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Workplace Implications of the Massachusetts Recreational Marijuana Law

On Nov. 8, 2016, Massachusetts voters passed Question 4, which legalizes the recreational use of marijuana (Recreational Use Law). The Recreational Use Law follows passage of a 2012 Massachusetts ballot question which legalized the medicinal use of marijuana. Please see our previous May 15, 2013 *GT Alert*, [*What Does the Massachusetts Medical Marijuana Act Mean for Employers?*](#), which summarizes the impact of the Recreational Use Law on employment practices and policies.

Background

The stated purpose of the Recreational Use Law, officially titled “The Regulation and Taxation of Marijuana Act,” 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.” Accordingly, the law makes it legal for adults to possess, use, and cultivate marijuana within certain limits. Marijuana use is, however, forbidden in public places or in any other location where smoking is prohibited.

As for the regulatory framework, the law creates the Cannabis Control Commission, consisting of three members appointed by the Treasurer of the Commonwealth of Massachusetts. This commission has “general supervision and sole regulatory authority over the conduct of the business of marijuana establishments.” The new law also establishes a Cannabis Advisory Board, consisting of 15 members appointed by the Governor of Massachusetts.

Impact on Employers

The law contains a single reference to its effect on employers, which is as follows: “This chapter 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.”

Otherwise stated, the Recreational Use Law does not give employees a “free pass” to use or possess marijuana in the workplace, even if the law permits adults to use marijuana in other contexts or locations. Accordingly, employers may continue to maintain and enforce no alcohol/no drug policies which prohibit marijuana.

Federal Law Considerations

It should be noted that use and possession of marijuana remains illegal under federal law. The Controlled Substances Act classifies marijuana as a Schedule I controlled substance. Schedule I is the category designated by federal law for controlled substances that may not be prescribed by a physician, and which have “a high potential for abuse.” Many employers are in industries that require compliance with federal requirements, such as transportation companies subject to U.S. Department of Transportation regulations. These regulations require comprehensive drug and alcohol testing guidelines for employees in safety sensitive positions. Any such federal law requirements are not modified by the Massachusetts Recreational Use Law.

Federal contractors and recipients of federal funding are generally required to comply with another federal law, the Drug-Free Workplace Act of 1988, which mandates that employers maintain a “drug-free workplace.” An employer that tolerates the use of marijuana in the workplace under state law would be in violation of its federal law obligations under the Drug-Free Workplace Act.

Workplace Drug Testing

The Recreational Use Law does not prevent employers from utilizing pre-employment drug testing. Under this procedure, a job applicant is provided a conditional offer of employment, contingent on passage of a drug screening test. The new law does not abridge an employer’s right to enforce pre-employment drug screening policies that screen for the use of drugs, including marijuana. Similarly, there is nothing in the Recreational Use Law regulating or prohibiting the use of drug testing for current employees, such as post-incident or reasonable suspicion drug testing policies.

While nothing in the Recreational Use Law makes it illegal for an employer to require drug testing, employers are well advised to review their personnel policies and procedures to ensure that proper safeguards are in place. Moreover, to avoid confusion and the possibility of litigation (even if unmeritorious), applicants and employees should be provided clear notice that drug testing includes testing for the presence of marijuana.

Effective Dates

Effective Dec. 15, 2016, adults in Massachusetts may possess, use and cultivate marijuana. Regulations are required to be promulgated by the Cannabis Control Commission by Sept. 15, 2017. Licensed marijuana establishments may operate as of Jan. 1, 2018.

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