Going To Pot: How Medical Marijuana Impacts Employer Drug Policies

Karl W. Butterer
Foster Swift Municipal Law News
November 24, 2014

AUTHORS/ CONTRIBUTORS
Karl W. Butterer

PRACTICE AREAS
Municipal & Public Entity Law

On November 4, 2008, Michigan voters approved the use of marijuana for medical purposes. Since its passage, the Michigan Medical Marihuana Act (MMMA) has prompted more questions than provided answers. Currently, Michigan law permits marijuana use and distribution under specific, limited circumstances. Under federal law, however, marijuana remains classified as a Schedule 1 controlled substance, and its use and sale is strictly prohibited. This inconsistency has led to great uncertainty about the limits and availability of marijuana use in Michigan. One of the greatest uncertainties is how the MMMA impacts employer drug policies.

PROHIBITIONS ON USING MARIJUANA / BEING UNDER THE INFLUENCE IN THE WORKPLACE.

The MMMA states that "nothing in this act shall be construed to require an employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana." Therefore, employers - including municipal employers - are certainly not required to allow the use of marijuana at the workplace, or to permit employees to work while "high."

USE OUTSIDE OF THE WORKPLACE.

Many employers, including municipalities, enforce zero tolerance drug policies and conduct drug testing which may detect the use of marijuana outside of the workplace. Courts around the country seem to be upholding private employers' rights to enforce zero tolerance drug policies, notwithstanding statutes legalizing medical marijuana use. A high profile 2012 ruling by the U.S. Court of Appeals for the Sixth Circuit, *Casias v. Wal-Mart Stores Inc.*, upheld a private employer's right to terminate an employee who was registered for medical marijuana use for failing a drug test.

In *Casias*, the employee - who had a state issued medical marijuana registry card - was fired by Wal-Mart after he tested positive for marijuana. The employee asserted that he used marijuana after work, and sued claiming that the firing violated the MMMA. The U.S. District Court for the Western District of Michigan dismissed the employee's case and the Sixth Circuit affirmed. The MMMA prohibits "disciplinary action by a business or occupational or professional licensing board or bureau" against a "qualifying patient." But the Sixth Circuit declined to read the term "business" independently, and instead held that it modifies "licensing board or bureau." The Court held that the MMMA, therefore, does not refer to private employment.

PRIVATE VERSUS PUBLIC EMPLOYMENT.

The *Casias* Court stated: "The language, structure, and purpose of the MMMA all signify that the statute was not meant to govern private employment decisions . . ." (Emphasis added). The Court went on to state that the MMMA gives people limited protection from "adverse state action in carefully limited medical marijuana decisions." (Emphasis added). Which kind of "state actions" public employees are protected against remains unclear. For example, may a public employer rely upon the *Casias* decision to terminate an employee who lawfully uses medical marijuana under the MMMA outside of work? While the federal disability laws do not require an employer to accommodate medical marijuana use, because marijuana remains illegal under federal law, it is unclear if public employers must accommodate medical marijuana use under state disability laws. For example, would a public employer be taking unlawful "adverse state action" against a public employee by refusing to accommodate her lawful use of medical marijuana under state law?

We will continue to keep you updated as Michigan courts interpret the MMMA as it relates to employees. In the meantime, municipal employers should consult their attorneys when issues of medical marijuana use arise.