

HRW CLIENT ALERT: MARIJUANA AND THE WORKPLACE

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On November 8, 2016, Massachusetts voters answered “yes” to Question 4, approving the Regulation and Taxation of Marijuana Act (the “Marijuana Act”). The Marijuana Act goes into effect on December 15, 2016. It allows, among other things, adults 21 years of age and older to possess up to one ounce of marijuana in public and up to 10 ounces at home for recreational purposes and to grow up to 6 marijuana plants per person with a limit of 12 plants per home. It also provides for the establishment of a Cannabis Control Commission to regulate and license the commercial sale of marijuana (starting in January 2018).

Four year ago, Massachusetts voters passed the Massachusetts Act for the Humanitarian Medical Use of Marijuana (the “Medical Marijuana Act”), which went into effect on January 1, 2013. That law already allows qualifying patients with certain medical conditions to obtain and use marijuana for medical purposes. Since the passage of the Medical Marijuana Act, the Massachusetts Department of Public Health (“DPH”) has issued procedures for the registration of qualifying patients. These procedures allow qualifying patients to obtain a registration card used to verify that they have been certified by a physician.

Both the Marijuana Act and Medical Marijuana Act impact marijuana’s legality under Massachusetts law. The possession and sale of marijuana remains illegal under federal law.

Many employers have inquired about the impact of the Marijuana Act in the workplace. The publicity surrounding marijuana legalization has also rekindled questions regarding the impact of the Medical Marijuana Act in the workplace. This Client Alert discusses the impact of both Acts, the accommodation of employee marijuana use, and drug testing of employees.

Can Employers Continue to Enforce Drug-Free Workplace and Drug Testing Policies?

The short answer: Probably, but with care given the many unanswered questions. Neither the Marijuana Act nor the Medical Marijuana Act require Massachusetts employers to tolerate use, possession, or being under the influence of marijuana in the workplace.

The Marijuana Act

The Marijuana Act explicitly provides as follows:

Employment. This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.

Thus, despite the Marijuana Act, employers may continue to enforce drug-free workplace and lawful testing policies. This includes disciplining employees who test positive for marijuana.

The Medical Marijuana Act

The Medical Marijuana Act and the DPH regulations provide that “nothing in this law requires any accommodation of on-site medical use of marijuana in any place of employment.” Yet, while the Medical Marijuana Act itself may not require such accommodation, that does not foreclose the possibility that such accommodation would be required under other laws, such as the disability discrimination provisions of the Massachusetts Fair Employment Practices Act, G.L. c. 151B. Further, the Medical Marijuana Act’s use of the phrase “on-site medical use” seems to contemplate that an employer might indeed have an obligation to accommodate “off-site” medical marijuana use under G.L. c. 151B.

For example, if a qualifying patient uses marijuana after work or on the weekend, but then tests positive under an otherwise lawful drug testing policy days or weeks later, can the employer terminate the employee? One Massachusetts Superior Court answered this question yes. In *Barbuto v. Advantage Sales and Marketing, LLC* (Suffolk Superior Court C.A. 15-02667), the employer terminated Cristina Barbuto after she tested positive for marijuana, even though she had a valid medical marijuana prescription to treat her Crohn’s disease. She sued, alleging, among other claims, that her termination constituted disability discrimination under G.L. c. 151B. Ms. Barbuto argued that her off-site marijuana use was a reasonable accommodation that her employer was required to provide under G.L. c. 151B.

The court disagreed and dismissed the disability discrimination claim. The court relied on the fact that the Medical Marijuana Act does not contain an anti-discrimination provision. Some other states that have legalized medical marijuana have included an employment protection provision in their laws. Massachusetts did not. The Court noted that, to the contrary, the Act and its implementing regulations explicitly state that an employer need not accommodate medical marijuana use. The court acknowledged that the Medical Marijuana Act’s no-accommodation provision does not reference “off-site” use. However, it also noted that the Medical Marijuana Act provides that “[n]othing in this law requires the violation of federal law or purports to give immunity under federal law” and that marijuana use for medical purposes remains illegal under federal law. The court further stated that its decision is consistent with court decisions in other states that have legalized medical marijuana, which “have held that state disability discrimination statutes do not extend to marijuana use for medical purposes because such use remains illegal under federal law.”

It should be noted, however, that *Barbuto* is only one case, and a different court or the Massachusetts Commission Against Discrimination (MCAD) might reach a different conclusion. Ms. Barbuto is currently seeking to appeal the decision to the Supreme Judicial Court. If the SJC accepts the appeal, its decision would be the final word on this issue and would provide clearer guidance to employers.

Drug Testing of Applicants and Employees in Massachusetts

No Massachusetts statute explicitly limits an employer's ability to conduct drug testing as a condition of employment. Depending on the circumstances, however, drug testing may violate Massachusetts privacy laws. The Supreme Judicial Court has established principles for drug testing of applicants and employees.

Massachusetts case law currently recognizes the four following levels of employee drug testing:

1. Pre-Employment

Applicants for employment are considered to have a lesser expectation of privacy than existing employees. Thus, pre-employment drug testing generally may be imposed on all applicants. Employers should test only after a bona fide offer of employment has been made. If a position requires pre-employment drug testing, the advertisement for the position or the job application should say so.

2. Reasonable Suspicion

Drug testing of an existing employee is generally permitted where the employer has a reasonable suspicion that an employee is under the influence while at work. Signs of impairment could include bloodshot eyes, poor coordination, drowsiness, or odor. Employers should document the basis for testing a particular employee by filling-out a reasonable suspicion checklist. It is a best practice to have at least two witnesses observe the employee and sign-off on the checklist.

3. Post-Accident

Drug testing of an existing employee is generally permitted under state law after the employee has been involved in a work-related accident. (Note, however, that such testing may be problematic under OSHA's anti-retaliation regulations if there is no reasonable possibility that drug use was a contributing factor to the accident.)

4. Random

To determine if random drug testing is permitted, Massachusetts courts balance whether the employer has a legitimate business interest that outweighs the employees' privacy interests. An employer's "general interest" in protecting the safety of employees and providing a drug free environment is not enough. Generally, random drug testing violates employees' privacy rights unless the position is safety sensitive, e.g., it requires operating a vehicle or heavy machinery.

Regardless of what level of testing an employer implements, testing should generally be conducted under a specific policy and procedures that have been made known to applicants and employees. Ideally, employees subject to reasonable suspicion, post-accident, or random testing

should be provided with a copy of the employer's drug testing policies and procedures upon commencing employment or upon the implementation of a new or updated policy. Employers also should consider implementing within their policies procedural safeguards to mitigate the impact on employees and their privacy. These might include the following:

- Advance notification (for example, 30 days before implementing random testing);
- Doing all testing at a medical facility with privacy safeguards;
- Providing employers only with "pass or fail" test results;
- Retesting to confirm positives;
- Not terminating employees for first-time positives;
- Offering employees assistance through Employee Assistance Programs; and
- Last Chance Agreements.

The Limitations of Marijuana Testing, Forgoing Pre-Employment Marijuana Testing, and Voluntary Accommodation of Medical Marijuana Use

The limitations of marijuana testing complicate the interplay of marijuana use and the workplace. A person can test positive for marijuana for weeks after using it. Additionally, there are non-psychoactive forms of medical marijuana (i.e. topical creams for pain relief) the use of which may still result in a positive drug test. This means that, when an employee tests positive, the test does not indicate whether the employee used marijuana or a derivative thereof hours before, days before, or even weeks before they were tested. Thus, the test does not reveal whether the employee was actually impaired while at work.

With this in mind, and expecting that legalization will lead to a rise in adult marijuana use, some employers are rethinking testing their employees for marijuana in order to avoid losing good applicants and employees. Instead, they are choosing to treat marijuana like alcohol – prohibiting employees from being under the influence while at work but not out-of-work use that does not affect the workplace. To enforce these policies, they are focusing on workplace behavior and observation (i.e., bloodshot eyes, odor, etc.) rather than drug tests that give no indication of when marijuana was used.

Employers have been increasingly willing to accommodate medical marijuana use for employees who are qualified patients, are not under the influence at work, and are not in safety sensitive positions. Ideally, any such policy should be made available to employees in writing. Below is some sample language for such an accommodation policy:

The Company may in its discretion seek to accommodate legally recognized Massachusetts medical marijuana users when possible depending on the Employee's position. Employees who obtain a registration card from the Massachusetts Department of Public Health must submit a letter to the Director of Human Resources attaching a copy of their card and requesting a reasonable accommodation. The Company will then enter into a discussion with the Employee and where applicable the Employee's Health Care provider to determine if such accommodation is appropriate under the circumstances.

An employer will want to consider a number of factors in assessing whether to offer their employee an accommodation such as:

1. Frequency of use;
2. Work schedule;
3. Federal and state regulatory requirements;
4. Safety sensitive position;
5. Vulnerable population;
6. Transfer to another position; and
7. Length of service, among others.

Whether to forego marijuana testing or to accommodate off-site medical marijuana use are cultural and business decisions for employers to make.

As states across the country legalize marijuana, these issues will become more prevalent. It is more important than ever for employers to carefully consider – and communicate to their employees – how such issues will be handled. These changes in the law present a good opportunity for employers to establish or update drug-related workplace policies to comply with the law and meet their business or organizational objectives.

Employers with questions or concerns regarding marijuana and the workplace can contact:

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