



**DEPARTMENT OF UNEMPLOYMENT ASSISTANCE
UI POLICY & PERFORMANCE
INTEROFFICE MEMORANDUM**

DATE: September 18, 2015

RESCISSION(s): None

REFERENCE NO.: UIPP 2015.08

TO: All DUA Managers, Career Center Field Operations Directors, Job Service Representatives, Compliance Officers, Review Examiners, Call Center Staff and Senior Staff Directors

FROM: Jennifer Lavin, Director, UI Policy & Performance

SUBJECT: Adjudication of Separations Caused by Possession of Less than One Ounce of Marijuana

1. PURPOSE.

To provide guidance on the distinction between discharge for testing positive for less than an ounce of marijuana and discharge for misconduct for using marijuana in the workplace in deliberate disregard of the employing unit's interest.

2. REFERENCES.

- G. L. c. 151A, § 25(e)(2);
- G.L. c. 94C, §32L

3. BACKGROUND.

As a result of the Massachusetts voters' approval of c. 387 of the Acts of 2008 in the November 4, 2008 state election, the Legislature enacted G.L. c. 94C, §32L which provides, in part, as follows:

Section 32L. Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense...

Except as specifically provided in "An Act Establishing A Sensible State Marihuana Policy," neither the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. By way of illustration rather than limitation, possession of one ounce or less of

marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance *including unemployment benefits...*

As used herein, “possession of one ounce or less of marihuana” includes possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body. Nothing contained herein shall be construed to repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marihuana...

If a claimant was discharged for possession of an ounce or less of marijuana at work (including possession in the sense of having tested positive¹) **and** the employer does not have an explicit, uniformly enforced policy prohibiting possession of marijuana at work, **and** the employer did not establish that the claimant used the marijuana at work, then the claimant should not be disqualified. This is because G. L. c. 94C, § 32L decriminalized possession of one ounce or less of marijuana and specifically states that “possession of one ounce or less of marihuana shall not provide a basis to deny an offender ... any form of public financial assistance including unemployment benefits.”

If the employer did have a reasonable and uniformly enforced rule prohibiting the possession of any amount of marijuana on the employer’s premises, and the employer establishes that the claimant was discharged for using marijuana (an ounce or less) in the workplace, then the claimant would be disqualified on the basis of the rule violation, not on the basis of possessing an ounce or less of marijuana.

Note: Possession of more than an ounce of marijuana remains a crime, so if the claimant is found to be in possession of **more than an ounce of marijuana** in the workplace, the claimant will be disqualified for a rule or policy violation. In the absence of a rule or policy, the claimant will be disqualified for deliberate misconduct in willful disregard of the employing unit’s interest because possession of more than one ounce of marijuana is against the law.

¹ The law defines “possession of one ounce or less of marihuana” to include “possession of one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body.” G. L. c. 94C, § 32L. In other words, possession includes having marijuana or its metabolites in one’s system, which would cause a positive drug test. Since G. L. c. 94C, § 32L says “possession of one ounce or less of marihuana shall not provide a basis to deny ... unemployment benefits” we cannot disqualify claimants based solely on a drug test that is positive for marijuana.

The decriminalization law did not “repeal or modify existing laws, ordinances or bylaws, regulations, personnel practices or policies concerning the operation of motor vehicles or other actions taken while under the influence of marijuana” so if an employer establishes that the claimant was discharged for violating a rule prohibiting driving, or some other action, while under the influence, then the claimant will be disqualified.

A drug test that is positive for marijuana is not enough, by itself, to establish that a claimant used or was under the influence of marijuana at work, because an individual can test positive for marijuana days, or even weeks, after last having used it. Although an employer may choose to discharge a claimant solely on the basis of having tested positive for marijuana, a claimant cannot be disqualified from receiving UI benefits solely on the basis of having tested positive for marijuana, because G.L. c. 94C, § 32L specifically prohibits it. A drug test that is positive for marijuana, *combined* with substantial and credible evidence that the claimant used marijuana while at work, would provide a basis for disqualification. If the claimant tested positive for marijuana as a result of a post-accident drug test, **and** the employer establishes the claimant caused the accident, **and** the employer has a uniformly enforced rule or policy prohibiting the operation of machinery while under the influence of drugs or alcohol, the claimant will be disqualified unless the fact-finder is persuaded by substantial and credible evidence of an alternative explanation for the accident, or that there was no connection between the positive drug test and the accident.

Example 1:

While operating a forklift in the employer’s warehouse, the claimant dropped 1500 lbs. of materials that were being moved from the loading dock and caused considerable damage to the materials being moved as well as the shelving it was being moved to. The employer’s policy states all employees involved in an accident at work must submit to a post-accident drug test. The claimant tests positive for marijuana and the employer discharges the claimant for violation of a company rule prohibiting the operation of machinery while under the influence of drugs or alcohol. In this case the claimant would be found ineligible for benefits, unless the claimant provided substantial and credible evidence of an alternate explanation for the accident and the fact finder was persuaded that there was no connection between the positive drug test and the accident.

Example 2:

The claimant worked for the employer, a landscaping company, as a member of a three-person work crew. One day, the supervisor visited the crew at a worksite and found them sharing a “joint” during their lunch break and he discharged all three. The employer has a policy that prohibits the use of drugs or alcohol on the job. The claimant will be disqualified because he was using marijuana at a worksite. Although the claimant was on break at the time, he used marijuana under circumstances where he knew or reasonably should have known that he was in violation of the employer’s company policy.

Example 3:

The employer had a reasonable and uniformly enforced policy against using or possessing marijuana at work. While driving the company van, the claimant was rear-ended by another driver, and was subject to a post-accident drug test. The claimant tested positive for marijuana. The claimant admitted having smoked marijuana several weeks earlier at a party and insisted that he had not used marijuana since that time. The employer did not present evidence to show that the claimant was impaired by marijuana at the time of the accident, or, apparently, at any other time while at work. The claimant is not subject to disqualification under § 25(e) (2) *because the claimant’s positive drug test result, by itself, does not establish that the policy was violated.*

Example 4:

The claimant worked as a commercial truck driver which required a commercial driver’s license that is subject to regulation by the Department of Transportation. If the claimant tests positive for marijuana in the course of employment and the Department of Transportation suspends the claimant’s CDL which results in the claimant losing her job with her employer, the claimant will be subject to disqualification under §25(e)(1) because she lost the ability to perform the essential functions of the job.

A discharge due to use or possession of any other illegal drug is different than a discharge due to possession of an ounce or less of marijuana, even in the case of addiction. This is because the use of an illegal drug can never be legal, and addiction to

an illegal drug, unlike alcoholism, can never be a mitigating state-of-mind factor under § 25(e) (2).

4. ACTION.

As in all discharge cases, the burden is on the employer to establish by substantial and credible evidence that, among other things, the claimant actually engaged in the conduct that caused the discharge. If the claimant denies using marijuana at work, to determine whether the employer established that the claimant did engage in the disqualifying conduct, the fact-finder may consider:

- Did someone see the claimant using marijuana? Where? When? What exactly did they see?
- Did someone detect the odor of marijuana on the claimant, or in an area that the claimant had recently visited?
- Did the claimant show signs of being under the influence of marijuana at work? (Short-term effects of using marijuana include: sleepiness; difficulty keeping track of time; impaired or reduced short-term memory; reduced ability to perform tasks requiring concentration and coordination, such as driving a car; increased heart rate; bloodshot eyes; dry mouth and throat; decreased social inhibitions; paranoia; hallucinations.³)
- Did the claimant's job performance or judgment change?
- Did the claimant provide a credible alternate explanation?

Just like any other relevant fact that is disputed by the parties, the adjudicator must look at all of the information in the record and decide which party's assertion is more likely accurate.

5. QUESTIONS.

If you have any questions, please contact the UI Policy & Performance Department at (617) 626-6422.

³ Possible short-term health effects of marijuana use, at <https://www.ncsacw.samhsa.gov/files/TrainingPackage/MOD2/PhysicalandPsychEffectsSubstanceUse.pdf> (last visited 7/28/2015)