

## Publications

### ***Labor and Employment Alert: Massachusetts High Court Requires Reasonable Accommodation for Medical Marijuana Users***

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In July 2017, the Massachusetts Supreme Judicial Court issued a landmark decision that medical marijuana users are entitled to reasonable accommodation and may pursue handicap discrimination claims under Massachusetts law. This means that an employee using medical marijuana is protected from discrimination under state law even though marijuana use is still illegal under federal law. The Court's holding protecting medical marijuana users is a significant departure from courts in other states as well as from the Americans with Disabilities treatment of illegal drug use.

### **Massachusetts Law**

In 2012, Massachusetts voters adopted a medical marijuana law whose stated purpose is "that there should be no punishment under state law for qualifying patients ... for the medical use of marijuana." Thus, a qualifying patient is generally protected from "arrest or prosecution, or civil penalty" and may "not be penalized under Massachusetts law in any manner, or denied any right or privilege" for using medical marijuana.

At the same time, the Massachusetts anti-discrimination law makes it unlawful for an employer to terminate or refuse to hire a person because of his or her handicap. An employer is further required to provide a qualified handicapped person with a reasonable accommodation to permit him or her to perform the essential functions of the position, unless doing so would impose an undue hardship.

### **The Court's Decision**

In *Barbuto v. Advantage Sales and Marketing*, Christine Barbuto was offered a job contingent upon passing a mandatory drug test. Barbuto explained that she used medical marijuana at her physician's recommendation and so would not pass the drug test. She added that she did not use marijuana daily and would not consume it before work or at work. When she failed the drug test, she was terminated.

Barbuto sued alleging handicap discrimination. She claimed that a reasonable accommodation to her handicap would be waiving the company's policy barring those who test positive for marijuana so that she could continue to use medical marijuana. The employer contended such an accommodation was per se unreasonable because marijuana is illegal under federal law; this also meant it did not have to engage in the interactive process to identify a reasonable accommodation before terminating her. The Court was "not persuaded by either argument."

First, the Court explained that "the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication" under Massachusetts law. Further, patients may not be denied "any right or privilege" on the basis of their medical marijuana use. Therefore, "an exception to an employer's drug policy to permit its use is a facially reasonable accommodation." The Court noted that Massachusetts law differs from that in other states which do not similarly protect medical marijuana users.

Second, the Court rejected the argument that federal law makes accommodating medical marijuana per se unreasonable because "the only person at risk of federal criminal prosecution for her possession of medical marijuana is the employee." Moreover, failing to accommodate medical marijuana "would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of states, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions."

And, third, even if per se unreasonable, the employer still had to engage in the interactive process to determine whether an alternative accommodation existed. "This failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination."

The Court did state that the employee will not necessarily prevail in the end. The employer could establish that permitting medical marijuana use is not a reasonable accommodation because it "would impair the employee's performance of her work or pose an unacceptably significant safety risk to the public, the employee, or her fellow employees." Or such use could violate the employer's contractual or statutory obligations – such as those imposed by the federal Drug-Free Workplace Act or the U.S. Department of Transportation. The Court also found there is no implied private cause of action under the Massachusetts Medical Marijuana Act and so there is no claim for wrongful termination in violation of public policy.

## Conclusion

Employers in Massachusetts should review their hiring, accommodation and drug testing policies and procedures to ensure they comport with the Court's ruling. A positive drug test for medical marijuana may no longer result in an automatic refusal to hire or termination. Instead, the employer must engage in an interactive process to determine whether it can reasonably accommodate the applicant's or employee's medical marijuana use. Contact your Vorys lawyer if you have questions about recreational or medical marijuana and their impact on your workplace.