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Massachusetts Employers May Have to Accommodate Medical Marijuana Use

In a first-of-its-kind ruling, the Massachusetts Supreme Judicial Court held that employers have a duty to reasonably accommodate employees' off-duty medical marijuana use under the Commonwealth's disability discrimination laws. Massachusetts employers should reevaluate their drug testing, zero-tolerance, and other employment policies in light of this decision, and ensure that they engage in an interactive process with medical marijuana users requesting an accommodation.

Background

In 1996, California became the first state to legalize marijuana for medical use. While 29 states and the District of Columbia now sanction medicinal use in some form, the use, possession and sale of marijuana remains illegal under the federal Controlled Substances Act (CSA) with limited exception. Classified under the CSA as a Schedule I substance with a high potential for abuse and no accepted medical use, marijuana cannot be prescribed by doctors under federal law and its possession and use is limited to federally approved research.

Massachusetts voters approved legalizing the use of medical marijuana in 2012, and the Commonwealth's Act for the Humanitarian Medical Use of Marijuana became effective on January 1, 2013. The act protects qualifying patients from "arrest or prosecution, or civil penalty, for the medical use of marijuana" and allows its limited possession for medical treatment. It also provides that any person meeting the law's requirements "shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." The act also expressly provides that it does not require any accommodation of on-site medical marijuana use in a place of employment or require the violation of federal law.

> **Comment.** Last year, Massachusetts voters approved legalizing recreational use and regulating marijuana like alcohol. The Regulation and Taxation of Marijuana Act, effective December 15, 2016, allows adults to use or possess limited quantities of marijuana. Like the medical marijuana law, the recreational use law does not require employers to permit or accommodate marijuana consumption in the workplace. However,

unlike the medical marijuana law, it explicitly allows employers to enact and enforce workplace policies that restrict employee use.

Supreme Judicial Court Weighs In

On July 17, the Massachusetts Supreme Judicial Court (SJC) held that employers have a duty to reasonably accommodate employees' off-duty medical marijuana use under the Commonwealth's disability discrimination laws. At issue in *Barbuto v. Advantage Sales and Marketing, LLC* was whether a qualifying patient who was fired because she tested positive for marijuana has a civil remedy against her employer.

The Facts

Cristina Barbuto was a qualified medical marijuana patient under Massachusetts law, who used medically prescribed marijuana to treat a loss of appetite due to Crohn's disease and irritable bowel syndrome. Barbuto applied for a job with Advantage Sales and Marketing, LLC (ASM), which conducted mandatory drug tests. She informed ASM that she would test positive for marijuana because she was a qualified patient, but would never consume marijuana before or during work. An ASM supervisor indicated that her medicinal use of marijuana shouldn't be a problem, despite ASM's drug-free workplace policy. However, after Barbuto tested positive for marijuana, ASM terminated her employment. She sued ASM alleging, among other things, handicap discrimination and failure to accommodate in violation of Massachusetts law.

ASM sought to dismiss her claims, arguing that Barbuto was not a qualified handicapped person, since the accommodation she sought – using marijuana – was unreasonable on its face as it violated federal law. Even if she was, she failed a drug test that all employees must pass. ASM also argued that Massachusetts' medical marijuana law does not provide a private right of action, and does not expressly prohibit an employer from terminating a medical marijuana user on public policy grounds. The trial court dismissed her claims, and Barbuto appealed.

> **Comment.** The Americans with Disabilities Act (ADA) does not protect the use of illegal drugs as defined by federal law, or require their accommodation. Thus, even if an employee's condition falls under the ADA, an employer would have no obligation to waive its drug-free workplace policy to accommodate medical marijuana use.

The Decision

On appeal, the SJC reversed, concluding that the plaintiff could sue her former employer for handicap discrimination in violation of Massachusetts law. At the same time, it found no express or implied statutory private cause of action under the medical marijuana law, nor did it uphold her claim for wrongful termination in violation of public policy.

Relying on the Massachusetts medical marijuana law's broad proscription against penalizing qualified medical marijuana patients, or denying any right or privilege, for their medical use of marijuana, the SJC found that such use was protected by state workplace antidiscrimination laws. The SJC further found that Barbuto stated a claim for handicap discrimination by alleging that she could have performed her job while taking the prescribed marijuana and, thus, the accommodation she sought for after-work, off-site medical marijuana use was facially reasonable. The court noted that ASM failed to engage in an interactive process with Barbuto to discuss an accommodation, and that failure gave rise to a viable handicap discrimination claim.

The SJC recognized that employers may still have a valid defense in medical marijuana cases by showing that the employee's use would impose an undue hardship, such as for federal contractors that must comply with the Federal Drug Free Workplace Act. The court also reaffirmed that Massachusetts law does not require allowing workplace marijuana use as an employee accommodation.

The *Barbuto* decision makes clear that the federal prohibition against marijuana use and possession will no longer allow Massachusetts employers to enforce "zero tolerance" drug policies. To avoid potential handicap discrimination claims, they should be prepared to engage in the interactive process with qualified applicants and employees who seek an accommodation based on their medical marijuana use.

> **Comment.** Courts in California, Colorado, Oregon and Washington have recognized that state medical marijuana laws create a narrow exception for medical marijuana users (and their caregivers) from state criminal – but not employment – laws, but they have found no duty to accommodate an employee's use of medical marijuana. (See, for example, our June 30, 2014 *For Your Information*.) Some states, like New York, extend certain employment protections to state-authorized users by including antidiscrimination provisions in their medical marijuana laws. (See, for example, our July 11, 2014 *For Your Information*.) While public acceptance of medicinal use of marijuana has been growing, it remains to be seen whether courts in other states will follow Massachusetts' lead.

In Closing

Medical marijuana use, while still unlawful under federal law, may now be protected by Massachusetts antidiscrimination laws. Massachusetts employers should re-evaluate their drug testing, zero-tolerance and other employment policies, and ensure that they engage in an interactive process with medical marijuana users requesting an accommodation.

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