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kriha boucek

Cannabis Q&A

Illinois has recently passed several laws addressing cannabis use, which may have Illinois educators wondering what this means for Illinois schools. We distributed two shorter newsletters on this topic in August but have since received many additional questions and have created this guide to include some information from our previously published newsletters, as well as address additional questions and provides practical guidance on navigating these complex laws in the school setting.

GENERAL QUESTIONS

What are the Illinois laws addressing cannabis that apply to the school setting?

1. The Illinois Compassionate Use of Medical Cannabis Program (Medical Cannabis Act) was signed into law in August of 2013, and was recently amended in August of 2019. This law allows qualified individuals with certain debilitating conditions to use cannabis for medical purposes when specific criteria are met.
2. Ashely's Law, which allows for the use and administration of medical cannabis to students in schools, was signed into law on August 2018, and amended in August 2019. The amended law goes into effect starting January 1, 2020.
3. The Cannabis Regulation and Tax Act (CRTA), legalizing the possession, use and sale of marijuana for recreational purposes will take effect on January 1, 2020.

How do these laws intersect with federal laws?

This is where it gets a little tricky. Currently, there are conflicts between state and federal laws on this topic. The U.S. Drug Enforcement Agency (DEA) classifies drugs into five categories or schedules depending on the drug's acceptable medical use and potential for abuse/dependency. Marijuana has always been categorized as a Schedule I drug, meaning that it has no currently accepted medical use in addition to a high potential for abuse.

However, there have also been some changes at the federal level that suggest the view on marijuana is in transition. For instance, the Agriculture Improvement Act of 2018 (the 2018 Farm Bill) removed hemp as an illegal drug under the Controlled Substances Act, meaning that under federal law, cannabis plants and derivatives that have 0.3 percent THC on a dry weight basis are no longer considered controlled substances. In the next section we will discuss the differences between THC and CBD, but because CBD is typically derived from hemp it may not be considered a controlled substance. Additionally, the FDA has currently approved one-cannabis-derived product (Epidiolex) and three cannabis-related drug products (Marinol, Syndros, and Cesamet). For more information see the FDA's website.

On June 20, 2019, the U.S. House of Representatives voted 267-165 in favor of prohibiting the DOJ from interfering with a state's decision to implement laws governing the use of cannabis, whether recreational or medicinal. Although not passed as law yet, the House's bi-partisan approval of this amendment marks the first time that either branch of the

U.S. Congress has voted to protect state recreational cannabis laws from federal enforcement actions. Since 2014, the U.S. Congress has adopted similar protections governing only medicinal (not recreational) cannabis use.

To add to the complexity, the Drug Free Workplace Act requires recipients of federal grants to provide a drug-free workplace. This means that school districts, as recipients of federal grants, must abide by this Act.

In Illinois, marijuana will be completely legal, however, the federal government has not legalized marijuana. Therefore, as of now, marijuana is still illegal under federal law and allowing such substances on school property risks federal funding. However, the outlook of the federal government may be changing given that is has taken hemp derived substances off the illegal drug list. It will be important for boards of education and administration to discuss this intersection when making decisions regarding the use of marijuana on school grounds. In addition, school boards and administration should also be on the lookout for new PRESS policies on the matter for additional guidance.

Could a school district be in danger of losing federal funding for following these state laws?

Given the conflict between federal and state law, it is technically possible for a school district to be in danger of losing federal funding, however, we think this is unlikely. The CRTA specifically states that it does not require schools to risk violation of federal laws to comply with the CRTA. In addition, sections 10-35(a)(2) and (3) of the CRTA prohibit the possession and use of cannabis on school grounds, school property, and school buses, except when allowed under Ashely's Law and the Medical Cannabis Act.

Additionally, under Ashley's Law, if the district or school would lose federal funding by authorizing the administration of a medical cannabis infused product to a student, the district or school may not authorize the use of the product. 105 ILCS 5/22-22(f).

Compliance with state marijuana laws may result in the Department of Education withholding federal funding, however, we believe such a scenario is unlikely. Even if the federal government began pursuing a school district for violation of the Drug Free Workplace Act, the district could easily stop the practice before the federal government "pulled the cord" on its funding.

What is cannabis, THC, and CBD?

The cannabis plant, from which both marijuana and hemp come from, contains more than eighty active chemical compounds, with delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD) as the most commonly known. THC is the psychoactive (or mind-altering) chemical in cannabis that can produce a "high" sensation. The basic difference between marijuana and hemp is the level of THC, with hemp containing 0.3 percent or less, and marijuana containing greater than 0.3 percent. CBD can be found in both the hemp plant and marijuana, but by itself does not cause a "high" sensation. CBD comes in many forms such as supplements, topicals, food/drink, and even pet products.

What we generally think of with CBD is the hemp-based version that is commercially available and legal to possess. In fact, we can find it readily available for legal purchase online, in drugstores, and in specialty shops. Marijuana-based CBD is grown under a state marijuana license and must be sold through a licensed dispensary and is the type of CBD that applies to Ashley's Law or the Medical Cannabis Act. CBD, whether, hemp-based or marijuana-based, is increasingly being used to address a variety of health concerns such as anxiety, insomnia, and may assist in addressing different types of chronic pain. For more information please see this Q&A from the FDA or this article from the Harvard Medical School.

Pharmaceutical CBD is used to describe drugs containing CBD. These drugs consist of clinical trials and a high degree of regulation before going to market. Epidiolex is currently the only FDA-approved cannabis-derived product.

The Medical Cannabis Act and Ashley's Law refer to a "medical cannabis infused product." What does this mean?

Both The Medical Cannabis Act and Ashley's Law define medical cannabis infused product as "food, oils, ointments, or other products containing usable cannabis that are not smoked." It's important to note that minors are not allowed to purchase or use forms of medical cannabis that are smoked or vaped. Currently, minors in Illinois may only be prescribed cannabidiol (CBD) oil.

What are some of the debilitating conditions that a qualifying patient must be diagnosed with to be eligible for a medical cannabis registry identification card in Illinois?

The Medical Cannabis Act lists a variety of qualifying debilitating medical conditions. There are currently over 40 qualifying conditions. Examples of conditions include seizures (including those characteristic of Epilepsy), autism, anorexia nervosa, chronic pain, migraines, cancer, Tourette syndrome, and multiple sclerosis. 410 ILCS 130/10(h). A full list of the conditions can be found on the Illinois Department of Public Health website.

EMPLOYMENT-RELATED QUESTIONS:

When the CRTA goes into effect, does this mean school district employees can now smoke marijuana recreationally at work?

No. The CRTA specifically provides that schools are allowed to remain drug-free. Sections 10-35(a)(2) and (3) of the Act prohibit the possession and use of cannabis on school grounds, school property and school buses, except when allowed under the Medical Cannabis Act and Ashely's Law.

School districts can and should continue to enforce drug-free work policies that prohibit the possession and use of recreational marijuana by students and staff. Section 10-50 of the CRTA permits an employer to adopt reasonable zero tolerance or drug-free workplace policies, so long as those policies are applied in a nondiscriminatory manner. If your district subscribes to PRESS, its policies have been reviewed to address the use of recreational marijuana.

Are school employees prohibited from using marijuana at any time?

There is no blanket prohibition for school employees contained in the CRTA, however, the CRTA does make mention of two types of employees:

- Bus Drivers/Driver's Education: It can be argued that the Medical Cannabis Act prohibits cannabis use at any time for an individual who holds a school bus driver's permit or a Commercial Driver's License, whether at work on not, recreational or medicinal.
- School Resource Officers: The Medical Cannabis Act also strictly prohibits cannabis use for individuals who work in fields such as fire officials/firefighters, Emergency Medical Service (EMS) personnel, Corrections Officers, Probation Officers, and Law Enforcement Personnel, which arguably includes School Resource Officers. 410 ILCS 130/30(a)(9) and (10). Agreements regarding school resource officers should be reviewed and updated to address this.

The CRTA and Medical Cannabis Act treat these employees differently and it is unclear, at this point, which standard would govern. We are working to gain more clarity on this matter through collaboration with other education organizations. Stay tuned for more information as it becomes available.

While the implications for other school employees is less clear, we think these situations should be treated similarly to alcohol. A history of case law in Illinois supports that being under the influence of marijuana while teaching students is cause for dismissal and is irremediable behavior that warrants discharge. *See Younge v. Bd. of Educ. of the City of Chi.*,

788 N.E.2d 1153 (Ill. App. Ct. 2003). An Illinois appellate court has also held that possession of marijuana outside of the school environment is sufficient cause to warrant a dismissal. *See Chicago Bd. of Educ. v. Payne*, 430 N.E.2d 310 (Ill. App. Ct. 1981). This may mean that it does not matter when and where a teacher consumes cannabis, they could still be disciplined as a school employee if cannabis consumption is detectable while the employee is on district premises or while performing work for the district.

In looking at other states in which medical marijuana is legal, courts have been mixed in rulings about whether an employee using medical marijuana for debilitating conditions can be terminated for testing positive on a drug test. The Colorado Supreme Court found that the termination of a quadriplegic individual who was licensed to use medical marijuana and tested positive was legal since marijuana use is illegal under federal law. *See Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015). Additionally, a court in New Mexico held that an employee with HIV/AIDS who failed the employer's drug test was properly terminated, as the State medical marijuana statute did not mandate accommodation of medical marijuana use and federal law preempted state law. *See Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D. N.M. 2016). However, other courts have ruled that failure to hire an applicant who legally uses medical marijuana under state law is illegal and that state law is not preempted by federal law. *See Noffsinger v. SSC Niantic Operating Co.*, 338 F. Supp. 3d 78 (D. Conn. 2018); *Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. Ct. 2017).

While it is not clear how this will play out in Illinois, if a district has a neutral drug free policy, the district may discipline or terminate an employee for being under the influence, for possessing, or using marijuana on school grounds. Less clear is how this may apply to employees who use marijuana outside of school, but based on case law in other states, if employees can be legally terminated for using medically prescribed marijuana under state law because it is still illegal under federal law, the argument could be made that recreational use, while legal under state law is still illegal under federal law and a positive drug test could be appropriate grounds for discipline or termination.

Are employees allowed to smoke marijuana at work as a reasonable accommodation for a disability?

At this point, a school district can reasonably deny the use of marijuana on school grounds as a reasonable accommodation since the CRTA expressly prohibits the use and/or possession of cannabis on school grounds, in school buildings, or on school busses (410 ILCS 130/30), and since it is illegal according to federal law. At the same time, we would encourage school districts to work with their employees to create feasible solutions to this issue. We foresee that this issue will be subject to litigation and the law may change as Illinoia courts address these issues.

Are employees allowed to use a medical cannabis infused product as a reasonable accommodation for a disability?

This answer is trickier. While Ashley's law now allows qualifying students to use medical cannabis, there are still some issues to play out between federal and state laws. As mentioned above, there is a strict legal prohibition on Bus Drivers. Last time we researched this, individuals 18 and older can be prescribed medical cannabis for over 50 debilitating conditions. They can be prescribed CBD oil or medical cannabis with THC. The use of a medical cannabis infused product may be considered a reasonable accommodation. It is possible that a reasonable accommodation might allow for an employee to leave work for a short period of time to self-administer a medical cannabis infused product off school grounds. However, this could conflict with a school district's Drug Free Work Place Act requirements, and it is clear that individuals who work with children in the school setting cannot be under the influence of cannabis.

To make matters more complex, testing for cannabis is not like alcohol. One could consume marijuana on Saturday for one of the approved debilitating conditions and then have no lingering effects on Monday but would test positive through a hair check or urine analysis. This is going to be a problem until drug testing technology and/or Illinois courts weight in on such issues. Districts will have to consider each situation on a case by case basis given the complexity and the infancy of the application to employees in schools.

Are employees allowed to use commercially-available CBD products?

Commercially-available CBD products are hemp-based products, and as mentioned above, hemp is no longer listed as an illegal drug under the Controlled Substances Act. We recommend that districts treat commercially-available CBD products in the same manner the district addressed other supplements or over the counter medications that employees may utilize.

What does it mean to be under the influence?

One factor that makes cannabis more complicated is that there isn't an easy test like a Breathalyzer that can easily detect when someone is under the influence. The CRTA states that an employee can be considered impaired when the employer has a "good faith belief" that the employee demonstrates specific and articulable symptoms that "decrease or lesson the employee's performance of the duties or tasks of the employee's job position." Examples of symptoms include impaired speech, coordination, unusual or irrational behavior, or disregard for the safety of the employee or others. 410 ILCS 705/10-50(d).

Under Illinois law, for the purposes of both civil and criminal action, a person is considered under the influence of cannabis if there is a THC concentration of 5 nanograms or more in blood or 10 nanograms or more in an other bodily substance, and anything less than this can be considered with other factors to determine if someone was under the influence of cannabis. 625 ILCS 5/11-501.2(b-5).

Additionally, schools still have the right to maintain a drug-free work environment and where it could get tricky is when an employee may have used cannabis outside of school, perhaps over the weekend, yet it remains in the individual's system and appears on a drug test even though they may not be under the influence at that moment. The drug test, in this case, could indicate that the employee used cannabis recently, but not necessarily that they were under the influence at work.

It's also possible that an individual who regularly uses a CBD product that contains only trace amounts of THC can create a build-up over time that might show up in a drug test. This means that a regular user of a CBD product could result in a positive drug test.

These are all issues that will need to be addressed over time. Because this situation is complex, it is recommended that districts determine each situation on a case-by-case basis, looking at a variety of factors such as the results of a drug test and observable and articulable behavioral observations. To that end, we have attached a checklist for use by districts in determining whether an employee is under the influence and subject to discipline. (attach link to the Colorado School District checklist).

This is another issue that will be subject to litigation as employees and unions test the limits of the definition of "under the influence" and an employer's "good faith belief." In addition, the CRTA indemnifies employers who take action against employees if they have a "good faith belief" that an employee was under the influence. 410 ILCS 705/10-50(e).

How do we test an employee that we think might be under the influence?

While there is no specific protocol, it's important for districts to develop and follow their local policies and procedures for testing both students and employees. The CRTA does not limit an employer's ability to discipline an employee or terminate employment when an employee violates the employment or workplace drug policy.

District officials should have reasonable suspicion to request a drug test and should look for specific and articulable symptoms of impairment as discussed above. If it is suspected that an employee might be under the influence, one option may be to send the employee to a work clinic in the same way you would in the event of an employee injury. It will be a good idea to make sure your district has an established relationship with a clinic in the event this is necessary. Another possible option is to have the employee drug tested in the nurse's office, however, we imagine some nurses may be

resistant to this. Either way, we suggest following the procedures the district would take if an employee was under the influence of alcohol and apply the same procedures uniformly.

Are there any consequences for a district if they subject an employee to a drug test or discipline an employee for recreational pot use?

As long as a district has a good-faith belief that an employee used or possessed cannabis in the workplace or while performing his or her job duties, the district may subject an employee to drug testing that is reasonable under the district's workplace drug policy. An employee will not have a cause of action against a district if the employee is disciplined or terminated based on the employer's good faith belief that the employee was impaired in the work place or while performing his or her job duties in violation of the workplace drug policy. 410 ILCS 705/10-50(e). We recommend districts follow a uniform procedure for all employees and document all stages of the process.

STUDENT-RELATED QUESTIONS:

Are there any health concerns about a child who is a registered medical cannabis patient using a medical cannabis topical product and then coming into skin-to-skin contact with other children?

According to the Illinois Department of Public Health, this is not a concern. However, to minimize any risk of secondary exposure, the topical medicine can be massaged into areas that can be covered after the product has been applied such as shoulders, soles of the feet, back of the heel/foot, elbows, or knees.

What if the administration of the medical cannabis infused product is disruptive to the educational environment?

The school may prohibit a parent/guardian or other individual from administering a medical cannabis infused product that would be disruptive to the educational environment or would cause other students to be exposed to the product. 105 ILCS 5/22-33(c).

Can a school nurse be required to administer a medical cannabis infused product to a student?

No. Ashley's Law allows a school nurse or school administrator to administer it to a student who is a registered qualifying patient but does not require it. The official position of the National Association of School Nurses (NASN) is that only FDA approved cannabis/marijuana medications be allowed in the school setting, so there may be some resistance from school nurses to administer products that have not yet been approved by the FDA. In instances where a doctor has prescribed a medical cannabis infused product that is not FDA approved and a school nurse is resistant to administration, districts should work collaboratively to develop a plan that best meets the needs of the student. As a reminder, school administrators can also administer this medication and students who are a registered qualifying patient can also self-administer under the direct supervision of a school nurse or school administrator.

Are schools required to allow the administration of a medical cannabis infused product to a student under the Individuals with Disabilities Act (DEA) or Section 504?

Probably not. As discussed earlier, there are some inconsistencies between state and federal law related to cannabis. While not binding in Illinois, a federal district court in New Mexico recently held that neither the IDEA nor Section 504 requires a district to administer or accommodate the administration of cannabis to a student, as to do so is unlawful under the Controlled Substances Act. The court reasoned that to require a school district to commit a federal crime to satisfy its obligation to provide the students with a Free Appropriate Public Education (FAPE) would be an absurd interpretation of IDEA. The court also found this does not constitute discrimination under Section 504 because the district's decision to not allow the storage or administration of cannabis on school grounds was not due to the student's disability, but rather because doing so would be in violation of federal law. *Albuquerque Pub. Schs. v. Sledge*, Slip Copy, 2019 WL 3759479 (D. N.M. 2019).

Now that recreational marijuana will be legal in Illinois, how should we expect this to impact our students and

what can we do to proactively address any concerns?

Based on feedback from our friends in other states where recreational marijuana is legal, we can expect to see marijuana come into schools in forms that we may not have previously seen. For instance, while students may have smoked marijuana more frequently in the past making it easier to see and smell, schools will likely see an increase in candy, gummies, and other forms that are not as recognizable. In anticipation of these changes, it will be important for schools to work with law enforcement and medical experts to provide professional development to both staff and students.

CONCLUSION:

Due to the uncertainty and infancy of this area of law, it is likely that there will be litigation on this issue that will help clarify many of the questions above. We will continue to provide you with updated information as it becomes available.

kriha kb boucek

2 TransAm Plaza Dr., Suite 450
Oakbrook Terrace, IL 60181
(630) 394-3790
krihalaw.com

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Contact us!

b		Cassie **Black**	cassie@krihaboucek.com Direct: (630) 332-0469
b		Sara **Boucek**	sara@krihaboucek.com Direct: (630) 394-3792
g		Kevin **Gordon**	kevin@krihaboucek.com Direct: (630) 394-3784
j		Stephanie **Jones**	stephanie@krihaboucek.com Direct: (630) 394-3786
k		Laura **Knittle**	laura@krihaboucek.com Direct: (630) 394-3783
k		Darcy **Kriha**	darcy@krihaboucek.com Direct: (630) 394-3782
l		Mohammed **Lakhani**	mohammed@krihaboucek.com Direct: (630) 394-3785
s		Rob **Swain**	rob@krihaboucek.com Direct: (630) 394-3788