

# CLIENT ADVISOR



## Background Checks for School Employees

## Clearing The Smoke Around The Medical Marijuana Act And The Workplace

The Massachusetts Medical Marijuana Act (MMA), which became effective January 1, 2013, permits qualifying patients with defined medical conditions to obtain and use marijuana for medicinal purposes. The MMA further eliminates civil and criminal penalties for marijuana use by qualifying patients. The Department of Public Health published regulations (effective May 24, 2013), to guide the use and accessibility of medical marijuana for qualifying users; however, only 105 CMR 725.650(A) & (B)(4) address the Act's impact on employer obligations and employee rights.

Several state courts have upheld an employer's right to continue drug testing and to take adverse employment action against applicants or employees who test positive for marijuana, despite their state's medical marijuana law. While Massachusetts courts have not yet interpreted the state's new law, decisions in other state courts may shed light on how Massachusetts courts will decide certain employment-related questions.

### Must Employers Accommodate Their Employees Who Use Medical Marijuana?

No. Employers are not required to allow employees to possess or use marijuana, even if it is used to treat a disability, as addressed in the regulations. Further,

the Americans with Disabilities Act does not protect medical marijuana users, or provide them with a right to an accommodation, because marijuana is still considered illegal under federal law.

### Can Employers Deny Employment to Applicants, or Discharge, or Discipline Employees Who Use Medical Marijuana?

Based on federal law and other state's case law, employers may continue to include marijuana in their drug testing, and deny applicants, or discipline, or discharge employees who test positive for marijuana.

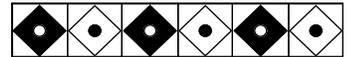
### How Do Employers Reconcile The New State Law With Federal Law Obligations?

Federal law preempts a state's medical marijuana law. Employers subject to federal laws must continue to comply with federal obligations. For instance, police departments must comply with the federal law prohibiting possession of a firearm or ammunition by an individual who uses marijuana, regardless of whether it is medicinal.

Employers should revise existing policies to prohibit the use of marijuana, including for medicinal purposes. Employers should also place employees on notice that testing positive for marijuana may subject employees to disciplinary action.

Effective September 1, 2013, new educators and other school employees in Massachusetts are required to undergo national background checks and fingerprinting; however, the state's system to conduct these checks is not expected to be in place until late fall.

There is currently legislation pending which would amend the statute to provide for the conditional hire of school employees, subject to the employee's successful completion of a national background check. Clients are encouraged to consult counsel to discuss the options for rescinding a conditional offer of employment if the background check reveals a criminal record.



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## Bullying Prevention Law Expanded

As part of the Fiscal Year 2014 Budget signed on July 12, 2013, Governor Deval Patrick approved an amendment to the state's Bullying Prevention Law (M.G.L. c. 71, §37O). The amendment extends the original Bullying Prevention Law to include bullying of students by school staff. Originally, the Bullying Law only applied to student-on-student bullying.

The amendments expand the definitions of "bullying" and "perpetrator" to include school staff. "School staff" is defined to encompass "an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional." The law also amends the first paragraph of subsection (d) to state that a bullying prevention and intervention plan shall apply not only to students, but to members of the school staff as well.

In light of these changes, districts should revise anti-bullying policies, handbook statements and bullying prevention and intervention plans. In addition, staff should be advised of these changes. Contact your CLP attorney for more information and advice.

