Marijuana Legalization and Drug-Free Workplace Policies

November 6, 2013

This alert discusses marijuana legalization, which raises many concerns for employers about drug-free workplace policies.

The Law

In November 2012 Colorado voters approved Amendment 64 which legalized marijuana for persons over the age of twenty-one.[1] Under Amendment 64 marijuana will be regulated and taxed much like alcohol. The Courts have thus far proven to be employer friendly in this regard. Section 6 of Amendment 64 itself makes clear that employers are not required to "permit or accommodate" the use of marijuana or other related activities in the workplace and it does not affect an employer's ability to have policies restricting the use of marijuana. Amendment 20, the Colorado Constitution's provision allowing the use of medical marijuana, similarly provides that an employer is not "required to accommodate the medical use of marijuana in any workplace".[2] Amendment 20 does not expressly address off-premises marijuana use.

Colorado and Washington became the first states to legalize marijuana in 2012 and medical marijuana is now legal in 20 states and the District of Columbia. Federal law still prohibits marijuana under the Controlled Substances Act.[3] This conflict presents various questions for employers related to their drug-free workplace policies. The Colorado Court of Appeals recently addressed this issue in *Coats v. Dish Network, LLC*, a case in which a quadriplegic employee was licensed to use medical marijuana under Amendment 20. He used medical marijuana according to the limits of his license; he never used marijuana on the employer's premises; and he was never under the influence of marijuana at work.[4] Nonetheless, Dish Network discharged the employee after he tested positive for marijuana in violation of its drug policy.

The discharged employee alleged that his discharge violated the Colorado Lawful Activities Statute which generally prohibits employers from discharging an employee for engaging in lawful activities during off-duty hours and off the employer's premises.[5] The court held that smoking marijuana was not a "lawful" activity within the meaning of the statute. The court reasoned that for an activity to be lawful, the activity must be legal under federal and state law. The *Coats* case clarified that an employer is still permitted to terminate an employee for marijuana use, even if the employee does not use marijuana on the employer's premises and is not under the influence while at work.

Other Colorado cases indicate that the law is employer friendly in other contexts as well. For instance, the court of appeals in *Beinor v. Industrial Claim Appeals Office* upheld the denial of unemployment benefits to an employee who was terminated after testing positive for marijuana.[6] Recently, the U.S. District Court in Denver granted an employer's motion to dismiss an employee's claims for violations of the Colorado Anti-Discrimination Act after the employee was terminated because he tested positive for marijuana. The court stated that "despite concern for [the plaintiff's] medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct."[7]

As such, Colorado law plainly permits employers to enforce drug-free workplace policies. Courts across the country have generally deferred to state legislatures to include employment protections in marijuana-use statutes. The supreme courts in California, Washington, Oregon and Montana, for example, have also upheld an employer's right to enforce drug-free workplace policies.

Potential Risks to Employers

Although the law in Colorado is clear that an employer may terminate or discipline an employee for marijuana use, medical or recreational, Amendment 64 brings about the potential for increased employee challenges to such actions. Some employees that become subject to discipline or termination as a result of their marijuana use may attempt to use Amendment 64 to challenge an adverse employment action. If more employees force employers to dispute or litigate the issue, drug-free workplace policy enforcement could become more expensive.

Recommendations

It is important for employers to have their drug policies reviewed and revised as necessary to make clear to current employees and new hires that the use of marijuana, along with all other illegal drugs is prohibited, even outside the workplace. Without specific direction from employers, employees may assume that, like alcohol, their recreational use of marijuana is permitted so long as it does not impact their work.

Uniform and consistent enforcement of your drug policy is essential. We recommend that employers have their new hires and current employees sign an acknowledgement form that outlines the employer's drug policy and any changes from the previous policy.

[1] Colo. Const. art. XVIII, § 16.

[2] Colo. Const. art. XVIII, § 14(10)(b).

[3] See 21 U.S.C. §§ 811- 812.

[4] 303 P.3d 147, 149 (Colo. App. 2013).

[5] Colo. Rev. Stat. § 24-34-402.5.

[6] 262 P.3d 970 (Colo. App. 2011).

[7] *Curry v. MillerCoors, Inc.*, 2013 WL 4494307, *3.