

## Marijuana in the workplace: the stakes are getting higher



Gary M. Feldman



Robert M. Kaitz

If you've noticed a pungent aroma wafting in the Massachusetts breeze, chances are it is coming from marijuana use.

Massachusetts voters approved a ballot measure to legalize recreational use and possession of marijuana on Nov. 8, 2016, and on Dec. 15 the law went into effect alongside the already-adopted medical marijuana scheme.

Following the 2016 election, more than half of American states now permit marijuana use, whether for medical purposes or for both medical and recreational use. In the 2016 election, three other states (California, Maine and Nevada) joined Massachusetts in voting to legalize recreational marijuana, and three additional states (Arkansas, Florida and North Dakota) adopted medical marijuana laws. Of the eight states with marijuana on the 2016 ballot, only one (Arizona) voted against adoption, giving the drug an 87.5 percent success rate on Election Day 2016.

We've witnessed a historic change in the nation's attitude toward marijuana use, as most voters have chosen to reverse a century of marijuana prohibition despite it remaining a Schedule I drug under federal law. Employers must be vigilant to adapt their policies to account for this rapid change.

The newfound acceptance of marijuana use in Massachusetts, combined with the current state of federal law and uncertainty relating to an incoming administration, leaves employers in a proverbial no-man's land regarding how to address the employment implications of medical and recreational marijuana use.

As employment lawyers, we can attest to the difficulties employers are having in navigating these uncharted waters.

Complicating matters, marijuana laws in Massachusetts provide little guidance for employers. They specify that no employer must tolerate marijuana use at work or while an employee is on



THINKSTOCK

the job. Beyond that, however, employers have little guidance on how to address daily workplace issues presented by a workforce now permitted by law to use marijuana.

The matter is further complicated by the lack of any reliable and accessible scientific test that is able to determine if a person is under the influence of marijuana at work.

Additionally, employers also must account for the fact that the active ingredient in marijuana remains in a user's blood for days or weeks following use, despite the effects only lasting a few hours.

The uncertainty faced by employers manifests in several areas, including drug-free workplace policies, drug-testing policies, and Americans with Disabilities Act compliance.

How can employers harmonize legalized marijuana with a drug-free workplace policy? With a workforce legally permitted to use marijuana, to what extent should and can employers drug test applicants and existing employees? What obligation does an employer have to provide a "reasonable accommodation" to an employee who uses medical marijuana to treat a serious health condition under the ADA and state law?

Absent clear legal guidance, employers should consider the following alternatives and decide on a course of action best suited to their particular business and work place.

### 1. Communication and training

Employers should communicate, in clear and unequivocal terms, that working while under the influence of marijuana, or using marijuana during work hours, is strictly prohibited and grounds for termination.

Employers should review existing policies and handbooks, and issue new policy statements regarding marijuana prohibitions in the workplace and impairment during work hours.

Employers may wish to train a management-level employee to recognize signs of impairment due to marijuana use, and to promulgate policies that

address situations in which suspicions arise regarding an employee's potential impairment during work hours. Any changes in policies must be emphasized through staff meetings led by senior HR or company management.

### 2. Is a drug-free workplace policy realistic?

Many employers have adopted a "drug-free workplace" policy. These policies typically call for terminating any employee who fails a drug test or is found to possess and/or use illegal drugs in the workplace or during work hours.

Employers with such a policy on the books need to consider whether it makes sense to abrogate or modify the policy because of marijuana legalization. Since applying any policy should be done uniformly among the entire workforce, employers must consider whether it is in their business interests to have a policy that requires passing on any applicant and/or terminating any employee who tests positive for marijuana.

Depending on the particular industry and workforce, some employers may reasonably conclude such a policy will unduly restrict their ability to hire and retain qualified employees.

unduly restrict the applicant pool for non-safety sensitive positions should consider excluding marijuana from the test protocol, or eliminating the drug-test requirement altogether.

Again, companies doing business with the federal government may be required to broadly drug test applicants, including testing for marijuana.

### 4. Medical marijuana and reasonable accommodation for a disability

Oftentimes, an employer first learns an employee is licensed for medical marijuana when a drug test comes back positive for marijuana. In other circumstances, an employee may initiate the discussion by notifying the employer that he/she needs to use marijuana during working hours for a chronic condition.

In either scenario, the company will have to address the implications of medical marijuana under the ADA and Massachusetts Fair Employment Practices Act. Neither statute provides an employee a right to use or be impaired by marijuana during work hours. Nor are there any federal or state cases that require allowing marijuana use as a reasonable accommodation.

In a recent Massachusetts Superior Court decision, an employee suffering from a chronic illness claimed disability discrimination when her employment was terminated after two days of work in a non-safety sensitive position, following a marijuana-positive pre-employment drug test.

The Superior Court judge dismissed the plaintiff's claim, concluding the employer had no obligation to accommodate her use of medical marijuana under state or federal law. The judge also concluded there was no viable claim for wrongful termination in violation of public policy, as the Massachusetts statute did not "evinced a clear public policy to forbid an employer from discharging an employee" who used medical marijuana.

The case is now on direct appeal to the Massachusetts Supreme Judicial Court.

Under existing law, an employer does not have to provide any accommodation for an employee's use of marijuana, and a properly administered positive drug test is grounds for termination.

A middle approach in response to a safety-sensitive position drug test positive for marijuana is to remove the employee from any safety-sensitive duties and require an ADA-type physician's certification on the nature and timing of the prescribed marijuana use. For instance, a prescription for a person to use marijuana at night for a sleep disorder may warrant a different response than a prescription for a chronic illness requiring marijuana use during work hours.

Employers should be proactive in considering modifications to existing policies and practices relating to the use of marijuana and be vigilant in monitoring the law in this rapidly changing field. **NEH**

The uncertainty faced by employers manifests in several areas, including drug-free workplace policies, drug-testing policies, and Americans with Disabilities Act compliance.

As an alternative to a drug-free workplace policy, employers should consider implementing a "no impairment" policy, which prohibits the use of marijuana at any time that will cause an employee to be impaired during work hours.

Also, remember that under existing federal law, companies doing business with the federal government may have to maintain a drug-free workplace policy.

### 3. Drug-testing policies

Similar to the issues with maintaining a drug-free workplace policy, employers must evaluate their current drug-testing policies. Central to the review is that a person will test positive for marijuana for several weeks after last usage, therefore invalidating any possible correlations between a positive marijuana test and impairment on the job.

According to a recent study of workplace drug tests, marijuana positives were up 26 percent from 2011. Employers with concerns that a pre-employment drug test including marijuana will

Gary M. Feldman practices in the business law, employment and litigation areas at the Boston law firm Davis, Malm & D'Agostine. He advises employers and business executives on all aspects of employment-related issues, policies and compliance. He can be contacted at [gfeldman@davismalm.com](mailto:gfeldman@davismalm.com). Robert M. Kaitz practices in the employment and litigation areas at Davis Malm. He is a trial lawyer focusing primarily on employment, professional liability and business litigation matters, as well as employment counseling. He can be contacted at [rkaitz@davismalm.com](mailto:rkaitz@davismalm.com).