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Marijuana at work: Convention takes a hit

It's high time for employers to evaluate their workplace policies and procedures concerning marijuana use. While still a Schedule I substance under federal law (along with the likes of heroin and LSD) decriminalization and legalization of marijuana for certain medicinal purposes has been overwhelmingly approved by Massachusetts voters. As a society, our behavior has followed suit: A recent study found that the percentage of American adults who had used marijuana in the last year was 9.5 percent, up from 4.1 percent in 2002. In June, Massachusetts opened its first medical marijuana dispensary, with three more dispensaries not far behind. In September, the Supreme Judicial Court held that the odor of burnt marijuana no longer constitutes probable cause sufficient to initiate a traffic stop.

The message appears to be clear in the eyes of the voters, the Legislature, and the courts: Our tolerance level for marijuana use has never been higher. Many would argue that, at least here in Massachusetts, marijuana use is now socially acceptable behavior.

Employers in Massachusetts should consider common-sense reforms to their policies and procedures relating to marijuana use in order to remain competitive and minimize potential legal exposure.

For example, when an employee uses marijuana for medicinal purposes in compliance with medical marijuana laws and performance of his or her job does not pose a safety risk, any adverse action against



the employee for testing positive for marijuana should be taken with great caution. A case currently pending in Suffolk Superior Court affirms this advice. In *Barbuto v. Advantage Sales and Marketing LLC*, an advertising employee who was terminated based on her use of medicinal marijuana has brought suit against her former employer, claiming a violation of her privacy rights under the Massachusetts Privacy Act, and for unlawful discrimination under G.L. c. 151B. And while *Dish Network* won the legal skirmish before the Colorado Supreme Court in choosing to fire a quadriplegic prescribed marijuana, few would quibble that it lost the public relations war in so doing. These closely watched cases may provide a strictly legal roadmap for employers regarding the treatment of employees acting in compliance with medical marijuana laws,



but in the end, the justification for adverse employment action in most workplace environments is simply not warranted.

Employers would be much better served not to take a "cookie cutter" approach to marijuana use. Marijuana use, whether medicinal or recreational, is ubiquitous, and employers need to face this new reality. Employers, both large and small, need to establish clear policies regarding marijuana use and the workplace, or risk a shrinking talent pool, facing a public relations fiasco, defending lawsuits not worth defending and otherwise getting burned.

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