

Implications for Public Employers – Regulation and Taxation of the Marijuana Act

We previously advised of several significant implications for public employers resulting from the passage of Question 4 at the November 8, 2016 State election, approving enactment of The Regulation and Taxation of Marijuana Act (“Act”), codified, in part, as G.L. c.94G. For public employers, the relevant portion of the statute, G.L. c.94G, §2(e), provides as follows:

This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.

Accordingly, public employers may continue to prohibit their employees from using or possessing marijuana in the workplace or in public buildings and from working while impaired by marijuana. Moreover, marijuana use is still prohibited under Federal Law. To address the legalization in Massachusetts of personal use of marijuana, however, drug testing and drug free workplace policies may need to be updated or clarified. Many municipal policies were drafted to prohibit a broad category of substances, i.e., “controlled or illegal substances”. With this change in the law, we recommend updating these policies to expressly prohibit the use of, or impairment by, “marijuana” while working or on municipal premises. Attached please find a sample Drug Free Workplace Policy that accounts for this change.

Despite legislative changes in Massachusetts, current federal prohibitions continue to be in full force and effect and applicable to use of marijuana by employees who possess firearms, such as police officers, and those required to hold a Commercial Driver’s License. We are aware that many police chiefs issued a general reminder to all law enforcement personnel that marijuana is still a controlled substance for purposes of federal law and that use or possession of marijuana is still prohibited. As set forth above, drug testing policies for these groups of employees should similarly be updated by expressly listing “marijuana” as a prohibited substance.

For other employees, including most non-safety sensitive employees, the extent of a public employer’s ability to regulate off-duty use of marijuana that does not impair an employee’s job performance remains unsettled. As a preliminary matter, a municipality will need to decide whether it wishes to regulate off-duty use of marijuana by other employees. There have not been any cases decided yet in Massachusetts on this issue. In other states that have legalized marijuana, there is little precedent, although in the few decided cases, it appears that the courts did recognize an employer’s right to regulate off-duty employee use of marijuana because marijuana remains a controlled substance under federal Law. Notwithstanding, this area of law is in its infancy and is still developing. In general, the broader the policy and the less it is directly related to work safety issues, the more likely it is to be strictly scrutinized by a court and potentially struck down.

If you are considering adopting any new or amended Drug and Alcohol related workplace policy or have any further questions, please contact Attorney Darren R. Klein (dklein@k-plaw.com) or any other member of our Labor and Employment Practice Group at 617.556.0007.

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TOWN OF ACME DRUG AND ALCOHOL-FREE WORKPLACE POLICY

Note: Towns that receive federal funds are required to adopt this policy.

I. PURPOSE

This Policy outlines prohibited workplace conduct with respect to controlled substances and alcohol. This Policy complies with the Town's obligations under the Federal Drug-Free Workplace Act, 41 U.S.C. § 8101, et seq.

II. APPLICATION

This Policy applies to all employees of the Town. Employees whose employment is governed by a collective bargaining agreement are subject only to those provisions of this Policy not specifically regulated by law or agreement.

III. POLICY

It is the Policy of the Town to provide employees with a working environment that is free of the problems associated with the use and abuse of alcohol and controlled substances. The use of controlled substances is inconsistent with the behavior expected of employees and subjects the Town to unacceptable risk of workplace accidents or other failures that would undermine the Town's ability to operate effectively and efficiently.

IV. PROCEDURES

- A. The non-prescriptive use, sale, possession, distribution, dispensation, manufacture, or transfer of controlled substances, marijuana or alcohol, including on-the-job consumption on Town property, or at any other worksite where employees may be assigned, or elsewhere during work hours, is strictly prohibited. Although certain uses of marijuana have been decriminalized in the Commonwealth of Massachusetts, the use of marijuana on Town property or any other worksite where employees may be assigned remains strictly prohibited.
- B. Further prohibited is the use, sale, possession, distribution, dispensation, manufacture, or transfer of controlled substances, marijuana, or alcohol on non-working time to the extent that such use impairs an employee's ability to perform his/her job or where such use, sale, possession, distribution, manufacture or transfer affects the reputation of the Town to the general public or otherwise threatens its integrity.

- C. Employees who are convicted of controlled substance-related violations under state or federal law in the workplace, including alcohol or marijuana related violations, or who plead guilty or *nolo contendere* to such charges, must inform their department head or appointing authority within five (5) days of such conviction or plea. Department heads or appointing authorities shall immediately notify the Town Administrator.
- D. Employees who are convicted or who plead guilty or *nolo contendere* to such drug-related violations, or are found to have consumed or to be impaired by controlled substances, marijuana or alcohol while on-duty, may be required to successfully complete a drug abuse or similar program as a condition of continued employment or re-employment with the Town.
- E. All employees must sign a statement acknowledging that they have been informed of the rules and requirements of the Drug-Free Workplace Act.

V. EMPLOYEE ASSISTANCE PROGRAM

The Town recognizes drug and alcohol dependency as an illness and a major public health problem. The Town's objective is to prevent drug-related offenses prior to their occurrence. Employees who wish to obtain help in dealing with such problems are encouraged to contact the Town Administrator or their healthcare provider for assistance. Conscientious efforts to seek such help will not jeopardize an employee's job, and will not be noted in any personnel record.

VI. SANCTIONS

Violations of any and all provisions of this Policy may result in disciplinary action, up to and including termination from employment.

DRUG AND ALCOHOL-FREE WORKPLACE POLICY

This acknowledges that I have received and reviewed the Town of ACME's Drug and Alcohol-Free Workplace Policy ("Policy"). By signing this form, I agree to abide by the Policy and any Guidelines promulgated thereunder, and I agree to review periodically any changes or modifications.

I understand that the unlawful manufacture, distribution, dispensation, possession, impairment or use of a controlled substance, marijuana, or alcohol is prohibited on any property of the Town, or while performing official duties for the Town, and violation of this Policy can subject me to disciplinary action, up to and including termination. I further understand that as a condition of employment, I must abide by the terms of this Policy and will notify my employer of any criminal drug, marijuana, or alcohol related conviction for a violation occurring in the workplace no later than five days after such conviction.

I recognize that the law and associated Policy regarding drugs and alcohol in the workplace are continually evolving. Therefore, I understand that my regular review of this Policy, as it may be amended, is required.

Print Name: _____

Signature: _____

Date: _____

To be included in employee's personnel file.