

**EMPLOYMENT  
LAW ALERT**

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## **MAYBE YOU CAN'T FIRE WORKERS FOR USING MARIJUANA AFTER ALL**

Sometimes, typically through drug testing, an employer discovers that an employee has been using marijuana. Marijuana use is, of course, a federal crime, and the use of illegal drugs often violates company policy, so employers might believe they are on sure footing to discharge employees for illegal drug use.

Employer rights in this area have become less certain as states approve the use of marijuana for medicinal and recreational purposes. Even so, the trend in employment litigation has favored employers. Courts generally reject wrongful discharge claims and similar efforts by employees to challenge dismissal's for using marijuana.

A new decision by the Supreme Court of Massachusetts throws a wrench into the mix. In *Barbuto v. Advantage Sales & Marketing*, employee Barbuto tested positive for marijuana. Barbuto told the company's human resources representative that she had a lawful marijuana prescription due to a disability. The representative's response was that "we follow federal law, not state law," so it did not matter that she had a prescription. Barbuto was fired. She filed a complaint that Advantage Sales violated its duty to accommodate her disability under the state's disability law.

The Court allowed the failure-to-accommodate claim to proceed. The Court reasoned that where state law allows medicinal marijuana use (as in Massachusetts), that drug is like any other prescription drug, say insulin. If an employee has a valid prescription for marijuana, the employer might have to bend its no-drugs policy and let the employee use marijuana as a reasonable accommodation of the disability. The Court also determined that Advantage Sales may have failed even to engage in the interactive process of discussing accommodation because it summarily fired Barbuto based on the positive illegal drug test result.

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Advantage Sales, not surprisingly, argued that marijuana use is a federal crime and that accommodating criminal conduct certainly cannot be a "reasonable accommodation." The Court rejected that argument. According to the Court, allowing an employee to use marijuana as prescribed by a physician, is, on its face, a reasonable accommodation. While use might be a federal crime *by the employee*, "[a]n employer would not be in joint [no pun intended, presumably] possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue" marijuana use. The Court also suggested the federal law is outdated.

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As a caveat, the Court noted that employers may assert a defense that permitting employees to use marijuana would constitute an undue hardship on the company's business. "For instance, the employer might prove that the continued use of medical marijuana would impair the employee's performance of her work or pose an unacceptably significant safety risk to the public, the employee, or her fellow employees." This defense likely will be of limited use to employers. First, it will be difficult in most cases to show that off-duty marijuana use poses an "unacceptably significant safety risk." Second, the Court indicated that a complaint may not be summarily dismissed based on an undue hardship argument. Instead, a court may rule on such an argument only at the summary judgment stage of the case (after discovery has been completed) or after trial.

The Court's decision might be viewed as narrow in certain ways. First, the Court noted that Barbuto's use was off duty and she did not work under the influence. Catching an employee possessing marijuana at work or working under the influence would be stronger justifications for discipline or discharge. Second, the Court's decision was based in part on the specific language of the Massachusetts statute that permits medical marijuana use. Among other things, that law does not require employers to offer "any accommodation of any on-site medical use" of marijuana. The corollary to that is that employers must offer reasonable accommodation for *off-site* use. Third, the Court recognized that "contractual or statutory obligations" might satisfy a showing of undue hardship. In particular, the Court noted that federal government contractors and transportation employers are subject to laws and regulations prohibiting drug use. (Federal law always preempts inconsistent state laws, and there are several industries in which federal law requires employers to ban marijuana use.)

The Massachusetts case directly applies only in that jurisdiction. Yet, the decision may be a hole in the dike: to foster state law, the Court was willing to wave aside the fact that marijuana possession and use is a federal crime. Employers in states that permit marijuana use may run significant legal risks in discharging employees for marijuana use.

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