

A Legal Look at Medical Marijuana

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What is the Law?

- Federal Law
 - Marijuana is an illegal controlled substance under the Controlled Substance Act, 21 USCS §801
 - Marijuana is still prohibited under the Department of Transportation's Drug and Alcohol Testing Program – 49 CFR Part 40, at §40.151
 - Americans with Disability Act (ADA) – Offers no protection to medical marijuana users

What is the Law?

- State Law
 - The Massachusetts Act for the Humanitarian Medical Use of Medical Marijuana – Chapter 369 of the Acts of 2012
 - Department of Public Health regulations – 105 CMR 725

Chapter 369 of the Acts of 2012

- The Massachusetts Act for the Humanitarian Medical Use of Medical Marijuana
- Purpose – no punishment **under state law** for medical use of marijuana
- Qualifying patient or caregiver not subject to arrest, prosecution or civil penalty
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Limitations on the Law

Section 7

- Nothing in the law allows the operation of a motor vehicle, boat or aircraft while under the influence of marijuana
- Nothing in the law requires any health insurance provider or any government agency to reimburse cost of medical marijuana
- **Nothing in the law requires any accommodation of on-site use of medical marijuana in any place of employment**, school bus or on school grounds, or of smoking medical marijuana in any public place
- Nothing in the law poses an obstacle to enforcement of federal law

Massachusetts Regulations

105 CMR 725.650

- Nothing in the law allows the operation of a motor vehicle, boat or aircraft while under the influence of marijuana
- Nothing in the law requires any accommodation of on-site use of medical marijuana **in any place of employment**, school bus or on school grounds, or of smoking medical marijuana in any public place

DOT Drug and Alcohol Testing for CDL Drivers

- Substances tested
 - Marijuana
 - Cocaine
 - Opiates – Opium and codeine derivatives (heroin)
 - Amphetamines and methamphetamines
 - PCP
- Oxycodone, Oxycontin, Percocet will generally not result in positive test

DOT Drug Testing Components

- Random
- Post accident – traffic citation required unless fatality involved
- Reasonable suspicion
- Return to duty and follow-up testing

Non- DOT Drug Testing Policies

- Pre-employment
- Random
- Annual – Agreed upon date or window
- Reasonable Suspicion
 - Articulating basis
 - Who is trained to observe?
- How many “strikes?”

Drug Testing Statistics

- DOT Safety Sensitive Urine Tests
 - 1.6% of all tests positive
 - 30% amphetamines
 - 17% cocaine
 - **39% marijuana**
- Testing – Non-DOT programs
 - 4.1% of all tests positive
 - 15% amphetamines
 - 13% benzodrine
 - **35% marijuana**
 - 17% oxycodone

Testing Statistics

Hair Testing

- 5.6% of all tests positive
- 50% of positive hair tests are for marijuana

Trends – Positive Tests

- DOT Testing – Has remained steady at 1.6% since 2008
- Overall workforce testing has remained steady at 3.5% since 2008
- 1988 – Total Workforce was 13.6% positive tests
- Are fewer of our employees using narcotics, or....?

Challenges Posed by the Medical Marijuana Law

- Marijuana is already the drug that comes up most often in employee testing
- This law increases access
- Even if you test employees for illegal drugs...
 - What about an employee with a “debilitating medical condition” such as HIV, AIDS, ALS, Crohn’s, Parkinsons, Multiple Sclerosis, or cancer?

Case Law

- Roe v. Teletech Customer Care Management (Washington)
- Casias v. Wal-Mart Stores (Michigan) US Court of Appeals

Medical Marijuana in Other States

- 20 States and District of Columbia have medical marijuana statutes
- 6 states have statutory protection for discrimination based upon employee's status as medical marijuana patient or who tests positive for marijuana (Arizona, Connecticut, Delaware, Illinois, Maine and Rhode Island)

Medical Marijuana in Other States

- Most states offering discrimination protection have exception if employer can demonstrate economic loss or...
- If employee possessed or was impaired on premises or during hours of employment

What Are We Trying To Accomplish By Drug Testing?

- Safety?
- Productivity?
- Help our employees to stay healthy?
- Is your policy effective?

Impairment

- Can be illegal drugs, prescription narcotics, alcohol or any combination of those substances
- Approved dosage of certain prescription narcotics, combined with small amounts of alcohol can result in severe impairment
- The line between what is legal and what is illegal is further blurred with this law
- Shouldn't our primary goal be to keep impaired employees off the job?

DOT Drug Testing

- Inform your employees – marijuana use still violates the policy
- Possession of a medical marijuana card does not
 - allow them to possess marijuana while on duty, or
 - to be under the influence of marijuana while on duty, or
 - to escape penalties for a positive test for marijuana
- The new law does not offer any protection regarding their employment
- Signed acknowledgments

Review your Drug/Alcohol Policy- Non-DOT Employees

- Pre-employment testing– your application should state that a positive test will disqualify applicants
- Do you actually test employees?
- Is the testing effective?
 - Rate of positive tests

Non- DOT Drug Policies

- Make sure policy addresses impairment while on duty regardless of cause of impairment
- Policy should state that possession of marijuana or any other illegal narcotic while on duty is not permitted
- Observation based enforcement – no testing
- Inform your employees – possession or being impaired by marijuana violates the policy

What to Expect in the Future

- 3 other New England states offer employment discrimination protection – don't be surprised if statute changes
- Massachusetts courts may extend protection against discrimination
- Better availability = more employees using

Questions

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