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Municipal Law News

November 2014

GOING TO POT: HOW MEDICAL MARIJUANA IMPACTS EMPLOYER DRUG POLICIES

-Karl W. Butterer

On November 4, 2008, Michigan voters approved the use of marijuana for medical purposes. Since its passage, the Michigan Medical Marihuana Act (MMMA) has prompted more questions than provided answers. Currently, Michigan law permits marijuana use and distribution under specific, limited circumstances. Under federal law, however, marijuana remains classified as a Schedule 1 controlled substance, and its use and sale is strictly prohibited. This inconsistency has led to great uncertainty about the limits and availability of marijuana use in Michigan. One of the greatest uncertainties is how the MMMA impacts employer drug policies.

PROHIBITIONS ON USING MARIJUANA / BEING UNDER THE INFLUENCE IN THE WORKPLACE.

The MMMA states that "nothing in this act shall be construed to require an employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana." Therefore, employers - including municipal employers - are certainly not required to allow the use of marijuana at the workplace, or to permit employees to work while "high."

USE OUTSIDE OF THE WORKPLACE.

Many employers, including municipalities, enforce zero tolerance drug policies and conduct drug testing which may detect the use of marijuana outside of the workplace. Courts around the country seem to be upholding private employers' rights to enforce zero tolerance drug policies, notwithstanding statutes legalizing medical marijuana use. A high profile 2012 ruling by the U.S. Court of Appeals for the Sixth Circuit, *Casias v. Wal-Mart Stores Inc.*, upheld a private employer's right to terminate an employee who was registered for medical marijuana use for failing a drug test.

In *Casias*, the employee - who had a state issued medical marijuana registry card - was fired by Wal-Mart after he tested positive for marijuana. The employee asserted that he used marijuana after work, and sued claiming that the firing violated the MMMA. The U.S. District Court for the Western District of Michigan dismissed the employee's case and the Sixth Circuit affirmed. The MMMA prohibits "disciplinary action by a business or occupational or professional licensing board or bureau" against a "qualifying patient." But the Sixth Circuit declined to read the term "business" independently, and instead held that it modifies "licensing board or bureau." The Court held that the MMMA, therefore, does not refer to private employment.

PRIVATE VERSUS PUBLIC EMPLOYMENT.

The *Casias* Court stated: "The language, structure, and purpose of the MMMA all signify that the statute was not meant to govern private employment decisions . . ."

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(Emphasis added). The Court went on to state that the MMMA gives people limited protection from "adverse state action in carefully limited medical marijuana decisions." (Emphasis added). Which kind of "state actions" public employees are protected against remains unclear. For example, may a public employer rely upon the *Casias* decision to terminate an employee who lawfully uses medical marijuana under the MMMA outside of work? While the federal disability laws do not require an employer to accommodate medical marijuana use, because marijuana remains illegal under federal law, it is unclear if public employers must accommodate medical marijuana use under state disability laws. For example, would a public employer be taking unlawful "adverse state action" against a public employee by refusing to accommodate her lawful use of medical marijuana under state law?

We will continue to keep you updated as Michigan courts interpret the MMMA as it relates to employees. In the meantime, municipal employers should consult their attorneys when issues of medical marijuana use arise.

BEWARE OF FCC'S NEW RULES & DEADLINES ON HANDLING TELECOMMUNICATIONS EQUIPMENT

- Ronald D. Richards, Jr.

Our newsletters have often updated you on the changing landscape and new laws that impact how a municipality may handle a request to install wireless telecommunications equipment and facilities – such as a cell tower and related equipment. Our May 2013 newsletter noted that the FCC was going to try to clarify various aspects of the two central laws that govern municipalities' handling of those requests: (1) Sec. 6409(a) of the federal Middle Class Tax Relief and Job Creation Act, 47 USC 1455 ("Section 6409(a)"); and (2) Section 332(c)(7) of the federal Telecommunications Act, 47 USC 332 ("Section 332").

It took almost two years, over 100 pages, nearly 800 footnotes, and almost 300 paragraphs, but the FCC finally issued its "clarifying" Order. On many of the items at issue, the FCC agreed with the wireless industry's proposals – over the objections of municipality groups. The FCC claims its new rules will promote deploying wireless infrastructure, which supports all wireless communications. We cannot summarize here all aspects of the FCC's new Order. But we nevertheless summarize many of its highlights below because you will need to know and follow them to avoid pitfalls in handling these requests.

First, Section 6409(a) significantly limits a municipality's power to review or deny requests relating to modifying an existing wireless tower or replacing existing equipment on a tower:

> *"a [municipality] may not deny and shall approve any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."*

Section 6409(a) defines an "eligible facilities request" as any request to modify an existing cell tower or base station that involves collocating new transmission

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equipment; removing transmission equipment; or replacing transmission equipment. But it does not define several other terms in Section 6409(a).

The FCC's October 2014 Order "clarified" parts of Section 6409(a) as follows:

- The FCC clarified the meanings of several terms in 6409(a), including "wireless tower or base station" and "substantially change the physical dimensions." It also chimed in on whether the key terms in Section 6409(a) allow an owner of a legal, non-conforming structure to expand it under 6409(a).
- It imposed a strict 60-day deadline to act on requests submitted under 6409(a). [Note that this is shorter than the 90-day deadline for municipalities to act on requests submitted under Section 332(c) that the FCC separately and previously imposed.]
- It set a "deemed granted" remedy if a municipality fails to act on a Section 6409(a) request within the 60-day deadline. So, a municipality that misses the 60-day deadline to act under 6409(a) is deemed to have granted the request.
- It identifies the situations in which 6409(a) applies to municipalities – and when it does not.

Next, the FCC turned to Section 332(c)(7), which speaks to municipal zoning authority over "personal wireless service facilities." Section 332(c)(7) has three key aspects:

1. Municipal regulation of the placing, constructing, and modifying of personal wireless service facilities must not "unreasonably discriminate among providers of functionally equivalent services."
2. A municipality's siting regulation must not "prohibit or have the effect of prohibiting the provision of personal wireless services."
3. A municipality must act on "any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request." [A 2009 FCC Order established that a presumptively "reasonable period of time" per this clause is 90 days for collocation applications, and 150 days for applications other than collocation applications.]

The FCC's October 2014 "clarifying" comments on Section 332 are as follows:

- Section 332's shot-clock to decide a siting application under Section 332 starts running from the date the application is first submitted. Municipalities that think that the clock does not start until it declares the application complete are mistaken.
- A municipality that claims an application under Section 332 is incomplete must be specific – pointing to a specific section of the law, ordinance, or application instruction that requires the missing information to be submitted.
- A municipality may not avoid Section 332's shot-clock by enacting a moratorium. Section 332's shot-clock runs regardless of whether a moratorium is adopted.
- It stated that to the extent distributed antenna systems (DAS) or small-cell facilities are or will be used to provide personal wireless services, their siting applications are also subject to the same presumptively reasonable time frames that apply to applications related to other personal wireless service facilities.

The FCC opted not to adopt new rules on whether a municipal ordinance that establishes preferences for locating wireless facilities on municipal property violates Section 332(c)(7)(B)(i)(I).

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Finally, the FCC Order identifies the time when its newly-adopted rules take effect (a set number of days after the rules are published in the Federal Register). To date, that publication has not yet happened. But municipalities would do well to expect that those rules will be published soon, which would make them effective potentially as soon as January 2015.

With the playing field tilted in favor of the wireless industry perhaps now more than ever, and with the people's ever-growing push to surf the net on cell phones and the expansion of cellular services and wireless broadband Internet services, municipalities can expect to see an uptick in wireless siting applications. Navigating all the relevant rules and timeframes can be challenging. But a municipality that is aware of those rules and time frames will be well-positioned to properly resolve those applications and, hopefully, stay out of court.

Please contact Ron Richards at 517.371.8154 or at rrichards@fosterswift.com with any questions about how to handle a telecommunications request.

AT THE PODIUM

Anne Seurynck and **Mike Homier** will present this year at the MTA Conference in Grand Rapids January 29, 2015. Anne will present on Library Law and Mike will discuss Special Assessments. Are you planning on attending? Register Here: www.michigantownships.org/conference.asp

Don't forget to join us on Thursday, January 29 for the Michigan Township Association's themed dinner party. We are sponsoring the Country & Western room.

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