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Medical Marijuana Usage May Require Accommodations

Employers are well aware that many states have adopted laws permitting the use of marijuana for medicinal purposes, and sometimes without demonstrating medicinal need. Since these laws were enacted, a variety of cases have been percolating in the courts relating to these statutes, some of which allege claims against employers who have enforced policies relating to drug testing and drug use at work. On July 17, 2017, the Supreme Judicial Court of Massachusetts held in [*Barbuto v. Advantage Sales & Marketing LLC*](#) that an employer who fired a newly hired employee for failing a drug test had violated state law prohibiting disability discrimination, notwithstanding the continuing federal ban on marijuana consumption. This is one of the first cases to hold an employer liable for enforcing its policy to withhold employment from a candidate who tests positive for marijuana use. It follows a decision from May in Rhode Island court, [*Callaghan v. Darlington Fabrics Corp.*](#), with a similar outcome.

In *Advantage Sales & Marketing LLC*, when informed that she would need to take a mandatory drug test as a condition of hire, plaintiff Cristina Barbuto told her hiring manager that she had Crohn's Disease and would test positive because she takes medical marijuana to manage her pain, in accordance with a written certification by her physician. Barbuto stated that she would not use medical marijuana at work, and her supervisor responded that the lawful use of medical marijuana would not be an issue with the company. Soon thereafter, Barbuto took the drug test, tested positive for marijuana, and was then told that she was being discharged because the use of marijuana was prohibited under federal law.

Among other claims, Barbuto alleged that the company violated the Massachusetts statute prohibiting "handicap" discrimination. The company urged dismissal of the case because Barbuto's marijuana use violated federal law and precluded her classification as a "qualified handicapped person." Advantage Sales further argued that requiring it to accommodate

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Barbuto's violation of a federal criminal statute was facially unreasonable, and moreover that she was not singled out for her disability, because all employees were required to pass a drug screening as a condition of employment.

The court rejected the employer's arguments, finding that Barbuto was a "qualified person with a handicap" due to her diagnosis with Crohn's disease, and that the employer was at no risk of federal prosecution simply for refraining from terminating the employee for off-duty, off-premises consumption. The court then held that the employer had failed to engage in the required interactive process with Barbuto, since it rejected her based on the test result without determining if there were other treatment alternatives that would have allowed her to remain compliant with the employer's policy. The court also refused to dismiss Barbuto's claims because the employer would have the burden of showing that, if there were no effective alternative, it would be an undue hardship to the employer to make an exception to its policy to accommodate Barbuto's medical needs.

While the Massachusetts and Rhode Island decisions differ from early decisions out of Washington, Colorado, Oregon and other states, these cases are an important reminder that recent legislation concerning marijuana consumption requires employers to be proactive in carefully and regularly reviewing policies and protocols, including policies on drug testing, substance abuse, and reasonable accommodations, that may be affected by the legislation. Employers who operate in multiple states should be aware that marijuana legislation varies by state, and that some states have had judicial decisions or have cases pending that would affect policies and procedures. In addition, a growing number of states, including New York, impose anti-discrimination and/or accommodation requirements that should be considered as part of an employer's policies and protocols.

Please feel free to contact Tonianne Florentino, or any other attorney at the firm, if you have any questions or would like assistance with the review of your policies and protocols.

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