



BRYCE DOWNEY & LENKOV  
LLC

## What Illinois Employers Ought to Know About Medical Marijuana

**Beginning on 1/1/14**, The Compassionate Use of Medical Cannabis Pilot Program Act, P.A., 98-0122 will allow “registered qualifying patients” in Illinois with specific debilitating conditions to legally obtain prescriptions for marijuana.

### **May employers discipline employees for violating workplace drug policies?**

Nothing in the Act prohibits employers from adopting reasonable regulations concerning the consumption, storage or timekeeping requirements for registered qualifying patients related to the use of medical marijuana.

The Act also provides that employers may enforce policies concerning drug testing, zero-tolerance or a drug-free workplace, so long as such policies are enforced in a non-discriminatory manner.

Employers may conduct drugs tests if they have reasonable cause to do so and are consistent and even-handed in the application of such testing. However, it is important to note that testing is not able to determine when any marijuana detected was consumed. This raises the issue of whether the marijuana was consumed during work or non-work hours and any disciplinary action taken as a result of such drug testing may expose employers to discrimination claims.

The Act provides that employers may discipline employees for violating workplace drug policies, again, so long as the discipline is not taken in a discriminatory manner. The Act provides that employers may not penalize an employee solely for his status as a registered qualifying patient, unless failure to do so would put the employer in major violation of federal law, or unless failing to do so would cause it to lose a monetary or licensing related benefit under federal law.

The Act specifically provides that an employee does not have a cause of action for:

1. Actions based on an employer’s good faith belief that a registered qualifying patient used/possessed marijuana on the employer’s premises or during hours of employment
2. Actions based on an employer’s good faith belief that a registered qualifying patient was impaired on the employer’s premises or during the hours of employment

### **Hiring and Promotion**

Employers may not discriminate in hiring and promotions based on an employee's medical marijuana status unless they face restrictions under federal law. For example, the U.S. Department of Transportation prohibits the use of medical marijuana for pilots, drivers and other safety-sensitive jobs.

Employers may ask a job applicant whether he or she uses any prescribed medication that may preclude the applicant from performing the job that he or she is applying for safely. If a job applicant discloses use of a prescribed medication that would preclude him or her from safely performing the job he or she is applying for, the employer may decline to hire the applicant. However, employers may not ask a job applicant whether he or she uses prescribed medication without regard to the nature of the job he or she is applying for, as doing so may raise HIPAA issues.

### **Smoking Breaks?**

It is important to keep in mind that the Act is a state law and that marijuana remains illegal under federal law. Courts have held that federal employment statutes such as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) do not protect or allow for the use of medical marijuana. Thus, employers are not required to permit an employee to take breaks to smoke medically prescribed marijuana under the ADA.

### **Workers' Compensation**

Despite this new legislation, an employee is barred from recovering compensation for work injuries caused by his or her intoxication, including impairment due to consumption of marijuana. For accidents on or after 9/1/11, recovery is barred if the employee's intoxication was the proximate cause of his injury, or if the employee's level of intoxication was sufficient to constitute a departure from employment. Intoxication is presumed if:

1. An employee's level of intoxication is at a BAC level of .08 or greater
2. There is evidence of impairment due to ingestion of cannabis or controlled substances; or
3. An employee refuses to submit to a test

As the legislation has yet to go into effect, we will have to wait and see how the Courts interpret this new legislation. In the meantime, employers should review their employment manuals and drug testing policies to ensure that their policies do not discriminate against registered qualifying patients. Additionally, we encourage you to watch Rich Lenkov's recent video on medical marijuana for the Illinois Manufacturers' Association by visiting <http://bdlfirm.com/chicago-workers-compensation-attorney-medical-marijuana-law/>. We will continue to keep you updated as the new legislation takes

effect. Please contact us with any questions you may have regarding implementing this new legislation in your workplace.



**by: Maital Savin**

Bryce Downey & Lenkov LLC

312.327.0038

Maital focuses her practice on civil litigation and workers' compensation defense. She has represented all types of employers, obtaining favorable results in numerous high-exposure claims and was recognized for successfully obtaining a "take nothing" arbitration decision in her client's favor. Maital frequently volunteers her time with the Jewish United Fund and is an active member of the Women's Bar Association of Illinois, the Chicago Bar Association (including the Labor & Employment Committee, the Young Lawyers Section Labor and Employment Committee, the Worker's Compensation Committee and the Alliance for Women Committee) and the Workers' Compensation Lawyers Association. In her free time she enjoys traveling, running and hiking.

## **Bryce Downey & Lenkov 2013 Case Results**

This past year was another highly successful year for our labor and employment department. We obtained summary judgment and dispositive case dismissals on various matters with demands exceeding well over \$1 million. We successfully resolved through mediation and direct settlement negotiations several other cases in an expedient, cost-efficient manner for well under 20% of the original demands and counseled several employers on resolving matters while avoiding litigation on same.

We stand ready to assist your company on any of your labor and/or employment litigation or counseling needs in 2014.

Please contact Storrs Downey via email ([sdowney@bdlfirm.com](mailto:sdowney@bdlfirm.com)) or telephone (312.327.0007) for any of your employment-related legal needs.