Client Alert: Medical Marijuana in the Workplace: An Employee's Balm; an Employer's Bane

BY TIMOTHY P. VAN DYCK • JULY 18, 2017

On July 17th, the Supreme Judicial Court ruled that Massachusetts employers may not terminate an employee merely because of his or her off-site use of medical marijuana. According to the Court, the use of medically-prescribed marijuana is as lawful as the use of any other prescribed medication, and employees may assert claims of handicap discrimination under state law against employers who fail to accommodate such use.

The case was brought by Cristina Barbuto, who accepted an offer of employment from Advantage Sales and Marketing (ASM) in 2014. When Barbuto was informed that she would be subject to a mandatory drug test, she told her supervisor that she would test positive for marijuana, which had been prescribed by her physician to treat her Crohn's disease. Barbuto stated that she used this medication at home in the evening, usually 2-3 times per week, and would not consume it before or at work. ASM fired Barbuto shortly after she began work when she tested positive for marijuana, stating that it followed federal, not state, law on the issue.

Barbuto brought several claims against ASM based on her termination, including a state law claim of handicap discrimination. She argued that she was a qualified handicapped person, capable of performing the essential functions of her job with a reasonable accommodation; namely, a waiver of ASM's policy barring employment for those who test positive for marijuana. ASM, on the other hand, contended that this accommodation was facially unreasonable because the use of marijuana – medical or otherwise – is still a crime under Federal law.

Yesterday, the SJC ruled in favor of the employee, holding "[t]he 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." The Court reasoned that the only person at risk of Federal criminal prosecution is the employee, and thus the illegality of possession at the Federal level is not a valid concern to most Massachusetts employers. Instead of terminating an employee, or taking any other adverse action, based on a general policy ban against marijuana use, employers have a duty to engage in an interactive process with the employee to determine whether an equally effective medical alternative is available that would not violate the policy. Where no equally effective alternative exists, the burden is on the employer to prove that the employee's use of medical marijuana would cause an undue hardship to the business in order to justify a refusal to accommodate the needs of the handicapped employee.

The SJC did not opine on the merits of the case, which will now be remanded to the trial court to determine whether ASM took appropriate action in assessing Barbuto's accommodation request. The ruling nevertheless puts the onus squarely on the shoulders of employers under state law to accommodate the needs of employees who are being treated with medical marijuana.

Massachusetts employers should immediately take these steps to avoid exposure to claims of handicap discrimination:

- **Amend policies and practices to treat medical marijuana equally with other prescription drugs.** Under the SJC's ruling, outright bans of marijuana use by employees will not be viewed favorably by the courts. Nevertheless, as with other prescription drugs, employers may state that medical marijuana use must not impair an employee's ability to perform the essential functions of his or her job effectively and in a safe manner that does not endanger other individuals in the workplace. Note also that the Massachusetts law legalizing medical marijuana states clearly that it does not require "any accommodation of any on-site medical use of marijuana in any place of employment." Thus, employers may still maintain a general ban of marijuana use while on company premises.
- **Engage in an individualized interactive process with each employee or applicant who discloses use of medical marijuana.** For employers who have concerns about an employee's use of medical marijuana, the law requires the employer to engage in an interactive process to determine if the use can be accommodated before the employer takes any adverse action. Employers are permitted to ask whether an equally effective medical alternative is available, and may ask the employee to have his or her physician certify that medical marijuana is the most effective medication for the employee's medical condition.
- **Identify the positions or circumstances in which accommodation of medical marijuana use would cause an undue hardship.** As with any other accommodation request, employers are not required to allow medical marijuana use that would cause an undue hardship to their business. The SJC's opinion acknowledges several specific situations in which such undue hardship could be shown:

    1. Employers who operate under Federal government contracts or receive Federal grants and are obligated to comply with the Drug Free Workplace Act;
    2. Employers in the transportation industry subject to U.S. Department of Transportation regulations prohibiting marijuana use by safety-sensitive employees; and
    3. Where an employer can prove that continued use of medical marijuana would impair work performance or pose an "unacceptably significant" safety risk to employees or the public, for example employees who operate heavy machinery or supervise young children.

Note, however, that the burden is always on the employer to prove that medical marijuana use subjects the employer to such risks and hardships.

