Do Your Drug–Free Workplace Policies Pass Muster

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By Peabody & Arnold on May 18, 2017

With the passage of the new recreational marijuana law in Massachusetts, many employers are wondering whether their drug-free workplace policies pass muster. Fortunately, the recreational marijuana statute contains a pro-employer carve-out that does not require employers to accommodate recreational marijuana use in the workplace. The Supreme Judicial Court will soon answer whether the same is true for medical marijuana use in its forthcoming ruling in *Barbuto v. Advantage Sales and Marketing, LLC.*

Recreational Marijuana Use in the Workplace

As many employers are aware, Massachusetts voters approved a ballot measure to legalize recreational use and possession of marijuana on November 8, 2016. This law went into effect on December 15, 2016. It remains to be seen how the passage of this law will affect employers in the Commonwealth. Employers should be encouraged, however, by the provision in the statute that explicitly does not "[r]equire 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." This language suggests that Massachusetts employers can continue to enforce drug-free policies in the workplace and will not have to accommodate an employee's recreational marijuana use.

Medical Marijuana Use in the Workplace

Whether an employer has to accommodate an employee's medical marijuana use is soon to be decided by the Supreme Judicial Court, the highest court in the Commonwealth. The SJC recently heard oral argument on the *Barbuto* case and will issue its decision in the coming months.

In *Barbuto,* the plaintiff was terminated by her employer after she tested positive for marijuana, even though she presented a valid prescription for medical marijuana for her Crohn's disease. She sued in state court, claiming, among other things, that she was discriminated against for her disability. The lower court dismissed this claim and the plaintiff appealed.

The Supreme Judicial Court will consider whether the Massachusetts Act for the Humanitarian Medical Use of Marijuana contains an implied right to a reasonable accommodation for employees' off-site use of medical marijuana. Courts in Washington, California, and Colorado have found that an employer is not required to accommodate an employee's prescribed use of medical marijuana. All three of these states have statutes similar in language to the Massachusetts Medical Marijuana Act. And, unlike other states with medical marijuana statutes, the Massachusetts statute does not contain an anti-discrimination provision for medical marijuana users. We expect that the SJC will rule on this issue in 2017, giving employers some much needed guidance on whether they can maintain their current drug-free workplace and drug-testing policies.

