

CHANGE IN MARIJUANA LAW EFFECTS ON THE WORKPLACE

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On December 15, 2016, recreational marijuana use became legal in Massachusetts. The law legalizes the use and possession of up to one ounce of marijuana in public and up to 10 ounces of marijuana at home for individuals 21 and older. The law also permits possession of up to six marijuana plants per person, with a maximum of 12 plants allowed per household.

What Does this Change Mean for Employers?

The new law permits the recreational use of marijuana for those over 21, but it does not create an absolute “right” to use or possess marijuana. As a result, employers remain free to prohibit the use of marijuana in the workplace and remain free to require a drug-free workplace. The law specifically states that it does 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.”

Further, the new law expressly prohibits marijuana smoking anywhere that cigarette smoking already is prohibited. As a result, any policies employers already have in place concerning smoking cigarettes on or around the premises will automatically extend to smoking marijuana.

Employers Subject to Certain Federal Requirements

Marijuana possession remains a criminal offense under federal law so employers that have federal contracts or receive federal funding are subject to the federal Drug Free Workplace Act and are required to establish and promulgate policies for a drug-free workplace. Drug testing is not mandated under the Act. However, covered employers must adhere to other requirements including publishing and distributing the company’s anti-drug policy to employees, establishing an awareness program informing employees of the risks of drug use, and notifying the federal contracting agency of any employee drug convictions.

Additionally, employers whose business activities extend into the federally regulated transportation industry are subject to federal Department of Transportation requirements concerning workplace drug and alcohol testing, including requirements that employers take immediate corrective action if certain types of employees test positive for drugs. The DOT imposes such requirements for employees in the aviation, railroad, mass-transit, and pipeline industries, employees operating commercial vessels, and for carriers and commercial driver’s license holders. Similar policies regulating employee drug and alcohol use are mandated for

companies that perform work for the Nuclear Regulatory Commission, the Department of Energy, and the Department of Defense.

What About Medical Marijuana?

The state's highest court, the Supreme Judicial Court, recently held that the Massachusetts anti-discrimination statute requires an employer to determine if it can accommodate an employee's use of medical marijuana. While the lower court found, consistent with other jurisdictions' laws, that our state's disability statutes do not extend to medical marijuana use because marijuana remains illegal under federal law, the Supreme Judicial Court of Massachusetts disagreed. It found that the employer needed to engage in an interactive process with the employee to see if the employer could accommodate the employee's medical marijuana use outside of the workplace. As a result, an employer may need to allow its use for medical reasons unless the employer can justify why it is unreasonable to accommodate off site marijuana use. This may not be easy to do.

What About Drug Testing?

The new law is silent on the issue of drug testing, so existing Massachusetts privacy law continues to govern this issue. Currently in Massachusetts, individuals have a statutory right to privacy, which provides freedom from unreasonable, substantial or serious interference with their privacy. Courts have found that unwarranted drug testing violates this privacy right. As a result, when employers are not drug testing pursuant to a federal requirement, they generally need to demonstrate some significant interest in knowing if their employees are using drugs. In the absence of a legal requirement to drug test, an employer's business interest in testing must outweigh the employee's privacy interest for the testing to be warranted.

Courts use a balancing test to determine whether an employer's interest in implementing a specific drug testing policy violates an employee's privacy right. The degree of risk presented by the nature of the employer's business often determines whether an employer's business interest is enough to warrant drug testing. For example, an employer engaged in dangerous work where safety is a primary concern (like construction) may have a substantial and legitimate interest in knowing whether its employees are using drugs. Conversely, an employer with only office staff that seeks to ensure its workforce is being productive as a reason for testing may not have a sufficient interest.

Considerations about the employee's privacy interest implicate not just whether the company screens for drug use, but how it screens for its use. There is a difference between collecting samples through urinalysis versus breathalyzer. Ultimately, when drug testing is not required by federal law, the question of whether a drug testing policy is appropriate and permissible depends on the job duties of the employees being tested. Employers have a far greater interest in testing employees that are performing work implicating safety concerns, such as those using power tools, operating machinery, or driving as part of their job, than they do testing employees performing desk work. A drug testing policy that may be justified for one employee might be invalid for another. Employers should proceed with caution before drug

testing any employee, and should avoid any one-size-fits-all drug testing policies and requirements.

Risk Considerations for Employers

There seems to be little question that employers can terminate employees for using marijuana during work hours: the Massachusetts law does not require employers to *allow* marijuana use. Remaining vigilant about any on-the-job drug or alcohol use remains the best practice for a host of liability and business practice reasons. However, employers need to be balance the benefit gained from drug testing against an employee's privacy rights by implementing drug testing policies. In addition, employers need to know that an employee may have a medical reason to use marijuana outside of the workplace which may need to be accommodated.

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