

Labor & Employment Client Alert **January 2018**

Hazy Guidance for Employers: Attorney General Sessions Issues Marijuana Enforcement Memorandum to Federal Prosecutors Amid Recent Medical Marijuana Rulings

On January 4, 2018, Attorney General Jefferson Sessions issued a memorandum rescinding several Obama-era policies that discouraged federal prosecutors from pursuing marijuana possession and distribution cases in marijuana legalization states like Massachusetts. The Obama-era policies were backed by a Congressional budget rider that bars the Department of Justice from spending its money prosecuting state backed medical marijuana operations. The amendment will expire later this month, and it is unclear whether Congress will renew it given the Trump administration's current priorities.

The new Sessions memorandum states that "marijuana is a serious drug" and "marijuana activity is a serious crime" prohibited by the federal Controlled Substances Act ("CSA"), which classifies marijuana as similar to drugs like heroin and LSD and does not recognize any valid medical use. The newly appointed U.S. Attorney for Massachusetts Andrew Lelling took a more aggressive tone towards marijuana than any other U.S. Attorney to date on January 8, 2017, threatening that he might prosecute participants in the state-sanctioned marijuana trade.

This hostility to marijuana use contrasts with recent state-level attitudes to marijuana. Medical marijuana has been legal in the Commonwealth since 2012. In 2016, recreational marijuana was legalized by a 54% vote. Despite the new threat of federal prosecution, the Massachusetts Cannabis Control Commission and Massachusetts Attorney General Maura Healey have confirmed their intention to move forward with enabling recreational marijuana sales to begin in July 2018.

The past year has also brought several legal decisions sanctioning medicinal (as opposed to recreational) marijuana use for employees. In July 2017, the Massachusetts Supreme Judicial Court issued its *Barbuto v. Advantage Sales & Marketing, LLC* decision, which held that the plaintiff's accommodation request to use medical marijuana in violation of the company's zero-tolerance drug use policy was reasonable notwithstanding the CSA. In August, a Connecticut federal district court found in *Noffsinger v. SSC Niantic Operating Company, LLC, et al.* that the CSA does not trump Connecticut's medical marijuana law, does not regulate the employment relationship, and does not make it illegal to employ marijuana users. A Rhode Island court came to a similar conclusion last May. Based on these cases, employees using medicinal marijuana will be protected from termination or other adverse employment action in many cases.

However, there continue to be exceptions for employers seeking to enforce zero-tolerance drug

policies or certain federal mandates/requirements. First, certain safety and security sensitive industries may be required to enforce drug-free workplaces if they are subject to certain regulations by agencies such as the Department of Defense, Department of Transportation, or the Nuclear Regulatory Commission. Second, per the *Barbuto* decision, employers who can demonstrate that medicinal off-duty drug use creates an undue hardship for the company because it impairs work performance, poses a safety risk, or violates contractual or statutory obligations under federal law may also be able to enforce zero-tolerance policies. Third, consistent with the Massachusetts Medicinal Marijuana Act, employers are not required to permit *on-site* use of medicinal marijuana.

The clash between the growing marijuana industry and its popular acceptance and the threat of prosecution by our new US Attorney may soon bring new legal changes to workplace drug policies. In the meantime, employers who rely on drug tests to approve prospective employees should regularly review their policies and seek legal counsel to formulate marijuana policies to best comport with applicable state and federal laws.

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For questions about pending or proposed laws or regulatory enforcement priorities, and how they will affect your operations, please contact Elizabeth Sherwood, Kier Wachterhauser, or the attorney assigned to your account.

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