient for violating a workplace drug policy.
>
> (d) Nothing in this Act shall limit an employer's ability to discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract or funding.
>
> (e) Nothing in this Act shall be construed to create a defense for a third party who fails a drug test.
>
> (f) An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination.

(g) Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: (1) actions based on the employer's good faith belief that a registered qualifying patient used or possessed cannabis while on the employer's premises or during the hours of employment; (2) actions based on the employer's good faith belief that a registered qualifying patient was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired.

(h) Nothing in this Act shall be construed to interfere with any federal restrictions on employment including but not limited to the United States Department of Transportation regulation 49 CFR 40.151(e).

(Source: P.A. 98-122, eff. 1-1-14.)

5. Employee use of recreational marijuana

Recreational use while employed at a school

The Cannabis Regulation and Tax Act (PA 101-27) allowing recreational use of marijuana in Illinois for those over the age of twenty-one (21) is very clear in its requirements that marijuana possession and usage is impermissible on or near school grounds or school buses. 410 Ill. Comp. Stat. 705/10-35. Additionally, all employers are allowed, should they so choose, to develop a policy of a drug free workplace. 410 Ill. Comp. Stat. 705/10-50. This Act does not determine or require that employers allow their employees to use marijuana or marijuana products. *Id.* Thus, an employer can also discipline or fire a worker for violating a drug free work policy, should the employer so choose. However, employees who abuse drugs or alcohol may be entitled to Family and Medical Leave Act ("FMLA") leave. 29 C.F.R. § 825.114. Substance abuse can qualify as a serious health condition within the FMLA statute. *Id. See also* 29 C.F.R. § 825.113. This does not necessarily mean that the employee is eligible for FMLA leave if they use and abuse marijuana, but it remains an additional consideration for schools and other employers. *Id.* While this may seem dire for schools, it is important to note that the ADA does not require a school to hold an employee with alcoholism to a different standard than other employees. *Ames v. Home Depot U.S.A. Inc.*, 629 F.3d 665 (7th Cir. 2011). They may still hold employees accountable to the same standards and qualifications as other employees, even if the performance or behavior is related to alcoholism. *Id.* While the full effects of marijuana are not yet

determined, it could be construed that employers should expect the same performance from an employee who has abused marijuana as it would expect from other employees.

The Act clearly states that employers cannot discipline employees for marijuana use outside of work hours. However, if impairment is clear during the work day, the Act does not prevent an employer from disciplining or terminating an employee, or if the employee violates the employer's drug free workplace policy. 410 Ill. Comp. Stat. 705/10-50(b), 410 Ill. Comp. Stat. 705/10-50(c). The Act further clarifies what is necessary for an employer to consider when determining if an employee is incapacitated:

> Sec. 10-50. *Employment; employer liability*.
>
> (a) Nothing in this Act shall prohibit an employer 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.
>
> (b) Nothing in this Act shall require an employer to permit an employee to be under the influence of or use cannabis in the employer's workplace or while performing the employee's job duties or while on call.
>
> (c) Nothing in this Act shall limit or prevent an employer from disciplining an employee or terminating employment of an employee for violating an employer's employment policies or workplace drug policy.
>
> (d) An employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. If an employer elects to discipline an employee on the basis that the employee is under the influence or impaired by cannabis, the

> employer must afford the employee a reasonable opportunity to contest the basis of the determination.
>
> …
>
> (f) Nothing in this Act shall be construed to enhance or diminish protections afforded by any other law, including but not limited to the Compassionate Use of Medical Cannabis Pilot Program Act or the Opioid Alternative Pilot Program.
>
> (g) 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.
>
> (h) As used in this Section, "workplace" means the employer's premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee's job duties, and vehicles, whether leased, rented, or owned. "Workplace" may be further defined by the employer's written employment policy, provided that the policy is consistent with this Section.
>
> (i) For purposes of this Section, an employee is deemed "on call" when such employee is scheduled with at least 24 hours' notice by his or her employer to be on standby or otherwise responsible for performing tasks related to his or her employment either at the employer's premises or other previously designated location by his or her employer or supervisor to perform a work-related task.
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> (Source: P.A. 101-27, eff. 6-25-19.)

It is imperative to note that while employers may discipline or terminate employees for drug use related to marijuana, drug tests for these products are by no means perfect. The most recent innovation, according to NPR, is a "Weed Breathalyzer." Francesca Paris, *Scientists Unveil Weed Breathalyzer Launching Debate Over Next Steps*, NPR, Sept. 5, 2019 at 1:07 P.M., available at https://www.npr.org/2019/09/05/757882048/scientists-unveil-weed-breathalyzer-launching-debate-over-next-steps. The scientists who are developing this breathalyzer claim their innovation will help to ensure marijuana from days previously is not detected. *Id.* This is important for schools

who are looking to drug test employees for marijuana use, if they believe the employee is impaired at work. If devices, such as this one, are scientifically valid and usable, then employers can be more certain they won't be subjected to litigation over whether or not the results of the drug test were valid or not.

Past recreational use and the possibility of expungement

The Illinois School Code provides that a school employee's licensure may be revoked should they commit a Narcotics offense, including offenses defined in the Cannabis Control Act. 105 ILCS 5/21B-80. The School Code also provides that all employees who wish to be employed at a school must submit to a fingerprint criminal record test. 105 ILCS 5/10-21. The statute further explains school boards cannot knowingly hire someone who was convicted of an offense that would lead to license revocation or suspension. *Id.* As the state legalizes marijuana and puts measures in place to wipe expungements related to marijuana use from, it leaves schools with yet another question. How should schools and school districts handle applicants for jobs whose records related to marijuana usage will be expunged?

The new recreational marijuana law (PA 101-27) also sets forth that drug charges (arrests, but not convictions) for a "minor cannabis offense" (generally, possession of less than 30 grams and a non-violent offense) will be automatically expunged. *See* Ryan Grenoble, *Illinois Set to Expunge Up To 770,000 Marijuana Convictions*, HuffPost, Jun. 28, 2019 updated Jul. 3, 2019, available at https://www.huffpost.com/entry/illinois-marijuana-record-expunged_n_5d1640eee4b07f6ca57cb0f0. In order to expunge a conviction, individuals can petition to have those prior offenses expunged provided they meet the statutory requirements.

Based on these expungements, individuals with certain prior convictions which may currently prohibit employment with a school district pursuant to Section 21B-80 of the School Code, may be eligible for employment in the future without the seven-year waiting period currently anticipated under 21B-80(b).