



Recreational Marijuana: Legal Ramifications for Illinois

By Daniel M. Kotin and Eddie Hettel

With the recent signing of HB 1438, Illinois became the 11th state to legalize the recreational use of marijuana. The statute is codified at 401 ILCS 705/ *et seq.*

Beginning on January 1, 2020, Illinois residents will legally be able to possess up to 30 grams (roughly 1 ounce) of cannabis flower, up to a half-gram of edible pot-infused products, and 5 grams of cannabis concentrates. As a reference, the average joint contains about 0.32 grams of marijuana, so 30 grams would equate to roughly 94 joints.

There are numerous potential benefits for the state that will likely result from the legalization of recreational marijuana use. Cannabis products will be taxed from 10-25%, which will increase revenue to aid the state's budget woes. Additionally, individuals who have been convicted of possession of under 30 grams will have the opportunity to receive a pardon from the governor. According to Governor Pritzker, "This will have a transformational impact on our state, creating opportunity in the communities that need it most and giving so many a second chance." Legalization of marijuana seems completely logical given the fact that the risk of catastrophic health consequences (e.g., overdose and physical addiction) have been essentially disproven, combined with the fact that so many in our population are consuming it anyway.

Yet, despite the numerous financial and societal upsides for legalization, recreational marijuana use is not free of concerns. One issue that remains largely unaddressed is the impact of marijuana use on driving, and the related issue of how law enforcement agencies can adequately test for driving while impaired by cannabis.

Comparisons with Alcohol

Marijuana's chemical makeup is very different from that of alcohol. It affects the human body in different ways and is more difficult to test the level of impairment in a user.

Nevertheless, both are mind-altering substances that undoubtedly impact driving. So, an analysis of driving under the influence of alcohol is worthwhile.

The alcohol that we drink is made up of the chemical ethanol. On average, the human body can metabolize it at a rate of one standard drink per hour. The short-term effects of alcohol use are well known. They include lowered inhibitions, trouble concentrating, loss of coordination, loss of critical judgment, longer reaction time, and dulled perception. Consuming alcohol more quickly than the body can process it leads to intoxication, so there is a direct correlation between the amount consumed in a given period of time and the level of intoxication. This makes alcohol easy to test for and ensures that one's blood alcohol concentration (BAC) will accurately reflect his or her level of impairment.

When an individual is suspected of driving under the influence of alcohol, police have multiple tools at their disposal to determine intoxication. They can conduct a field sobriety test and gauge the individual's thinking abilities and motor functions. They also can perform a breathalyzer test to determine an individual's BAC. A breathalyzer test is non-invasive and can be administered immediately in the field. Although a blood test is the most accurate way to determine BAC, it is invasive and inconvenient. Furthermore, it cannot be performed in the field, leading to delayed results – and thus the results may not reflect a driver's BAC at the time he or she was

behind the wheel. A breathalyzer test, in contrast, can be conducted on the spot and has a low margin of error.

Lessons from History

The history of regulation of driving under the influence of alcohol should serve as a warning as we consider similar concepts related to newly legalized recreational marijuana. The modern methods available to deter driving under the influence of alcohol were not enacted in months or even years. It took decades to realize the effects of driving while intoxicated and develop adequate ways to deter such conduct. With the exception of Prohibition from 1920-1933, alcohol has always been legal to consume in the United States. The development of motor vehicles made it reasonable that regulation was necessary to prevent driving while intoxicated.

The first DUI laws went into effect in New York in 1910. However, it was not until the 1970s and 1980s that awareness of the impact of drunk driving became widespread. Laws began to reflect the public's concerns, legal limits were reduced to .08%, penalties were increased for driving under the influence, and states raised the legal drinking age to 21. Technology for the breathalyzer test also improved, and the margin of error in modern testing equipment is far lower than the earlier models.

Although driving under the influence of alcohol continues to plague American roadways, the rate of drunk driving fatalities nationwide declined 53% from 1982-2014. This was largely due to a decrease in the legal BAC to .08% and stricter penalties for driving while intoxicated. Decades of research gave legislators useful knowledge of the effects of alcohol, which in turn made

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American roads safer. For example, in 1958 the legal BAC limit in Illinois was .15%. Gradually, the limit was lowered, eventually to .08% in 1997 after testing determined that this was the BAC level at which a driver is likely impaired.

So, after more than a century, society seems to now have a pretty good handle on regulating and policing drunk driving.

Unfortunately, the effects of marijuana upon driving are not as well-known, and there is currently no known test that can provide an immediate, accurate assessment of impairment. It took decades to learn the effects of alcohol use on driving, and decades more to develop effective tests to combat such conduct. Aside from the creation of a task force to study the issue, the statute does not outline any new ways to deter driving under the influence of marijuana.

Correlation of Marijuana Use with Impairment

In marijuana, the mind-altering equivalent of ethanol in alcohol is tetrahydrocannabi-

nol (THC). The concentration of THC in an individual's blood varies based on the form of ingestion. When smoked, THC levels peak within the first few minutes after inhaling, often rising to levels between 50-100 ng/ml (the legal limit in Illinois is 5 ng/ml). Levels will then decline to single digits within an hour, so high THC levels in the bloodstream are a strong indication that someone has recently inhaled marijuana. However, detectable levels of THC may persist in chronic users for days or even weeks, depending on frequency of use and dosage. So, how can a driver be charged with impaired driving based on a blood test when he or she may not have smoked marijuana for weeks?

Orally ingested marijuana has a much different effect on THC levels in the bloodstream. THC concentration does not rise as quickly after ingestion and drop off after a sharp initial peak. Edibles cause THC levels to gradually rise and then peak between 2-4 hours later depending on the amount ingested. Levels will then decline to zero around 4 hours after plateauing.

A high concentration of THC in the bloodstream is an indicator of impairment, but it is not conclusive. Rates of impairment differ from user to user based on a multitude of factors specific to each individual user. Unlike with alcohol, a high concentration of THC in the bloodstream does not necessarily mean that a driver is impaired. Conversely, a low THC concentration in the bloodstream does not mean that a driver is not impaired. So, therein lies another tremendous hurdle for adequately monitoring and policing marijuana use.

High levels of THC in the bloodstream affect driving because they alter a driver's cognitive abilities and fine motor skills. Notable results include slower reactions and hand/eye coordination; distorted perceptions of time and distance; anxiety, panic or paranoia; and trouble thinking, learning, and remembering. However, a high or low THC concentration does not conclusively mean that a driver is impaired or not impaired. The THC content in blood declines more rapidly than do levels



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of impairment. Infrequent cannabis users may remain impaired for hours after their blood levels have fallen below the legal limit. On the other hand, frequent marijuana users may have consistent THC blood concentrations at or above the legal limit and demonstrate no signs of impairment.

Testing by Police

The Illinois Sheriffs' Association and the Illinois Association of Chiefs of Police have been critical of the new law for several reasons. Police are concerned that recreational use will result in increased traffic accidents from motorists driving while high. They cite studies from states that have previously legalized recreational marijuana that show an increase in the number of traffic accidents in which drivers tested positive for cannabis.

Studies have shown a correlation between high THC blood levels and impaired driving, but is there an accurate way for police to determine if a driver is truly impaired by marijuana? In contrast to alcohol, marijuana does not break down in the body in a manner that correlates with impairment. THC concentrations in blood collected after driving may be significantly lower than the levels at the time of usage. Thus, the overall level of impairment is difficult to determine. Unlike alcohol, which has a much clearer and quicker method to determine impairment, THC is metabolized much differently between frequent and infrequent users.

The 10 states that have previously legalized recreational marijuana conduct testing in several ways.

- One method is a field sobriety test similar to those conducted to gauge alcohol impairment, in which a driver is asked to perform various mental and physical tasks that may reflect their level of impairment. During such tests, police may enlist a drug recognition expert to observe an individual's symptoms including gaze and pupil dilation.
- Another option is a blood or urine test. However, blood tests are largely unable to accurately determine whether marijuana has been consumed within the last few hours because of the length

of time it can remain in one's system.

- An additional test that can be performed is a saliva swab. The accuracy of these tests has also come into question because of the length of time that trace amounts of THC can remain in a user's system. It is difficult to determine that users are impaired solely because an amount of THC is detected in their saliva.

Race between Progress and the Law

With recreational marijuana becoming legal, we are at the precipice of a dramatic shift in our society. As Thomas Jefferson once stated,

[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

It would be unfortunate to play catch-up on an issue that is fundamental to our safety and liberty. According to CyberDriveIllinois, drivers are legally considered to be under the influence if they have a THC concentration of either 5 nanograms or more per milliliter of whole blood or 10 nanograms or more per milliliter of other bodily substance. HB 1438 does not change the current law or address any additional methods for how to test for THC impairment in drivers. It merely creates a task force led by the Illinois State Police to study the issue of driving under the influence of cannabis and examine the best practices for roadside testing. The task force has no deadlines or goals, or even articulated plans. The creation of this task force is merely an acknowledgement that we face a serious problem and do not yet know what to do about it.

The Illinois legislature and governor moved with deliberate speed to pass the recreational marijuana legislation and sign it into law, and should be applauded for that. But the same sense of urgency is also needed in determining how to regulate and police driving under the influence. It took the better part of a century to get

some degree of control of the drunk driving epidemic in our country. Let's not follow the same course with marijuana.

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For more information about the various issues with marijuana, some resources are:

- www.illinoispolicy.org/what-you-need-to-know-about-marijuana-legalization-in-illinois/
- www.chicagotribune.com/politics/ct-met-illinois-marijuana-legislation-house-committee-20190530-story.html
- chicago.suntimes.com/cannabis/2019/5/31/18647398/high-time-legal-recreational-pot-bill-on-way-to-governors-desk
- www.news-gazette.com/news/local/2019-03-17/police-states-where-marijuanas-legal-see-more-accidents.html
- www.mystateline.com/news/illinois-police-chiefs-raise-safety-concern-over-proposed-marijuana-legalization/1989635603
- www.chicagotribune.com/news/breaking/ct-met-police-oppose-marijuana-legalization-in-illinois-20190508-story.html
- www.mcmahonlegal.net/dupage-dui-lawyers/marijuana-avoid-dui
- www.chicagotribune.com/news/breaking/ct-met-cb-legal-marijuana-illinois-20190531-story.html?fbclid=IwAR2tKyutCSSH-X3M1NoB21mKpDpBcXJN-1HiXzO8hRojB0W4o1p_MzrzKGA
- ilga.gov/legislation/101/HB/10100HB1438sam002.htm
- www.cyberdriveillinois.com/publications/pdf_publications/dsd_a118.pdf
- www.healthline.com/health-news/difficult-to-develop-roadside-test-for-marijuana#2
- www.drugabuse.gov/news-events/news-releases/2016/01/research-thc-blood-levels-sheds-light-difficulties-testing-impaired-driving
- aaafoundation.org/evaluation-data-drivers-arrested-driving-influence-relation-per-se-limits-cannabis/
- www.canorml.org/employment/marijuana-drug-detection-times/#blood
- www.responsibility.org/wp-content/uploads/2015/02/2014-State-of-Drunk-Driving-Fatalities-in-America.pdf
- www.monticello.org/site/research-and-collections/quota-tions-jefferson-memorial
- www.britannica.com/topic/alcohol-consumption
- www.alcohol.org/effects/
- www.history.com/topics/roaring-twenties/prohibition
- www.history.com/this-day-in-history/first-drunk-driving-arrest
- www.cyberdriveillinois.com/publications/pdf_publications/dsd_a292.pdf
- www.nytimes.com/2016/07/15/science/how-much-weed-is-in-a-joint-pot-experts-have-a-new-estimate.html