

# Management Alert



## Recreational Marijuana Use Becomes Legal in Massachusetts: Questions and Answers for Dazed and Confused Employers

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**Seyfarth Synopsis:** Massachusetts has voted to legalize the recreational use of marijuana. For employers that want to maintain drug-free workplaces, the new marijuana law raises a number of questions regarding employer rights and obligations. In this client alert, we identify a number of issues facing employers in the wake of this new law and offer our initial reactions and insights

On November 8, 2016, Massachusetts citizens voted in favor of legalizing the possession and use of marijuana for recreational purposes, joining a growing number of states that have passed similar laws. This means that employers likely will have to address employee use of marijuana in the Commonwealth. Unfortunately for employers, the legislation does not provide clear guidance on how to deal with the thorny employee-relations issues that are sure to arise. The following are some of the employment related issues facing employers and our initial insights. We should note that this overview should not be construed as legal advice or relied on as a definitive statement of outlook, as we have very few details at this point.

### What Does The New Marijuana Law Actually Allow?

Under the new law, an individual who is 21 or older may possess for personal use up to 1 ounce of marijuana in public, and up to 10 ounces at home. The law also allows the possession for personal use of up to 6 marijuana plants per person, with a limit of 12 marijuana plants per household. Under the law, marijuana use is forbidden in public places or anywhere else smoking is prohibited.

The law's stated purposes are to (1) "control the production and distribution of marijuana under a system that licenses, regulates and taxes the businesses involved in a manner similar to alcohol," and (2) "remove the production and distribution of marijuana from the illicit market and to prevent the same of marijuana to persons under 21 years of age by providing for a regulated and taxed distribution system." To these ends, the law requires the creation of a Cannabis Control Commission, consisting of three members appointed by the Treasurer of the Commonwealth, and a Cannabis Advisory Board, consisting of 15 members appointed by the Governor. The Cannabis Control Commission will regulate the marijuana business in the Commonwealth and the Cannabis Advisory Board will make recommendations to the Cannabis Control Commission.

A link to the law is available [here](#).

## When Does The Law Become Effective?

Appropriately aged individuals may possess and use marijuana for recreational purposes on December 15, 2016. Licensed marijuana establishments can open as soon as January 1, 2018. There are a number of interim deadlines associated with the regulatory process and creation of the Cannabis Control Commission and Cannabis Advisory Board. Recent news reports indicate that lawmakers are concerned about the ability to meet those deadlines. However, even if there are delays, they do not appear to have much, if any, consequence to employers. Individuals who meet the minimum age requirement—meaning entire populations of employees—can lawfully use marijuana for recreational purposes starting December 15, 2016.

## Does The Law Say Anything About Employer Rights And Obligations?

The law provides some protection for employers, stating that the law “shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.” This means that employers do not have to permit marijuana use at work or during work hours. However, the law says nothing else about employer rights or restrictions when it comes to managing employees.

## Should Employers Change Their Drug Use And/Or Drug Testing Policies?

Employers remain free to establish drug-free workplaces. In fact, marijuana is still classified as a Schedule I substance under the federal Controlled Substances Act, and thus illegal to possess or use under federal law. However, Massachusetts now permits use of marijuana for both medical and recreational purposes, so a thorough review of drug use and testing policies may be in order. Employers may want to consider limited or scaled back drug testing policies that focus more on reasonable suspicion or use in the workplace, or no testing for marijuana at all. For employers that do test for marijuana, a review of the actual tests administered may be warranted, as accurate determination of marijuana usage is difficult to determine through standard drug testing tools. For employers with workplaces that have heightened safety and injury concerns, these issues are paramount. As noted above, the law includes certain built-in protection for employers to address these concerns. For example, the law does not require employers to permit employees to work under the influence of marijuana. However, depending on the language of the drug-related policies, some modifications may be appropriate. As with other employment policies, it is important for employers to apply lawful policies consistently to similarly situated employees.

## Can Employers Prohibit Employee Use of Marijuana Outside of Work?

This issue is complicated. It may vary from employer to employer and it may change as the law develops through the legislative and regulatory processes, and through interpretation of the law by the courts. As drafted, the law does not state that employers must allow off-duty recreational or medical use of marijuana; it does not state that employers cannot fire employees who test positive for marijuana or refuse to hire an applicant because of marijuana use; it does not state that employees or applicants can sue employers who take adverse action against them because of marijuana use; and it does not state that employers are subject to penalties for taking adverse action against employees or applicants because of marijuana use. The law has decriminalized marijuana use, but it does not expressly require employers to permit it. Moreover, the law does not change the fact that marijuana use is still a crime under federal law.

All of this said, an employer that decides not to tolerate off-duty use of marijuana—whether for medical or recreational purposes, or both—may be subject to legal challenge. Such challenges could be made based on discrimination laws or the assertion of privacy rights, among others. Also, employers may face obstacles dealing with drug testing because generally available testing methods do not effectively evaluate whether an employee is presently under the influence of marijuana.

Notably, employers that are federal contractors or deal with unionized employee populations have unique considerations and requirements imposed by contract and/or rules governing federal contractors.

## How Have Courts Dealt With Employee Discipline Based On Marijuana Use That Is Protected By Similar Legislation In Other States?

Case law on this type of legislation is understandably limited, given that it is relatively new and unchallenged. However, some courts outside of Massachusetts have addressed the lawfulness of adverse action taken by employers against employees for use of marijuana. Those courts generally uphold adverse action based on employee or applicant use of marijuana. In addition to relying on the particular provisions of the state laws at issue, courts have reached these conclusions, at least in part, on the fact that marijuana use is still a crime under federal law. While the decisions from other states are not binding on Massachusetts courts, they can be instructive.

## What Should Employers Do Now To Be Proactive?

Employers would be wise to evaluate their drug-related policies and practices. Consider those policies and practices in light of the language of the new law in Massachusetts, in addition to the emerging laws in other states. Those employers with multi-state operations may want to ensure that their policies meet the legal requirements and restrictions applicable in each state where they have employees and tailor their policies to be universally compliant. Another step that may be appropriate for employers with lawful drug-related policies is to notify or remind employees of company expectations under those policies. Also, employers should seek guidance from experienced employment counsel on navigating this emerging law while being mindful of business needs and workplace culture. Stay tuned regarding developments in this area of the law.

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