Decriminalization of Recreational Marijuana and the Workplace

By Joseph T. Bartulis, Esq.

On November 8, 2016, the voters in Massachusetts decriminalized recreational use of marijuana. The law took effect on December 16, 2016.

In light of the new recreational marijuana use law, employers have three common questions:

1. *What impact does the new recreational marijuana use law have on an employer's ability to discharge or discipline an employee who comes to work under the influence of marijuana?*
2. *What impact does the new recreational marijuana use law have on an employer's ability to prohibit the possession of small, recreational use amounts of marijuana on company property?*
3. *May an employer continue to drug test employees for marijuana now that it has been decriminalized, and may an employer make hiring or termination decisions based on a positive marijuana test result?*

The short answer to the first two questions is "none." The decriminalization of marijuana for recreational use by persons twenty-one and over has no impact whatsoever on an employer's ability to continue to prohibit all employees from being under the influence of marijuana at work, from using it during work time, or from possessing it in the workplace. It is business as usual for employers with policies which address these first two questions and for employers seeking to implement such policies. An express provision within the recreational marijuana use law provides that employers may "enact and enforce workplace policies restricting the consumption of marijuana by employees." MGL c. 94G, section 2(e).

Regarding the third question, an employer's ability to test for marijuana use now depends on the timing of and reason for the drug test: Is it pre-employment, reasonable suspicion, or random testing of persons in safety-sensitive positions? What is the employer's need for the information?

In Massachusetts there is no express law which prohibits drug testing. However, through case law, the Massachusetts courts have weighed the privacy rights an individual has regarding bodily fluids, or the expectations of privacy of the individual, against the employer's need for the information. See MGL. c. 214 section 1B. See also *Barbuto v. Advantage Sales & Marketing, Inc.*, 48 F.Supp.3d 145 (D. Mass. 2015) (medical marijuana case presently on direct appellate review by Mass. Supreme Judicial Court).

Regarding **pre-employment drug testing**, it may occur so long as:

1) the applicant is made aware of the drug testing in the job posting before he or she applies for the job;
2) it only occurs after the employee has been given a conditional offer of employment -- conditioned only on his or her passage of the drug test; and
3) all recipients of conditional offers for the particular position are also drug tested. If the employer drug tests for a particular position, all selected candidates for that particular job should be tested.

Turning to the question of whether an employer may choose not to hire a candidate for failing a marijuana drug test, there is nothing in the law which prohibits the employer from doing so. However, given that marijuana has been decriminalized, the question becomes whether an employer wants to limit its successful candidates to only those who have no trace of marijuana in their systems at the time of the pre-employment drug test -- especially when the usage may have been several days before.

Regarding **reasonable suspicion drug testing**, an employer may require an employee to submit to a drug test if it has reasonable suspicion to conclude that an employee is presently under the influence of drugs. It is helpful for employers to be trained in identification of the common indicia of behavior and appearance that lead to reasonable suspicion. When an employer believes an employee is working under the influence, testing for marijuana along with all the other drugs is still logical and justified. Employers are encouraged to create clarity about drug policies by expressly stating in the employee handbook that it is prohibited to be in possession of or under the influence of any alcohol or drugs in the workplace, and that violation of this policy can lead to disciplinary action up to and including termination.

Regarding mandatory testing pursuant to a commercial driver's license program required by the federal Department of Transportation (DOT) or similar licensing authority, the testing should continue as usual and marijuana use should be tested for. DOT testing, for example, is a federal program, and marijuana use is still illegal under federal law.

With the exception of post-accident drug testing, the final drug testing protocol is **random drug testing** of people in safety-sensitive positions. Where an employer conducts a random drug testing program of its current employees, the following continue to be recommended prerequisites:

- The position is a safety-sensitive position.
- A causal nexus exists between the safety-sensitive nature of the position and the need to random drug test.
- The employees in the safety-sensitive positions are aware, in advance, that random drug testing occurs on persons in their positions.
- There is a pre-established protocol in place for determining when employees will be "randomly" tested.

For random drug testing of employees in safety-sensitive positions where there is no reasonable suspicion that the employee is under the influence of drugs, it is now suggested that employers consider no longer testing for marijuana, given that it is now decriminalized. Unlike alcohol, which wears off within hours of use, marijuana can remain in a person's system long after the effects of the drug have worn off. It is possible that testing for nonwork recreational marijuana use may violate an employee's privacy rights. While employers have every right to make sure employees are not under the influence of marijuana while at work -- just as they do not want employees under the influence of alcohol at work -- they should have little or no interest in how employees spend their nonwork hours so long as the conduct outside work is not illegal under Massachusetts law and has no impact on their fitness for work while at work.

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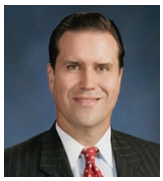

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