CLIENT ALERT: Massachusetts Legalizes Recreational Use of Marijuana But Does Not Alter Employer Obligations – By: Alexandra L. Pichette

On November 8, 2016, Massachusetts voters approved a ballot measure allowing the recreational use of marijuana, effective December 15, 2016. The new law, titled the Regulation and Taxation of Marijuana Act (the "Act"), seeks to regulate and tax businesses that manufacture and distribute marijuana in the same manner as businesses that manufacture and distribute alcohol. The law should have limited impact on employer drug use policies because it explicitly allows employers to continue enacting and enforcing drug use policies that restrict employees' use of marijuana.

In 2012, Massachusetts became the eighteenth state to legalize the use of medical marijuana. (*See* previous client alert: Massachusetts Becomes Eighteenth State to Allow Medicinal Marijuana Use). Part of a developing trend, Massachusetts is now one of a growing number of states to legalize marijuana for medical and/or recreational uses. Other states that have legalized marijuana for recreational use include California, Nevada, Maine, Oregon, Washington, Colorado, Alaska and the District of Columbia.

Pursuant to the Act, a person twenty-one years or older will not be subjected to criminal or civil penalties for possessing, using, purchasing, processing or manufacturing up to one ounce of marijuana, provided that not more than five grams of marijuana are in the form of marijuana concentrate. The Act also legalizes keeping up to ten ounces of marijuana in an individual's primary residence. Massachusetts residents with a green thumb can now grow and cultivate up to six marijuana plants per person and twelve plants per residence for personal use. Other provisions of the Act treat marijuana like alcohol or tobacco; for example, it is prohibited under the Act to consume or smoke marijuana in a public place where smoking tobacco is prohibited. The Act also prohibits having an "open container" of marijuana (defined as a package of marijuana with a broken seal or from which the contents have been partially removed) in the passenger area of a motor vehicle. Further, it remains illegal to drive while impaired by marijuana, although the Act does not define what it means to be "impaired."

In light of this new legislation, employers can reasonably expect the number of employees using marijuana to increase. However, the Act's effect on employers is explicitly limited; the newly enacted M.G.L. c. 94G, section 2(e) provides the following: "this chapter shall not require an employer to permit or accommodate conduct otherwise allowed by [the Act] in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees." Accordingly, employers may still prohibit or limit the use of marijuana the same way they would regulate the use of alcohol and other substances.

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Notwithstanding the Act's limited impact on the employment relationship, this may be a good time for employers to revisit their drug use policies. In particular, employers who prohibit working under the influence of marijuana should clarify their understanding of what it means to be impaired by marijuana and the ways in which they will evaluate impairment. And, while the Act itself does not limit an employer's ability to regulate employee marijuana use, employers should contact their MBJ attorney with questions regarding the Act, medicinal marijuana law, and their policies related to drug use and drug testing.

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