

General Personnel

Drug- and Alcohol-Free Workplace: E-Cigarette, Tobacco, and Cannabis Prohibition¹

All District workplaces are drug- and alcohol-free workplaces.²

¹ State or federal law controls this policy's content. This policy contains an item on which collective bargaining may be required. Any policy that impacts upon wages, hours, and terms and conditions of employment, is subject to collective bargaining upon request by the employee representative, even if the policy involves an inherent managerial right. The Right to Privacy in the Workplace Act (RPWA) allows employers to regulate employees' use of lawful products that impair an employee's ability to perform his or her assigned duties. 820 ILCS 55/5(b). The Cannabis Regulation and Tax Act (CRTA), 410 ILCS 705/10-35(a)(8), allows penalties issued by employers of law enforcement officers for consumption, possession, sale, purchase, or delivery of cannabis or cannabis-infused substances while on or off duty to be collectively bargained; districts that employ school resource officers should consult their board attorneys about this provision of the CRTA.

The federal Drug-Free Workplace Act applies only to the specific programs receiving federal funds. 41 U.S.C. §8101 *et seq.* For ease of administration, this policy makes its requirements applicable to all employees to avoid confusion during implementation and to avoid complications when obtaining and maintaining federal funds. The CRTA, 410 ILCS 705/, legalized cannabis, but it remains a *Schedule I* (c)(17) controlled substance under federal law, meaning that it has no currently accepted medical use in addition to a high potential for abuse. 21 U.S.C.A. §812 (exempting hemp as defined at 7 U.S.C.A. §1639o). 41 U.S.C. §§8101, 8102 and 8103. While not law, in June 2019, the U.S. House of Representatives, in a voice vote, voted in favor of an amendment to H.R. 3055, which was introduced by Reps. Earl Blumenauer (D-OR), Tom McClintock (R-CA), and Eleanor Holmes Norton (D-D.C.), prohibiting the U.S. Dept. of Justice (DOJ) from interfering with a state's decision to implement laws governing the legalization of cannabis (recreational and medicinal). This marked the first time that either branch of the U.S. Congress has voted to protect state recreational cannabis laws from federal enforcement actions. If the amendment becomes law, it would block the DOJ from using funds to intervene in state and territory cannabis legalization laws. This policy continues to prohibit employees from using cannabis as allowed by the CRTA. See f/n 9, below.

The federal Safe and Drug-Free Schools and Communities Act provides funds, upon application, for drug and violence prevention programs; it does not contain policy mandates. Illinois also has a Drug Free Workplace Act (30 ILCS 580/) that applies to districts with 25 or more employees working under a state contract or a grant of \$5,000 or more.

² Replace this sentence with the district's drug- and alcohol- free policy goal(s), if any.

With the passage of the CRTA, 410 ILCS 705/, each board and superintendent may wish to engage in a risk-management conversation about the district's drug- and alcohol-free policy enforcement and discipline goals. Enforcement and discipline goals depend upon a board's risk-level tolerance and community expectations. Risk-level-tolerance decisions will depend upon many factors, including, but not limited to: (1) the board attorney's recommendations, (2) the district's budget parameters, if any, for reasonable suspicion training on identification of symptoms of impairment and/or being under the influence, (3) drug testing, and (4) the community's expectations. Answers to the following questions might structure this risk-management conversation:

1. Does the board want to implement a reasonable suspicion program (or any other type of *just cause* provisions in an applicable collective bargaining agreement) to identify employees suspected of being impaired and/or under the influence to enhance its ability to discipline?
2. Does the board want the superintendent to secure training for designated district employees to educate them to identify symptoms of impairment or being under the influence of the substances prohibited in this policy?
3. How does the board want to address employees in positions of leadership, e.g., the superintendent and/or building principal(s), who are perpetually on call due to the nature of their positions and responsibilities (see f/n 3, below)?
4. How will the district manage its duty to educate students about the dangers of drugs and alcohol against the reality that employees are allowed to use lawful products off duty and off the district's premises (820 ILCS 55/5(a))?
5. Will licensed educators be held to a higher standard than non-licensed employees due to their professional code of conduct expectations?
6. Will employees working directly with students be held to a higher standard than employees not working directly with students?

An employee is *on call* when the District schedules the employee with at least 24 hours' notice to be on standby or otherwise responsible for performing employment-related tasks either at the District or another location previously designated by the District.³ All employees are prohibited from engaging in any of the following activities while on District premises or while performing work or being on call for the District:⁴

1. Unlawful manufacture, dispensing, distribution, possession, or use of an illegal or controlled substance.⁵
2. Distribution, consumption, use, possession, or being impaired by or under the influence of an alcoholic beverage; being present on District premises or while performing work for the District when alcohol consumption is detectable, regardless of when and/or where the use occurred.⁶
3. Distribution, consumption, possession, use, or being impaired by or under the influence of cannabis; being present on District premises or while performing work for the District when impaired by or under the influence of cannabis, regardless of when and/or where the use occurred, unless distribution, possession, and/or use is by a school nurse or school administrator pursuant to *Ashley's Law*, 105 ILCS 5/22-33.⁷ The District considers employees impaired by or under the influence of cannabis when there is a good faith belief that an employee manifests specific

³ 820 ILCS 55/5. Consult the board attorney regarding how the board wants to treat employees who may be considered *on call*, e.g., superintendents, principals, coaches, and/or maintenance workers, etc.

For boards that do not want to refer to employees on call, delete this sentence and the following phrase from the sentence that immediately follows it: ~~or being on call.~~

⁴ To align with best practices for identifying and subsequently initiating discipline of employees for violating this policy (especially with the passage of the CRTA) and any possible collective bargaining agreement provisions, the superintendent may want to convene the **Employee Substance Abuse Prevention Committee** (see sample administrative procedure 2:150-AP, *Superintendent Committees*).

⁵ These actions are prohibited by both federal (41 U.S.C.A. §§8101, 8102 and 8103) and State Workplace Acts. See f/n 13, below. These laws do not address *under the influence* but a board may add: “, or being impaired by or under the influence of any illegal substance or any detectable use of any illegal substance regardless of when or where the use occurred.” This option is limited to *illegal* substances to avoid prohibiting employees from using lawfully prescribed controlled substances. See f/n 13. Contact the board attorney for advice concerning this provision and whenever the district wants to discipline or dismiss an employee using it. If a hearing is required before the district may discipline or discharge an employee under this provision, the district must put forth evidence that the employee violated it. A district would also have this burden if a grievance is filed under a *just cause* provision in a collective bargaining agreement. This policy's third paragraph addresses prescribed medications other than cannabis.

⁶ Optional; alcohol is not addressed in either the federal or State Drug-Free Workplace Acts. Contact the board attorney for advice concerning this provision and whenever the district wants to discipline or dismiss an employee using it. If a hearing is required before the district may discipline or discharge an employee under this provision, the district must put forth evidence that the employee violated it. A district would also have this burden if a grievance is filed under a *just cause* provision in a collective bargaining agreement. The Ill. Court of Appeals held that when the policy defines *under the influence* as any “mental, emotional, sensory or physical **impairment** due to the use of drugs or alcohol,” the school district must prove that the teacher showed signs of impairment even though she registered 0.056 blood-alcohol level on a Breathalyzer. *Kinsella v. Bd. of Ed. of the City of Chicago*, 27 N.E.3d 226 (Ill. App. Ct. 1st Dist. 2015).

⁷ “[R]egardless of when and/or where the use occurred” is intended to mean that an employer may reach an employee's conduct on- or off duty depending upon the facts of the disciplinary situation; however, the CRTA contains a specific requirement that law enforcement employers adopt a policy outlining penalties for discipline of law enforcement employees for their on or off-duty conduct involving consumption, possession, sale, purchase, or delivery of cannabis or cannabis-infused substances. *Id.* at 10-35(a)(8). See also f/ns 1, above, and 9, below. Consult the board attorney if the district employs a school resource officer(s) (SRO(s)) as opposed to contracting with a local law enforcement agency for SRO services.

410 ILCS 130/25(b) prohibits discipline or arrest of school nurses and/or administrators for acting in accordance with *Ashley's Law*, 105 ILCS 5/22-33. Employers may enforce drug-free workplace policies when they are applied in a nondiscriminatory manner. 410 ILCS 705/10-50(a) includes disciplining employees – even those who are *registered qualifying patients* – for violating drug-free workplace policies (410 ILCS 130/50 and 705/10-35(a)(1)). Contact the board attorney for advice concerning the Compassionate Use of Medical Cannabis Program Act (Medical Cannabis Program Act (MCPA)).

articulable symptoms⁸ while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position.⁹

Upon the Superintendent or designee's reasonable suspicion of an employee's violation of any of the prohibited activities stated above, the Superintendent or designee may direct the employee to undergo a drug and/or alcohol test to corroborate or refute the alleged violation. State law protects the District from liability when it takes actions pursuant to a reasonable workplace drug policy, including but not limited to subjecting an employee or applicant to reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test.¹⁰

For purposes of this policy, a controlled substance means a substance that is:

1. Not legally obtainable,
2. Being used in a manner different than prescribed,
3. Legally obtainable, but has not been legally obtained, or
4. Referenced in federal or State controlled substance acts.

⁸ Specific articulable symptoms listed in 410 ILCS 705/10-50(d) include: the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or 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. In contrast to the CRTA, the MCPA, while listing the same specific, articulable, symptoms, does not require an employer to have a *good faith belief* that a *registered qualifying patient* is under the influence of cannabis. 410 ILCS 130/50(f).

⁹ 410 ILCS 705/10-35 and 10-50(a) allow reasonable, nondiscriminatory, zero-tolerance policies. If the district seeks to discipline an employee on the basis that he or she is under the influence of or impaired by cannabis, it must afford the employee a reasonable opportunity to contest the basis of the determination. *Id.* at 10-50(d). See also *f/n* 7, above. **Contact the board attorney for advice concerning this provision and whenever the district seeks disciplinary action or dismissal of an employee on the basis of the cannabis prohibitions in the policy.**

See also the Ill. Vehicle Code 625 ILCS 5/11-501.2(b-5) number one: when an individual's tetrahydrocannabinol concentration (THC) is five nanograms or more in whole blood or 10 nanograms or more in another bodily substance, e.g., saliva, urine, etc., as defined in 625 ILCS 5/11-501.2(a), a presumption under Illinois law exists that the individual is under the influence of cannabis. Under 625 ILCS 5/11-501.2(b-5) number two: when an individual's THC is less than five nanograms in whole blood or less than 10 nanograms or more in another bodily substance, e.g., saliva, urine, etc., as defined in 625 ILCS 5/11-501.2(a), the individual may still be considered impaired.

In addition to a zero-tolerance policy, the CRTA also allows civil, criminal, or other penalties for:

1. Engaging in tasks under the influence of cannabis when doing so would constitute negligence, professional malpractice, or professional misconduct (410 ILCS 705/10-35(a)(1));
2. Possessing cannabis on a school bus or on school grounds (*Id.* at 10-35(a)(2)(A)-(B) unless permitted under the MCPA);
3. Using cannabis on a school bus or on school grounds (*Id.* at 10-35(a)(3)(A)-(B) unless permitted under the MCPA);
4. Using cannabis in a public place while impaired or under the influence of cannabis (*Id.* at 10-35(a)(3)(F));
5. Knowingly being impaired by or under the influences of cannabis in close physical proximity to anyone under 21 years of age who is not a registered medical cannabis patient under the MCPA (*Id.* at 10-35(a)(3)(G));
6. Smoking [and/or *vaping* (see *f/n* 19, below for a definition of vaping)] it in any place where smoking is prohibited under the Smoke Free Illinois Act (*Id.* at 10-35(a)(4));
7. Using cannabis as an on-duty law enforcement officer, corrections officer, probation officer, or firefighter (*Id.* at 10-35(a)(8)), or consuming, possessing, selling, purchasing, or delivering cannabis or a cannabis-infused substance(s) while on or off duty [only if a policy has been adopted] *Id.* at 10-35(a)(8); or
8. Using cannabis while being on duty as an individual holding a school bus permit or Commercial Driver's License (*Id.* at 10-35(a)(9)).

¹⁰ 410 ILCS 705/10-50(d). For boards that will not communicate to employees what will happen when reasonable suspicion exists, delete the first sentence of this paragraph: ~~Upon the Superintendent or designee's reasonable suspicion of an employee's violation of any of the prohibited activities stated above, the Superintendent or designee may direct the employee to undergo a drug and/or alcohol test to corroborate or refute the alleged violation.~~

410 ILCS 705/10-50(e)(1), protects the district from liability for actions described in the last sentence of this paragraph. Delete it if the board will not communicate this information to its employees.

For purposes of this policy, *District premises*¹¹ means workplace as defined in the Cannabis Regulation and Tax Act (CRTA) in addition to District and school buildings, grounds, and parking areas; vehicles used for school purposes; and any location used for a School Board meeting, school athletic event, or other school-sponsored or school-sanctioned events or activities. School grounds means the real property comprising any school, any conveyance used to transport students to school or a school-related activity, and any public way within 1,000 feet of any school ground, designated school bus stops where students are waiting for the school bus, and school-sponsored or school-sanctioned events or activities. “Vehicles used for school purposes” means school buses or other school vehicles.

As a condition of employment, each employee shall: ¹²

1. Abide by the terms of this Board policy respecting a drug- and alcohol-free workplace; and
2. Notify his or her supervisor of his or her conviction under any criminal drug statute for a violation occurring on the District premises or while performing work for the District, no later than five calendar days after such a conviction.

Unless otherwise prohibited by this policy, prescription and over-the-counter medications are not prohibited when taken in standard dosages and/or according to prescriptions from the employee’s licensed health care provider, provided that an employee’s work performance is not impaired. ¹³

To make employees aware of the dangers of drug and alcohol abuse, the Superintendent or designee shall perform each of the following: ¹⁴

1. Provide each employee with a copy of this policy.
2. Post notice of this policy in a place where other information for employees is posted. ¹⁵
3. Make available materials from local, State, and national anti-drug and alcohol-abuse organizations. ¹⁶
4. Enlist the aid of community and State agencies with drug and alcohol informational and rehabilitation programs to provide information to District employees.
5. Establish a drug-free awareness program to inform employees about: ¹⁷

¹¹ 410 ILCS 705/10-35 and 10-50(a) allows employers to prohibit cannabis in the *workplace*. Many attorneys agree it is a best practice for employers to define workplace in policies that prohibit cannabis. 410 ILCS 705/10-50(h) defines *workplace* as the employer’s premises, including any building, real property, and parking area under the control of the employer or area used by an employee while in performance of the employee’s job duties, and vehicles, whether leased, rented, or owned – and may be further defined by the employer’s written policy when it is consistent with this definition.

This policy’s definition of workplace expands the above CRTA definition to areas that board policy and/or the School Code impose duties upon districts to keep students safe, including:

1. The *school property* definition from sample policy 8:30, *Visitors to and Conduct on School Property*;
2. The *school grounds* definition at 105 ILCS 5/10-27.1A(d); and
3. Places that school districts must prevent and respond to bullying, including vehicles used for school purposes. 105 ILCS 5/22-**110, renumbered by P.A. 104-391.**

¹² Required by the State and federal Drug-Free Workplace Acts.

¹³ This optional paragraph is not addressed in State or federal drug-free workplace acts. An employer should generally not ask an employee about his or her use of medication. See rules implementing the Americans with Disabilities Act, 29 C.F.R. §1630.14. Consult the board attorney if an employee is suspected of working while impaired or under the influence.

¹⁴ Numbers one through five in this paragraph are required by the State and federal Drug-Free Workplace Acts. 30 ILCS 580/3.

¹⁵ As an alternative, replace the phrase “in a place where other information for employees is posted” with the district’s local method, e.g., staff intranet, Internet, etc.

¹⁶ 105 ILCS 5/22-81, added by P.A. 103-399 (a/k/a *Louie’s Law*), required the Ill. State Board of Education (ISBE) and the Ill. Dept. of Human Services to develop and regularly update a comprehensive *Substance Use Prevention and Recovery Instruction Resource Guide* for public elementary and secondary schools across the state of Illinois. It is available at: www.isbe.net/Pages/Substance-Use-Prevention-and-Recovery-Instruction-Resource-Guide.aspx.

¹⁷ The drug-free awareness program requirement can be met by developing a brochure on drug abuse or by contacting local, State, or national anti-drug abuse organizations for materials. The materials should be distributed to employees along with a list of places employees may call for assistance.

- a. The dangers of drug abuse in the workplace,
 - b. Available drug and alcohol counseling, rehabilitation, re-entry, and any employee assistance programs, and
 - c. The penalties that the District may impose upon employees for violations of this policy.
6. Remind employees that **Board** policy 6:60, *Curriculum Content*, requires the District to educate students, depending upon their grade, about drug and substance abuse prevention and relationships between drugs, alcohol, and violence. ¹⁸

E-Cigarette, Tobacco, and Cannabis Prohibition ¹⁹

All employees are covered by the conduct prohibitions contained in policy 8:30, *Visitors to and Conduct on School Property*. The prohibition on the use of e-cigarettes,²⁰ tobacco, and cannabis products applies both (1) when an employee is on school property, and (2) while an employee is performing work for the District at a school event regardless of the event's location.

Tobacco has the meaning provided in 105 ILCS 5/10-20.5b.

Cannabis has the meaning provided in the CRTA, 410 ILCS 705/1-10.

E-Cigarette is short for electronic cigarette and includes, but is not limited to, any electronic nicotine delivery system (ENDS), electronic cigar, electronic cigarillo, electronic pipe, electronic hookah, vape pen, or similar product or device, and any components or parts that can be used to build the product or device.

²¹

¹⁸ Optional. This statement serves as a display of good judgement and a reminder to employees that 105 ILCS 5/27-255, added by P.A. 104-391, and 5/27-115 renumbered by P.A. 104-391 (provided it can be funded by private grants or the federal government) require districts to educate students about the prevention and avoidance of drugs abuse, the dangers of opioid and substance abuse, and the dangers of fentanyl.

¹⁹ 105 ILCS 5/10-20.5b, The Smoke Free Illinois Act, 410 ILCS 82/, and the CRTA, 410 ILCS 705/10-35(a)(4)(smoking anyplace where smoking is prohibited under the Smoke Free Illinois Act). Federal law prohibits smoking inside schools. 20 U.S.C. §6083(a).

The prohibition in sample policy 8:30, *Visitors to and Conduct on School Property*, referred to here, applies "on school property or at a school event." Here, "at a school event" is clarified with the phrase "while ... performing work for the District" in order to align with this policy's other prohibitions.

²⁰ While 720 ILCS 675/1, excludes e-cigarettes from its definition of tobacco, it does not address vaporization. Prohibiting *e-cigarettes* aligns with the district's obligation to maintain a safe, smoke-free environment and is a logical extension of 105 ILCS 5/10-20.5b, The Smoke Free Illinois Act (410 ILCS 82/), and The Prevention of Tobacco Use by **Persons Under 21 Years of Age** and Sale and Distribution of Tobacco Products Act, 720 ILCS 675 (provides the legal age to buy tobacco and e-cigarette products to 21 years of age). In addition, the U.S. Food and Drug Administration now regulates e-cigarettes. 21 C.F.R. Parts 1100, 1140, and 1143.

E-Cigarettes may resemble cigarettes but contain a battery-operated heating element that turns a liquid into an aerosol (or vapor) that sometimes includes nicotine, flavorings, and other chemicals. The act of inhaling and exhaling the aerosol is known as *vaping*. See <https://nida.nih.gov/publications/drugfacts/vaping-devices-electronic-cigarettes>. For ease of administration, this sample policy treats *vaping*, whether tobacco products or not, and smoking tobacco the same due to the outbreaks of lung disease associated with the use of e-cigarettes and vaping. Some e-cigarettes do not look like tobacco products; they are designed to resemble other objects, such as USB flash drives, to be more easily concealed. Like smoking tobacco, vaporization products may include nicotine, which is derived from and is the addictive drug in tobacco, and other potentially harmful chemicals. See *Tobacco/Nicotine and Vaping* at: <https://nida.nih.gov/research-topics/tobacconicotine-vaping>. Unlike smoking tobacco, vaping does not produce smoke, but rather the aerosol, often mistaken for water vapor and consisting of fine particles. Many of these particles contain varying amounts of toxic chemicals, which have been linked to cancer and respiratory and heart disease. For resources, see https://digitalmedia.hhs.gov/tobacco/educator_hub.

²¹ Optional. If a district does not want to include the statutory example that includes the term *vape pen*, which provides notice that vaping products are also prohibited through the term e-cigarette, replace ~~includes but is not limited to, any electronic nicotine delivery system (ENDS), electronic cigar, electronic cigarillo, electronic pipe, electronic hookah, vape pen, or similar product or device, and any components or parts that can be used to build the product or device~~ with "shall have the meaning provided in the Prevention of Tobacco Use by **Persons Under 21 Years of Age** and Sale and Distribution of Tobacco Products Act, 720 ILCS 675/1(a-9)."

District Action Upon Violation of Policy

An employee who violates this policy may be subject to disciplinary action, including termination.²² In addition or alternatively, the Board may require an employee to successfully complete an appropriate drug- or alcohol-abuse rehabilitation program.

The Board shall take disciplinary action with respect to an employee convicted of a drug offense in the workplace within 30 days after receiving notice of the conviction.²³

Should District employees be engaged in the performance of work under a federal contract or grant, or under a State contract or grant of \$5,000 or more, the Superintendent shall notify the appropriate State or federal agency from which the District receives contract or grant monies of the employee's conviction within 10 days after receiving notice of the conviction.²⁴

Disclaimer²⁵

The Board reserves the right to interpret, revise or discontinue any provision of this policy pursuant to the **Suspension of Policies** subhead in **Board** policy 2:240, *Board Policy Development*.

- LEGAL REF.: 20 U.S.C. §7101 et seq., Safe and Drug-Free School and Communities Act of 1994.
 21 U.S.C. §812, Controlled Substances Act; 21 C.F.R. §1308.11-1308.15.
 41 U.S.C. §8101 et seq., Drug-Free Workplace Act of 1988.
 42 U.S.C. §12114, Americans With Disabilities Act.
 21 C.F.R. Parts 1100, 1140, and 1143.
 30 ILCS 580/, Drug-Free Workplace Act.
 105 ILCS 5/10-20.5b.
 410 ILCS 82/, Smoke Free Illinois Act.
 410 ILCS 130/, Compassionate Use of Medical Cannabis Program Act.
 410 ILCS 705/1-1 et seq., Cannabis Regulation and Tax Act.
 720 ILCS 675, Prevention of Tobacco Use by Persons under 21 Years of Age and Sale
 and Distribution of Tobacco Products Act.
 820 ILCS 55/, Right to Privacy in the Workplace Act.
 23 Ill.Admin.Code §22.20.
- CROSS REF.: 5:10 (Equal Employment Opportunity and Minority Recruitment), 5:120 (Employee
 Ethics; Code of Professional Conduct; and Conflict of Interest), 6:60 (Curriculum
 Content), 8:30 (Visitors to and Conduct on School Property)

²² An employee who currently uses *illegal* drugs is not protected under the Americans With Disabilities Act (ADA) when the district acts on the basis of such use. 42 U.S.C. §12114. Legal drug abusers and alcoholics may still be protected as *handicapped* under the Rehabilitation Act of 1973 (29 U.S.C. §706 et seq.) or the Ill. Human Rights Act (IHRA). 775 ILCS 5/1-101 et seq. and 56 Ill.Admin.Code §2500.20. The Rehabilitation Act, however, excludes from protection “an alcohol or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment ... would constitute a direct threat to the property or the safety of others.” 28 C.F.R. §42.540(k)(1).

The ADA neither authorizes nor prohibits drug testing; it allows the results of such tests to be used as the basis for disciplinary action. 42 U.S.C. §12114; 29 C.F.R. §1630.16(c). Drug tests may still violate other laws, e.g., Title VI and the Rehabilitation Act. 42 U.S.C. §2000e et seq.; and 29 U.S.C. §701 et seq. Drug tests may also be a subject of collective bargaining. See paragraph one of f/n 1, above. Consult the board attorney before implementing a drug-testing program to enforce this policy.

²³ Required by both the federal and State Drug-Free Workplace Acts.

²⁴ Id.

²⁵ Optional best practice text.