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Municipal Law News

Foster Swift Administrative & Municipal Group

Michigan Medical Marijuana Act - Webinar Follow-Up

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

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1. 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.

2. 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.

3. 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, feel free to contact **Ronald Richards** at **517.371.8154** or **rrichards@fosterswift.com.**

FOCUS: Labor & Employment

GINA Recordkeeping Requirements Are Coming

by: Michael R. Blum

The Genetic Information Nondiscrimination Act of 2008 (GINA) took effect for employers on Nov. 21, 2009. GINA prohibits the use of genetic information in making employment decisions, restricts employers from asking for, requiring, or buying genetic information, and strictly limits the disclosure of genetic information. GINA's enforcement procedures and remedies are identical to those found in Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). But unlike Title VII and the ADA, no record retention requirements currently exist under GINA. That is about to change – and municipalities should take note.

In a notice published in the Federal Register on June 2, 2011, the Equal Employment Opportunity Commission (EEOC) proposed to extend existing recordkeeping requirements under Title VII and the ADA to entities covered by GINA, which includes both private sector and state and local government employers. The EEOC is not attempting to require employers to create any documents that do not otherwise exist. But records that employers make or keep will need to be retained in the same way that Title VII and the ADA require. Consider the following:

- Title VII and the ADA require any personnel or employment record made or kept by an employer to be

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- retained for a period of one year from the date of the making of the record or the personnel action involved, whichever is later. This includes requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship.

- In the case of involuntary termination of an employee, the personnel records of the individual terminated must be kept for one year from the date of termination. Please note that although federal law only requires a one-year retention period for these records, the statute of limitations under Michigan's employment laws is longer. So it is prudent to keep personnel records for at least 6 years after termination, unless a charge of discrimination or lawsuit has been filed.

- Where a charge of discrimination or lawsuit has been filed, the employer must preserve all personnel records relevant to the charge or action until the case is over. A "litigation hold" must be enacted to stop the destruction of all relevant documents, including e-mails, so they are not destroyed under the employer's normal document destruction schedules or policies. Documents considered to be relevant are not limited to personnel records relating to the aggrieved person, but could also include personnel records for all employees holding positions similar to that held or sought by the aggrieved person. Similarly, the employer must preserve application forms or test papers completed by both an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

If you have any questions about GINA or municipal recordkeeping requirements, please contact **Michael Blum** at **248.785.4722** or **mblum@fosterswift.com**.

Attorney General Says a Municipality May Not Refuse Utility Services to Tax-Foreclosed Property Based on Unpaid Charges

by: Ronald D. Richards Jr.

A municipality may not condition providing utility services to tax-foreclosed property by demanding that a buyer of tax-foreclosed property pay delinquent utility-service charges that the former owners of the foreclosed property incurred. *Attorney General Opinion*, No. 7258 (5/6/11). The Attorney General issued that ruling in early May 2011. Here is the Attorney General's reasoning.

Under the General Property Tax Act, a judgment of foreclosure extinguishes all liens and interests related to unpaid utility-service charges against the property. A tax foreclosure cancels any liens against property for water or sewage services imposed under the Municipal Water Liens Act (1939 Public Act 178) for these reasons:

1. Section 5 of Public Act 178 expressly provides that liens under the Act are lower priority from tax liens on the property;
2. MCL 211.78k(5) cancels the liens against foreclosed property; and
3. MCL 211.78m(13) cancels any subsequent lien due on property that may arise during the year of the foreclosure of the property.

So although § 6 of Public Act 178 authorizes a municipality to enforce its liens by discontinuing service, once the tax liens are foreclosed no liens remain against the property that can be enforced by refusing to provide service. As such, Public Act 178 does not allow a municipality to refuse utility services to tax foreclosed property based on unpaid charges incurred by former owners.

However, the Attorney General added, a municipality may recover those charges by including the delinquent charges in the cost of the property at the time it is offered for sale under the General Property Tax Act, or by instituting other lawful action against the former owners.

If you have questions, feel free to contact **Ronald Richards** at **517.371.8154** or **rrichards@fosterswift.com.**

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Court Update - State Must Disclose Medical Marijuana Records to Feds

by: Ronald D. Richards Jr.

On June 4, 2011, a federal district court ruled that the Michigan Department of Community Health must give over documents that the federal drug enforcement agency asked for involving 7 persons who applied for medical marijuana caregiver and patient cards. The Department of Community Health had opposed the disclosure, citing the Michigan Medical Marijuana Act's confidentiality rules. But the judge ruled that the confidentiality rules in the Michigan Act do not prevent disclosure since (a) the Michigan Act did not give any privacy rights to those who violate federal laws; and (b) the items sought were intended to be shown to police even under the Michigan Act. The judge explained: "the use of marijuana remains a federal felony. The new Michigan statute makes no claim, of course, that the federal government cannot continue to enforce federal law, or that the Michigan statute overrides federal law." So the judge concluded that the Michigan Act does not — and cannot — present any obstacles to the federal government enforcing federal drug laws. The judge's ruling required the Department to disclose the patient and caregiver registration cards for the seven individuals at issue, and associated applications. (*USA v Dep't of Community Health*, WD Mich, 1:10-mc-109).

This decision suggests that at least federal courts — when confronted with arguments as to whether the federal drug laws or the Michigan Act is superior — may be inclined to side with the federal laws. There are several other court cases still pending that involve interpretations of the Michigan Act. We are monitoring them closely.

If you have questions about the pending cases or the Act, feel free to contact **Ronald Richards** at **517.371.8154** or **rrichards@fosterswift.com.**

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