

Colorado High Court: Workplace Drug Policies Apply to Medical Marijuana Users

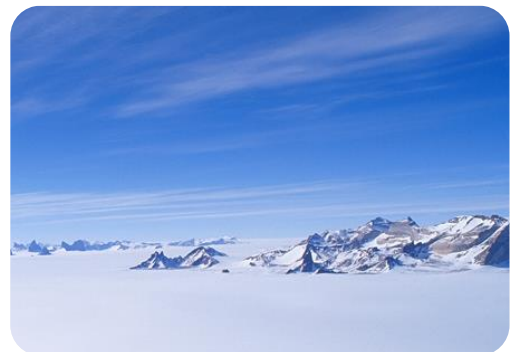
In a much-anticipated ruling, the Colorado Supreme Court upheld an employer's right to establish and enforce a zero tolerance drug policy even though the state has decriminalized both medical and recreational marijuana use. The court concluded that the state law barring the discharge of an employee for "lawful" off-duty conduct does not protect employees who use marijuana because its use remains prohibited by federal law. Employers with operations in Colorado will want to review their drug and discipline/discharge policies in light of this decision.

Background

Since California first legalized the medical use of marijuana in 1996, 22 other states and the District of Columbia have decriminalized it. Despite growing acceptance at the state level, marijuana remains classified as a Schedule I substance under the federal Controlled Substances Act (CSA) — considered the most dangerous types of drugs with a high potential for abuse and severe dependency and no accepted medical use. Because marijuana possession, distribution and use remain illegal under federal law, employers in nearly half the country face ongoing challenges navigating conflicting state and federal drug laws. (See our [June 30, 2014 For Your Information.](#))

In 2000, Colorado voters passed Amendment 20 to the state's constitution (now [Article XVIII, Section 14](#)) that effectively legalized medical marijuana for patients and their primary caregivers, but did not require employers to accommodate its use in the workplace. In 2012, Colorado voters passed [Amendment 64](#), legalizing the recreational use of marijuana under state law.

Like some other states (including New York and California), Colorado has a lawful off-duty activities statute ([C.R.S. § 24-34-402.5](#)). Enacted in 1990 to protect smokers from employment discrimination, the law now enjoys a broader application. As part of the Colorado Civil Rights Act, it generally prohibits employers from disciplining or discharging employees for engaging in "lawful" conduct — including alcohol and tobacco use — away from the employer's premises during nonworking hours. Notably, the statute does not define "lawful."



Even though marijuana has become more accessible over the past few years, courts are just beginning to address many of the workplace issues that surround its use. Rulings in states like California have recognized a narrow exception from state criminal — but not employment — laws for medical users. While most of the states that have legalized medical marijuana do not provide employment protections for its use, a handful provide some protection based on an employee's status as a state-authorized user.

Colorado Courts Weigh In

Dan Coats is a quadriplegic licensed by Colorado to use medical marijuana, which he consumes at home. In 2010, Coats failed a random drug test by his employer, testing positive for THC (marijuana's active ingredient). Dish Network fired him for violating its zero tolerance drug policy. Coats sued for wrongful termination, claiming state-licensed medical marijuana use is "lawful activity" under Colorado's lawful activities statute.

Compliance With Federal Drug Laws

At the federal level, employers must comply with a variety of laws including the CSA, Drug Free Workplace Act of 1988 (DFWA), and Department of Transportation (DOT) guidelines, where applicable.

The trial court dismissed the case, concluding that the Medical Marijuana Amendment (Amendment 20) did not establish a state constitutional right to state-licensed medical marijuana use but rather created an affirmative defense from criminal prosecution for such use. The court did not address whether an activity that violates federal law could trigger employment protections under Colorado's lawful activities statute. Coats appealed.

In 2013, the Colorado Court of Appeals [affirmed](#) the lower court's ruling, but with different reasoning. The court concluded that because activities conducted in-state are subject to both Colorado and federal law, federally prohibited but state-licensed medical marijuana use is not protected under Colorado's lawful activities statute. Again, Coats appealed.

Comment. Marijuana possession and use is federally prohibited. However, as a matter of [policy](#), the Department of Justice has not pursued criminal cases against individuals who use or distribute marijuana for medical purposes in compliance with state laws. Rather, the DOJ has left it to the states to implement regulatory and enforcement systems for their marijuana laws.

On June 15, the Colorado Supreme Court [upheld](#) both lower court decisions. In *Coats v. Dish Network*, the high court found that the term "lawful" under the plain language of the state's lawful activities statute is not limited to state law. Rather, the term refers only to those activities that are lawful under both state and federal law. Finding that marijuana use cannot be "lawful" under the Colorado law at issue because it is illegal under federal law, the court concluded that Coats was not protected from discharge. As a result, the court did not have to address whether the state's medical marijuana amendment deemed it lawful.

Recreational Use Legalized

Several other states — including Alaska, Oregon and Washington state — as well as Washington DC have adopted laws that allow the recreational use of marijuana, potentially creating additional employment and safety issues for employers.

In Closing

This is an important decision for employers and employees alike. It confirms that employers may continue to enact zero tolerance policies, conduct random marijuana testing and base employment actions on the results — even in a state that has effectively legalized marijuana. Thus, regardless of any evidence of impairment, marijuana use — recreational or medical — may be grounds for termination in Colorado if it results in a positive drug screen in violation of a workplace drug policy. While the decision affects Colorado employers directly, courts in other jurisdictions may look to it as they consider the many unresolved issues surrounding medical marijuana use.

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