Spring 2020

Vo. 37, No. 2

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ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

VOLUME 37 SPRING 2020 ISSUE 2

The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

Published quarterly by the University of Illinois School of Labor and Employment Relations at Urbana Champaign and Chicago-Kent College of Law.

(ISSN 1559-9892) 565 West Adams Street, Chicago, Illinois 60661-3691

WHAT A LONG, STRANGE TRIP IT'S BEEN: MARIJUANA'S FIFTY-YEAR JOURNEY FROM AN ILLEGAL NARCOTIC TO A LAWFUL RECREATIONAL DRUG AND WHETHER WORKPLACE DRUG POLICIES WILL NOW GO UP IN SMOKE

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I. INTRODUCTION

Until recently, marijuana, a controlled narcotic under federal law since 1970, had been unlawful in all fifty states.[1] As a result of politically unacceptable outcomes in the criminal justice system resulting from arrests and convictions for marijuana possession, many states, including Illinois, have liberalized their drug laws. In 2014, the Illinois General Assembly legalized marijuana used for medical purposes.[2] More recently, the General Assembly legalized recreational marijuana.[3] Despite legalizing marijuana for medicinal or recreational use, the General Assembly did not specifically address the impact of these laws on the workplace. In fact, in both instances, the General Assembly attempted to preserve the status quo in the workplace by allowing employers to continue to enforce workplace drug policies, including zero-tolerance policies.[4] Based on this new legislative framework, adult employees using marijuana need no longer fear the constable, but they must still be mindful of the HR Director.

Part II of this Article discusses the federal government's treatment of marijuana over the years. Part III reviews the data documenting the human and economic costs associated with enforcing marijuana laws and argues that the outcomes in the criminal justice system, having become untenable, established the conditions that made legalization efforts in some of the individual states possible. Part IV examines Illinois's medical marijuana law and discusses impact of medical marijuana drugs on the workplace. Part V describes the opioid epidemic and its relationship to the Illinois Alternative to Opioids Act of 2018. Part VI discusses Illinois's recent recreational marijuana statute and describes how this law will affect the workplace. Even though Illinois's medical and recreational marijuana laws specifically attempted to preserve the status quo for employees, this Article will conclude in Part VII by arguing that consumer demand for marijuana and labor market conditions will diminish the value of the employer protections in the Recreational Cannabis Act and will ultimately force Illinois employers to liberalize their existing policies regarding marijuana.

II. FEDERAL REGULATION OF MARIJUANA

In what may come as a surprise to anyone who has read a newspaper in the last fifty years, "[f]or most of American history, marijuana was legal to grow and consume."[5] People used marijuana recreationally, while doctors and pharmacists prescribed it to

treat numerous conditions,[6] including fatigue, coughing fits, asthma, rheumatism, delirium tremens, migraine headaches, and menstrual symptoms.[7] Marijuana's inclusion in the U.S. Pharmacopoeia in 1850[8] is a testament to its perceived medicinal value in the mid-nineteenth century.

Attempts by the individual states to regulate marijuana began in the early part of the twentieth century and were largely driven by racism and xenophobia occasioned by the presence of black and Latino migrant workers.[9] In 1919, California was one of the first states to prohibit the sale and possession of marijuana.[10] Illinois outlawed marijuana in 1931.[11] The first attempt by the federal government to regulate marijuana occurred in 1937[12] when Congress passed the Marihuana Tax Act.[13] The Marihuana Tax Act did not outlaw marijuana *per se*, but instead required those who sold or possessed marijuana, as well as physicians who prescribed it, to purchase a tax stamp.[14] Congress set the tax at such a prohibitively high rate that the Marihuana Tax Act "was tantamount to a legal prohibition."[15] Violators of the Marihuana Tax Act were charged with "tax evasion" and faced maximum fines of $2,000 and five years in jail.[16] Notably, the American Medical Association opposed the legislation, suggesting that the physicians of the day saw medicinal value in prescribing marijuana to patients.[17] However, in 1941, marijuana was removed from the U.S. Pharmacopoeia.[18]

In 1951, Congress passed the Boggs Act, which established harsh mandatory minimum sentences for simple possession of marijuana, as well as other drugs.[19] Specifically, an initial conviction for drug possession resulted in a mandatory two-year minimum sentence; a second conviction carried from five to ten years; and a third carried from ten to twenty years.[20] As Matthew Braun writes, "The 1951 Boggs Act was enacted because politicians pushed a narrative that marijuana was used by African Americans and Mexican Americans."[21] Five years later, in 1956, Congress passed the Narcotic Control Act and actually increased the penalties set forth in the Boggs Act.[22]

A. Controlled Substances Act

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act ("Comprehensive Drug Act") which repealed the mandatory minimum sentences of the earlier legislation, and consolidated the nation's drug laws generally. [23] Title II of the Comprehensive Drug Act is the Controlled Substances Act ("CSA").[24] The CSA established five schedules of controlled substances and classified marijuana as a Schedule I drug, alongside such drugs as LSD, cocaine, heroin, and peyote.[25] Marijuana's status as a Schedule I drug was based on Congress's determination that it "has a high potential for abuse" and "has no currently accepted medical use in treatment in the United States," and that "there is a lack of accepted safety for use of the drug … under medical supervision."[26] Opiates are listed as Schedule II drugs.[27] According to the CSA, though Schedule II drugs like opiates have "a high potential for abuse," they are distinguishable from Schedule I drugs because they have a "currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions."[28] "The CSA provides for the periodic updating of schedules and delegates to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove or transfer substances to, from or between schedules."[29] After

Congress passed the CSA, marijuana was finally outlawed in all fifty states.[30] Marijuana remains a Schedule I narcotic today, notwithstanding considerable efforts to reschedule the drug.[31] In fact, there is legislation currently pending in Congress to remove cannabis from the CSA.[32]

For many years, the CSA set forth the basic framework for regulating drug use in society and the workplace. To the extent there were any changes in drug laws, the changes created greater restrictions regarding the use of drugs in the workplace. For example, the Drug-Free Workplace Act of 1988 requires some federal contractors and all federal grant recipients to agree to maintain a drug-free workplace as a precondition for receiving a federal contract.[33] Covered employers must publish a statement that controlled substances are prohibited in the workplace, punish employees convicted of drug offenses, and make a good faith effort to maintain a drug-free workplace.[34]

B. Omnibus Transportation Employee Testing Act

In 1991, Congress passed the Omnibus Transportation Employee Testing Act in response to its perception that "drug and alcohol abuse [had] become an increasing problem in the workplace."[35] The statute directed the U.S. Department of Transportation ("DOT") to develop drug and alcohol regulations for employees in the railroad, trucking, aviation, and mass-transit industries.[36] In 1994, the various administrations within DOT, including the Federal Highway Administration ("FHA") and the Federal Transit Authority ("FTA"), promulgated regulations pursuant to the Congressional mandate. Under rules promulgated by the FHA and the FTA, covered employers must perform drug and alcohol testing on every employee performing a "safety-sensitive function,"[37] including employees of intrastate motor carriers who perform "safety sensitive functions."[38] Required testing includes: random testing,[39] pre-employment testing,[40] reasonable suspicion testing,[41] post-accident testing[42] and return-to-duty testing.[43] When an employee tests positive for drug use or refuses to submit to a required test, the FHA and FTA rules require the employer to remove the employee from the safety-sensitive function[44] until such time as the employee is evaluated and tests negative for drugs on a return-to-duty test.[45] Notably, the regulations do not require an employer to discipline or terminate an employee who fails a drug test. The DOT regulations inform many collective bargaining agreements covering employees working in safety-sensitive industries or holding commercial drivers' licenses ("CDLs").

Even though alcohol abuse can be just as damaging to individual employees, and ultimately the workplace, drugs are often treated more harshly than alcohol in collective bargaining agreements. For example, the Joint Labor Management Uniform Drug/Alcohol Abuse Program[46] incorporated into the collective bargaining agreements entered into between Local 150 of the International Union of Operating Engineers (as well as other trades) and the Mid-America Bargaining Association ("MARBA") treats drug-related infractions differently than alcohol-related infractions. These collective bargaining agreements cover thousands of employees working in the construction industry throughout northeast Illinois. On its face, the Policy provides that employees testing positive for drug use "will be fired."[47] In contrast, the Policy provides that

"[e]mployees found under the influence of alcohol while on duty, or while operating a company vehicle, will be subject to termination."[48] Thus, the Policy takes a zero tolerance approach to drugs, while allowing for leniency in cases involving alcohol. One explanation for the Policy's disparate treatment of drugs and alcohol could be that drugs like marijuana were unlawful and the negotiators were justified in attempting to rid the workplace of illicit drugs. Another more subtle explanation is that labor and management negotiators were more likely to drink alcohol than to use drugs, making them less sympathetic to drugs than alcohol. Regardless of the explanation, the existence of federal drug laws and regulations made it easy for labor and management to take a hard line on drugs—particularly in safety-sensitive industries.

C. 2014 and 2018 Farm Bills

"Cannabinoid is the name given to all the chemical compounds found in cannabis, the plant genus that includes both hemp and marijuana."[49] Tetrahydrocannabinol (THC) and cannabidiol (CBD) and are the most common cannabinoids found in cannabis.[50] THC is the psychoactive ingredient causing euphoria.[51] CBD, in contrast, is nonintoxicating and does not produce euphoria or psychoactive effects.[52] THC and CBD are both present in hemp and marijuana; marijuana is rich in THC; hemp is richer in CBD."[53] The initial definition "marihuana" under the CSA was broad enough to include both hemp and marijuana.[54]

Many Americans first learned of CBD in 2013 when Dr. Sanjay Gupta hosted a program on CNN in which he profiled a six-year-old girl in living in Colorado who used CBD to reduce seizures caused by epilepsy.[55] The program generated immediate interest in, as well as demand for, CBD oil.[56] As the *New York Times* reported, "Mere weeks after the CNN documentary aired, the spike in CBD interest prompted the Financial Industry Regulatory Authority to issue an investor alert on marijuana stock scams: As the F.D.A. would later show, many online CBD products contained little or no CBD whatsoever."[57]

In a seemingly unrelated earlier event, in 2011, James Comer won an election for Kentucky state agriculture commissioner after campaigning to legalize industrial hemp.[58] Comer's core constituents were Kentucky tobacco farmers desperate for a new cash crop.[59] Giving heed to Tip O'Neill's oft-cited adage that "all politics is local," Senate Majority Leader Mitch McConnell of Kentucky later included a hemp pilot program for "research" in the Agriculture Act of 2014 (also known as the 2014 Farm Bill).[60] Colorado Congressman, now Governor of Colorado, Jared Polis, also sponsored the pilot program.[61] The legislation defined hemp as cannabis containing less that 0.3 percent THC.[62] The 0.3 percent threshold was not based in science; it was, instead, an arbitrary threshold.[63] The *New York Times* reports that "entrepreneurs interpreted this research-oriented pilot program as the *de facto* legalization of cannabidiol"[64]—which is curious since "the 2014 Farm Bill did not modify the [CSA] to exclude from Schedule I either hemp or products containing THC derived from hemp."[65]

In December 2018, Congress passed the Agricultural Improvement Act of 2018[66] (also known as the 2018 Farm Bill), which, based on language inserted by Senator McConnell[67] defined hemp as "the plant Cannabis sativa L. and any part of that plant,

including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a [THC] concentration of not more than 0.3 percent on a dry weight basis" [68] and removed hemp from classification as marijuana under the CSA.[69] This opened the door to the lifting of restrictions on the sale, transfer and possession of hemp, as well as the sale, transfer, and possession of its components—including CBD.[70]

Importantly, the 2018 Farm Bill did not legalize CBD outright. Instead, the 2018 Farm Bill provides that CBD "derived from hemp will be legal, if and only if that hemp is produced in a manner consistent with the Farm Bill … and by a licensed grower."[71] CBD produced in other settings remains an illegal Schedule I narcotic.[72] And cannabis with more than 0.3% THC remains a Schedule I narcotic under the CSA.[73] As Catie Wightman notes, "The difference between hemp and marijuana comes down to a tenth of a percent of THC; Cannabis sativa L. is legal hemp at 0.3% THC but becomes illegal marijuana at 0.4% THC."[74] She adds: "The difference between illegal hemp and illegal marijuana is impossible to see with the naked eye and determining the quantity of THC to such a degree requires sensitive testing equipment."[75]

CBD has been touted as an effective treatment for depression, insomnia, brain injury, opioid addiction, diabetes, arthritis, inflammation and joint pain, and nausea from chemotherapy.[76] Despite its increasing popularity, "[m]ost of the information about CBD's effects in humans is anecdotal or extrapolated from animal studies, and few rigorous trials have been conducted,"[77] causing at least one doctor to characterize CBD as an "expensive placebo" rather than a "panacea."[78] The Federal Drug Administration ("FDA") explains, "[o]ther than one prescription drug product to treat two rare, severe forms of epilepsy, [the FDA] has not approved any other CBD products, and there is very limited available information about CBD, including about its effects on the body."[79] In 2017, the National Academies of Sciences, Engineering and Medicine found limited evidence of the ability of CBD to treat anxiety.[80] Beyond that, according to the Center for Science in the Public Interest, there is no evidence that CBD "will lower the risk of diabetes, shrink tumors, wean a person off opioids, ease schizophrenia or calm anxious pets."[81] There is, however, encouraging research indicating that CBD used by recovering opioid addicts has proven effective in helping them avoid relapse.[82]

In 2019, the policy director for the Center for Science in the Public Interest observed that since the passage of the 2018 Farm Bill, "the marketplace [has been] full of products that are essentially unknown" and that consumers are not aware "that they are guinea pigs."[83] Undeterred by the scientific uncertainty, a recent survey conducted by an investment bank found that 7% of adults in the United States, 17 million people, had reported using CBD in the months following the passage of the 2018 Farm Bill.[84] Similarly, in 2019, Gallop surveyed 2,500 Americans and found 14% reported using CBD for pain, anxiety and sleep issues.[85] Usage of CBD will likely continue to increase as it becomes more available and as people continue to report positive results (actual or perceived) after using CBD products. A cannabis market research firm predicted sales of CBD will reach $22 billion by 2022.[86]

The FDA currently has jurisdiction to regulate hemp. Remarkably, the agency has neither evaluated nor approved any of the CBD products sold over the counter today, an array that includes oils, creams, bath bombs and dog treats.[87] Indeed, though CBD is explicitly not allowed in dietary supplements or foods, "the FDA has tended to overlook these infractions."[88] Because of limited resources, and perhaps the anti-regulatory fervor of the Trump administration, the FDA's regulatory oversight has been limited to "warn[ing] companies to stop making unfounded claims" and engaging in deceptive advertising.[89] The FDA has filed only nine warning letters against CBD companies; those companies faced "few serious repercussions."[90]

There are currently over 1,000 products available online containing CBD.[91] CBD products are often marketed to suggest that they do not contain any THC or, if they do, that the THC will not be detected on a drug test.[92] On December 14, 2016, the U.S. Drug Enforcement Agency responded to a comment about whether a proposed rule regarding marijuana extracts was applicable to CBD if not combined with other cannabinols, like THC.[93] The DEA responded, "For practical purposes, all extracts that contain CBD will also contain at least small amounts of other cannabinoids."[94] In a footnote, the DEA further explained, "Although it might be theoretically possible to produce a CBD extract that contains absolutely no amounts of other cannabinoids, the DEA is not aware of any industrially-utilized methods that have achieved this result."[95]

A 2012 study published in the *Journal of Analytical Toxicology* found that a common forensic drug testing method can easily mistake CBD for THC,[96] resulting in false positive result for an employee using a CBD product. Moreover, a 2017 study published in the *Journal of the American Medical Association* ("JAMA") found that after testing 84 CBD products purchased online, 26.19% of the samples had less CBD than indicated on the label, while 43.85% of the samples had more CBD than indicated on the label.[97] Only 30.95% of the products tested were labeled accurately.[98] That is, nearly 70% of the products were labeled incorrectly. Notably, THC was detected in 18 of the 84 samples at levels the authors of the study observed "may be sufficient to produce intoxication or impairment, especially among children."[99] The authors concluded by explaining that their "findings highlight the need for manufacturing and testing standards, and oversight of medical cannabis products."[100] The JAMA study confirms the unregulated nature of the nascent CBD industry; its detection of THC in levels capable of producing intoxication in over 20% of the products tested should give pause to any employee subject to drug testing who is considering using a CBD-infused product. Based on the findings, an employee subject to workplace drug testing who uses a lawful CBD product (even one marketed as being undetectable on a drug test) has a 20% chance that THC will be detected.

As will be discussed more thoroughly below, CBD will have a dramatic impact on the workplace. At the risk of oversimplification, Congress legalized hemp because the Senate Majority Leader wanted to create a new cash crop for struggling tobacco farmers in his state. The impact of CBD on the workplace was never debated prior to the passage of the 2018 Farm Bill and neither Congress nor the Department of Labor has offered any guidance to employers obligated to maintain a drug-free workplaces under federal law as to how they should respond when their employees begin taking unregulated CBD that

is laced with TCH. It will now be up to practitioners to figure out how to integrate CBD into existing drug policies.

III. MARIJUANA AND THE CRIMINAL JUSTICE SYSTEM

From a criminal justice perspective, federal and state drug laws have had a devastating effect on communities, as well as state and local budgets. In 1971, President Nixon officially declared war on drugs.[101] He identified drugs as "public enemy number one" and announced that "in order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive."[102] One commentator observed that with those words, President Nixon "laid the foundation for a return to rigid, punitive drug sentencing" and "cast would-be drug offenders as dangerous enemies to be fought with the force of the criminal justice system."[103] President Nixon was the first president to address drugs as a "central national-policy concern"; his predecessors "generally did not involve themselves actively in drug control policy." [104] Former Nixon aide John Ehrlichman conceded in a 1994 interview that Nixon intended his war on drugs to undermine his perceived enemies; he explained:

> The Nixon campaign in 1968, and the Nixon White House after that had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[105]

Presidents Ford and Carter both "distanced themselves from the drug issue."[106] One commentator observed that President Ford "largely backed away from Former President Nixon's drug policy" and "presented a milder tone to drug policy reform."[107] For his part, President Carter asked Congress to consider decriminalizing marijuana.[108] Congress, however, did not enact any legislation in response to President Carter's request.[109] President Regan took office in 1981 and returned to the bellicose rhetoric that characterized the Nixon years. For instance, President Reagan criticized the policy of the Carter administration by explaining that he was "taking down the surrender flag …. [and] running up the battle flag."[110] President Reagan shifted the focus of national drug policy from treatment to enforcement and advocated zero-tolerance policies in the workplace, among other policies.[111] President George H.W. Bush continued President Reagan's drug policies, but increased the focus on law enforcement efforts.[112] Subsequent administrations continued to pour billions of dollars into the war on drugs, but policy differences did emerge as some administrations, for example, prioritized treatment over enforcement (Bill Clinton) or prioritized addressing consumer demand over efforts to cut off the supply of drugs (George W. Bush).[113]

The hippies, once targeted by Nixon, grew up, got jobs, and presumably fell off the radar of law enforcement. This is not to say, however, that their appetite for marijuana dissipated. White professionals, even lawyers, have always been able to purchase and

use marijuana without much fear of criminal recrimination. Even though marijuana usage rates are comparable across races, black and brown people have had different experiences with the criminal justice system when it comes to marijuana. For example, a 2013 study conducted by the American Civil Liberties Union explained that "despite the fact that marijuana is used at comparable rates by whites and blacks, state and local governments have aggressively enforced marijuana laws selectively against Black people and communities."[114] The ACLU study found that a black person was 3.73 times more likely to be arrested for marijuana possession than a white person.[115] Another report found that Blacks and Hispanics "make up twenty percent of the marijuana smokers in the United States but comprise 58% of marijuana offenders sentenced under federal law in 1995."[116]

The costs of enforcing drug laws have been staggering. Between 1970 and 2010, the U.S. spent $1 trillion on the war on drugs, including $121 billion to arrest more than 37 million non-violent drug offenders, including those arrested for marijuana possession.[117] The U.S. currently spends more than $47 billion each year on the war on drugs.[118] A 2010 study from the libertarian Cato Institute found that in 2008, state and local governments spent a combined $5.4 billion (after accounting for offsetting fines and seizures) on enforcing marijuana prohibitions.[119] According to that study, Illinois spent over $89 million on marijuana enforcement.[120]

The massive expenditures at the federal and state level have done nothing to curb demand for marijuana. The 2013 ACLU report found that "[b]etween 2001 and 2010, there were 8,244,943 marijuana arrests, of which 7,295,880, or 88%, were for marijuana possession."[121] A 2018 article in the *Federal Sentencing Reporter* observed, "More than 10 million marijuana arrests, the vast majority for simple possession, have already been recorded nationwide in the twenty-first century."[122] The Substance Abuse and Mental Health Services Administration estimated that 43.5 million Americans (15.9% of the population) used marijuana in 2018, this represented an increase from 2002–2017.[123] By any objective measure, the war on drugs, particularly marijuana, has been an absolute failure.

President Obama entered the White House as the first chief executive in our history to publicly acknowledge smoking *and inhaling* marijuana recreationally.[124] Despite acknowledging the legitimacy of a continued discussion about the utility of drug laws, President Obama explained, "I personally, and my administration's position, is that legalization is not the answer."[125] The following year, President Obama's Justice Department issued a memorandum (the so-called "Cole Memo"[126]) clarifying that the federal government would not prioritize criminal prosecution of citizens complying with the marijuana laws of their states.[127] Many considered the Cole Memo to be a signal to the states that the Justice Department would not interfere with local efforts to legalize or decriminalize medical or recreational marijuana.[128] On January 14, 2018, Attorney General Jefferson Beauregard Sessions III rescinded the Cole Memo and reminded federal prosecutors that Congress had determined that "marijuana is a dangerous drug and marijuana activity is a serious crime."[129] Following the 2018 midterm elections, Sessions was unceremoniously replaced by William P. Barr, who announced that he would leave enforcement of marijuana laws to the states.[130]

The growing unease, on both the political right[131] and left,[132] with the human and economic costs of the war on drugs fueled a legalization movement. Proponents of legalization cited the costs of the failed war on drugs, as well as the potential economic benefits that would come from legalization. The Cato Institute study found, using 2008 numbers, that legalizing *all* drugs and imposing appropriate sin taxes on those drugs would save $41.3 billion a year in law-enforcement costs and generate $46.7 billion in annual tax revenues ($8.7 billion attributable to marijuana).[133] Again using 2008 numbers, the Cato Institute found that legal marijuana in Illinois would generate nearly $125 million in annual tax revenues.[134] The lure of new tax revenue streams, particularly in the face of the exorbitant costs associated with the failed war on drugs, caused voters and politicians alike to embrace efforts to legalize marijuana. In 1996, California became the first state to legalize medical marijuana; it did so through a ballot initiative.[135] In 2012, Colorado and Washington became the first states to legalize recreational marijuana.[136] Each state did this through a ballot initiative, rather than through the legislative process.[137] President Obama responded to the legalization initiatives in Colorado and Washington by explaining, "[I]t's important for it to go forward because it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished."[138] Currently, 33 states (including Illinois) have legalized medical marijuana; recreational marijuana has been legalized by 11 states (including Illinois) and the District of Columbia. New York and New Jersey are expected to join the list of eleven soon.[139] Illinois was the first state to legalize marijuana through the legislative process.[140] There is currently bipartisan legislation pending in Congress, the Strengthening the Tenth Amendment through Entrusting States (STATES) Act, that would protect states that have legalized marijuana from intervention from the federal government.[141]

Illinois liberalized its drug laws in response to unacceptable outcomes in our criminal justice system, not unacceptable outcomes in the workplace. This is not to say that an employee discharged for violating a workplace drug policy ever considered that outcome acceptable or just. Rather, this is to say that changes in state drug laws were not intended as a reform of labor and employment laws. The General Assembly specifically attempted to preserve the status quo in the workplace, while at the same time legalizing marijuana for medical and recreational use. Whether the status quo can or should be preserved is a question addressed below.

IV. MEDICAL MARIJUANA IN ILLINOIS

On January 1, 2014, the Compassionate Use of Medical Cannabis Pilot Program Act ("Medical Cannabis Act") went into effect in Illinois.[142] The Medical Cannabis Act allows qualifying patients to use cannabis without being subject to arrest, prosecution, or property forfeiture.[143] In enacting the law, the General Assembly specifically found that "[c]annabis has many currently accepted medical uses in the United States, having been recommended by thousands of licensed physicians to at least 600,000 patients in states with medical cannabis laws."[144] The legislature further found that "medical research has confirmed the beneficial uses of cannabis in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions,

including cancer, multiple sclerosis, and HIV/AIDS . . .”[145] As explained above, one of the rationales given by Congress for banning Schedule I drugs, including marijuana, was that such drugs had “no currently accepted medical use in treatment in the United States.”[146] At least with respect to marijuana, the federal and state legislative findings are at odds with one another.

Notably, the General Assembly’s certitude is not present in the scientific community. To date, “[m]arijuana has no officially recognized health benefits according to the [FDA] and more than twenty leading medical and scientific organizations,”[147] including the National Academy of Sciences’ Institute of Medicine, American Academy of Family Physicians, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American College of Physicians, and the American Medical Association.[148] One commentator has explained, “an absence of FDA approval does not prove that marijuana is ineffective or unsafe.”[149] Instead, “[i]t simply means that the benefits and risks of the drug have not been studied sufficiently to meet FDA standards, and the risk/benefit ratio is therefore undetermined.”[150] As the National Academy of Medicine explained in a 2017 report, “very little is known about the efficacy, dose, routes of administration, or side effects of commonly used and commercially available cannabis products in the United States.”[151]

There is, to be sure, anecdotal evidence from both patients and physicians to suggest that marijuana is effective for treating epilepsy, Parkinson’s disease, Tourette’s syndrome and glaucoma. There is also “good-quality research” (though not sufficient to meet FDA standards) suggesting that marijuana may be beneficial for ameliorating chronic neuropathic or cancer pain, and spasticity associated with neurological disorders like multiple sclerosis.[152] We simply do not have the rigorous research from the scientific community that usually precedes a change in public policy. This paper has argued that legalization was a direct response to unacceptable outcomes in the criminal justice system. It is difficult to imagine that any state, including Illinois, would have legalized medical marijuana with such an underdeveloped body of scientific research if it had not been part of a broader plan of criminal justice reform. Drug laws in this country have always been driven by politics, not science, and the recent reforms in Illinois are no exception.

Although the Medical Cannabis Act legalized the use of medical marijuana, the law preserved employers’ rights to administer drug tests, enforce zero-tolerance policies and/or maintain drug free workplaces.[153] And, in an acknowledgment of existing federal laws, the Medical Cannabis Act provided, “Nothing in this Act shall limit and 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 lose a federal contract or funding.”[154] Thus, for an employer with an ideological commitment to a drug-free workplace or otherwise subject to federal regulations, the Medical Cannabis Act did little to alter the treatment of marijuana in the workplace. Put another way, employees subject to workplace drug policies will not be able to use medical marijuana without facing repercussions in the form of workplace discipline, despite passage of the Medical Cannabis Act. Initially enacted as a “pilot program,” the Cannabis Act became permanent in 2019.[155]

No Illinois court has ruled on whether a valid medical marijuana patient may be disciplined or discharged for using marijuana outside of the workplace.[156] Courts in other jurisdictions have held, however, that similarly structured medical marijuana laws were not intended to alter the employment relationship. For example, in *Casias v. Wal-Mart*,[157] the Sixth Circuit held that holding a medical marijuana card was not a defense to disciplinary action taken by a private employer against an employee for failing a drug test. The court found the Michigan Medical Marihuana Act was intended to protect users from state action and was not intended to regulate private employment.[158] The Sixth Circuit agreed with district court's finding that "private employees are not protected from disciplinary action as a result of their use of medical marijuana, nor are private employers required to accommodate the use of medical marijuana in the workplace."[159]

Similarly, in *Coles v. Harris Teeter, LLC*,[160] an at-will employee covered by Washington D.C.'s medical marijuana law was terminated upon failing a drug test. The court explained that it could not ascertain a "clear policy mandate in the District's law that an employer must accept an employee's lawful marijuana use."[161] Instead, the district court observed that the statute at issue in that case, as well as similar statutes in other states, "legalized the use of marijuana for certain medical purposes, but did not otherwise explicitly mandate that employers must tolerate that use."[162]

Finally, in *Ross v. RagingWire Telecommunications, Inc.*, the California Supreme Court in a 5–2 decision ruled that it was not going to impose obligations on private employers with respect to the state's medical marijuana law, explaining that "[n]othing in the text or history of the [state medical marijuana law] suggests the voters intended the measure to address the respective rights and duties of employers and employees."[163] These cases demonstrate that courts have allowed employers to enforce otherwise reasonable drug policies, notwithstanding medical marijuana laws. Based on the structure of the Illinois Medical Cannabis Act, it is hard to imagine an Illinois court analyzing a termination case brought by a user of medical marijuana any differently.

The passage of medical marijuana laws may have legalized marijuana usage in certain contexts and made marijuana more widely available for patients, but it appears not to have had much of an impact on the workplace. Although the above cases appear correctly decided as a matter of statutory construction, the outcomes are troubling from the plaintiffs' perspectives and highlight one of the difficulties in managing medical marijuana laws going forward. The plaintiffs in the above cases were all terminated for using lawful medical marijuana. Most state marijuana laws were passed on ballot initiates and generated tremendous attention in the press. Individual employees are, of course, responsible for knowing the requirements of their jobs, including all workplace policies. But as a practical matter, it is not unreasonable for an employee who voted in a successful ballot initiative and later obtained the proper credentials for a medical marijuana card to conclude that the new state law trumped any workplace drug policy. The discharged employee in such a scenario looks different (in the terms of intent, culpability, etc.) than an employee facing discharge for violating a drug policy prior to the passage of a state medical or recreational marijuana law. Going forward, it is

imperative that unions and employers explain the relationship between state legalization efforts and workplace policies to avoid a situation where an employee complies with state law, but nevertheless finds herself in violation of an employer's drug policy.

V. THE OPIATE EPIDEMIC AND THE ILLINOIS ALTERNATIVE TO OPIODS ACT OF 2018

The opioid epidemic has plagued the United States. Barbara Fedders explains: "Opioids are a class of drugs that include pain relievers available legally by prescription, such as oxycodone, marketed as OxyContin; hydrocodone, marketed as Vicodin; codeine; morphine; the illegal drug heroin; and synthetic products such as fentanyl and carfentanil."[164] "Each is chemically related and interacts with opioid receptors on nerve cells in the body and brain, producing pain relief and euphoria." [165] According to Dr. Zeez N. Kain, "consistent consumption of drugs like Hydrocodone and Oxycodone leads to increased tolerance and a condition called hyperalgesia, which is increased sensitivity to pain after long term intake of pain medication."[166] "Those consequences, in turn, require more pain medication for the patient and dependency develops before the drugs were ever technically abused." [167]

The Substance Abuse and Mental Health Services Administration "estimated that 10.3 million people aged 12 and older misused opioids in the past year, including 9.9 million prescription pain reliever misusers and 808,000 heroin users."[168] The same survey also estimated that 2 million people aged 12 or older had an opioid use disorder in 2018.[169] Tragically, the CDC reports that opioid overdoses continue to claim an average of 128 American lives each day.[170]

Illinois was not immune from this plague. In 2018, Illinois enacted the Alternative to Opioids Act of 2018 ("Opioids Act"). The Opioids Act, passed as an amendment to the Medical Cannabis Act, cited specific findings from the Illinois Opioid Action Plan, released in September of 2017.[171] The Action Plan characterized "[t]he opioid epidemic [as] the most significant public health and public safety crisis facing Illinois."[172] It further found that "drug overdoses have now become the leading cause of death nationwide for people under the age of 50" and estimated that opioid overdoses killed nearly 11,000 Illinois residents between 2008 and 2018.[173] At current rates, the Action Plan predicted "the opioid epidemic will claim the lives of more than 2,700 Illinoisans in 2020."[174] The Action Plan attributed the increase in opioid deaths to "the dramatic rise in the rate and amount of opioids prescribed for pain over the past decades."[175]

The Opioid Act extended the lawful use of medical marijuana to qualifying participants in an Opioid Alternative Pilot Program who have medical conditions "for which an opioid has been or could be prescribed by a certifying health care professional based on generally accepted standards of care."[176] Several studies have found that cancer patients using marijuana needed fewer opioid painkillers.[177] In addition, opioid-related deaths have declined in states that have legalized medical marijuana.[178] But a study published in the *American Journal of Psychiatry* found "cannabis use, even among adults with moderate to severe pain, was associated with a substantially increased risk of

nonmedical prescription opioid use at 3-year follow-up."[179] The authors of the study explained that "a strong prospective association between cannabis and opioid use disorder should nevertheless sound a note of caution in ongoing policy discussions concerning cannabis and in clinical debate over authorization of medical marijuana to reduce nonmedical use of prescription opioids and fatal opioid overdoses."[180]

Although it is not clear that medical marijuana will reverse any of the alarming trends associated with the opioids, one thing is clear: there is no known case of human death by cannabis poisoning.[181] Thus, from a public health perspective, marijuana is an objectively less dangerous option for pain management than opioids. There is, of course, a certain irony that after a fifty-year war on drugs, a Schedule I narcotic historically peddled by street-level drug dealers is being promoted by our legislature as an alternative to physician-prescribed Schedule II opiates. In any event, for individuals affected by the opiate crisis, any relief is welcome.

Because the provisions of the Opioid Act are integrated into the existing Cannabis Act, all the employer protections, including the right to administer drug testing and enforce a zero tolerance policies and/or drug free workplaces[182] apply to an individual/employee who wishes to take advantage of the new law and transition from an opioid to marijuana. Swapping marijuana for an opioid raises a serious issue for an employee subject to DOT regulations or a zero-tolerance drug policy. Notwithstanding the well-documented dangers of opioids, employees are usually able to use physician-prescribed opioids (when not working) without implicating DOT regulations or even an employer's zero-tolerance drug policy. Transitioning from an opioid to medical marijuana may be prudent from a public or personal health perspective, but for an employee with a CDL or subject to a zero-tolerance workplace policy, such a transition may result in a positive drug test and place her job in jeopardy. Whether using marijuana while off duty as a substitute for an opioid could be considered a "reasonable accommodation" under the Illinois Human Rights Act is beyond the scope of this paper, but is a plausible argument that could be asserted on behalf of an employee seeking to transition. For now, the Opioids Act effectively allows an employer to veto an employee's decision to transition from opioids to marijuana, thereby minimizing the possible benefits of the legislation.

VI. RECREATIONAL MARIJUANA IN ILLINOIS

On July 29, 2016, Illinois became the twenty-first state to decriminalize the possession of small amounts of marijuana.[183] On January 1, 2020, the Illinois Cannabis Regulation and Tax Act ("Recreational Cannabis Act") went into effect and Illinois became the eleventh state to legalize recreational marijuana. [184] The Recreational Cannabis Act seeks to regulate cannabis "in a manner similar to alcohol…"[185] Accordingly, the legislature eliminated criminal penalties for the possession and personal use of defined amounts of cannabis flower, cannabis-infused product, and cannabis concentrate for Illinois residents 21 years of age or older[186] and established a plan for the distribution and taxation of cannabis.[187] Despite allowing the personal use of cannabis, the Recreational Cannabis Act specifically provides that employers are not required to "allow employees to use or be under the influence of cannabis in the workplace or while on call"[188] and sets forth "specific, articulable symptoms" that evidence impairment.[189]

The statute also expressly permits employers to adopt "reasonable" zero-tolerance or drug-free workplace policies, including drug testing, and allows an employer to discipline or terminate employees for violating such policies.[190] Employers must, however, afford employees "a reasonable opportunity to contest the determination" of impairment if it leads to discipline.[191]

Upon passing the Recreational Cannabis Act, the General Assembly amended the Illinois Right to Privacy in the Workplace Act ("Privacy Act") to provide, "[e]xcept as otherwise specifically provided by law, including Section 10-50 of the Cannabis Regulation and Tax Act . . . , it shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges or employment because the individual uses lawful products off the premises of the employer during non-working and non-call hours."[192] The term "lawful products" is specifically defined as "legal under state law."[193] The Recreational Cannabis Act also insulates employers from some employee lawsuits. Specifically, the Act provides:

> 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 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 . . . [194]

This language was added to the legislation shortly before the law went into effect at the urging of the management community.[195]

A. Consumer Demand for Legal and Illegal Marijuana

In the first month following the enactment of the Recreational Cannabis Act, Illinois residents spent $30.6 million on recreational marijuana; out-of-state residents spent an additional $8.6 million—bringing total first month sales to $39.2 million.[196] These strong first month sales generated cannabis tax revenue in the amount of $7.3 million and sales tax revenue in the amount of $3.1 million.[197] The high consumer demand dried up supply and even forced some dispensaries to close.[198] Shortages are expected for months.[199] Annual recreational marijuana sales are expected to generate anywhere from $500 million[200] to $1.6 billion[201] in revenue and millions of dollars in annual tax revenues.[202] In fact, the Illinois Department of Revenue forecasts initial tax revenues of $34 million in 2020, climbing to $375.5 million in 2024.[203]

B. Marijuana in Illinois

Illinois may have legalized marijuana, but it did not eliminate unlawful marijuana. Marijuana purchased at legal Illinois dispensaries is subject to state excise taxes ranging between 10% and 25% (based on THC content), in addition to general state sales tax of 6.25% and local sales taxes as high as 4.75%—resulting in purchase prices twice as much

as the those paid on the illegal, secondary market.[204] Some large Illinois communities, including Mount Prospect, Arlington Heights, and Naperville, have also exercised their right to "opt out" and ban recreational sales.[205] Illegal drug markets rarely encounter shortages and drug dealers do not "opt out" of servicing individual communities. The combination of higher prices, supply problems and out-right bans will allow the black market to persist in Illinois. Notably, black markets thrived in California and Colorado even after those states legalized marijuana.[206] A recent article in the *New York Times* observed that "despite legalization of marijuana in more states—arrests for drugs increased again last year."[207] Black markets sales will continue, and one would expect arrests at point of sale and/or for possession of illegally purchased marijuana to continue, notwithstanding legalization and decriminalization.

C. Marijuana and the Workplace

Even though none of the recent changes in drug laws at the federal and state levels were intended to reform labor and employment laws, the impact of these legislative changes will be felt most immediately and acutely in the workplace. As a result of widely available legal CBD and marijuana, more employees will be coming to work with THC in their systems. This will present novel issues for employers in safety-sensitive industries requiring drug-free employees, as well as employers in non-safety sensitive industries that nevertheless demand workers to remain drug-free.

As explained above, a common drug test often mistakes CBD for THC.[208] In addition, the DEA tells us that "all extracts that contain CBD will also contain at least small amounts of other cannabinoids."[209] A small amount of the other most common cannabinoid in hemp (THC) revealed on a drug test is enough to violate a zero-tolerance policy. In detecting a small amount of TCH, a drug test cannot determine whether that small amount of THC is the residual of a larger amount of marijuana ingested days or weeks earlier or simply the small amount accompanying the larger CBD product used more recently. The JAMA study cited above found most CBD products are not labeled properly and detected TCH levels sufficient to product intoxication or impairment in 20% of the CBD products tested.[210] For all these reasons, an employee who is otherwise respectful of an employer's zero-tolerance policy has a reasonable chance of failing a drug test upon taking a lawful CBD product.

The availability of unregulated CBD products that likely contain some amounts of THC will make zero-tolerance policies difficult to administer. An employer with a zero-tolerance policy will find itself on the horns of a dilemma if faced with an employee who has failed a drug test after taking a falsely-labeled CBD product. Discipline seems unwarranted, unnecessarily punitive and lacking in just cause. Yet creating an exception for CBD products will likely undermine an entire policy, as any self-respecting marijuana user subject to a zero-tolerance policy will likely have ample supplies of CBD products to present in the event of a failed drug test. Difficult choices like these may prompt some employers to reconsider the value of maintaining zero-tolerance policies or the consequences of failing a drug test. As explained, above, even the DOT regulations do not require discipline upon a failed drug test. Instead, the regulations only require an employer to remove an employee from a safety-sensitive position until that employee

passes a return-to-duty test.[211] The increasing popularity of unregulated CBD may cause employers to consider severing discipline from drug testing, or at least reconceptualizing discipline as it relates to drug testing.

Despite legalization, employees will continue to buy, sell, and use illegally obtained marijuana, and drug arrests may actually increase.[212] In the past, drug arrests and convictions often spilled over into the workplace, leading to discipline for off-duty conduct and union grievances in response. These cases will also likely continue, although the criminal penalties in cases involving possession of small amounts of marijuana may not be as severe in the wake of decriminalization. Arbitrators reviewing discipline for off-duty conduct typically require a showing of a "nexus" between the off-duty conduct and an employer's legitimate business interest.[213] In drug cases, this is often established by showing that the off-duty conduct could seriously damage an employer's public image or that the conduct makes it impossible for supervisors or co-workers to deal with the employee.[214] After the passage of the Recreational Cannabis Act, an off-duty case involving a marijuana arrest looks more like a tax avoidance case than a traditional drug crime. Whether an employer will be able to establish the requisite nexus in such cases will depend on the specific facts of the case, but the existence of the Recreational Cannabis Act will make it more difficult to establish an injury to an employer's reputation or co-worker backlash.

The Recreational Cannabis Act envisions treating marijuana "in a manner similar to alcohol"[215] and does not require employers to tolerate employees who are "under the influence of cannabis in the workplace or while on call."[216] There is an obvious appeal to thinking about marijuana in the same way we think about alcohol. The difficulty, of course, is with the ability to test real-time impairment of individuals suspected of being under the influence of marijuana. This will prove to be one of the biggest issues for employers willing to allow off-duty marijuana usage but demanding workplace sobriety. Currently available drug tests reveal use, not impairment; such tests "cannot ascertain the quantity of a drug consumed, the time of consumption, or its effect on the user."[217] The best available tests can only establish that a person has used marijuana in the last few days.[218] Until tests for real-time impairment are available, employers will be forced to rely on subjective factors in evaluating employees for workplace impairment.[219]

Discipline based on subjective evaluations will almost certainly be challenged through union grievance procedures. These cases will ultimately end up in arbitration where the employers will have the burden under the traditional just cause standard to prove impairment through testimony from decision-makers about their subjective evaluations of the grievant. Cases based on subjective evaluations are always difficult, but this new category of cases will prove even more difficult considering the range of THC content available today. Malcom Gladwell observed in *The New Yorker* that "[b]ecause of recent developments in plant breeding and growing techniques, the typical concentration of THC … has gone from the low single digits (in the 1980s and 1990s) to more than twenty percent—from a swig of near-beer to a tequila shot."[220] Writing in the *New York Times*, two physicians explained, "[i]n the early 1990s, the average THC content for confiscated marijuana was roughly 3.7 percent. By contrast, a recent analysis of marijuana for sale in Colorado's authorized dispensaries showed an average THC content of 18.7

percent."[221] High potency strains of marijuana contain THC levels as high as 28 percent.[222]

An employee using marijuana with low THC content before or during work will likely exhibit behaviors vastly different from an employee using marijuana with high THC content. The variability in THC levels will make it difficult for employers to standardize evaluation criteria. The Supreme Court teaches us that labor arbitrators are usually chosen because of their "knowledge of the common law of the shop."[223] Arbitrators have no particular expertise in determining impairment after-the-fact. Arbitrators, as well as labor and management advocates, will have to learn how to evaluate claims of impairment in response to a new category of grievances created by the Recreational Cannabis Act and modern growing techniques.

Congress and the General Assembly legalized CBD and marijuana, respectively, without giving much thought about how these laws will affect the workplace. Even though CBD and marijuana will affect the workplace, the precise impact is unknown at this point. This Article has identified a few areas that may be affected by these new laws, but this analysis is by no means intended to be exhaustive. In fact, one would expect legal CBD and marijuana will affect the workplace in ways not contemplated by Congress, the General Assembly, or this Article. Practitioners now find themselves in uncharted waters.

D. Pre-Employment Testing

The management bar applauded the General Assembly's eleventh-hour decision to strengthen employer protections in the marijuana legislation.[224] In explaining the new law to clients and potential clients, several management firms have taken aggressive positions on pre-employment, post-offer drug testing. Two management lawyers believe, for example: "These amendments [to the Recreational Cannabis Act] make clear that employers may continue pre-employment drug testing and, to the extent permissible by the employer's policy, withdraw offers of employment to employees who tested positive for cannabis use . . . "[225] There are at least two problems with this assertion.

First, no Illinois court has considered the issue of pre-employment, post-offer drug testing since the recent passage of the statute. Expressing certitude about an eventual interpretation of a new statute is dangerous.[226] Second, on the merits, the law does not seem that clear to warrant such certainty. As explained above, the Privacy Act provides, in relevant part, "except as provided in Section 10-50 of the Cannabis Regulation and Tax Act it shall be unlawful for an employer to refuse to hire… any individual… because the individual uses lawful products . . . "

Sections 10-50 (a) through (c) provide that nothing in the Act: (a) prohibits an employer from adopting reasonable policies concerning the use of cannabis in the workplace; (b) requires an employer to permit an employee to be under the influence in the workplace; or (c) limits or prevents an employer from disciplining or terminating an employee for violating an employer's workplace drug policy.[227] Absent from this section of the statute

is any language suggesting that an employer may withdraw a job offer based on a positive drug test. Given the structure of the statute, if the legislature intended to permit the withdrawal of post-testing job offers, one would have expected language to the effect of "nothing in the Act limits or prevents and employer from withdrawing a job offer if an employee tests positive for marijuana on pre-employment drug test." The statute does not say this.

Section 10-50(e)(1) of the Recreational Cannabis Act does, however, provide, "[n]othing in this Act shall be construed to create or imply a cause of action for any person against an employer for: . . . withdrawal of a job offer . . . due to a failure of a drug test."[228] Importantly, a cause of action in response to a withdrawal of job offering following a positive drug would likely be brought under the Privacy Act, not the Recreational Cannabis Act. For its part, Section 15(c) of the Privacy Act provides, "If an employer or prospective employer violates this Act, an employee or applicant for employment may commence an action in the circuit court to enforce the provisions of this Act . . . "[229] And, Section 10-50(f) of the Recreational Cannabis Act provides, "[n]othing in this Act shall be construed to enhance or diminish protections afforded by any other law . . . "[230]

The question for Illinois courts will be whether the language in Section 10-50(e)(1) of the Recreational Cannabis Act (i.e., "nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: . . . withdrawal of a job offer due to a failure of a drug test) trumps Section 15 of the Privacy Act which creates a private right of action against a prospective employer that refuses to hire an employee because she used a lawful product. To defeat a claim brought under the Privacy Act, a prospective employer will have to persuade a court that the cause of action was, in fact, "created" by the Recreational Cannabis Act, not the Privacy Act. The answer to this question is not as clear as some management firms have suggested. In harmonizing the two statutes, a court could reasonably find that an employer violates the Privacy Act if it withdraws a job offer because a prospective employee fails a pre-employment drug test. Particularly since an employer may, under the Recreational Cannabis Act, clearly enforce a zero-tolerance policy, the better approach in such a case may be for the employer to follow through on the offer of employment, but advise the employee of the employer's policies and counsel the employee that future marijuana use will not be tolerated.

By taking an aggressive approach to pre-employment drug tests, employers will find that they are excluding otherwise qualified candidates from the hiring process. Objective evidence reveals that Americans have a growing appetite for marijuana. The 2013 ACLU report discussed above found over 7 million people were arrested for marijuana possession between 2001 and 2010.[231] These were only the people who were caught. The study from the Substance Abuse and Mental Health Services Administration discussed above estimated that 43.5 million Americans (15.9% of the population) used marijuana in 2018.[232] Although estimated use rates were highest among people aged 18 to 25 (34.8%), 28.5 million (13.3%) adults aged 26 or older used marijuana in 2018.[233] This represented an increase from 2002–2017.[234] Eight million people reportedly use marijuana every day.[235] These numbers on usage help explain the nearly $40 million in first month marijuana sales in Illinois. Many people use this drug and usage rates in

Illinois will likely continue to increase with the passage of the Recreational Cannabis Act. Putting aside the question of whether it is lawful to withdraw a job offer following a positive drug test, it seems irrational for an employer to exclude so many people from the hiring process simply because they may have used or are using marijuana. Indeed, it is hard to imagine an employer implementing any policy that would systematically exclude 13% to 35% of working-age adults from the hiring process, yet this would be the effect of a rigid drug policy that relies on pre-employment drug screening.

Employers are always on much firmer ground regulating on-duty employee conduct, as opposed to off-duty conduct. As explained above, to sustain the discipline for off-duty conduct, arbitrators typically require employers to establish a nexus between the alleged conduct and an employer's legitimate interest. The idea that an employer could regulate pre-employment, lawful conduct by rescinding a job offer following a pre-employment drug test seems to stretch existing doctrine too far. Using existing doctrine as a guide, it is difficult to imagine what interest an employer could articulate that could justify the rescission of an offer of employment upon learning than an employee used lawful marijuana while unemployed, for example. From a policy perspective, even someone opposed to employees using marijuana while off-duty might concede that a period of unemployment is an appropriate time for a person to use lawful marijuana. A person whose job offer has just been rescinded may not have recourse to a collectively bargained grievance procedure and arbitration, but that same person would present as a sympathetic plaintiff in a suit brought under the Privacy Act in a case of first impression to test the limits of the new legislation.

VII. CONCLUSION

Marijuana was never as dangerous as Congress declared in passing the CSA and it is likely not the risk-free wonder drug that some advocates of medical marijuana have posited. Legalization efforts at the state level may eventually pressure Congress to reclassify marijuana on the CSA schedule. Until that happens people will continue to use marijuana for medicinal purposes under the cover of state law. People will also continue to use CBD products, often purchased online, to address a host of ailments. As people learn more about the dangers associated with opioids, patients may also turn to medical marijuana for post-surgery relief instead of filling initial prescriptions for opioids. Patients already taking an opioid may attempt to wean themselves by transitioning to medical marijuana. And with the recent passage of the Recreational Cannabis Act, many people (both veteran and new users) will use marijuana without fear of arrest or prosecution. All of this is to say that because of the passage of the 2018 Farm Bill at the federal level, and the Medical Marijuana Act and the Recreational Cannabis Act in Illinois, THC is now a lawful part of the lives of many Illinois residents—many of whom also happen to be employees.

Despite legalizing medical and recreational marijuana in the main, the General Assembly preserved the right of employers to enforce their own drug policies. Under this framework, non-employees (students, retirees, etc.) may use marijuana for medical or recreational purposes without incident or repercussion. Employees, on the other hand, may only use marijuana without consequence if their employer does not maintain

and enforce a drug policy. At least with respect to working adults, the legislature has essentially outsourced state drug policy to management in the non-union setting and to labor and management in the unionized setting.[236] In the past labor and management could avoid the issue of marijuana in the workplace by hiding behind state and federal laws that criminalized the drug—workplace prohibitions on marijuana usage were justified because marijuana was illegal. That cover is now gone. Labor and management must now wrestle with the issue and find solutions that match the realities of the workplace. It will now be up to employers and unions to decide the permissible limits of marijuana usage for employees. One would expect a public works contract to deal with marijuana differently than a contract covering custodians, for example.

There will be little debate that workplace impairment (from drugs or alcohol) is unacceptable. Policing workplace marijuana impairment will be difficult, however, until affordable, reliable, real-time testing becomes available. Off-duty employee marijuana usage presents an even more difficult issue for employers. The General Assembly preserved employers' right to maintain zero-tolerance policies but created conditions that will make it impossible for employers to maintain the status quo. Legalization created a new consumer market and consumer demand for marijuana is high. Furthermore, the legalization of CBD at the federal level means that non-marijuana using employees will have THC in their systems, which will be detectable on drug tests. Positive test results for non-marijuana using employees will undermine the legitimacy of drug testing or result in unwarranted discipline—both of which are bad outcomes.

Macroeconomic conditions will ultimately pressure Illinois employers to liberalize or eliminate existing drug policies. Illinois legalized marijuana at a time of historically low unemployment rates; in January 2020 the unemployment rate in Illinois was 3.5%.[237] Prior to the economic collapse caused by COVID-19, many employers reported shortages of skilled workers in the labor market.[238] In 2018 the Bureau of Labor Statistics estimated there were only 6.4 million workers available to fill 6.7 million open positions.[239] Labor shortages were particularly acute in the public sector.[240] On March 21, 2020, Illinois shut down non-essential portions of its economy in response to COVID-19, [241] causing an immediate spike in unemployment rates. As of April 2020, the unemployment rate in Illinois was 16.4%.[242] At the time of this writing, many states, including Illinois, have instituted plans to reopen their economies.[243] It is doubtful Illinois will return to historically low unemployment rates any time soon and it is unclear how Illinois's economy will ultimately respond to this health crisis. It is clear, however, that certain industries will fare better than others. Many employees in industries deemed "essential"—including construction, health care, food production, distribution, utilities, critical trades, public safety, transportation, etc.[244]-- remained working through the early days of the crisis and will continue to do so. Illinois's unemployment rate will likely remain high in the short run, but tight labor market conditions will continue in essential industries.

In early 2020, before the first reported U.S. death caused by COVID-19, the General Assembly's decision to legalize marijuana was the topic *de jure* for practitioners. On May 27, 2020, the U.S. reached the grim milestone of 100,000 reported deaths caused by COVID-19.[245] That number will continue to increase. This health crisis highlights the

insignificance of most of the issues (including legalized marijuana) that advocates for labor and management debate so vigorously in this publication, at conferences and across the bargaining table. The crisis will hopefully end soon with as little more human and economic damage as possible. And one day we will return to debating the more mundane issues of labor and employment law, including the General Assembly's decision to legalize marijuana.

When that day comes, we will see that employers in safety-sensitive industries will have little choice but to maintain restrictions on marijuana usage. Outside of safety-sensitive industries, however, employers will find that rigid drug policies will be difficult to administer and will diminish the pool of qualified candidates in the hiring process and/or threaten existing relationships with skilled employees. In contrast, employers that do not restrict off-duty marijuana usage may find that the absence of restrictions will be viewed by some applicants and employees as a benefit which can be exploited for purposes of recruitment and retention. In the long run, the labor market will be the final arbiter of whether employers in non-safety sensitive industries will be able to maintain rigid workplace drug policies.

The legislature allowed employers to maintain the status quo, but the costs of maintaining rigid drug policies will likely be too high for Illinois employers. Employers in non-safety sensitive industries opposed to off-duty marijuana use may not fully appreciate it as yet, but in due time their employees will join the ranks of millions of other employees across the state who use medical and recreational marijuana without consequence in the workplace. Marijuana's "long, strange trip"[246] may be coming to an end in Illinois, but the journey for labor and employment lawyers has just begun as we all struggle to understand employment in a state where marijuana is no longer verboten and where employees begin or continue using marijuana and CBD products for medicinal and recreational purposes. Marijuana is legal in Illinois. Rigid employer drug policies will now go up in smoke.

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[1] 21 U.S.C. §812; *see* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 83 (Jan. 2015) (observing that marijuana was prohibited in all fifty states following the passage of the Controlled Substances Act in 1970).
[2] 410 ILL. COMP. STAT. 130/1, *et seq*.
[3] 410 ILL. COMP. STAT. 705/1-1, *et seq*.
[4] 410 ILL. COMP. STAT. 130/50(b); 410 ILL. COMP. STAT. 705/10-50 (a), (c).
[5] Chemerinsky et al., *supra* note 1, at 84.
[6] *See* David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 174 (2018).
[7] Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 692 (2009).
[8] *Id*.
[9] Chemerinsky et al., *supra* note 1 at 81.
[10] *Gonzalez v. Raisch*, 545 U.S. 1, 5 (2005).
[11] Bruce Rushton, *The War on Weed: Prohibition Cost Illinois Big Bucks*, ILL. TIMES, February 9, 2012, http://www.illinoistimes.com/springfield/the-war-on-weed/Content?oid=11440556.
[12] To put the Marihuana Tax Act in historical context, Prohibition ended in 1933 with the passage of the Twenty-First Amendment. That Congress would have restricted or prohibited access to a popular

intoxicant four years *after* Prohibition ended bolsters the argument that early drug laws were driven by racism and xenophobia, as opposed to any other rational public policy objective.
[13] *Gonzalez,* 545 U.S. at 82.
[14] Katner, *supra* note 6, at 177.
[15] *Id.*
[16] Michael Berkey, *Mary Jane's New Dance: The Medical Marijuana Legal Tango*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 417, 425 (Spring 2011).
[17] Katner, *supra* note 6 at 178; Chemerinsky et al., *supra* note 1, at 84.
[18] Stern & DiFonzo, *supra* note 7, at 692.
[19] Katner, *supra* note 6, at 175.
[20] 21 U.S.C. § 174 (1952).
[21] Matthew R. Braun, *Re-Assessing Mass Incarceration in the Light of Decriminaliztion in Maryland*, 49 U. Balt. L. F. 24, 54 (2018) (*citing* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 202 (rev. ed. 2012)).
[22] Kasey C. Phillips, *Drug War Madness: Policies, Borders & Corruption*, 13 CHAP. L. REV. 645, 655 (2010).
[23] Pub. L. No. 91-513, § 1101(a)(2), (4), 84 Stat. 1291, 84 Stat. 1236 (1970).
[24] 21 U.S.C. §812, *et seq.*
[25] *Id.* §812 (a), (b)(1).
[26] *Id.* §812(b)(1)(A)-(C).
[27] *Id.* §812(c).
[28] *Id.* §812(b)(2)(A)-(C).
[29] *Gonzalez*, 545 U.S. at 14-15, *citing* 21 U.S.C. §811.
[30] Chemerinsky et al., *supra* note 1, at 84.
[31] *Gonzalez*, 545 U.S. at 15.
[32] H.R. 3884, so-called Marijuana Opportunity, Reinvestment and Expungement ("MORE") Act; *see also* Tom Angell, *Marijuana legalization bill approved by congressional committee in historic vote*, BOSTON GLOBE, (Nov. 20, 2019), https://www.bostonglobe.com/news/marijuana/2019/11/20/marijuana-legalization-bill-approved-congressional-committee-historic-vote/krJuSAOF8D1X0dCoar8QfI/story.html.
[33] 41 U.S.C. §8102.
[34] 41 U.S.C. §§8103(a)(1)(A), (F), (G).
[35] S. Rep. No. 54, 102d Cong., 1st Sess. (1991).
[36] Public L. No. 102–43, Title V, 105 Stat. 917, 952 (1991).
[37] 59 Fed. Reg. 7484, 7573 (1994).
[38] 49 C.F.R Parts 391, 392, 395 (1988); *see also* 49 C.F.R. Part 382.
[39] 49 C.F.R. §§382,311, 654.35.
[40] *Id.* §§382.301,654.31.
[41] *Id.* §§ 382.307, 653.43, 654.37.
[42] *Id.* §§ 382.303, 653.45, 654.33.
[43] *Id.* §§ 382.309, 382.311, 653.49, 654.75, 653.51, 654.75.
[44] *Id.* §§ 382.501, 653.49.
[45] *Id.* §§ 382.605, 653.49.
[46] The Joint Labor-Management Uniform Drug/Alcohol Abuse Program is on file with the author.
[47] *Id.*
[48] *Id.*
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[223] *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).
[224] *See, e.g.,* Jennifer L. Colvin & Michael V. Furlong, *Illinois Governor Signs Employer-Friendly Amendments to Recreational Marijuana Law*, OGLETREE DEAKINS INSIGHTS (Dec. 6, 2019), https://ogletree.com/insights/2019-12-06/illinois-governor-signs-employer-friendly-amendments-to-recreational-marijuana-law/; *see also* Melissa A. Logan et al., *Illinois Legislature Amends Marijuana Law. Amendment Bring Clarity andRrelief toEmployers with Workplace Drug Testing Programs.* SHRM (Dec. 10, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/illinois-legislature-amends-marijuana-law.aspx.
[225] Tiffany S. Fordyce & Laura Luisi, *Amendments to Illinois Cannabis Regulation and Tax Act Clarify Limits of Employer Liability*, Nat'l L. Rev. (Dec. 26, 2019), http://www.natlawreview.com/article/amendments-to-Illinois-Cannabis-Regulation-and-Tax-Act-Clarify-Limitations-of-Employer-Liability.html; *see also* Logan et al., *supra* note 224S ("The specific language in the amendment that addresses pre-employment and random testing, however, signals the Illinois legislature's desire to clarify the law in such a way that allows employers to continue to maintain and enforce pre-employment and random drug-testing policies after the act goes into effect on Jan. 1, 2020").
[226] Some management firms have expressed less certainty in their analysis. *See, e.g.*, *Amendments to Illinois' Recreational Marijuana Law May Reduce Employer Liability*, VEDDER PRICE (Dec. 11, 2019),

https://www.vedderprice.com/amendments-to-illinois-recreational-marijuana-law-may-reduce-employer-liability
("the amendments have *seemingly* reduced, if not eliminated, any Privacy Act liability for withdrawing an offer from an applicant who tests positive for THC…") (emphasis added); *see also* Condon McGlothlen, Adam R. Young & Craig B. Simonsen, *Illinois General Assembly Passes Amendments to Recreational Cannabis Law That Help Reduce Employer Liability*, SEYFARTH SHAW (Nov. 26, 2019), https://www.environmentalsafetyupdate.com/states/illinois/illinois-general-assembly-passes-amendments-to-recreational-cannabis-law-that-help-reduce-employer-liability/ ("With regard to pre-employment, post-offer testing, revisions to the Legalization Act *seemingly* eliminate employer liability for revoking offers due to failed drug tests") (emphasis added).

[227] 410 ILL. COMP. STAT. 705/10-50(a)-(c).

[228] *Id.*, 705/10-50(e)(1).

[229] 820 ILL. COMP. STAT. 55/15.

[230] 410 ILL. COMP. STAT. 705/10-50(f).

[231] *See supra* note 123 and accompanying text.

[232] SAMHSA REPORT, *supra* note 101, at 13.

[233] *Id.* at 14.

[234] *Id.*

[235] Berenson, *supra* note 221.

[236] Drug testing is a mandatory subject of bargaining under the National Labor Relations Act, as well as Illinois's two public sector collective bargaining statutes. *See Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989); *County of Cook v. Licensed Practical Nurses Ass'n of Illinois*, 284 Ill.App.3d 145, 155, 671 N.E.2d 787, 794 (1st Dist. 1996); *County of Cook (Cermak Health Services)*, 10 PERI ¶1009 (ILLRB 1994).

[237] https://data.bls.gov/timeseries/LASST170000000000003.

[238] Annie Lowrey, *Wages are Low and Workers are Scarce. Wait, What?* THE ATLANTIC (Sept. 19, 2018), https://www.theatlantic.com/ideas/archive/2018/09/is-america-facing-a-labor-shortage/570649/ ("Business are complaining of worker shortages, arguing they could do more and sell more and build more if they could just find the labor").

[239] Glen Thrush, *Amid Worker Shortage, Trump Signs Job Training Order*, N.Y. Times (July 19, 2018), https://www.nytimes.com/2018/07/19/us/politics/trump-worker-training.html?searchResultPosition=1 ("President Trump, responding to companies' struggles with a shortage of skilled workers that has left more than six million jobs unfilled nationwide, signed an executive order Thursday geared at better aligning government training programs with the demands of industry").

[240] Jeanna Smialek, *A Hot Job Market is Causing Labor Pains for State Governments*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/business/us-job-market.html?searchResultPosition=1 ("The tight labor market is forcing both states and localities to take a second look at imperfect applicants, raise wages and even run short-staffed as they try to keep police departments, schools and state capitals functioning smoothly").

[241] Executive Order 2020-10 (March 20, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx; *see also* Shia Kapos,*"We Know This Will be Hard": Pritzker Orders Illinois Residents to Hunker Down Amid Coronavirus*, POLITICO (Mar. 20, 2020), https://www.politico.com/news/2020/03/20/illinois-pritzker-coronavirus-139601.

[242] https://www.bls.gov/web/laus/laumstrk.htm.

[243] Executive Order 2020-32 (April 30, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx.

[244] Executive Order 2020-10, at ¶12.

[245] Ted Anthony, *American Coronavirus Deaths at 100,000" What Does that Number Mean?*, CHI. TRIB. (May 27, 2020), http://www.chicagotribune.com/coronavirus/ct-nw-us-coronavirus-deaths-100-thousand-20200527-pdy2q233y5blnir4i45lfrp52a-story.html.

[246] Grateful Dead, *Truckin',* AMERICAN BEAUTY (1970) ("Lately it occurs to me what a long, strange trip it's been").

RECENT DEVELOPMENTS

By Student Editorial Board:

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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employee relations community.

I. IELRA Developments

A. Arbitration

In *Western Illinois University v. IELRB*, 2020 IL App (4th) 190143(4th Dist. Apr. 10, 2020), the Fourth District Appellate Court held that an arbitrator lacks jurisdiction to determine whether an employer complied with the arbitrator's award, even though the arbitrator had retained jurisdiction in the award to resolve disputes with respect to implementation of the remedy. The court reversed an IELRB determination that the University had violated section 14(a)(8) of the IELRA when it failed to comply with the arbitrator's supplemental award.

Due to declining enrollment, Western Illinois University (WIU) laid off several faculty. The Union grieved the layoffs and the arbitrator sustained the grievance with respect to two faculty members, finding that WIU violated the contractual requirement that it make reasonable efforts to locate other equivalent employment within the university for them. The arbitrator awarded that WIU make such efforts and retained jurisdiction to resolve disputes over implementation of the award. Subsequently, WIU notified the two faculty members that it was unable to find equivalent employment for them. The Union then moved to invoke the arbitrator's retained jurisdiction. Over WIU's objection, the arbitrator convened a second hearing and found that WIU failed to comply with the first award and awarded additional remedies. WIU refused to comply with the second award. The IELRB held that the second award was binding and ordered WIU to comply.

The court held that the question of whether a party has complied with an arbitration award falls within the exclusive primary jurisdiction of the IELRB. Consequently, the court opined, the arbitrator lacked authority to determine whether WIU complied with the first award. The court distinguished arbitrator retention of jurisdiction to correct errors and clarify ambiguities in an award from jurisdiction to determine compliance.

The court further held that the arbitrator lacked contractual authority to decide whether WIU had complied with the first award. The court observed that the collective bargaining agreement provided "that '[a]rbitration shall be confined *solely* to the application and/or interpretation of [the CBA] and the *precise* issues submitted for

arbitration" and that the arbitrator "shall have *no authority* to determine *any other issue(s).*'" (Emphasis provided by the court.) The court continued:

> [The contract] could have simply stated that "arbitration shall be confined to the application and/or interpretation of [the CBA] and the issue submitted to arbitration," but the actual sentence says much more. By including the modifiers "solely" and "precise" in that sentence, the CBA makes clear that the scope of the arbitrator's powers must be construed *narrowly*, not broadly. To conclude otherwise would render the addition of those modifiers meaningless. And if the presence of those modifiers were somehow not adequate to get this message across, the very next sentence of article 6.12(b) of the CBA makes the meaning of that article clear by stating the following: "The arbitrator shall have no authority to determine any other issue(s)." (Emphasis in original.)

The court viewed the precise issue submitted to the arbitrator as whether WIU complied with the contractual layoff procedures. According to the court, the arbitrator's first award finding that WIU had not complied with those procedures was within the arbitrator's authority but the second award, finding that WIU had not complied with the first award, was outside the scope of that authority. The court remanded the case to the IELRB, instructing the IELRB to determine whether WIU complied with the first award.

B. Exclusive Representation and Union Membership

In *Bennett v. AFSCME Council 31*, 2020 WL 1549603 (C.D. Ill. March 31, 2020), the U.S. District Court for the Central District of Illinois upheld the constitutionality of the IELRA's provision that a union selected by the majority of employees in a bargaining unit is the exclusive representative of all unit employees. The court also held constitutional the collection of union dues from a bargaining unit member despite her claim that she would not have joined the union had she known that she could not constitutionally be required to pay a fair share fee.

Susan Bennett was a custodian for the Moline-Coal Valley School District No. 40 and was represented by AFSCME Local 672. Bennett joined Local 672 in 2017 and authorized the deduction of union dues from her pay. She resigned her membership in 2019 during a window for such resignations established in the dues deduction authorization card. She sued, contending that she had had a constitutional right to resign at any time and that her membership in the union was coerced and involuntary because she had joined believing that her only alternative was to pay a fair share fee even though such fees were declared unconstitutional in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018). She further alleged that the IELRA's provision making AFSCME her exclusive representative violated her right to be free from compelled association with the union.

The court held that Bennett's decision to join the union was not obtained under physical or economic compulsion. The court opined that merely because Bennett would have made a different decision in 2017 had she realized that the Supreme Court would

invalidate fair share fees a year later did not render her uncoerced decision void. The court reasoned that intervening changes in the law do not invalidate an otherwise lawful agreement. The court observed that criminal defendants are not allowed to withdraw plea agreements that waive their rights to appeal or collaterally attack their convictions merely because the Supreme Court subsequently modifies constitutional law or criminal procedure in their favor.

Turning to Bennett's constitutional challenge to AFSCME's status as exclusive representative, the court observed that the Supreme Court and the Seventh Circuit have upheld exclusive representation against constitutional attack, citing *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1985); *Hill v. SEIU*, 850 F.3d 861 (7th Cir. 2017). The court concluded that *Janus* did not disturb the holdings of these cases.

C. Preliminary Injunctive Relief

In *Board of Trustees of Triton Community College District No. 504 and Cook County College Teachers' Union, Local 1600, IFT-AF,* 36 PERI ¶ 96 (IELRB 2019), the IELRB denied the college district employer's request for injunctive relief relating to two unfair practice charges in which the employer alleged the union engaged in bad faith bargaining and that the union engaged in an unlawful strike.

In deciding whether injunctive relief was appropriate in each charge, the IELRB relied on Section 16(d) of the IELRA, which provides that the IELRB may petition the circuit court for appropriate temporary relief or a restraining order once an unfair labor practice complaint has been issued. The Board also relied on *University of Illinois Hospital*, 2 PERI 1138 (IELRB 1986), in which the Board held preliminary injunctive relief is appropriate where there is reasonable cause to believe that the Act may have been violated and where injunctive relief is just and proper.

On November 4, 2019, Triton Community College District No. 504 filed two charges with the IELRB against Cook County College Teachers' Union, Local 1600, IFT-AFT. In the first charge, the College alleged the Union violated sections 14 (b)(3) and (1) of the IELRA when it withdrew from, proposed changes to and tried to renegotiate the parties' tentative agreement for a successor collective bargaining agreement. The College also alleged that the Union engaged in regressive and bad faith bargaining, failed to designate agents with sufficient bargaining authority to engage in meaningful negotiations, failed to support the parties' tentative agreement, and unlawfully failed and refused to bargain in good faith.

On October 24, the parties reached and signed a tentative agreement. The agreement contained the following language: "By signing below, the parties agree that this is the settlement agreed to between them and shall be presented to their respective bodies for ratification and shall be recommended for approval." The Union's bargaining team presented the agreement to its membership as the College's last, best, and final offer rather than as a tentative agreement. When the Union's members sought answers to

specific questions, the Union's negotiators refused to reach out to the College and seek answers. On October 30, the bargaining unit rejected the agreement presented for ratification. The College argued that the Union, by distributing the tentative agreement to its membership with no explanation, presenting it as a last, best, and final offer, and subsequently withdrawing from that agreement on key terms and introducing new items at the very last minute of negotiations, breached its duty to support the tentative agreement.

The IELRB found the facts as presented by the College sufficiently established reasonable cause to believe the Union had violated the IELRA but did not find the allegations serious and extraordinary enough to grant preliminary injunctive relief. The IELRB noted that while it was unusual that the misconduct was alleged by an educational employer against a labor organization the remedy would nonetheless be the same: the respondent could cease and desist from refusing to bargain as opposed to being subject to an injunction.

In the second charge, the College alleged the Union violated Sections 14(b)(3) and (1) and Section 13(b) of the IELRA when it announced its intent to engage in a strike before completing all the requirements of Section 13(b) of the Act and when it engaged in a one-day strike on November 6.

The College alleged the Union did not comply with the Section 13(b)(3) requirements: "that at least 10 days have elapsed after a notice of intent to strike has been given by the exclusive bargaining representative to the educational employer, the regional superintendent and the Illinois Educational Labor Relations Board" because the Union did not serve its notice of intent to strike on the superintendent.

The IELRB held the College did not have a significant likelihood of prevailing on the merits of the case because it was unclear whether there was a regional superintendent with jurisdiction over the College, requiring the issue to be determined by an Administrative Law Judge. Furthermore, if no regional superintendent with jurisdiction over the College was found, the strike would have met the requirements in 13(b).

While the IELRB, in *Joliet Junior College*, 8 PERI 1011 (IELRB 1991), granted a community college employer's request to seek injunctive relief where the union engaged in a strike without serving the regional superintendent, the case could not be relied on in this case. Joliet Junior College had been granted relief because Section 13 had "no special rules dispensing with service of the Notice of Intent to Strike on the Regional Superintendent when the educational employer is a community college" at the time. However, the Section was amended in 2014 and now requires a notice of intent to strike to be served on a superintendent "if one exists with jurisdiction over the educational employer." *See* 80 Ill. Adm. Code 1130.40(a). If there is no regional superintendent for community colleges, the union is excused from serving a notice of intent to strike on the regional superintendent.

The Board also held preliminary injunctive relief was not just and proper, reasoning that there was nothing left for an injunction to restore. The strike at issue lasted one day, November 6, and the bargaining units had returned to work. Furthermore, there was no evidence of any threat of another strike. In fact, there was a letter from the Union President that clearly stated "there would not be another strike without fulfilling the statutory requirements in the IELRA.

Accordingly, even if there was reasonable cause to believe that the Act may have been violated by the strike, preliminary injunctive relief was not just and proper in this second charge as well.

II. IPLRA Developments

A. Discrimination Based on Protected Activity

In *AFSCME Council 31 and County of DuPage (DuPage Care Center)*, 36 PERI ¶ 114 (ILRB State Panel 2020), the State Panel reversed the Executive Director's dismissal of an unfair practice charge that alleged that the DuPage Care Center ("DCC") discharged a union steward because of his protected concerted activity. The ILRB found the Union submitted sufficient evidence to warrant issuance of a complaint. The case presented legal and factual disputes on whether the discharged employee engaged in protected activity and whether the employer was aware of the activity.

During the initial investigation, the Executive Director found the following. On April 21, 2019, Abderrahim Bezzaz, a certified nursing assistant (CNA) and member of the union's collecting bargaining committee, arrived for an overtime shift at DCC. One nursing supervisor instructed him to report to a particular unit. A second nursing supervisor, Maria Bamberger, instructed him to go to a different unit. When Bezzaz questioned Bamberger's instruction, she gave Bezzaz an ultimatum: report to 2-East unit or leave the facility. Bezzaz decided to leave.

On April 23, 2019, Bezzaz attended an investigatory meeting regarding the events of April 21, 2019. During the meeting, DCC accused Bezzaz of "insubordination, using profanity, and abandoning his shift[,]" and using profanity and threatening language against Bamberger. On April 25, 2019, DCC sent Bezzaz a letter terminating his employment.

The Charging Party argued that Bezzaz was terminated because he served as a union steward. Further, the Charging Party argued Bezzaz's use of threatening language encompassed his threat to report Bamberger's actions to the Union. The Charging Party argued this constituted "protected activity to seek union assistance." The Executive Director found that the Charging Party failed to show a causal nexus between Bezzaz's engagement in protected activity and his discharge.

To establish a charge of discrimination for engaging in protected activity, a charging party must demonstrate that "(1) the employee at issue was engaged in union or protected concerted activity; (2) the employer knew of his conduct, and (3) the employer

took the adverse action against him in whole or in part because of his protected conduct."

In this case, the State Panel found, Bezzaz was a union steward and involved in the negotiation of a first contract between the Union and DCC. DCC was aware of Bezzaz's activities. Further, the ILRB concluded Bezzaz's threat was protected because he "intended to seek assistance or mutual aid and protection from the Union" arising out of his dispute with Bamberger regarding his overtime shift. The Union also presented evidence that DCC initially responded to Bezzaz's "threat" as an indication he was reporting Bamberger to the Union.

The State Panel found the third prong sufficiently satisfied to warrant issuance of a complaint. Bezzaz was terminated only five months after AFSCME Council 31 was certified as the bargaining representative and while he was serving on the team negotiating the first contract. Further, Bezzaz's threat to report Bamberger to the Union occurred only several days before he was terminated The ILRB found that these circumstances raised issues of fact concerning the causal connection between Bezzaz's protected activity and his discharge, as well as whether DCC acted with intent to discourage membership in the union. The State Panel concluded that a complaint should issue.