CLIENT ALERT: Massachusetts Becomes Eighteenth State to Allow Medicinal Use of Marijuana But Employers' Obligations Under Federal Law Do Not Change

On November 6, 2012, Massachusetts voters approved a ballot measure making Massachusetts the eighteenth state to allow medicinal marijuana. The law eliminates state criminal and civil penalties for the medical use of marijuana if certain conditions are met; however, it is unlikely that the new law will significantly impact employers' rules and policies governing drug use as marijuana is still illegal under federal law.

The Massachusetts medicinal marijuana law will take effect on January 1, 2013. The law permits patients to possess up to a 60-day supply of marijuana for personal medical use. Patients must have been diagnosed with a "debilitating medical condition," such as cancer, glaucoma, HIV/AIDs, hepatitis C, ALS, Crohn's disease, Parkinson's disease, or multiple sclerosis and obtain written certification from a doctor with whom the patient has "a bona fide physician-patient relationship." Under the law, a patient may also designate a personal caregiver, who is at least 21-years-old, to assist with the patient's medical use of marijuana. The caregiver may not consume marijuana obtained for the personal, medical use of the patient. Both the caregiver and the patient must register with the Massachusetts Department of Public Health ("DPH").

The law also provides for the establishment of no more than 35 non-profit, medical marijuana treatment centers in the state. The treatment centers may grow, process, and provide marijuana to patients or their caregivers. The treatment centers must apply to DPH for registration by (1) paying a fee; (2) identifying its location and one additional location, if any, where marijuana will be grown; and (3) submitting operating procedures, consistent with rules to be issued by DPH regarding the growing and storing of marijuana.

The DPH is responsible for drafting regulations governing the implementation of the law. The DPH has 120 days after the law takes effect on January 1, 2013 to clarify key sections of the law, including defining what qualifies as a 60-day supply.

The law also sets forth specific limitations, some of which restrict the law's reach into the workplace. The law does not give immunity under federal law or obstruct the enforcement of federal law, nor does it supersede Massachusetts laws prohibiting the possession, cultivation, or sale of marijuana for nonmedical purposes. This is significant for employers because federal law, which bans medical marijuana, is the controlling law. Employers' concerns regarding the potential liability that arises from employee drug use are not lessened simply because an employee uses the drug for medicinal purposes. The Massachusetts law explicitly recognizes this relationship between state and federal law.

Courts in other states with medicinal marijuana laws have also recognized that employers must follow federal law, upholding employers' terminations of employees who fail employer drug tests. In *Casias v. Wal-Mart*, decided in September, the Sixth Circuit ruled that the Michigan Medical Marijuana Act ("MMMA") does not regulate private employment. Joseph Casias was terminated for failing a standard drug test required by Wal-Mart policy when he was injured on the job. Mr. Casias had sinus cancer and an inoperable brain tumor. He obtained a medical marijuana registry card from the state of Michigan to use marijuana to manage head and neck pain. Mr. Casias provided this registry card to his shift manager and told the manager that he never smoked marijuana during work or had come to work under the influence. He sued Wal-Mart for wrongful termination and violation of the MMMA. The Court concluded that the MMMA does not impose restrictions on private employers and therefore Wal-

Mart could terminate Mr. Casias's employment because he failed the drug test.

It is also unlikely that federal and state disability laws would protect employees who use medicinal marijuana. Courts in Washington, California, and Montana have ruled that the ADA does not require employers to accommodate medical marijuana use. The Massachusetts law does not require "any accommodation of any on-site medical use of marijuana in any place of employment." Thus, employers will not have to permit marijuana use as a reasonable accommodation.

These decisions indicate that employers should continue to follow federal law, which still criminalizes marijuana. Also, the Massachusetts law does not allow employees to use marijuana in the workplace. Employers' policies may still prohibit employees from using, possessing, selling, or being under the influence of marijuana. However, employers should consistently enforce their policies related to drug use and drug testing and not single out medicinal marijuana users.

Employers should contact their MBJ attorney with questions concerning the Massachusetts medicinal marijuana law and their policies related to drug use and drug testing.

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