



Michigan Medical Marijuana Act - Webinar Follow-Up

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PRACTICE AREAS

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On May 18, 2011, Foster Swift's Mike Homier, Laura Garlinghouse, and Ron Richards presented a free webinar on the Michigan Medical Marijuana Act and the issues that Act presents municipalities. The webinar covered the Act's rules, the various regulation options for municipalities, and recent court updates on the many medical marijuana cases out there. The huge turnout of registrants is greatly appreciated. The issues that the Act presents are clearly a challenge for municipalities state-wide. For anyone interested in the webinar presentation, a full audio and video version of the webinar is available at the following link:

www.fosterswift.com/news-events-Michigan-Medical-Marijuana-Act-Municipalities.html

During the webinar, several interesting questions were received – some of which were answered during the webinar and others reluctantly could not be answered due to time constraints. Yet for the benefit of all of our readers, below is one intriguing question that involves the intersection of employer rights and medical marijuana patient rights.

MICHIGAN MEDICAL MARIJUANA ACT Q & A:

QUESTION

We have an EMT who has a medical marijuana card. We did not know this when we hired him. He went to take his practicals at the hospital and they did a test and found out. Somehow it got out in the community and the Township found out. We called him in and point blank asked him if this was true. He did not deny it, but was upset that the HIPPA laws were violated. Should we fire him?

ANSWER

This question was posed during the webinar. Without relevant documents and details (such as whether the employer has a drug use policy), advice on firing the EMT cannot be given. But below is a summary of some **guiding principles**.

1. 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 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. Two key factors in the decision were that the marijuana use was detected as part of a company drug testing policy and that Wal-Mart had consistently enforced that policy. *Casias v Walmart* (W.D. Mich.)
2. Although this sounds like a slam dunk win for private employers, pause before celebrating. First, this is a federal court decision; state courts are not bound to follow it. Second, the ACLU (who represents the employee) is appealing the decision to the Sixth Circuit Court. As Casias's ACLU lawyer, Scott Michelman, noted on NPR's "Michigan Radio," the ACLU will argue that the intent of the statute is to protect medical marijuana users from having to choose "between their job and their medicine." The ACLU's appeal relies, in part, on language in the Act that states that a qualifying patient who has been issued and possesses a registry identification card must not be subject to "arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business...for the medical use of marijuana in accordance with" the Act. That appeal is in its early stages; we have not yet seen the last of the issue but are monitoring this case closely.
3. Second, we would not recommend terminating an employee unless everything else is in order – e.g., the employer has sound employment policies and procedures that have been reviewed by counsel. Other important considerations include whether the employer has a drug use policy and if it has consistently enforced and followed that policy, and whether the employer has a policy for other prescription drugs.
4. So until this issue is actually settled, to avoid being a test case in state court, one might consider forbidding the use and possession of even medical marijuana at work. If an employee's performance is impaired, proceed to discipline simply on the basis of the poor performance. If the employee is in a safety sensitive position, and the employee's performance is impaired, that could provide a reasonable basis for testing, and any disciplinary action as a result of a positive test will be based on the impaired performance in a safety-sensitive position - not simply on the fact that medical marijuana was in the employee's system.

If you have questions regarding this webinar feel free to contact Anne Seuryneck (616.726.2240) of the Foster Swift Municipal Practice Group.