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Mass. Court Turns Over A New Leaf: Rules Employer May Be Liable for Failing to Accommodate Employee's Medical Marijuana Use

Legal Alert

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Even though 29 states now allow medical marijuana, employee use of medical marijuana is unprotected in many workplaces because marijuana use of any kind remains illegal under federal law. Favoring an employee's right to be free from discrimination for using medical treatments that are legal under state law over the federal ban, a recent decision from Massachusetts's highest court means employers may need to reevaluate and revise their policies to keep up with this rapidly evolving area of employment law.

On July 17, 2017, the Massachusetts Supreme Judicial Court ruled a trial court erred when it dismissed an employee's claim that she was subjected to disability discrimination when her employer terminated her after she tested positive for marijuana in pre-hire drug screening. The case, *Barbuto v. Advantage Sales and Marketing LLC*, is noteworthy because, in many states, employers have been able to terminate workers for failing drug tests due to medical marijuana use.

Where are we?

By way of background, employers have broad discretion to terminate employees for medical marijuana use in many states on the basis that use of marijuana, even if lawful under state law, remains a federal crime. This is well illustrated by the case of *Coats v. Dish Networks, LLC*, decided by the Colorado Supreme Court in 2015. In that case, an employee was terminated for testing positive for marijuana. It was undisputed that the employee had a valid prescription to use medical marijuana, which was legal in Colorado, and that he did not use marijuana at work or in a way that impaired his work performance. When he tested positive for marijuana, he was terminated and brought an action against his former employer for violation of Colorado's Lawful Off-Duty Activities statute, which generally prohibits employers from discharging an employee based on his/her engagement in "lawful activities" off the premises of the employer during nonworking hours. The Colorado Supreme Court upheld the dismissal of the employee's claims and found the employer had a right to terminate him for off-duty activities that violated federal law, even if they were lawful under Colorado law. Similarly, the NFL prohibits players from using medical marijuana even in states where it is legal under state law.

Closer to home, under New Jersey law currently, employers have no strict obligation to accommodate medical marijuana users and employers may terminate an employee who fails a drug test, even if the employee can lawfully use medical marijuana under state law and was not impaired at work. Pennsylvania's recently adopted medical marijuana law broadly prohibits discrimination against an employee or job candidate because he or she has a medical marijuana prescription (i.e., is a cardholder), but it is silent on whether an employer can rely upon a positive drug test as a reason for an adverse employment action in itself. Both Pennsylvania and New Jersey permit an employer to terminate an employee who is impaired in the workplace.

What Happened in Massachusetts?

That brings us back to *Barbuto*. In *Barbuto*, before she was hired, the employee disclosed that she used medical marijuana to treat an underlying condition, but did not use it during working hours. When the results of her drug screening were positive for marijuana, she was terminated after completing her first day. Barbuto alleged the termination was discriminatory and the employer violated her rights by failing to make a reasonable accommodation. In many states, Barbuto's claim would have been dismissed, but in Massachusetts the Court took a novel approach. The Court found the employer had a duty to make a reasonable accommodation for medical marijuana usage outside of working hours, despite the employer's drug policy, explaining, "the fact that the employee's possession of medical marijuana is in violation of federal law does not make it per se unreasonable as an accommodation." This outcome is surprising because it limits an employer's discretion to discipline employees who use medical marijuana, in violation of federal law, by relying on the state's anti-discrimination laws. Most states have similar anti-discrimination protections.

Where we are going?

Although the *Barbuto* decision only applies in one of the 29 states where medical marijuana is currently legal, it is worth noting because of the potential for its reasoning to be applied in other states where medical marijuana is lawful. If it is followed in other states, it creates a new risk when an employer has a zero-tolerance drug testing policy that leads to discipline for employees who lawfully use medical marijuana and are not impaired at the workplace. In states where this issue has not been resolved, employers should expect to face claims similar to those raised in *Barbuto*. For example, in *Barrett v. Robert Half Corporation*, a New Jersey employee tried to make a similar argument, but his case was dismissed on the basis that he never requested an accommodation, meaning the court never reached the issue of whether allowing off-duty use of medical marijuana is a reasonable accommodation.

Even if state courts do not follow *Barbuto*, legislatures are also revisiting the issue. For instance, in New Jersey two bills offering express workplace protections for medical marijuana users are working their way through the legislature.

What should employers do?

In light of this ever-changing landscape, employers should carefully evaluate whether they need to screen for marijuana when conducting tests that are not related to suspicion of drug use in the workplace. Today, in states where there is no clear precedent, disciplining an employee for a positive test when the employee has disclosed a need for medical marijuana usage and there is no evidence of workplace use is an increasingly risky decision and may soon give rise to a legislatively-sanctioned claim. Of course, employers need not tolerate employees who are impaired in the workplace. Additionally, some employers, especially those with safety-related positions and certain government contractors, may be required to screen for any marijuana use and enforce a zero-tolerance policy. For everyone else, it is a good idea to think carefully before imposing discipline for medical marijuana use outside of the workplace.
To learn more about the information presented in this alert, we invite you to contact Adam Gersh, or any member of Flaster Greenberg's Labor and Employment Department.