COMPLIANCE BULLETIN

MA Court Rules Disability Law May Protect Off-duty Medical Marijuana Use

HIGHLIGHTS

- Massachusetts employers may be required to accommodate off-duty medical marijuana use.
- The state's disability law allows lawsuits against employers with zero-tolerance drug policies.
- Other states' disability laws may allow similar lawsuits against employers.

IMPORTANT DATES

July 17, 2017

The Massachusetts Supreme Judicial Court issued its decision in *Barbuto v. Advantage Sales and Marketing*.

OVERVIEW

Massachusetts' highest court has ruled that terminating an employee for off-duty medical marijuana use may violate the employee's rights under the state's disability discrimination and medical marijuana laws. The Massachusetts Supreme Judicial Court issued its ruling in *Barbuto v. Advantage Sales and Marketing* on July 17, 2017.

The decision differs from those of other state courts, which have held that employers can have zero-tolerance drug use policies. The decision does not require employers to always permit off-duty medical marijuana use. Rather, employers may need to allow it as an accommodation in certain circumstances.

ACTION STEPS

Massachusetts employers should review their marijuana policies to ensure that they do not allow unlawful discrimination based on disability. Employers in other states should become familiar with their state's marijuana and employment discrimination laws to ensure that their marijuana use policies comply with all provisions.

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Barbuto v. Advantage Sales and Marketing

In its decision in *Barbuto v. Advantage Sales and Marketing*, issued on July 17, 2017, the Massachusetts Supreme Judicial Court (MSJ Court) ruled that the state's disability discrimination law may require an employer to waive its employee drug-use policy as a reasonable accommodation for an employee who uses medical marijuana outside of work.

The case began in 2014, when Cristina Barbuto accepted an entry-level position with Advantage Sales and Marketing (ASM). Before submitting a urine sample to comply with ASM's mandatory drug testing policy, Barbuto informed an ASM supervisor that she would test positive for marijuana because her doctor had prescribed the drug to treat her Crohn's disease and irritable bowel syndrome. The supervisor indicated that this was not a problem, and Barbuto began working for the company a week later.

After she completed her first shift, Barbuto was fired because her drug test came back positive for marijuana. Barbuto filed a lawsuit against ASM, claiming that the termination violated her rights under both the Massachusetts Medical Marijuana Act and the Massachusetts Anti-discrimination Act. A state Superior Court dismissed her claims, resulting in Barbuto's appeal to the MSJ Court.

Massachusetts Medical Marijuana Act (MMMA)

The MMMA, enacted in 2012, protects individuals who have been diagnosed with a debilitating medical condition (including Crohn's disease) from prosecution and civil penalties for using doctor-prescribed marijuana. Specifically, the law protects qualifying patients from being "penalized under Massachusetts law in any manner, or denied any right or privilege" based on medical marijuana use.

Although the MMMA does not require employers to accommodate "any on-site medical use of marijuana in any place of employment," the law is silent about off-site use.

Massachusetts Anti-discrimination Act (MADA)

The MADA makes it illegal for employers to discriminate against an employee or applicant based on his or her disability, as long as the individual is capable, with reasonable accommodation, of performing the essential functions of a position. The sole exception is where an employer can demonstrate that the accommodation required for an individual's disability would impose an undue hardship to its business.

Under the MADA, an employee may sue his or her employer for unlawful disability discrimination, and courts may award various remedies, such as job reinstatement and back pay. Courts may also impose civil penalties on employers that violate MADA.

The main issue in *Barbuto v. Advantage Sales and Marketing* was whether Barbuto had the right to sue ASM under the MADA. ASM argued, and a lower court had agreed, that because all marijuana use is a crime under

federal law, the only accommodation Barbuto sought under the MADA—the continued use of medical marijuana—was "facially unreasonable."

Reversing the lower court, the MSJ Court noted that despite federal law, the MMMA makes a qualifying patient's use of medically prescribed marijuana "as lawful as the use and possession of any other prescribed medication" in Massachusetts. In addition, the MMMA's provision allowing employers to prohibit **on-site** medical marijuana use "implicitly recognizes" that **off-site** use "might be" a permissible accommodation under MADA. For these reasons, along with the fact that federal law only puts Barbuto, not ASM, at risk of prosecution for marijuana possession, the court held that federal law does not automatically make medical marijuana use an unreasonable accommodation under the MADA.

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Under the MADA, the MSJ Court held, ASM had a duty to engage in an interactive process with Barbuto to determine whether any equally effective medical alternatives were available to accommodate her disability. If no equally effective alternative exists, the MADA requires ASM to either prove that Barbuto's marijuana use would cause an undue hardship to its business or make an exception to its drug policy as an accommodation.

Thus, the decision does not necessarily mean that Barbuto will ultimately prevail in her disability discrimination claim. The MSJ Court remanded the case back to the lower court, where ASM will still have the opportunity to prove that the requested accommodation is unreasonable. For example, ASM could prevail if it shows that Barbuto's continued marijuana use would impair her work performance or pose an "unacceptably significant" safety risk to the public, herself or her co-workers.

State and Federal Drug Laws

All marijuana use is illegal under federal law. The federal Controlled Substances Act classifies marijuana as a Schedule I substance, which includes drugs considered to have high potential for abuse and no currently-accepted medical treatment applications.

However, nearly 90 percent of the states, as well as Puerto Rico and the District of Columbia, have passed laws allowing limited possession of marijuana for medical treatment. The highest courts in several of those states have issued rulings relating to medical marijuana use and employment. The MSJ Court mentioned three of those rulings and explained why the circumstances in *Barbuto v. Advantage Sales and Marketing* led to a different result. Specifically:

- ✓ In a 2008 decision, the California Supreme Court held that an employee did not have the right to sue his employer under the state's disability discrimination law for terminating his employment based on his lawful medical marijuana use. According to the MSJ Court, California's medical marijuana law is different from the MMMA because it does not include language protecting medical marijuana users from being denied any right or privilege.

- In a 2011 decision, the Washington Supreme Court held that the state's medical marijuana law does not give employees a right to sue their employers for wrongful termination. According to the MSJ Court, Barbuto's case is different because she brought a claim under the MADA, which explicitly provides the right to sue, and because, unlike Washington's medical marijuana law, the MMMA explicitly protects medical marijuana users from being denied any right or privilege.
- In a 2015 decision, the Colorado Supreme Court held that because federal law makes marijuana possession unlawful, an employee does not have the right to sue his or her employer under Colorado's "lawful activities" law, which bars employers from terminating an employee based on his or her off-duty participation in lawful activities. In contrast to that law, the MADA does not require an employee to prove that his or her medical marijuana use is lawful. Instead, the MADA places the burden on employers to prove that allowing an employee's off-duty medical marijuana use would be an unreasonable accommodation for the employee's disability.

Impact on Employers

The MSJ Court's decision means that employers in Massachusetts may not enforce a zero-tolerance marijuana policy against an employee who uses doctor-prescribed medical marijuana for a debilitating medical condition. Under the MADA, if an employee who tests positive for marijuana is a "qualifying patient" under the MMMA, his or her employer must engage in an interactive process with the employee to determine whether there are any medical alternatives to marijuana use that would be equally effective to accommodate the employee's disability and:

- If an equally effective medical alternative exists, allow it as an accommodation; or
- If no equally effective medical alternative exists, either:
  - Allow the employee to use medical marijuana as an accommodation; or
  - Prove that the employee's marijuana use would cause an undue hardship to its business.

Employers in other states that have legalized medical marijuana may want to consider reviewing:

- Their state's medical marijuana law to determine whether it protects individuals from being denied rights and privileges under other state laws;
- Their state's disability discrimination law to determine their responsibilities relating to a disabled employee who uses medical marijuana; and
- Their state's other employment laws to determine the circumstances under which an employee's off-duty use of medical marijuana may be protected activity.