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# Employment Law Fall Update

Thursday, October 10, 2019

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Illinois' Hazy New Law Legalizing Recreational Use of Marijuana
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How The Board Can Tackle Sexual Harassment
By Steven J. Pearlman, *Forbes*

What the Google Walkout Means For Employers
By Steven J. Pearlman and Danielle Moss, *Corporate Counsel*

Arbitration Wars: A report from the front
By Anthony J. Oncidi, *Los Angeles & San Francisco Daily Journal*

48,568 views | Aug 15, 2019, 12:44pm

# Illinois' Hazy New Law Legalizing Recreational Use Of Marijuana

**Steven Pearlman** Contributor

Careers

*I defend employment litigation around the country.*

Illinois Gov. J.B. Pritzker signs into law a bill to legalize marijuana in Illinois next year. (Antonio Perez/Chicago Tribune/TNS via Getty Images) GETTY

If you're approaching Illinois, you might hear the sound of residents blaring their favorite Bob Marley tunes. That's because Illinois just legalized recreational use of marijuana. This new law could leave Illinois employers dazed and confused in trying to figure out how to make sure their employees aren't stoned on the job. Dylan rightly said "you don't need a weatherman to know which way the wind blows." But, as with most things in the law and technology, it's not that simple. Far from it, in fact, given the state of today's drug-testing technology…it doesn't indicate when exactly someone puffed the magic dragon.

A sampling to put this in context: Colorado and Washington became the first states to legalize recreational use in 2012; Oregon and Alaska did so in 2014; California, Maine, Massachusetts and Nevada followed suit in 2016; and Vermont went in the same direction in 2018.

Illinois boarded the magic bus this year. On June 25, Governor Pritzker signed into effect the Cannabis Regulation and Tax Act, which will take effect on January 1, 2020. This new law protects employees' right to use marijuana during off-duty hours. It amends the Illinois Right to Privacy in the Workplace Act, which prevents employers from disciplining or discharging employees for using "lawful products" off the workplace premises during nonworking hours. The amendment cuts through the fog by defining the phrase "lawful products" to mean products that are legal under state law, which is particularly noteworthy because cannabis use remains illegal under federal law.

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But what about federal law and state laws that strictly require employees to keep off the grass? Illinois employers may continue using drug testing that federal or state laws require, and also may continue to use their existing policies in order to maintain federal contracts.

Further, the new law provides that Illinois employers may use reasonable zero tolerance or drug-free workplace policies or employment policies concerning drug testing, smoking, consumption, storage or use of cannabis in the workplace or while on call provided that the policy is applied in a non-discriminatory manner.

But here's the question: how can an employer police its workforce to ensure employees are sober on the job? Current drug tests are not accurate enough to determine if someone was actually under the influence of marijuana during working hours. Indeed, it's reported that pot may appear on a drug screen up to 30 days after it has been used (depending upon factors such as how much body fat a person has, how often he or she consumes it, how much one smokes and the sensitivity of the test).

So, there's a risk that an employee who fails a drug screen on Monday will claim he or she had used marijuana on Sunday (or well before) and that the drug screen didn't flag on-duty usage.

The new law empowers employers to consider an employee to be under the influence of cannabis if they have a "good-faith belief" that the employee manifests specific, articulable symptoms that decrease or lessen the employee's performance. It lists the following symptoms:

- impairment of speech, physical dexterity, agility, coordination;
- unusual behavior or demeanor;
- negligence or carelessness in operating equipment or machinery;
- disregard of the employee's own safety or the safety of others;
- involvement in any accident that results in serious damage to equipment or property;
- disruption of a production or manufacturing process; or
- carelessness that results in any injury to the employee or others.

The law doesn't indicate the quantum of proof that's required. And notice that it makes no mention of whether an employee has glossy eyes, smells of marijuana or has paraphernalia.

If any of these symptoms are present, an employee must be given a reasonable opportunity to contest the basis of the employer's good-faith belief of impairment due to marijuana. But what's a "reasonable opportunity?" Should an employee be permitted to submit a written explanation of her behavior? Should she be allowed to tell her side of the story to human resources? Should she be allowed to call in witnesses? What about calling in a medical professional? What other kind of evidence should she be allowed to present?

And what happens next? Consider a situation where an employee claims he had impaired physical coordination or speech because he was up all night dealing with a family emergency or suffering from a stomach flu or some other difficult-to-pin-down physical condition. And consider a situation where an employee claims his manager's subjective determinations were out to lunch or driven by animus or an ulterior motive. Open issues.

What should Illinois employers do?

As an initial matter, studies show that most employers are ill-prepared for new laws legalizing recreational use of cannabis. For example, a June 2019 study by Paychex found that "business owners are slightly more prepared to manage legalized medical use than recreational use:

- Legalized medical use
    - 42% - very prepared
    - 24% - somewhat prepared
    - 34% - not prepared
- Legalized recreational use
    - 39% - very prepared
    - 23% - somewhat prepared
    - 38% - not prepared”

(https://www.paychex.com/newsroom/news-releases/business-owners-not-prepared-to-manage-legalized-marijuana)

Some of these questions might be addressed by forthcoming regulations implementing the statute. In the meantime, employers should proceed with caution and consider:

- training managers to recognize the symptoms of marijuana use;
- directing managers to document all facts supporting their good-faith belief that an employee was under the influence during work hours;
- developing a procedure that provides employees with a reasonable opportunity to show they were not under the influence during work hours;
- updating policies to reflect the new law; and
- communicating to the workforce that on-the-job marijuana remains a terminable offense and will be strictly policed.

Now is the time for employers to get in front of this new law.

**Steven Pearlman**

I have been practicing labor and employment law for over two decades. I have a national practice at Proskauer, and am resident in the firm’s Chicago office. I handle the full spectrum of employment law issues, with an emphasis on whistleblowing, class actions, wage-and-hour, restrictive covenants and harassment/discrimination/retaliation issues. I regularly conduct investigations, reporting to boards of directors and their audit committees. **Read Less**

679 views | May 13, 2019, 10:35am

# How The Board Can Tackle Sexual Harassment

**Steven Pearlman** Contributor
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The #MeToo movement ushered in a new era of accountability, shedding light on sexual harassment in scores of industries involving employees at all levels—from the C-suite to the mailroom. As the movement matured, companies stepped up preventative and remedial measures through human resources, internal and external legal counsel and compliance professionals. Those efforts ranged from modernizing policies and procedures to enhancing training at various levels of the workforce to holding individuals accountable through discipline and discharges. Though helpful in many respects, those are not panaceas. Indeed, EEOC data vividly illustrates an increase in the filing of sexual harassment charges from 2017 to 2018, and EEOC settlements recovered in 2018 were approximately $70 million whereas those in 2017 were approximately $47.5 million.

What's more, internal complaints continue to be lodged both by employees and their attorneys. So isn't it time to consider additional methods of minimizing the incidents and risks attendant to sexual harassment?

Over the last few years, many companies have learned the hard way that a sexual harassment scandal can compromise their brand, reputation, customer relationships and sponsorships, as well as their ability to attract and retain talent and maintain productivity. And, of course, it can result in significant civil liability. What we're now learning is that the risks can get magnified when sexual harassment catches the attention of regulators (note the considerable fine the Massachusetts Gaming Commission recently levied against Wynn Resorts) and result in derivative and/or securities actions (the former often alleging that management and the board were asleep at the wheel or refused to take action against known misconduct, and the latter generally alleging that the company misled investors by touting policies championing its commitment to ethics and compliance and/or denying that alleged misconduct had actually occurred).

So let's consider the idea of escalating sexual harassment complaints to the board and treating them with a level of gravity similar to other sorts of significant enterprise risks.

What types of complaints should be escalated to the board? There's a spectrum of complaints that allege sexual harassment with varying degrees of risk: one-off jokes are on one end of the spectrum, and sexual assault is on the other. Complaints that involve allegations of sexual assault, minors, higher-level employees and/or systemic culture issues are prime candidates—they present the biggest reputational and financial risks.

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What might the board do? Consider starting with a risk assessment to determine the level of risk the organization faces and whether and to what extent it is prepared to respond appropriately. This may involve at least the following steps:

**1.** At the outset, create a new committee (or subcommittee) or task a standing committee with responsibility for risk to conduct the assessment. The committee may begin by analyzing past internal complaints over an appreciable period of time to obtain meaningful data (between the past five and ten years)—*e.g.*, complaints to human resources, the hotline and the legal and compliance departments—as well as external complaints (*e.g.*, civil lawsuits and administrative charges). Likewise, the committee could analyze settlements in prior cases. That would give a sense of the levels of risk and the nature of the matters. For example, repeated settlements of substantial sums could raise a flag. At the same time, the committee could analyze pending claims to determine the risks they pose and how they could be resolved.

**2.** The committee could also get its finger on the pulse of the workforce.

**3.** The committee may review whether sexual harassment training is conducted at all levels of the workforce and whether it is effective and modern. Of course, the committee also could review all policies bearing on sexual harassment claims—*e.g.*, sexual harassment and anti-retaliation policies and relevant portions of the code of conduct—to ensure they are complete, effective and modern.

**4.** The committee could review the level of utilization and effectiveness of the company's hotline, whether it provides for anonymous reporting and whether its existence is adequately publicized to the workforce.

**5.** The committee may take a close look at the company's investigative protocols to determine if they provide for prompt and thorough investigations while ensuring workplace due process for the complainant and the accused alike. And the committee could consider whether a process exists to facilitate appropriate remedial measures based on the results of investigations.

Using this this approach sets the right tone at the top, and sends a message throughout the organization that the board takes sexual harassment seriously and will hold individuals who engage in misconduct accountable. This may have a trickle-down effect with respect to deterrence and enforcement of sexual harassment policies. Again, going to the highest levels of a company is warranted as a result of the reputational, business and financial risks that sexual harassment complaints present.

**Steven Pearlman**

I have been practicing labor and employment law for over two decades. I have a national practice at Proskauer, and am resident in the firm's Chicago office. I handle the full spectrum of employment law issues, with an emphasis on whistleblowing, class actions, wage-and-hour, restrictive covenants and harassment/discrimination/retaliation issues. I regularly conduct investigations, reporting to boards of directors and their audit committees. **Read Less**

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# What the Google Walkout Means For Employers

*By Steven J. Pearlman and Danielle J. Moss*


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A new byproduct of the #MeToo movement has afforded employees significant leverage: employee walkouts. Google just experienced this, and responded with some substantial changes in its practices.

In October, the *New York Times* published an article detailing how, over the past decade, three Google executives were paid millions of dollars to quietly exit the company following sexual harassment accusations. Daisuke Wakabayashi and Katie Benner, "How Google Protected Andy Rubin, the 'Father of Android'." **https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html.** According to the article, one senior vice president was awarded a stock grant valued at $150 million in the middle of an investigation into his alleged sexual assault of a subordinate. The article further noted that this executive received $90 million in cash after the harassment allegation was deemed credible. This precipitated a headline-grabbing employee walkout.

The Google walkout came together in less than a week, facilitated by the organizers' use of the company's platform and resources. It united 20,000 workers, starting in Tokyo and spreading across Singapore, London, Dublin and the United States. Participants' levels of employment varied widely, ranging from software developers and engineers, to lower level employees and contractors. Kate Conger and Daisuke Wakabayashi, "Google, After Employee Walkout, Overhauls Sexual Misconduct Policy." **https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html.**

The walkout participants presented a number of demands, such as: elimination of mandatory arbitration for sexual misconduct claims; employee representation on the board of directors; greater transparency regarding sexual harassment complaints; and the elimination of non-disclosure agreements. *Id.*; Alexia Fernandez Campbell, "Google Announces Changes to Sexual Harassment Policies after Global Employee Walkout," *Vox*. **https://www.vox.com/2018/11/8/18075840/google-ceo-announces-sexual-harassment-policy.**

Google took these demands seriously, likely appreciating that the costs and risks attendant to the walkout and continued employee discord range from lost productivity, attrition, and private and government-initiated litigation, to decreased employee morale, inability to attract talent, and reputational harm. The walkout also raises labor and employment law questions, such as whether employers must pay employees for time spent protesting and whether discipline is appropriate for not working as scheduled.

Google responded swiftly and decisively: It agreed to end mandatory arbitration of sexual misconduct claims; committed to provide more transparency with respect to sexual harassment complaints and the outcome of investigations; and agreed to centralize reporting channels to one dedicated website with live support and services (e.g., counseling and career coaching).

But Google did not accede to the demands that it add an employee representative to its parent company's board, or eliminate the use of non-disclosure agreements.

It behooves employers to proactively consider their options knowing that such demands could be made.

1. **Eliminate Mandatory Arbitration?** Critics argue it unfairly deprives aggrieved employees of access to the courts and media, which has led states (e.g., New York) to pass legislation proscribing arbitration of sexual harassment claims. Such laws may be preempted by the Federal Arbitration Act. Moreover, there are many significant benefits to arbitration, ranging from confidentiality, expediency and cost efficiency, to avoiding the risk of runaway juries. Google's decision to forgo these substantial benefits underscores the unique circumstances of the walkout and the leverage it afforded employees. Most employers understandably remain steadfast in their use of mandatory arbitration, particularly given the U.S. Supreme Court's *Epic Systems Corp. v. Lewis* decision upholding such agreements.

2. **Appoint an Employee Representative to Board of Directors?** In this #MeToo era, many employers care as much about prevailing in the court of public opinion as prevailing on issues of liability. Advocates for employee representatives on boards of directors believe this will prevent decisions that undermine employee interests. But Google apparently considered this to be an unorthodox demand which has not gained traction in response to the #MeToo movement. Employers may consider alternatives such as taking steps to ensure that sexual harassment complaints are directly reported to the board.

3. **Expand Anti-Harassment Policies and Procedures?** The #MeToo movement has led to employees seeking greater transparency about sexual harassment complaints and the outcome of investigations, and companies have generally taken such demands seriously. Google agreed to report the number of substantiated complaints over time, trends, disciplinary actions taken and descriptions of offenses warranting termination. However, there are a number of factors that limit such transparency, such as complainants requesting confidentiality, privacy issues, and companies' need to minimize the risk of defamation claims. Employers would benefit from educating their workforces on these limitations to manage expectations.

4. **Do Away With Non-Disclosure Agreements?** There is an increasingly negative public perception that companies protect alleged harassers by keeping sexual misconduct allegations confidential. But these agreements protect against reputational risks and, without them, employers may have a greater interest in enduring protracted litigation in hopes of setting the record straight. Such considerations may have influenced Google's decision to continue to use non-disclosure agreements. Also, there are many instances where employees welcome non-disclosure agreements, desiring to keep their allegations confidential.

Employers in the technology industry have reacted to the walkout, with some already changing their practices. Given the results employees achieved through the walkout, workforces at other companies may follow suit. Now more than ever, employers would be well served to heed the Google walkout's warning shot by getting ahead of these issues to avoid becoming the next headline.

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Daily Journal

www.dailyjournal.com

TUESDAY, SEPTEMBER 10, 2019

PERSPECTIVE

# Arbitration Wars: A report from the front

By Anthony J. Oncidi

For better or worse, California obstinately continues to go its own way on the issue of workplace arbitration. Two recent developments — passage by the state Legislature of a bill that would outlaw arbitration and a confounding new opinion from the California Supreme Court — prove once again that the U.S. Supreme Court has much work left to do here in the Golden State.

Against the backdrop of these developments, of course, looms the Federal Arbitration Act, which was enacted in 1925 "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The *Concepcion* court recognized that this erstwhile hostility to arbitration "had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Id.* at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

Although *Concepcion* and a handful of more recent opinions from the U.S. Supreme Court have sought, whack-a-mole style, to stamp out still more "devices and formulas" aimed at invalidating arbitration, California just keeps breeding moles.

Daily Journal photo

**Justice Ming Chin's spirited dissent: 'Today, the majority holds that an arbitration agreement is substantively unconscionable — and therefore unenforceable — precisely because it prescribes procedures that, according to the majority, have been 'carefully crafted to ensure fairness to both sides.' If you find that conclusion hard to grasp and counterintuitive, so do I.'**

On Sept. 5, the California Legislature passed Assembly Bill 51 and sent it to Gov. Gavin Newsom for his signature — he has not yet indicated whether he will sign it. Assembly Bill 51 would make it a criminal misdemeanor for a person to require an applicant or employee to "waive any right, forum or procedure" for a violation of the California Fair Employment and Housing Act or the Labor Code, including the right to file and pursue a civil action in court.

This is the third time in four years the California Legislature has attempted to outlaw arbitration in the workplace; Gov. Jerry Brown vetoed two previous measures, refusing as recently as last September to sign a law similar to Assembly Bill 51 because "this bill plainly violates federal law." (Gov. Brown's Message Returning AB 3080 without his Signature (Sept. 30, 2018)).

In the wake of the Me Too movement, the state of New York passed a law last year (New York Law, N.Y.C.P.L.R. Section 7515), which also was intended to prohibit "mandatory arbitration clauses." Section 7515 remained standing for all of 11 months before being struck down by a federal court on FAA preemption grounds. *See Latif v. Morgan Stanley & Co.*, 2019 WL 2610985 (S.D.N.Y. June 26, 2019). In short, it is not clear what California hopes to accomplish by enacting Assembly Bill 51 — other than to virtue signal its extreme distaste for arbitration.

So, what's really at stake in the Arbitration Wars? This dispute is somewhat reminiscent of the "Wars of Religion" that roiled Western Europe 400 years ago in that both sides claim to be fighting about one thing when in truth they're actually battling about something entirely different.

The plaintiffs bar claims it doesn't like arbitration for a dozen different reasons, chief among which are that the confidential nature of the proceeding allows bad actors to hide their misdeeds (easy solution: excise the confidentiality provision); arbitrators prefer employers because the arbitrator is hoping to get selected for the next case (this is a canard because both sides must consent to the arbitrator); and there's usually no right of appeal (this affects both sides equally).

On the other hand, the defense bar claims it likes arbitration because it's faster and cheaper than civil litigation (not really) and it's usually private so there's less dirty laundry airing that goes on (sometimes).

In reality, plaintiffs dislike arbitration (and employers prefer it) because juries tend to give employees much higher damage awards than does the typical, garden-variety arbitrator. Since plaintiffs' lawyers usually prosecute employment claims on a contingency-fee basis (taking up to 50% of any settlement or judgment), no plaintiff's lawyer wants to be in front of some reasonable factfinder who is inclined to award lower average amounts than a riled-up jury might. In fact, many plaintiffs' lawyers will simply drop the case or the client once they find out about the arbitration agreement.

And one need not look much further than the headlines to see what juries in California are doing to employers with alarming regularity these days: $31 million to a dental supply company employee (who suffered only $5,000 in lost wages before getting another job); $15.4 million to a Los Angeles Times columnist (who was not even fired); $15.4 million to a 53-year-old Jack in the Box employee (who was called "grandma" by a co-worker); $8 million to a Chipotle employee (who was believed to have stolen money); $13 million to a university oncologist (who was interrupted during meetings and called a "diva" and an "angry woman"); and $18.6 million to an Allstate employee (who was terminated after being arrested for domestic violence).

To top it all off, the California Supreme Court has just added another piece to the puzzle palace that is arbitration jurisprudence in this state with its recent opinion in *OTO, LLC v. Kho*, 2019 DJDAR 8320 (Aug. 29, 2019). In order to best understand the court's opinion, it's advisable to start with Justice Ming Chin's spirited dissent: "Today, the majority holds that an arbitration agreement is substantively unconscionable — and therefore unenforceable — precisely because it prescribes procedures that, according to the majority, have been 'carefully crafted to ensure fairness to both sides.' If you find that conclusion hard to grasp and counterintuitive, so do I" (citations omitted).

In short, the majority of the court invalidated an arbitration agreement because it incorporated too many of the "intricacies of civil litigation" — even while recognizing that in the past the court had struck down arbitration agreements because they had incorporated too few such "intricacies." *See Armendariz v. Foundation Health Psychcare Serv., Inc.*, 24 Cal. 4th 83 (2000).

Missing from this analysis, of course, is the answer to the following vital question: What's a California employer supposed to do now? One cannot read *OTO* and come away with a clear understanding of how an employer can be sure it has drafted the perfect "Goldilocks" arbitration agreement that is neither too much like civil litigation nor too dissimilar from it so that it's just "litigation-y" enough to meet the court's fastidious standards.

There is no question what the U.S. Supreme Court will do with *OTO* if it can find the time to correct yet another fine mess in this area. After all, the California Supreme Court has at least twice before gotten FAA preemption wrong according to the U.S. Supreme Court in *Concepcion*, abrogating *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), and *Sonic-Calabasas A Inc. v. Moreno*, 565 U.S. 973, vacating 51 Cal. 4th 659 (2011).

Perhaps the U.S. Supreme Court will finally come to recognize that with approximately 12% of the U.S. population and almost 15% of the nation's GDP, California deserves at least a proportionate share of the high court's docket!

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