

# CAMPBELL

LITIGATION, P.C.

DEFENDING CLIENT INTERESTS

## **Employer Drug Policy Stands in light of Legal Medical Marijuana Usage, but Proposed Federal Marijuana Legislation may Impact Drug Policies**

The Colorado Supreme Court recently upheld an employer's right to terminate an employee who tests positive for marijuana at work when the employee is legally allowed to partake of marijuana off-duty. *See Coats v. Dish Network LLC*, 2015 Colo. 44 (2015). In Colorado, employees are protected by a legal off-duty statute that prohibits an employer from terminating an employee for engaging in legal activity off-duty.<sup>1</sup> Colorado legally allows for the medical use of marijuana.<sup>2</sup> The intersect of these two laws, combined with an employer's drug policies, provided for some uncertainty for Colorado employers. The *Coats* decision has cleared up any confusion.

### **Colorado Upholds Employer's Drug Policy in light of Employee's Legal Off-Duty Marijuana Usage.**

Brandon Coats was a customer service representative for Dish Network. Mr. Coats is paraplegic and suffers from debilitating seizures. To help combat those seizures, Mr. Coats registered for a medical marijuana registry card and began to use medical marijuana beginning in 2009. Mr. Coats did not report to work under the influence of marijuana and performed satisfactorily, but tested positive for marijuana when Dish Network conducted a random drug test in 2010. Dish Network terminated Mr. Coats following the positive drug test, and Mr. Coats

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<sup>1</sup> *See* Colo. Rev. Stat. 24-34-402.5.

<sup>2</sup> *See* Colo. Const. art. 18 § 14. Colorado has also legalized the recreational use of marijuana. *See* Colo. Const. art. 18 § 16.

<sup>3</sup> Those nine other states are: California (CA Labor Code §§ 96(k) and 98.6), Illinois (Ill. Rev. Stat. ch. 820, § 55/5), Michigan (Mich. Const. art. 14 § 16), Montana (Mont. Const. art. 2, § 39), Nevada (Nev. Const. art. 10 § 1), New Jersey (N.J. Const. art. 17 § 10), New York (N.Y. Const. art. 21 § 4), and Rhode Island (Rhode Island Const. art. 11 § 1).

subsequently sued Dish Network alleging a violation of the Colorado legal off-duty statute.

In a 6-0 decision, the Colorado Supreme Court affirmed the appellate court's holding in *Coats* that in order for an activity to be protected by the State's legal-off duty statute, the activity must be "lawful" both under Colorado law and federal law. *Coats* is yet another victory for employers in upholding the employer's right to terminate an employee who violates the employer's drug policies. As a result of the decision, employers in Colorado may continue to have "zero tolerance" marijuana policies, and will not be required to permit employee (or prospective employee) usage of marijuana outside of work.

**The *Coats* Decision Provides Additional Guidance to Employers in States with Laws Similar to Colorado.**

Colorado is not alone in having a law protecting the usage of medical marijuana, in addition to having a law protecting the use of legal products and/or engaging in legal activity. Nine other states have a similar scheme.<sup>3</sup> *Coats* will provide a source of strong persuasive authority to courts in the other nine states that have a combination of lawful medical marijuana usage and legal off-duty statutes, in addition to any state adopting such laws in the future. Accordingly, employers located outside of Colorado, but whose state laws mirror Colorado's, stand on stronger ground to enforce their drug policies as a result of the decision. The *Coats* decision does not alleviate the need to have strong, clear, and consistent workplace conduct policies, especially as they relate to drug testing employees. Although *Coats* provides employers with new guidance, that guidance will likely not last forever, especially given the potential Congressional action that could make medical marijuana lawful at the federal level.

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<sup>3</sup> Those nine other states are: California (CA Labor Code §§ 96(k) and 98.6), Illinois (Ill. Rev. Stat. ch. 820, § 55/5), Minnesota (Minn. Stat. Ann. § 181.938), Montana (Mont. Code. Ann. §§ 39-2-313 and 314), Nevada (Nev. Rev. Stat. § 613.333), New York (N.Y. Labor Code § 201-d), North Carolina (N.C. Gen. Stat. § 95-28.2), Tennessee (Tenn. Code Ann. § 50-1-304), and Wisconsin (Wis. Stat. Ann. §§ 111.321 and 111.35). Combined with Colorado, states that have both a law protecting medical marijuana usage and legal activity and/or usage of legal products account for approximately 34 % of the nation's population.

## **Proposed Federal Marijuana Legislation, if passed, will impact Employer Drug Policies in Ten States.**

The *Coats* court focused exclusively on whether an activity must be “lawful” both at the state and federal level in order to receive protection under the legal off-duty statute. Because marijuana of any kind is illegal on the federal level, marijuana usage, even if legal under state law, is not protected by the legal off-duty statute. Consequently, if federal legislation passes making marijuana legal under federal law, *Coats* will be inapplicable in protecting employer drug policies in the ten states similar to Colorado that have both a legal off-duty statute and allow for legal usage of medical marijuana.

At present time, there are several proposed bills in Congress seeking to legalize some form of marijuana.<sup>4</sup> The momentum leans towards legalizing some form of marijuana in the near future; however, it is unlikely that the current proposed bills will be enacted any time soon. There are political heavyweights on both sides of the aisle lining up to co-sponsor these bills. For example, Senator Rand Paul (R-KY) has co-sponsored a bill<sup>5</sup> with Senator Cory Booker (D-NJ) to effectively legalize medical marijuana for patients in states that currently allow medical marijuana usage. However, there is also strong opposition, so this bill, along with the other proposed bills, will likely never even see a vote in the current session of Congress.<sup>6</sup>

In the event that some form of legislation passes to make some form of marijuana (i.e. either medical or recreational) legal on the federal level, employers in states with legal off-duty

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<sup>4</sup> See Respect State Marijuana Laws Act of 2015, H.R. 1940, 114th Cong. (2015) (This act would modify the CSA to protect anyone acting in compliance with state marijuana laws); Marijuana Tax Equity Act, H.R. 1014, 114th Cong. (2015) and Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. (2015) (These acts would remove federal marijuana prohibitions and replace them with a comprehensive regulating scheme); The Compassionate Access, Research Expansion, and Respect States Act, H.R. 1538, 114th Cong. (2015) and The Compassionate Access, Research Expansion, and Respect States Act, S. 683, 114th Cong. (2015) (This act would make possession, distribution, and production of medical marijuana that is legal under state law, legal under federal law).

<sup>5</sup> See The Compassionate Access, Research Expansion, and Respect States Act, S. 683, 114th Cong. (2015).

<sup>6</sup> See Ginger Gibson and Dion Rabouin, *On Marijuana Legislation, Advocates Hopeful But Congress Moving Slowly*, International Business Times, Apr. 21, 2015 (<http://www.ibtimes.com/marijuana-legalization-advocates-hopeful-congress-moving-slowly-1885572>).

statutes will likely need to overhaul their drug policies. An employer could continue to terminate an employee for showing up to work under the influence. However, simply testing positive on a random drug test would unlikely be enough to take such action. For employers in states without legal off-duty statutes, the situation is a bit clearer. All of the courts that have looked at the issue to date have sided with the employer in determining that the legal marijuana statutes provide protection from criminal prosecution, but not protection from adverse employment actions.<sup>7</sup> As a result, employers in states without legal off-duty statutes could continue to maintain their drug policies, and terminate employees who test positive for marijuana.

### **Conclusion**

*Coats* provides strong authority for employers to continue to enforce their current drug policies, even in states where medical marijuana is legal, and the state has a legal off-duty statute. However, the proposed federal legislation has the ability to dramatically change the landscape of this area. Accordingly, Campbell Litigation will continue to monitor the proposed federal legislation.

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<sup>7</sup> See, e.g., *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012); *Roe v. Teletech Customer Care Mgmt. (Colorado) LLC*, 171 Wash. 2d 736 (2011); *Emerald Steel Fabricators, Inc. v. BOLI*, 230 P.3d 518 (Or. 2010); *Johnson v. Columbia Falls Aluminum Co.*, 213 P.3d 789 (Mont. 2009); *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008).