

Construction Law

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Impact of New Medical Marijuana Pilot Program on the Construction Industry

The Compassionate Use of Medical Cannabis Pilot Program Act (“the Act”), 410 ILCS 130/1, *et seq.*, went into effect in Illinois on January 1, 2014. The Act removes state level criminal penalties for the possession and use of marijuana by individuals suffering from specific qualifying medical conditions. 410 ILCS 130/5(e). The Act also prohibits employers from discriminating against this new group of marijuana users. *Id.* § 130/40(a)(1). In the construction industry, where a high degree of alertness is required to prevent injury and where workers routinely operate heavy machinery, this legislative change has some leaders clutching their hardhats. This column provides a brief overview of a few of the legal issues arising out of the medical marijuana pilot program that might impact the construction industry.

Maintaining Drug-Free Jobsites

Under the Act, many members of the workforce are permitted to use marijuana legally. The pilot program authorizes physicians to offer patients the option of using pot to alleviate symptoms associated with a variety of medical conditions, such as cancer, glaucoma, HIV/AIDS, hepatitis C, Crohn’s disease, severe fibromyalgia, spinal cord injury and disease, rheumatoid arthritis, fibrous dysplasia, post-concussion syndrome, Tourette’s syndrome, complex regional pain syndrome, neurofibromatosis, chronic inflammatory demyelinating polyneuropathy, and lupus. 410 ILCS 130/10(h). Qualifying patients who receive a written certification from a physician may register with the Illinois Department of Public Health for legal status as medical marijuana patients. *Id.* § 130/55. Although individuals employed in certain enumerated professions are prohibited from registering in the program, construction workers and contractors are not included on that list. *Id.* § 130/30(a)(9). The only related industry workers who are not eligible to register as cardholders are commercial drivers. *Id.* § 130/30(a)(10).

Beware of Impaired Workers

Although the medical marijuana pilot program does not authorize any worker to possess or use marijuana while he or she is on duty, the Act may provide a legitimate explanation for a positive drug test for certain construction workers. Substance abuse is more common amongst construction workers than workers in other industries. Sharon L. Larson, U.S. Dep’t of Health & Human Servs., Substance Abuse and Mental Health Services Administration, Office of Applied Studies, Worker substance use and workplace policies and programs (2007), available at <http://www.oas.samhsa.gov/work2k7/work>.

htm#6.1 (last visited Nov. 17, 2013). It is axiomatic that preventing workers from operating dangerous and complex machinery, performing construction work, and otherwise completing construction-related tasks while under the influence of any mind-altering substance is necessary and appropriate—regardless of whether the substance was obtained legally. After all, nothing in the Act relieves any employer from its general duty under the Occupational Safety and Health Act of 1970 to provide all employees with a workplace that is free of recognized hazards that could cause serious physical harm. *See* Pub. L. No. 91-596, § 5(a)(1). Injuries resulting from impairment by drug use could qualify as avoidable workplace hazards.

Currently, employers lack a readily available, affordable, and scientifically reliable method to differentiate between an impaired worker and a sober worker who tests positive for THC (a chemical component of cannabis) on a drug test due to relatively recent legal marijuana use. This recognized problem is addressed in the Act, which instructs employers regarding when a registered medical marijuana patient may be considered impaired. 410 ILCS 130/50(f). A finding of impairment is justifiable if a person “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.” *Id.* That is, there is a presumption that after a workplace accident any worker testing positive for marijuana was impaired on the job. Employers, however, must provide cardholder employees with an opportunity to contest the basis of any finding of impairment if the employee is to be disciplined as a result of such a finding. *Id.*

Of interest, the language of the Act explicitly states that it is not to be construed as permitting any person to undertake tasks while under the influence of marijuana when doing so would constitute negligence or professional misconduct. *Id.* § 130/30(a)(1). Similarly, the Act does not preclude the entry of a civil judgment against a cardholder for negligent actions taken while the cardholder was impaired. *Id.* The effect that those provisions may have on construction negligence claims has yet to be determined.

The Anti-Discrimination Clause

Some construction industry employers are concerned that the Act will hinder their ability to maintain safe and drug-free jobsites. The Act strictly prohibits employers from discriminating against an employee based upon his or her status as a medical marijuana patient. 410 ILCS 130/40(a)(1). Further, any company policies pertaining to drug testing or aimed to ensure a drug-free work environment are legally required to be applied in a non-discriminatory manner. *Id.* § 130/50(b). Employers are now faced with the challenging task of determining how to successfully execute that mandate. At a minimum, care should be taken to ensure that company policies and other materials pertaining to drug testing and substance abuse do not call for action that could be construed as singling out medical marijuana users.

Despite the anti-discrimination clause contained within the Act, employers should not let fear of discrimination litigation compel them to turn a blind eye to substance abuse that could impact performance. The Act specifically states that none of its provisions create a cause of action for any person against an employer “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.” 410 ILCS 130/50(g)(1). Further, a number of state courts have found that employers need not accommodate medical marijuana use by their employees. *See, e.g., Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010). Specifically, courts have issued rulings that

support the right of an employer to discharge an employee who used medical marijuana, after a positive drug test result. See, e.g., *Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2008); *Coats v. Dish Network*, 303 P.3d 147 (Colo. Ct. App. 2013). Of importance, no court has had an opportunity yet to address whether a construction-industry employer must accommodate a worker's use of marijuana prescribed for medical purposes in Illinois.

In any event, one group of construction-related employers is immune to attack for discrimination under the Act: federal contractors and grantees. An exception to the Act's anti-discrimination provision exists if the entity at issue is required to take action pursuant to federal law or risk losing "a monetary or licensing-related benefit under federal law or rules." 410 ILCS 130/40(a)(1); *id.* § 130/50(d). Under the Drug-Free Workplace Act of 1988, all Federal grantees and most federal contractors must ensure a drug-free environment for their workers and comply with various requirements imposed by the federal government—including a mandate to take action against individuals that use controlled substances, such as marijuana. 41 U.S.C. § 701. As such, entities that receive federal funding or regularly perform work on federally funded construction projects should be exempt from the Act's anti-discrimination provision. 410 ILCS 130/50(d).

Difficulties Associated with Related Construction Contracts

The Act introduces new businesses to the state of Illinois: marijuana cultivation centers and dispensaries. These entities no doubt will retain contractors to perform various tasks from time to time. Contractors are urged to take appropriate precautions when dealing with these new businesses, as Marijuana remains illegal under the federal Controlled Substances Act, 21 U.S.C. §§ 801–971.

Although recent federal enforcement guidelines indicate that growers and dispensaries may not be prosecuted if they operate in compliance with state law, the Department of Justice will continue to criminally prosecute these entities—despite state law legalizing their activities—if prosecution serves an important federal interest. Conflicts Between State and Federal Marijuana Laws: Hearing Before the S. Comm. on the Judiciary, 113th Cong. 2–4 (Sept. 10, 2013) (statement of James M. Cole, Deputy Att'y Gen.), available at <http://www.justice.gov/iso/opa/ola/witness/09-10-13-dag-cole-testimony-re-conflicts-between-state-and-federal-marijuana-law.201312231.pdf> (last visited Feb. 3, 2014). As such, raids, property forfeiture, and property seizure remain an ongoing risk for marijuana-related businesses and any party contracting with them. After all, if the property of the grower or dispensary is seized on the basis that it is used for illegal means, any mechanic's lien may be useless. Further, certificates of insurance and bank loans may be harder to obtain while working on projects for marijuana-related businesses. Moreover, federal courts might decline to intervene where legal recourse typically would be permitted on the basis that entities dealing with marijuana and marijuana-related entities have "unclean hands," given that the sale and possession of marijuana remains a serious federal crime. See, e.g., *Northbay Wellness Group, Inc. v. Beyries*, No. C 11-06255, 2012 U.S. Dist. LEXIS 133377, at *8 (N.D. Cal. Sept. 18, 2012).

Cardholder Confidentiality

It remains to be seen whether courts will find a cardholder's status as a medical marijuana patient to be discoverable in the context of a construction negligence claim. It is clear, however, that defense attorneys will not be able to search the Illinois Department of Public Health records to assess whether a plaintiff has registered as a medical marijuana patient. The list is confidential. 410 ILCS 130/145(a). Although all names will be compiled in a searchable database, the information will only be accessible by law enforcement personnel and medical cannabis dispensary organization agents. *Id.* § 130/150(b). Any breach of the confidentiality of the information obtained under the Act is a Class B misdemeanor. *Id.* § 130/145(c).

Conclusion

All in all, the Compassionate Use of Medical Cannabis Pilot Program Act is not expected to have a particularly profound impact on construction contracts, companies' drug-free workplace policies, or construction claims. Construction industry leaders, however, are advised to stay informed on this quickly-evolving topic, to consult an employment attorney for advice regarding the implementation of a workplace drug testing program to ensure that they do not run afoul of the Act's anti-discrimination clause, and to take precautions when contracting with new marijuana-related entities.

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