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# For employers, time to review drug-testing policies

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Medicinal use of marijuana has been decriminalized throughout New England. The first Massachusetts medical marijuana dispensary opened its doors on June 24. It is now clear that medical marijuana is quickly becoming an everyday aspect of health care delivery in New England and throughout the country.

But legalization of medical marijuana has created a great deal of confusion for employers. Taking into account the complexities of state and federal drug, drug-testing, privacy and disability laws, what is the best course for employers so that they can make smart real-time decisions and stay out of trouble?

**Med-marijuana laws in New England**

The new medical marijuana laws in the six New England states all provide that qualified medical marijuana users may not be "denied any right or privilege" because of their legitimate marijuana use for medicinal purposes under the respective state laws.

The Connecticut and Maine statutes prohibit employers from making hiring and firing decisions solely on the basis of an individual's status as a qualified medical marijuana user.

As to reasonable accommodation for disabled workers, other than in Vermont, the New England medical marijuana laws each explicitly provide that allowing employees to use medical marijuana on-site and/or to work under the influence of marijuana does not constitute reasonable accommodation.

The Massachusetts "Act for the Humanitarian Medical Use of Marijuana" states, for example: "[n]othing in this law requires an accommodation of any on-site medical use of marijuana in any place of employment … ."

Notably, however, each of these medical marijuana statutes is silent as to whether tolerance of the legitimate use of medical marijuana off-site and off-hours is required as a reasonable accommodation to enable disabled employees to perform the essential functions of their jobs under applicable fair employment and disability discrimination laws.

While legislation has been proposed to more fully address the employer-employee relationship in view of the legalization of medical marijuana, no further statutory or regulatory guidance is yet available.

**Lawsuits against employers**

Litigation around the country has resulted from employers discharging employees who are medical marijuana users when they test positive for marijuana on mandatory drug tests.

Courts in California, Montana and Washington, for example, have found in favor of defendant-employers on various grounds. See *Ross v. Raging Wire Telecommunications, Inc.*, 42 Cal. 4th 920 (2008) (California Compassionate Use Act does not provide private right of action or create public policy to support wrongful discharge claim or right to accommodation under state fair employment law); *Johnson v. Columbia Falls Aluminum Co., LLC*, 209 MT 108N (2009) (Montana Medical Marijuana Act explicitly provides that employers are not required to accommodate employee use of medical marijuana); *Roe v. TeleTech Customer Management* (Colo.) LLC, 171 Wn. 736 (2011) (Washington Medical Use of Marijuana Act does not provide private right of action or create public policy to support wrongful discharge claim or right to accommodation under state fair employment law).

In its June 15, 2015, decision *Coats v. Dish Network, LLC*, Advance Sheet No. 13SC394, the Colorado Supreme Court concluded that an employer's termination of a "card-carrying" quadriplegic medical marijuana user for testing positive for marijuana on a random drug test did not violate the Colorado Lawful Activities Act, 24-34-402.5, C.R.S. (2014), which prohibits employers from discharging employees because of off-site, off-hours "lawful activities." Rejecting the plaintiff's argument that the lawful activities statute includes only state law, not federal law, within its definition of "lawful," the Colorado Supreme Court concluded that medical marijuana use is not "lawful" because it violates the federal Controlled Substances Act, 21 U.S.C. §844(a)(2012), under which marijuana is classified as an illegal "Schedule I" controlled substance.

The *Coats* court cited the U.S. Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), in which the Supreme Court determined that the Controlled Substances Act pre-empted the California medical marijuana statute under the Supremacy Clause of the U.S. Constitution.

**Controlled Substances Act**

In spite of decriminalization of marijuana for medical and/or recreational purposes in 23 states and the District of Columbia, marijuana currently remains a Schedule I chem-

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ical under the federal Controlled Substances Act. Marijuana was classified as a Schedule I controlled substance in 1970 when it was determined to have high potential for abuse; no currently accepted medical use in the U.S.; and to be unsafe, even under medical supervision.

**Mandatory drug-testing for jobs that do not involve a safety risk should be promptly and carefully reconsidered in light of the new medical marijuana laws.**

While there is now substantial bi-partisan support for re-classification of marijuana under the Controlled Substances Act, at this point, the "possession, distribution, manufacture, cultivation, sale and transfer" of marijuana still violate this federal law.

In recognition of the quickly expanding legalization of medical marijuana use under state law, amendments to the Commerce, Science and Justice Appropriations Bill this year, in both the House and Senate, explicitly bar the Department of Justice from spending money to interfere with states' implementation of medical marijuana laws.

By de-funding federal enforcement of the Controlled Substances Act with respect to medical marijuana use in any state in which the drug can be lawfully used for medicinal purposes, lawmakers have effectively nullified the federal measure that would otherwise pre-empt state laws legalizing the use of medical marijuana.

**Pending litigation in Massachusetts**

The case of *Barbuto v. Advantage Sales and Marketing LLC* is the first case brought in Massachusetts challenging the termination of an employee based on her use of medical marijuana.

Plaintiff Cristina Barbuto claims to be a qualified, card-carrying medical marijuana user, with a prescription for low-dosage marijuana to treat the symptoms of Crohn's disease and irritable bowel syndrome.

Barbuto was hired by defendant Advantage Sales and Marketing LLC as a Massachusetts-based "brand ambassador" in the company's marketing department.

Her employment offer was rescinded and she was sent home after her first day of employment due to the results of a drug test indicating marijuana use. When she protested, Barbuto allegedly was told by a human resources representative that the employer followed federal law, not state law.

At this time, the case is pending before the Massachusetts Commission Against Discrimination and is expected to be filed shortly in state or federal court. Barbuto claims in her charge of discrimination that she was capable of performing the essential functions of her job and was unlawfully discriminated against in violation of G.L.c. 151B for no reason other than the manner in which her disabilities are medically treated.

According to Barbuto's lawyer, the focus of his client's legal claims is at least two-fold, including a claim for violation of her privacy rights under G.L.c. 214, §1B, in addition to her disability discrimination claim.

The Massachusetts Privacy Act, G.L.c. 214, §1B states: "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." The privacy statute provides a private right of action and legal and equitable relief.

Based on her MCAD charge, Barbuto is seeking recovery for lost wages, harm to her reputation and emotional distress damages.

**Employers should promptly re-evaluate policies**

This new and unsettled area of the law creates significant challenges for employers.

To reduce the risk of legal claims and litigation, it is critical that employers work with their employment counsel to re-evaluate drug-testing policies and carefully consider situations related to employee use of medical marijuana.

Employers are well advised — at a minimum — to follow existing precedent with regard to employee drug-testing.

In Massachusetts, a mandatory drug-testing policy will pass muster under the Privacy Act when the legitimate business interests of the employer outweigh the privacy interests of the employee.

To determine the legitimate business interests of an employer, the courts look to such factors as assessment of the safety risks posed by the employee based on his/her specific job duties. See *Webster v. Motorola, Inc.*, 418 Mass. 425, 432 (1994), citing *Folmsbee v. Tech Tool Grinding & Supply, Inc.*, 417 Mass. 388, 392 (1994).

For positions that do not involve safety concerns, mandatory drug-testing may not survive the scrutiny of the courts.

Absent some other compelling legitimate business reason to require testing, employers are unlikely to prevail if their drug-testing policy is challenged. See *Webster* at 433-434 (finding that an employee whose job duties do not pose "an immediate risk to health and safety" has a privacy interest that outweighs the employer's interest in drug-testing).

Accordingly, mandatory drug-testing for jobs that do not involve a safety risk should be promptly and carefully reconsidered in light of the new medical marijuana laws.

When an employee uses marijuana for medicinal purposes in compliance with medical marijuana laws and performance of his or her job does not pose a safety risk, any adverse action against the employee for testing positive for marijuana should be taken with great caution. NEIH