Medical Marijuana Laws Create Haze of Uncertainty for Employers

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The ADSC justifiably places an incredible premium on safety as a successful workplace safety program is essential to the wellbeing of employees and employers alike. Maintaining a drug free workplace is a critical component of such a safety program. Yet, at the ADSC's Summer Meeting in Montreal, the most common topic of conversation at times did not involve a discussion of where one could purchase the best poutine or smoked meat sandwiches, but how ADSC members were going to address the rapidly changing marijuana laws south of the Canadian border.

The rise of medical marijuana laws has added a new layer of complexity to the enforcement of these commonplace drug free safety programs. Although marijuana remains classified as a "Schedule 1" illegal substance under federal law in the United States, no fewer than 29 states and the District of Columbia have passed some form of medical and/or recreational marijuana legislation. Accordingly, drug-free employers in a majority of states now find themselves in the middle of the controversy–forced to choose how they will implement their workplace policy with respect to this federally illegal but now ostensibly state-legal substance.

After all, if an employee takes medical marijuana at the advice of a physician for a disability, does an employer now violate state or local disability discrimination laws if it terminates an employee for use of medical marijuana? For employers in many jurisdictions, the answer is anything but simple. Indeed, the Supreme Judicial Court of Massachusetts recently demonstrated just how uncertain the law can be in a July 17, 2017 opinion, *Barbuto v. Advantage Sales & Mktg., LLC*, Mass. No. SJC-12226, 2017 Mass LEXIS 504.

To Accommodate or Not to Accommodate? A Massachusetts Case Study

In *Barbuto*, a former employee alleged that her Crohn's disease resulted in an inability to maintain a healthy weight without the use of medical marijuana. The employer maintained a drug-free workplace program, and terminated the employee despite the fact that she stated that her use of marijuana was medical in nature. The employee brought suit in Massachusetts, arguing that Massachusetts' discrimination law prohibited discrimination on the basis of medical marijuana use.

The employer moved to dismiss the employee's lawsuit by arguing that the employee failed to state a claim of "handicap" discrimination under Massachusetts law for two reasons: (1) she could not be a "qualified handicapped person" because the accommodation she sought, use of medical marijuana, must be per se unreasonable because it is illegal under federal law; and (2) even if she could be a "qualified handicapped person," she was terminated for failing a drug test that all employees must pass, not because she was disabled.

Massachusetts' medical marijuana statute is silent as to reasonable accommodations of employees, but provides that the use and possession of medical marijuana by a qualifying patient is lawful and medical marijuana users are protected from the denial of any right or privilege. The court rejected the employer's argument as to federal illegality, and construed the Massachusetts law's ambiguity in favor of the former employee, reasoning that "[w]here, in the opinion of the employee's physician, medical marijuana is the most effective medication for the employee's debilitating medical condition, and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation." *Id.* at *13-14.

The Massachusetts court further noted that "even if the accommodation of the use of medical marijuana were facially unreasonable (which it is not), the employer here still owed the plaintiff an obligation under [Massachusetts Law] before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy." *Id.* at *16. Thus, the employee's claim of handicap discrimination survived where the employer terminated her without engaging in the interactive process.

What Steps Should Be Taken?

While *Barbuto's* impact is immediately apparent for Massachusetts employers, the case also provides valuable insight to employers in other "medical marijuana" jurisdictions:

- ***All employers should be aware of the laws of all states in which they operate.*** Not all states that adopted medical marijuana legislation employed the ambiguous language found in Barbuto. For example, New York and Nevada have laws explicitly providing that medical marijuana must be reasonably accommodated. New York Health Law, Title V-A, § 3369(2); Nev. Rev. Stat. § 453A.800(3). Other states, like Ohio, explicitly provide that an employer cannot be compelled to accommodate employee marijuana use. R.C. § 3796.28. A third group of states, such as Colorado, have interpreted ambiguous statutory language and, contrary to Massachusetts, found that accommodations were not necessary. Therefore, as a starting point, employers must familiarize themselves with the statutory framework in which they are operating.
- ***Review Workplace Policies in light of Medicinal Marijuana.*** Although Barbuto was a somewhat surprising decision, employers should not read the case to imply that that workplace drug testing is now a thing of the past. Even in a jurisdiction where use of marijuana is (or arguably is) a potential "reasonable accommodation" under state or local anti-discrimination laws, an employer may still wish to test for, and prohibit, medical marijuana. For example, employers covered by DOT regulations requiring drug tests must continue to abide by those regulations. Moreover, employers should be mindful that some courts have historically found employers to be negligent when employees in certain safety sensitive positions were using drugs and the employer did not drug test them. Accordingly, the best practice is for employers to review existing policies and to make determinations as to the drugs to be tested for in light of the applicable state law, as well as the type of work that the employees are performing.

Please feel free to contact us to request a copy of the medical marijuana statute in any of the states in which you work.

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