



# Marijuana and the Public Workplace



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# The Usual Disclaimer

2

*The information in this presentation is provided for informational and training purposes only and should not be considered legal advice.*

The Massachusetts marijuana laws are new. This presentation presents information we know as of June 2017. We expect the law to change and develop once regulations are issued and the case law comes out. We urge you to call your attorney before making policy changes or taking disciplinary action under these laws.

# Part I

3

## **MARIJUANA LEGAL LANDSCAPE**

***FEDERAL LAW***

***STATE LAW***

**MUNICIPAL PERSPECTIVE ON LEGALIZATION**

# Marijuana Legal Landscape

4

- Federal Controlled Substances Act (“CSA”)
- Massachusetts Medical and Recreational Marijuana Statutes
  - Medical: “Humanitarian Medical Use of Marijuana” (Chapter 369 of the Acts of 2012; 105 CMR 725.00)
  - Recreational: “Regulation of the Use and Distribution of Marijuana Not Medically Prescribed” (M.G.L. c. 94G)



Image source: The Patriot Ledger Online

# Marijuana Under Federal Law



5

- The use or possession of marijuana is a violation of federal law.
- Under the federal “Controlled Substances Act” (“CSA”), marijuana is classified as a “Schedule I substance.”
  - Schedule I means a substance has no accepted medical use and a high potential for abuse.
- The use and/or possession of any Schedule I substance, including marijuana, is prohibited under the CSA regardless of whether the use/possession is for recreational or medical purposes.

Reference: 21 U.S.C. § 812, 844(a).

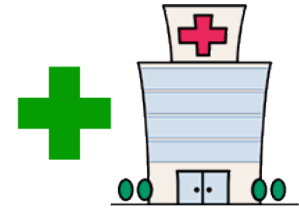
# State Marijuana Law: Medical



6

- Went into effect January 1, 2013.
- Protects qualifying patients and personal caregivers from prosecution under state law for the medical use of marijuana.
- Protects health care professionals from prosecution under state law for advising patients about the risks and benefits of medical use of marijuana and for providing patients with certifications for the use of marijuana.
- Provides for the legal operation of medical marijuana dispensaries.

# State Marijuana Law: Medical



7

- Three important limitations in the medical marijuana law:
  1. The law does not require employers to accommodate any **on-site** use of medical marijuana in any place of employment.
  2. The law explicitly states that it does not provide immunity from federal prosecution for violations of the federal CSA.
  3. It is not clear whether or not the law includes a cause of action against an employer.

# State Marijuana Law: Recreational



8

- Went into effect December 15, 2016.
- Applies to persons 21 years of age and older.
- Legalized the possession and use of 1 ounce or less of marijuana and the possession of up to 10 ounces of marijuana in a person's primary residence.

Reference: M.G.L. c. 94G § 7



# State Marijuana Law: Recreational



9

**Three important limitations in the recreational marijuana law:**

- 1. Local governments may prohibit or regulate the possession and consumption of marijuana in public buildings.**
- 2. Marijuana is not permitted in schools or on school grounds (including athletic fields).**
- 3. Employers may prohibit recreational marijuana use and possession in the workplace.**

Reference: M.G.L. c. 94G § 2

# The Conflict Between State and Federal Law

10

- The Department of Justice (“DOJ”) enforces the federal CSA.
- In 2013, the DOJ issued guidance in light of the increasing number of states legalizing medical and/or recreational marijuana.
- The DOJ clearly stated that no state or local law provides a legal defense to a violation of the federal CSA.

Reference: U.S. Department of Justice, *Memorandum: Guidance Regarding Marijuana Enforcement*, August 29, 2013 (available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>)

# Marijuana Legalization: A Municipal Perspective

11

## Moratoriums

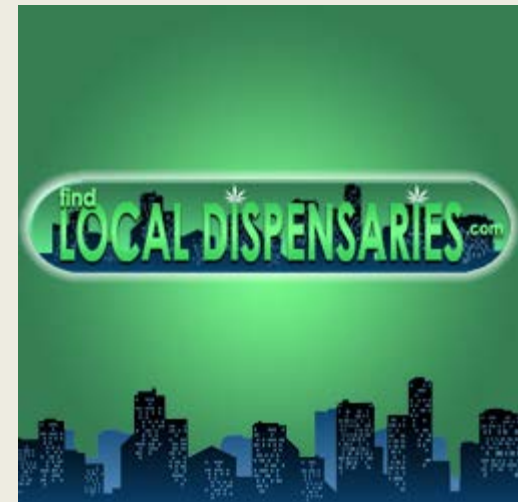
- The Attorney General has approved several local zoning bylaws imposing temporary moratoriums on recreational marijuana businesses in municipalities.
- The AG has found moratoriums extending through November 30, 2018 to be reasonably limited in time and scope.
- Moratoriums give municipalities time to engage in planning studies and establish local rules and procedures for recreational marijuana activities.

Reference: The AG's letters approving temporary moratoriums on recreational marijuana businesses can be found at: <http://www.mlu.ago.state.ma.us/>

# Marijuana Legalization: A Municipal Perspective

12

- We are still awaiting regulations from the Cannabis Control Commission, which is tasked with promulgating regulations under the recreational marijuana law.
- If you have additional questions regarding municipal law and the recreational marijuana law:
  - Consult your attorney!



# Part II

13

**MARIJUANA IN THE WORKPLACE**

**IMPAIRMENT AT WORK**

**OFF-DUTY MARIJUANA USE**

**BASICS OF DRUG TESTING LAW**

# Possession and Use of Marijuana in the Workplace

14

Under the Massachusetts marijuana laws, employers may continue to prohibit employees from possessing and using marijuana in the workplace.

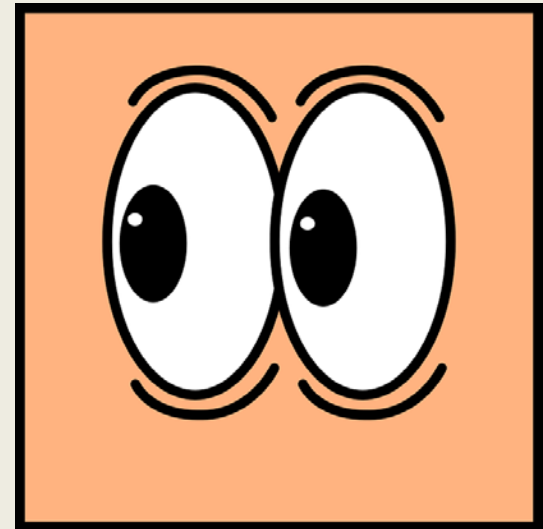
Employees may be disciplined for bringing marijuana to work or using marijuana at work – even if the employee is a medical marijuana patient.



# Signs of Marijuana Use

15

- Dilated pupils
- Bloodshot eyes
- Withdrawn, avoidant behavior
- Decreased coordination
- Dry mouth
- 'Inappropriate' laughter
- Odor of marijuana



# Effects of Marijuana Use

16

- Impaired short-term memory
- Distorted sense of time and distance
- Decreased ability to track a moving stimulus
- Distorted vision and depth perception
- Reduced concentration



# Employer's Response to Suspected Impairment at Work

17

- **Observe & Document**
  - Appearance, Behavior, Speech, Body Odor
  
- **Meet with the employee**
  - If possible, include the employee's union representative and the human resources director at the meeting
  - Clearly state your observation – “This is what I see...”
  - Keep it simple, avoid judgments and accusations
  - Stay calm at all times
  - Explain your responsibility as a manager
  - Document the meeting
  
- **Take appropriate action**

Reference: <https://www.getsmartaboutdrugs.gov/drugs/marijuana> (A U.S. DEA Website)

# Off-Duty Marijuana Use

18

- Can employers have a policy prohibiting employees from using marijuana while at home or off-duty?
- What about “Zero Tolerance” Policies – are they still enforceable?
  - DOT Employees – YES; federal prohibitions on use of marijuana apply
  - Non-DOT Employees –
    - ✦ The state law is **UNCLEAR** on this point.
    - ✦ The recreational marijuana law is **silent** on whether employers may regulate an employee’s off-duty use of marijuana.
    - ✦ The medical marijuana law is also **silent** regarding employee off-duty use of marijuana.
    - ✦ Existing policies requiring employees to comply with federal law – continue to enforce but understand there may be legal challenges.

# Off-Duty Medical Marijuana Use

19

- Barbuto v. Advantage Sales and Marketing, LLC
  - Barbuto, an employee of Advantage Sales and Marketing, LLC, possessed a prescription for medical marijuana to treat Crohn's disease. She was terminated after she tested positive for marijuana during a urinary drug test. Barbuto sued the employer alleging: 1) disability discrimination under G.L. c. 151B; 2) invasion of privacy; 3) termination in violation of public policy; and 4) violation of the Massachusetts medical marijuana statute/regulations.
  - On May 31, 2016, the Superior Court **dismissed** all of Barbuto's claims except the invasion of privacy claim.
  - The case is currently pending before the Supreme Judicial Court on direct appellate review.



Reference: *Barbuto v. Advantage Sales and Marketing, LLC*, Civil Action No. 15-02677 (May 31, 2016).

# Off-Duty Marijuana Use

20

- Barbuto v. Advantage Sales and Marketing, LLC
  - The issue: Does an employer violate Chapter 151B if the employer disciplines or discharges an employee on account of the employee's off-duty/at home medical marijuana use?
  - Under the ADA (federal statute), an employer has no duty to accommodate illegal drug use.
  - Certain state courts (e.g., California and Colorado) have held that “state disability discrimination statutes **do not extend to marijuana use** for medical purposes because such use remains illegal under federal law.”
  - Some state medical marijuana laws include express protections for employees using medical marijuana (including Connecticut, Maine and Rhode Island).

Reference: *Barbuto v. Advantage Sales and Marketing, LLC*, Civil Action No. 15-02677 (May 31, 2016).

# Off-Duty Marijuana Use

21

- Barbuto v. Advantage Sales and Marketing, LLC
  - Stay tuned for the SJC's opinion on this topic
  - Position of Massachusetts Commission Against Discrimination in amicus brief:
    - ✦ There is no categorical exclusion of prescribed medical marijuana use as requiring a reasonable accommodation – should be dealt with on the facts of each case.
    - ✦ MCAD brief recognizes that a reasonable accommodation may not be required where the employer is in one way or another subject to federal law requirements, such as federal contracts or safety-sensitive positions – MCAD suggests that this may make an accommodation unreasonable or impose an undue burden on the employer.

# Review of Employee Drug Testing

22

- In public employment, an employee drug test is a “search” within the meaning of the 4<sup>th</sup> Amendment to the U.S. Constitution and of article 14 of the Massachusetts Declaration of Rights.
- The first question to ask:
  - Am I dealing with unionized or non-unionized employees?

# Drug Testing & Unionized Employees

23

- In Massachusetts, drug testing is a mandatory subject of bargaining.
- The terms of a drug use and testing policy must be bargained if dealing with a union.

# Employee Drug Testing Cont.

24

- The next question to ask:
  - Am I dealing with employees holding commercial drivers licenses (CDLs)?
- Federal Department of Transportation (DOT) regulations govern the drug use and testing policies applicable to these employees.
  - DOT Guidance states that marijuana use remains unacceptable for any safety-sensitive employee (ex: bus/truck drivers) subject to drug testing under DOT regulations.





# Employee Drug Testing Cont.

25

- If an employer wants to impose a drug testing policy on non-union, non-CDL employees, the employer is must consider state and federal constitutional law.
- Policy must be job-related and limited to employees in safety sensitive positions only.
  - Examples: Snow removal equipment operators, motor equipment repairmen
- If implementing a drug testing policy, it should include (at a minimum):
  - When employees will be tested (randomly, reasonable suspicion, post-accident, etc.)
  - What employees are considered safety sensitive
  - Procedures for testing
  - Procedures for providing notice of testing

# Pre-Employment Drug Screens

26

- Massachusetts law permits employers to require prospective employees to undergo post-offer, pre-employment drug screens.
- Can an employer rescind an offer to an applicant who tests positive for marijuana?

# Drug-Free Workplace Act

27

- Applies to federal grantees
- Requires grantees to comply with certain drug-free workplace requirements as a condition of receiving a federal contract or grant from a federal agency
  - Create and distribute a policy statement that includes actions that will be taken against employees who violate the policy
  - Inform employees of the availability of EAPs

# Marijuana Policy Recap

28

- **What we know you don't need to change:**
  - You may continue prohibit use/possession of marijuana at work.
  - You may continue to prohibit employees from being under the influence of marijuana at work.
  - Policies for employees who are governed by federal DOT regulations.
- **Less clear:**
  - Employers might be able to prohibit off-duty marijuana use, but the statute is not clear – look out for subsequent case law and regulations on this point
  - Drug testing for non-CDL employees – a positive test result might be a result of off-duty use

# Part III

29

## **SCENARIOS**

# Scenario #1

30

You suspect Bobby Marley, a firefighter, has been coming to work under the influence of marijuana. On several occasions, you've noticed Bobby with bloodshot eyes, smelling of marijuana smoke, and behaving unusually. You share your observations with Bobby and ask why he is exhibiting these symptoms. He says, "I smoked at home with my friends on Saturday night. There's nothing illegal about that."

- What are the potential issues?

## Scenario #2

31

You're aware that Mary Jane, a librarian, is a medical marijuana patient. You have no problem with her using marijuana at home to treat her medical condition, but you have reminded her of Town policies prohibiting her from coming to work under the influence and prohibiting possession and use of marijuana at work. One day, you notice a strong odor of marijuana emanating from Mary Jane's desk area. You ask her if she brought marijuana to work, but she denies having any.

- The marijuana odor is very strong in Mary Jane's desk area. May you search her desk?
- Her purse is tucked beneath the desk where the odor is strongest. May you search her purse?
- What appropriate action can the employer take?

# Scenario #3

32

Chester Chong, a police officer, maintains an Instagram account set to “public,” meaning anyone can see the pictures he posts to the app. You are looking at his Instagram photos and you notice one photo of what appears to be marijuana. You tap on the photo to view the caption, which reads: “Finally #legal.” You’re concerned Chester may be smoking in violation of Police Department policies prohibiting any possession or use of marijuana. You are also concerned that the picture may reflect poorly on the Department.

- What appropriate action can the employer take?





## Scenario #4

33

You employ a group of non-union employees in the Department of Public Works who occasionally perform job duties including snow removal, public park maintenance (such as mowing, trimming, clearing, etc.) and building repair (using various tools, ladders, etc.). You consider this to be a safety sensitive position and would like to implement a drug testing policy for these employees to ensure safety in the workplace.

- Would such a policy be permissible?
- What would such a policy include?

# Q & A

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