Are Employee Drug Tests Going Up in Smoke?

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On January 1, 2014, the nation's first marijuana retail stores opened in Colorado. This landmark event came approximately 14 months after Colorado voters approved a constitutional amendment to legalize the recreational use of marijuana in November of 2012. Article XVIII, Section 16, of the Colorado Constitution—popularly referred to as *Amendment 64*— was adopted into law on December 10, 2012. Amendment 64 authorizes state entities to regulate and tax marijuana in a manner similar to alcohol. Accordingly, individuals aged 21 or older can legally possess, use, and distribute marijuana under state law. Washington State has similarly legalized recreational marijuana, and Washington, D.C. and at least 20 states—including Colorado and Washington—have authorized the use of marijuana for medical purposes.

This month, state Representative Sherry Jones (D-Nashville) introduced legislation in Nashville to allow people suffering from certain diseases to use marijuana to treat their symptoms, if their doctor states that the benefits of using cannabis outweigh its health risks to that patient. HB1385 is known as the Koozer-Kuhn Cannabis Act. Similar legislation is also pending in eight other states, meaning that medicinal marijuana could soon become the majority rule in the United States.

Colorado's example marks a dramatic legal and political shift, and the new laws could potentially impact employers who promote a drug-free workplace. As state laws have become more accommodating towards marijuana use, discharged employees have begun to challenge common practices such as mandatory drug tests and employee termination. Employers should be aware of these cases as they proceed through the state and federal court system. At present, however, both state and federal law afford companies the right to continue restricting employee drug use.

Federal Controlled Substances Act

Despite new state laws liberalizing marijuana use, it is still illegal to possess and use marijuana under the federal Controlled Substances Act. 21 U.S.C. § 811. The Controlled Substances Act lists marijuana as a Schedule I controlled substance, indicating it has high potential for abuse and has not been accepted as a safe form of medical treatment within the United States. The U.S. Attorney General's office reiterated this designation in response to the ballot initiatives in Colorado and Washington. More recent guidance from the federal government suggests that the Department of Justice will prioritize the prosecution of marijuana-related crimes of national significance, which excludes many individual recreational users; however, the Controlled Substances Act remains unchanged. Employers may therefore take comfort in the fact that both medicinal and recreational marijuana use continue to be prohibited under federal law.

Amendment 64

Colorado employers will also be insulated from employee claims of discriminatory practices or privacy violations by the text of the enabling legislation, Amendment 64, itself. The Amendment specifically states that employers shall reserve the right to continue drug testing and similar practices:

> "Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees."
> COLO. CONST. art. XVIII, § 16.

The Amendment further provides that employers may restrict the possession, distribution, or use of marijuana on company property.

Because Amendment 64 is still in its infancy, Colorado courts have yet to interpret its provisions. Nevertheless, employers can anticipate that courts will analyze recreational marijuana disputes using a similar framework to that in place for medicinal marijuana use.

Colorado's Lawful Activities Statute

Recent litigation involving marijuana in the workplace has focused on whether employers in states that have decriminalized medicinal marijuana can restrict its use outside of working hours. Colorado's Lawful Activities Statute forbids an employer from terminating an employee for engaging in a lawful activity off-premises during nonworking hours. COLO. REV. STAT. §24-34-402.5. Despite Colorado's legalization of medical and recreational marijuana, much controversy has centered on whether these uses can be properly described as *lawful* within the meaning of the Lawful Activities Statute.

The Lawful Activities Statute carves out three explicit exceptions in which an employee's termination will not be considered discriminatory. Employers have the authority to enforce company policies restricting employees' lawful activities when the policy relates to an occupational requirement, when the policy relates to an employee's particular job responsibilities, or when a conflict of interest may result. If any of the three statutory exceptions apply, employers have firm legal grounds to drug test employees and terminate those with positive tests.

Recent Cases

Even when the Lawful Activities Statute's exceptions are not applicable, both state and federal courts have interpreted its provisions in favor of employers. In *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. Ct. App. 2013), the Colorado Court of Appeals reasoned that to be "lawful" within the meaning of the statute, an activity must comply with federal, as well as state, law. The plaintiff employee in *Coats* had obtained a license from the State of Colorado to use marijuana for medicinal purposes. Although he alleged that he had never used marijuana at work or been under the influence on company premises, he was still fired after failing a drug test pursuant to company policy. The *Coats* court explained that in order for an employee to receive the protection of the Lawful Activities Statute, his conduct necessarily cannot be contrary to federal or state law. Although state law permitted the plaintiff to use medical marijuana, federal law still prohibited marijuana use and did not recognize an exception for medical necessity. As a result, the use was not lawful, and the employer did not discriminate in terminating the employee.

Similarly, the U.S. District Court for the District of Colorado agreed that Colorado's Lawful Activities Statute does not extend to an employee's firing due to medical marijuana use. In *Curry v. MillerCoors, Inc.*, No. 12-cv-02471-JLK, 2013 WL 4494307 (D. Colo. Aug. 21, 2013), the Court held that employers are entitled to implement and enforce written drug policies, and Colorado's statute does not shield an employee from the company's standard practices. Put simply, the plaintiff employee had been terminated because of his misconduct, not because he had a disability.

Since individuals with severe illnesses and disabilities are afforded more protection under the law than healthy people, it is unlikely that courts bound by the precedent of *Coats* and *Curry* would afford protection to employees who use marijuana recreationally. We can therefore expect courts to lean just as heavily in favor of employers—if not more so—once disputes arise in the wake of Amendment 64.

Washington and Other Jurisdictions

Colorado's growing body of case law serves as a reliable indicator of how other jurisdictions will treat the same or comparable issues. Washington State – which is expected to open its own retail marijuana shops later this year—has similarly dismissed medicinal marijuana users' claims against employers. The Supreme Court of Washington explained that allowing such actions for wrongful termination directly conflicts with the state's long-standing at-will employment doctrine. *Roe v. Teletech Customer Care Management LLC*, 257 P.3d 586 (Wash. 2011). While public policy may in some instances overcome the state's deference towards employers in termination decisions, the *Roe* court found that a clear public policy existed against forcing employers to sanction their employees' illegal activity.

In *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012), The Ninth Circuit Court of Appeals likewise emphasized the federal prohibition on marijuana in denying protection for medicinal marijuana users under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. ("ADA"). Much like the District of Colorado in *Curry*, the *James* court determined that while the underlying illness necessitating medicinal marijuana treatment may qualify as a disability for protection under the Americans with Disabilities Act, use of marijuana in itself does not.

Employer Best Practices

In sum, Colorado's Amendment 64 has not resulted in the complete legalization of marijuana in Colorado. Employers may still prohibit employees from using marijuana and conduct drug testing in furtherance of corporate policies for the time being; however, the state of the law is not yet well-settled. In early January, the Supreme Court of Colorado granted certiorari to review the dismissal of *Coats* at the appellate level. Employers should continue to monitor the Colorado case law—as well as legal developments in other states and the District of Columbia—and evaluate their employee policies as the landscape develops.

While other states permitting medicinal marijuana are likely to follow Colorado's lead, employers should still proceed with caution until they are familiar with the laws of a particular state. Unlike Colorado and Washington, several states have explicitly written employee protection provisions into legislation authorizing medicinal marijuana. Employers should be mindful of the statutory protections for marijuana users in each state in which they conduct business. As a best practice, all employers should reiterate to employees that violations of federal controlled substance laws are still grounds for termination and revise their corporate policies as necessary.