

MASSACHUSETTS EMPLOYMENT LAW



Medical Marijuana Law – Off-duty Use



Massachusetts' highest court has ruled that terminating an employee for off-duty medical marijuana use may violate the employee's rights under the state's disability discrimination and medical marijuana laws. The Massachusetts Supreme Judicial Court issued its ruling in [Barbuto v. Advantage Sales and Marketing](#) on July 17, 2017. The decision differs from those of other state courts, which have held that employers can have zero-tolerance drug use policies. The decision does **not** require employers to always permit off-duty medical marijuana use. Rather, employers may need to allow it as an accommodation in certain circumstances.

STATE RESOURCES

Massachusetts
Department of Labor
Standards [website](#)

Massachusetts
Department of Public
Health [website](#)

BARBUTO V. ADVANTAGE SALES AND MARKETING

In its decision in [Barbuto v. Advantage Sales and Marketing](#), the Massachusetts Supreme Judicial Court (MSJ Court) ruled that the state's disability discrimination law may require an employer to waive its employee drug-use policy as a reasonable accommodation for an employee who uses medical marijuana outside of work.

The case began in 2014, when Cristina Barbuto accepted an entry-level position with Advantage Sales and Marketing (ASM). Before submitting a urine sample to comply with ASM's mandatory drug testing policy, Barbuto informed an ASM supervisor that she would test positive for marijuana because her doctor had prescribed it to treat her Crohn's disease and irritable bowel syndrome. The supervisor indicated that this was not a problem, and Barbuto began working for the company a week later.

After she completed her first shift, Barbuto was fired because her drug test came back positive for marijuana. Barbuto filed a lawsuit against ASM, claiming that the termination violated her rights under both the Massachusetts Medical Marijuana Act and the Massachusetts Anti-discrimination Act. A state Superior Court dismissed her claims, resulting in Barbuto's appeal to the MSJ Court.

MASSACHUSETTS MEDICAL MARIJUANA ACT (MMMA)

The MMMA, enacted in 2012, protects individuals who have been diagnosed with a debilitating medical condition from prosecution and civil penalties for using doctor-prescribed marijuana.

Although the MMMA does **not** require employers to accommodate "any **on-site** medical use of marijuana in any place of employment," the law is silent about **off-site** use.

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MASSACHUSETTS ANTI-DISCRIMINATION ACT (MADA)

The MADA makes it illegal for employers to discriminate against an employee or applicant based on his or her disability, as long as the individual is capable, with reasonable accommodation, of performing the essential functions of a position. The sole exception is where an employer can demonstrate that the accommodation required for an individual's disability would impose an undue hardship to its business.

Under the MADA, an employee may sue his or her employer for unlawful disability discrimination, and courts may award various remedies, such as job reinstatement and back pay. Courts may also impose civil penalties on employers that violate MADA.

MSJ COURT RULING

The main issue in *Barbuto* was whether Barbuto had the right to sue ASM under the MADA. ASM argued, and a lower court had agreed, that because all marijuana use is a crime under federal law, the only accommodation Barbuto sought under the MADA—the continued use of medical marijuana—was “facially unreasonable.”

Reversing the lower court, the MSJ Court noted that despite federal law, the MMMA makes a qualifying patient's use of medically prescribed marijuana “as lawful as the use and possession of any other prescribed medication” in Massachusetts. In addition, the MMMA's provision allowing employers to prohibit **on-site** medical marijuana use “implicitly recognizes” that **off-site** use “might be” a permissible accommodation under MADA. For these reasons, along with the fact that federal law only puts Barbuto, not ASM, at risk of prosecution for marijuana possession, the court held that **federal law does not automatically make medical marijuana use an unreasonable accommodation under the MADA.**

Under the MADA, the MSJ Court held, ASM had a duty to engage in an interactive process with Barbuto to determine whether any equally effective medical alternatives were available to accommodate her disability. If no equally effective alternative exists, the MADA requires ASM to either prove that Barbuto's marijuana use would cause an undue hardship to its business or make an exception to its drug policy as an accommodation.

Thus, the decision does not necessarily mean that Barbuto will ultimately prevail in her disability discrimination claim. The MSJ Court remanded the case back to the lower court, where ASM had the opportunity to prove that the requested accommodation was unreasonable.

IMPACT ON EMPLOYERS

The MSJ Court's decision means that employers in Massachusetts may not enforce a zero-tolerance marijuana policy against an employee who uses doctor-prescribed medical marijuana for a debilitating medical condition. Under the MADA, if an employee who tests positive for marijuana is a “qualifying patient” under the MMMA, his or her employer must engage in an interactive process with the employee to determine whether there are any medical alternatives to marijuana use that would be equally effective to accommodate the employee's disability and:

- If an equally effective medical alternative exists, allow it as an accommodation; or
- If no equally effective medical alternative exists, either:
 - Allow the employee to use medical marijuana as an accommodation; or
 - Prove that the employee's marijuana use would cause an undue hardship to its business.