

Massachusetts and Marijuana: FAQs

Introduction

The November 2016 passage of the citizens' petition Question 4: The Regulation and Production of Marijuana Act (the new law) focused primarily on the production and sale of marijuana with limited decriminalization of its possession and consumption. The new law has raised a number of issues with employers -- particularly in the areas of hiring, discipline and termination practices. ***While the new law does have a clear carve out for employers with regards to their current employment practices,*** it comes with new legal challenges, new fact patterns and new exposure not anticipated before. The purpose of this FAQ guidance is to give you a general overview of what the law does and does not do. To the extent that you are confronted with a particular challenge that creates legal exposure, it is recommended that you engage employment law counsel given the novelty and fluidity of developments with the new law.

1. What does the new Massachusetts law generally provide?

Generally, the new law legalizes marijuana along the same lines that the consumption of alcohol is legal in Massachusetts. As the title of the law suggests, its primary public policy focus is to 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 to make marijuana legal for adults 21 years of age or older. Additionally, the law also addresses employment and property rights.

2. Can a Massachusetts employer test for marijuana as part of a screening/job application process?

Yes. Massachusetts does not have a "lawful activities" statute which would protect Massachusetts employees from employer action or discipline for engaging in legal off-work site conduct. For example, several Boston area hospitals test for nicotine as part of their hiring practice even though smoking cigarettes is a legal activity in Massachusetts. Massachusetts businesses that employ personnel in other states should strive to discover through their employment counsel if those other states have "lawful activities"

3. How does the new law impact an employer's right to discipline employees?

The text of the new law changes nothing. Specifically, an employer is not required to permit or accommodate the consumption of marijuana in the workplace and an employer's authority is not limited in enacting and enforcing workplace policies restricting the consumption of marijuana by employees. Employers should also appreciate that under the earlier 2012 Massachusetts Marijuana Medical treatment law, an employer is not required to provide any accommodation of any on-site medical marijuana use at work.

4. Are there any risks to disciplining employees who test positive under The Americans with Disabilities Act?

There should be no risk if the discipline by the employer follows an employee's use of marijuana which is strictly recreational in nature. However, if the employee is certified as having a medical need to use marijuana, the employer may have some risk, although it is a novel issue, under the ADA. To that end, a review of several current reported cases across the country appear to support a growing judicial consensus that the ADA is not violated by an employer's disciplining employees for testing positive for marijuana usage whether the usage is either recreational or medical in nature. Because of the novelty of this issue, however, an employer may want to consult with an employment law attorney before disciplining an employee who is using marijuana pursuant to a prescription by a healthcare provider.

5. How does the new marijuana law impact current laws regarding transportation?

There is no change. Specifically, the act does not amend existing state or local penalties for operating, navigating or being in actual physical control of any motor vehicle, train, aircraft, motorboat or other motorized form of transport or machinery while impaired by marijuana or a marijuana product or for consuming marijuana while operating, navigating or being in actual physical control of any motor vehicle, train, aircraft, motorboat or other motorized form of transport or machinery.

6. How does the new marijuana law impact the rights of property owners in regards to their tenants?

The law does not prevent a property owner from prohibiting or otherwise regulating the consumption, display, production, processing, manufacture or sale of marijuana and marijuana accessories on or in property the person owns, occupies or manages.

A property owner, however, cannot have a lease agreement that prohibits a tenant from consuming marijuana by means other than smoking on or in the property in which the tenant resides unless failing to do so would cause the landlord to violate a federal law or regulation.

7. Are there state regulations that accompany the new law?

Not yet...but there will be. The law calls for the creation of (a.) a cannabis control commission to have general supervision and sole regulatory authority over the conduct of the business of marijuana establishments; (b.) a cannabis advisory board to study and make recommendations on the regulation of marijuana and marijuana products; and (c.) empower the Massachusetts Department of Revenue and local towns and cities to impose a sale tax on marijuana products with an exception for medicinal marijuana.

8. Is the use of marijuana now decriminalized in Massachusetts?

Not entirely. The decriminalization is limited with regards to the amount of marijuana a person can possess, grow or give to another a person, and any possession of marijuana by a person younger than 21 remains a crime.

9. How does the new Massachusetts law impact Federal laws?

It doesn't. Under federal law, marijuana is classified as a Schedule I controlled substance regardless of state-authorized medical marijuana. There are other federal laws which need to be considered as well. First, the Occupational Safety and Health Act (OSHA), requires employers to provide a safe workplace to their employees. Employee utilization of marijuana could possibly jeopardize workplace safety. Second, under the Drug Free Workplace Act of 1988, employers must maintain a "drug-free workplace" as a condition to becoming a federal contractor or receiving funding from the federal government. Depending upon the nature of your business and contracts, you may want to further consult employment law counsel about your unique circumstances.