

# Municipal Law News

Foster Swift Administrative & Municipal Group

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**Special THANK YOU to the MTA for a great 2011 Annual Conference and for giving Foster Swift the opportunity to present at the Attorney Institute. We look forward to next year!**

## Medical Marijuana Update

by: [Ronald D. Richards Jr.](#)

Another month, another flurry of activity on the Medical Marijuana Act front. Here are just a few items that arose recently:

### FEDERAL COURT ALLOWS WALMART TO FIRE EMPLOYEE FOR MEDICAL MARIJUANA USE

A federal judge in Detroit just ruled that Michigan's Medical Marijuana Act does not prohibit an employer from firing people for drug use. Instead, the judge ruled, the Act merely bars authorities from arresting and prosecuting people for marijuana use. The lawsuit stemmed from Walmart's decision to fire an employee after he tested positive for marijuana use - even though the employee has a medical marijuana card and allegedly smoked it to alleviate an inoperable brain tumor and cancer. A key factor in the decision was that the marijuana use was detected as part of a company drug testing policy that it had consistently enforced.

### TENANT EVICTED FROM FEDERALLY SUBSIDIZED HOUSING FOR USING MEDICAL MARIJUANA

A Michigan district court recently upheld a landlord's decision to evict a tenant from federally subsidized housing for using medical marijuana. The landlord evicted the tenant for medical marijuana use, giving two reasons: (1) it violated the tenant's lease's prohibition against illegal substances, and (2) the landlord must follow federal law to continue to provide federally subsidized housing.

### COURT OF APPEALS ISSUES ANOTHER DECISION REGARDING MEDICAL MARIJUANA

Just this month, the Court of Appeals reversed a Shiawassee Circuit Court decision on whether the defendant's method of storing marijuana met the statutory requirement to keep the marijuana in an "enclosed, locked facility." The statute defines "enclosed, locked facility" as "a closet, room, or other enclosed area equipped with locks or other security devices..." The defendant stored the marijuana in various places in the defendant's home - such as a living room closet, bedroom, laundry room, and hallway - and outdoors in an area surrounded by a chain link fence but with an open-top.

The Court of Appeals ruled that the defendant's storage did not meet the "enclosed, locked facility" requirement. As a result, the defendant was not protected by the Act and could be prosecuted.

### FEDERAL GOVERNMENT ISSUES SUBPOENA FOR MICHIGAN-HELD MEDICAL MARIJUANA PATIENT RECORDS

This dispute arose when the United States Drug Enforcement Administration issued a subpoena to the Michigan Department of Community Health requesting records of 7 persons who applied for medical marijuana caregiver cards. The Department of

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michigan municipal league  
business alliance program

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Community Health initially opposed the subpoena, citing concerns about whether complying with the subpoena would cause it to violate the Michigan Medical Marijuana Act's confidentiality clauses. The Michigan Attorney General stated he would agree to release the information if a court ordered it to do so and if officials could not be held liable for the release. Several medical marijuana groups are seeking

permission to participate in the matter to oppose the release of the information. The parties presented arguments on February 1, 2011. The case is still pending in the Western District of Michigan, Case No. 1:10-mc-109.

If you have questions, please contact **Ronald Richards Jr.** of the Foster Swift Municipal Team.

## FOCUS: Labor & Employment Corner

### Remember Federal Requirements Before Reinstating Drunk Employees to Perform Safety-Sensitive Job Duties

by: **Michael R. Blum**

Many municipalities employ drivers to perform safety-sensitive functions. What if one of these drivers arrives at work and appears to be under the influence of alcohol or a controlled substance? What can you do? What should you do?

The first step most employers should and do take is to determine whether cause exists under its established policies or a collective bargaining agreement to require a substance test. If cause exists, then the municipality-employer arranges for the employee to take a substance test. If test results confirm that the driver had an excess amount of alcohol or a controlled substance, the employer then determines the appropriate level of discipline based on its established policies, work rules, and the employee's employment record.

After the employee has served whatever penalty has been imposed, some may wonder if the employer is free to reinstate the employee to his or her prior job. The answer depends. If the job involves safety-sensitive functions, the answer is, "No, not yet." Rather, the employer must ensure compliance with federal regulations.

Under federal regulations, an employee who is found to have an alcohol level of 0.02 or greater but less than 0.04 cannot return to work and perform safety-sensitive functions until the start of the driver's next regularly scheduled duty period – but at least 24 hours after the substance screen.

If the driver is found to have an alcohol level of 0.04 or higher or the presence of a controlled substance (except when the use is pursuant to the instructions of a licensed medical practitioner), the driver must meet additional requirements before being reinstated.

1. The driver must obtain an evaluation from a substance abuse professional (SAP).
2. After successful compliance with the SAP's evaluation recommendations, the driver must take a return-to-duty test, which cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and treatment. The employee must have a negative drug test result and an alcohol test with an alcohol concentration of less than 0.02.
3. Only after the employer ensures that these requirements have been met can the driver be allowed to return to his or her prior job and resume performance of safety-sensitive functions.

If you have questions about how to handle labor-related matters, please contact **Michael Blum** of the Foster Swift Municipal Team.

## FOCUS: Bond Counsel Corner

### Possible New Life for Build America Bonds

by: [John M. Kamins](#)

There are two noteworthy developments in February 2011 regarding a possible revival of the federal Build America Bonds (BABs) program, as anticipated in our January 2011 Bond Counsel Corner article, "Updates on Federal Tax Laws Affecting Municipal Bonds." We reported there that efforts failed last year to extend the BABs program beyond the December 31, 2010 sunset date in the authorizing law (the American Recovery and Reinvestment Act of 2009). We further said: "There may be efforts in the new U.S. Congress to resurrect the BABs program in a revised format, but prospects are speculative."

Under the ARRA, state and local governments could issue taxable (not tax-exempt) BABs in 2009 and 2010 and receive federal subsidy payments from the U.S. government equal to 35% of their interest costs on those bonds. New issuances of BABs currently are not allowed in 2011.

What are this month's new developments? *First*, a bill has been introduced in the U. S. House of Representatives to reinstate the BABs program for just two years, reducing the federal subsidy payment rate from 35% to 32% for BABs issued in 2011 and 31% for BABs issued in 2012.

*Second*, President Obama's proposed fiscal 2012 federal budget, issued February 14, 2011, contemplates making

permanent (with no sunset date) a revised BABs program at a 28% federal subsidy payment rate. The President's budget proposal also would enlarge the BABs program to allow BABs to be issued for all purposes for which tax-exempt bonds currently may be issued. Before the Dec. 31, 2010 sunset, BABs could only be issued to finance capital expenditures.

Just as we stated in last month's Bond Counsel Corner, "prospects are speculative" for the revival of BABs - whether pursuant to the new pending House bill (introduced by Gerald Connolly, D-Va.) or as proposed in the President's fiscal 2012 federal budget request. BABs have been opposed by several Republican members of Congress, including the House Ways and Means Committee chairman Dave Camp, of Michigan's 4th Congressional District (including 14 counties - Leelanau, Grand Traverse, Kalkaska, Missaukee, Roscommon, Clare, Osceola, Mecosta, Isabella, Midland, Saginaw, Gratiot, Montcalm and Shiawasee). We will provide you further updates on the prospects for a BABs revival in future Bond Counsel Corners.

If you have questions, please contact [John Kamins](#) or [Janene McIntyre](#) of the Foster Swift Municipal Team.

### Emergency Financial Managers Reform Legislation and Training

by: [John M. Kamins](#)

In his State of the State address January 19th, Governor Rick Snyder called for legislative changes to the statute governing the appointment and powers of emergency financial managers ("EFMs") for financially distressed Michigan local governments and school districts (commonly called "Act 72" or the "Local Government Fiscal Responsibility Act"). He stated that the current Act does not allow intervention and assistance early enough and that clarity is needed regarding the powers of EFMs.

On February 9, 2011, House Bill No. 4214 and four related bills to reform the EFM process were introduced and referred to the Committee on Local, Intergovernmental, and Regional Affairs, which held a hearing on them the next day. State Treasurer Andy Dillon has publicly said that fast action by the Legislature is needed. A final version of the legislation may be enacted into law by the time of our March 2011 *Municipal Law News*. We will provide an update on this

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## FOCUS: Bond Counsel Corner

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pending legislation in our next Bond Counsel Corner.

On February 9 and 10, also, Michigan State University and the Michigan chapter of the Turnaround Management Association hosted a basic training seminar in Lansing for potential EFMs. *The Bond Buyer* newspaper quoted a Michigan Department of Treasury spokesman:

"The training is part of an initiative to further assist local governments and school districts facing financial difficulties by ensuring that individuals are well prepared to handle the difficult challenges they would face as EFMs."

If you have questions, please contact **John Kamins** or **Janene McIntyre** of the Foster Swift Municipal Team.

## Watch for Info on Upcoming Foster Swift Free Seminar

We thank everybody who attended the Foster Swift Municipal Team's "Ask a Lawyer" session at the MTA's January seminar. The turnout was fantastic and great questions were asked. Given the overwhelming popularity of

that session, Foster Swift will be conducting a free seminar in the Spring along similar lines. Look for more details in future editions of Foster Swift's *Municipal Law News*!

If you would like to receive the Municipal Law News by e-mail, or sign up for other Foster Swift publications, visit [fosterswift.com/news-signup.html](http://fosterswift.com/news-signup.html) and complete the 'Newsletters Sign-up' form.

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