

Cannabis Legalization in Illinois and Disability Rights





Equip For Equality

- ▶ Protection and advocacy (P&A) system for the State of Illinois
- ▶ **Mission:** Advance the human & civil rights of people with disabilities in Illinois
- ▶ **Free legal assistance** for people with disabilities about issues related to their disability
- ▶ **Legal teams:** Civil Rights, Special Education, Abuse Investigations

Voice: 800.537.2632 TTY: 800.610.2779

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NEW LEAF
— ILLINOIS —

A PROJECT OF ILLINOIS EQUAL JUSTICE FOUNDATION

Clearing Cannabis Convictions

- **New Leaf Illinois** is statewide, state-funded initiative to provide free legal help to people impacted by cannabis arrests and convictions.
- Do you wonder if you are eligible or if your records were automatically expunged?
- Contact **New Leaf Illinois TODAY** to complete a **1-minute registration** and find out if you are eligible to clear your cannabis records!



NewLeafIllinois.org



855-963-9532

Statewide Reach

- New Leaf Illinois is a network of 20 **legal aid** and **advocacy organizations** across the state
- It does not matter where a cannabis arrest or conviction happened in Illinois, there is **one** starting point!
- Anyone can call, regardless of income to see if they are eligible



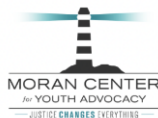
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PROYECTO DE AYUDA PARA TRABAJADORES DEL CAMPO Y JARDINEROS



Impact to Date

- More than **1,500 people registered** for service online at NewLeafIllinois.org or by calling 855-963-9532
- After registering, within 1-2 days, a legal aid professional contacts you to discuss eligibility. If you are eligible, you are referred to a legal aid network partner.
- The network closed more than **900 cases**, with more than 950 cases in progress
- Cases represent most counties in Illinois, with greatest number in **Cook County**



NewLeafIllinois.org



855-963-9532





Today's Session

Overview of Relevant Laws

- ▶ Americans with Disabilities Act
- ▶ Illinois Human Rights Act
- ▶ Compassionate Use of Cannabis Program Act

Questions

Americans with Disabilities Act

- ▶ Federal civil rights law
- ▶ Title I: Employment
- ▶ Title II: Public entities
- ▶ Title III: Private businesses
- ▶ Does not apply to private, multi-family housing
- ▶ Has non-discrimination and more proactive requirements – reasonable accommodations



Americans with Disabilities Act

Who is protected?

- ▶ **Actual Disability**
 - ▶ An individual who has an **impairment** that **substantially limits a major life activity**
- ▶ **Record of**
 - ▶ Record of or **history** of an actual disability
- ▶ **Regarded As**
 - ▶ **Perceived** to have an impairment
- ▶ **Association**
 - ▶ Association or **relationship** with a person with a disability

Americans with Disabilities Act

Who is not protected?

- ▶ An individual who is **currently engaging** in the **illegal use** of drugs, when the covered entity **acts on the basis of such use**
- ▶ Whether a substance is **illegal** depends on whether it is illegal as defined by the federal Controlled Substances Act (CSA).
- ▶ **CSA:** Cannabis is an illegal controlled substance with no exception for medicinal use
- ▶ **Result:** Courts uniformly hold that the ADA does not protect people who currently use cannabis

What does **currently** engaging mean?

Failed drug test = currently engaging

But how long ago must someone have stopped using?

- ▶ No categorical rules
- ▶ **Courts/EEOC:** An applicant's or employee's drug use is current if it occurred recently enough to justify an employer's reasonable belief that the individual's involvement with drugs is an ongoing problem.
- ▶ ***Suarez v. Penn. Hosp. of Univ. of Penn. Health Sys.*, 2018 WL 6249711 (E.D. Pa. Nov. 29, 2018)**
 - ▶ Not currently using: Nurse fired 5.5 months after completing 29 days of intensive inpatient treatment

The ADA **does** apply in the following situations ...



- ▶ Individual successfully completed a supervised drug rehabilitation program and is **no longer engaging** in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use.
- ▶ Individual is **erroneously** regarded as engaging in such use, but is not engaging in such use
- ▶ Person is not hired because of a **family member** has a **record** of illegal drug use.
- ▶ Entity does not act **on the basis** of drug-use (pretext)
 - see *Hundell v. Thomas Jefferson University Hospitals*, 2021 WL 63252 (E.D. Pa. Jan. 7, 2021)

Does the ADA apply?

- ▶ **John** has a history of drug addiction. He participated in a drug rehabilitation program and has not used drugs, including cannabis in nine months. He is not hired for a job because of concerns that he will begin using drugs again.

Does the ADA apply?

- ▶ **Jake** previously used cannabis socially, but hasn't done so in nine months. He is not hired for a job because of concerns that he will begin using cannabis again.

Does the ADA apply?

- ▶ **Cynthia** lives in Illinois. She has a medical cannabis card and uses it in the evenings to treat her PTSD. She is given a job offer, but then fails a drug test based on her cannabis use.

Does the ADA apply?

- ▶ **Jose** spends significant time outside of his job with a group of co-workers who tested positive for illegal drugs. Jose's boss sees him outside in the parking lot with these friends and also believes an untrue rumor that Jose had been addicted to drugs and has been through rehab. As a result, Jose is fired.

Does the ADA apply?

- ▶ **Natalie's** son had successful treatment for substance abuse addiction in the past. Natalie is applying for a new job and after her prospective employer learns about her son, Natalie is not hired.

Disability-Inquiries & Medical Exams

- ▶ The ADA prohibits employers from certain disability-related inquiries and medical exams
- ▶ Rules differ based on stage of employment
 - ▶ Pre-employment
 - ▶ Post-conditional job offer
 - ▶ Current employees
- ▶ Tests for illegal use of drugs are **not** medical exams so can be conducted at any stage of employment
- ▶ Inquiries about drug use
 - ▶ Current use = **OK** under the ADA
 - ▶ Past use = **Not OK** if questions get at addiction and therefore possible **record of impairment**



Public Entities & Private Businesses

- ▶ Titles II and III do **not** prohibit discrimination against current users of illegal drugs, **except**:
- ▶ Public entities and places of public accommodation cannot deny someone access to **health services** or **services connected with drug rehabilitation** on the basis of illegal drug use
- ▶ **Recent Case – *Simmons v. IL Dept of Human Rights*, 2021 WL 4497140 (N.D. Ill. Sept. 30, 2021)**

State laws

**Illinois Human
Rights Act**

**Compassionate
Use of Medical
Cannabis
Program Act**



Illinois Human Rights Act

- ▶ Protects people from disparate treatment and requires reasonable accommodations
- ▶ Disability does not include an employee currently engaging in the illegal use of drugs. [775 ILCS 2-104\(C\)\(1\)](#).
- ▶ An employer “may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees.” [775 ILCS 5/2-104\(C\)\(3\)\(a\)](#).
- ▶ No published cases involving cannabis from state court (yet)

Recent case in the Illinois Human Rights Commission

In the Matter of the Request for Review by: Craig Miller, Petitioner

2020 WL 719967 (IHRC Feb. 11, 2020)

- ▶ Employee failed drug test based on medical marijuana use; ultimately fired
- ▶ Commission denied request for review
- ▶ The Employer is within its rights to establish a zero-tolerance policy, medical marijuana prescription or not
- ▶ Cited Compassionate Use Act

Court decisions outside of Illinois

Callaghan v. Darlington Fabrics

2017 WL 2321181 (R.I. Super. May 23, 2017)

- ▶ Applicant who was not hired due to medical marijuana use stated a claim under Rhode Island anti-discrimination law

Barbuto v. Advantage Sales and Marketing

477 Mass. 456 (July 17, 2017)

- ▶ Permitting off-site use of medical cannabis may be a reasonable accommodation under state law anti-discrimination law



Illinois Compassionate Use of Medical Cannabis Program Act

- ▶ Pilot Project in 2014
- ▶ Became permanent in 2019
- ▶ Illinois is 20th State to legalize cannabis for medical purposes
- ▶ Recognized medical benefits of cannabis
- ▶ Medical marijuana in Illinois is available to residents who have obtained medical marijuana cards and have been certified as having a [qualifying debilitating medical condition](#)

Illinois Compassionate Use of Medical Cannabis Program Act

- ▶ Distinctions from recreational use of marijuana
 - ▶ Available to minors
 - ▶ Only registered medical marijuana patients and caregivers in Illinois can cultivate marijuana (up to five marijuana plants at home)
- ▶ Anti-discrimination requirement:
 - ▶ No school, employer, or landlord may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver unless failing to do so would put the school, employer, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules. **410 ILCS 130/40)(a)(1)**

Illinois Compassionate Use of Medical Cannabis Program Act



But employers are expressly **permitted** to:

- ▶ Enforce a policy concerning drug testing, zero-tolerance, or a drug free workplace if the policy is applied equally to everyone
- ▶ Discipline for violating a workplace drug policy
- ▶ Discipline for failing a drug test, if failing to discipline would result in the employer violating federal law or cause it to lose a federal contract or funding

Unclear if there is private right of action - **410 ILCS 130/50**

Recent case from Pennsylvania found implied private right of action under its state medical cannabis law - ***Palmiter v. Commonwealth Health Sys., Inc.*, 260 A.3d 967 (Pa. Super. 2021)**



Court decisions outside of Illinois

Whitmire v. Wal-Mart Stores, Inc.

359 F.Supp.3d 761 (D. Ariz. 2019)

- ▶ Customer Service Supervisor held a medical marijuana card to treat chronic pain
- ▶ Given drug test after workplace accident
- ▶ Tested positive & fired
- ▶ Claims under state laws, including **Arizona Medical Marijuana Act**
 - ▶ AMMA prohibits employment discrimination
 - ▶ Exception if employee uses, possesses, or is impaired on employer's premises or during work hours

Whitmire continued

- ▶ AZ law: Impairment can't be based only on presence of metabolites of marijuana in insufficient concentration to cause impairment
- ▶ Here, no expert testimony about concentration level
- ▶ Wal-Mart moved for summary judgment - good faith belief of impairment
- ▶ **Court:** Granted summary judgment to employee *sua sponte*
 - ▶ Firing a **registered qualifying patient** who tests positive regardless of marijuana concentration is a bright line disregard of state law
 - ▶ Test itself insufficient without expert testimony

Take-aways and Resources

- ▶ Important to educate cannabis-users with disabilities on interplay between state cannabis laws and federal and state laws that protect people with disabilities from discrimination
- ▶ New Leaf Fact Sheet developed by EFE: [Cannabis Legalization in Illinois and Disability Rights](#)
- ▶ [ADA Legal Brief and Webinar: Drugs, Alcohol and Conduct Rules](#) (EFE, Jan. 2020)
- ▶ EFE Fact Sheet: [Cannabis/Marijuana in the Workplace](#)
- ▶ Efforts to enact stronger anti-discrimination protections at the federal and state level
 - ▶ [Legislation](#)

Questions?

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