

# **Colorado Employers May Have a “Zero Tolerance” Marijuana Policy**

In November 2012, Colorado and Washington State became the first U.S. states to legalize non-medical marijuana use. This year, Colorado became the first state in which it's legal for adults to recreationally smoke marijuana (Washington's law goes into effect later this year). With the legalization of marijuana use by adults 21 and older, Colorado employers face a number of questions regarding their rights and duties with respect to employee use of marijuana. The following attempts to provide current answers to many common – and important – questions that employers and Denver staffing agencies may have.

## **Colorado Employers Do Not Have to Allow Marijuana Use on the Job**

It may seem a trivial point, but the fact that Colorado voters have approved two constitutional amendments legalizing the use of marijuana – first for medical purposes only, and most recently for personal use by adults 21 or older -- does not empower an employee to use marijuana on the job. Both of these amendments are now the law, and both state clearly that employers are not required to permit employees to use marijuana (in any form) while the employee is working.

## **Colorado Employers May Have a “Zero Tolerance” Marijuana Policy**

In the wake of Colorado's legalization of recreational marijuana use, employees and applicants may be confused and assume that employers are no longer permitted to conduct drug testing, terminate employees based on a positive drug test, or refuse to hire potential employees if they have a positive test. That is not the case. Employers in Colorado continue to have the power to have any marijuana policy they want, including zero tolerance.

## **Employers Should Protect Themselves and Implement Strong Workplace Safety Policies**

It is important to remember that employers may be held liable for acts of their employees that occur within the scope of employment – including if an employee is high or impaired. For example, if a driver delivering goods, or a receptionist or accounting clerk making a bank deposit, is impaired and gets into a traffic accident, the employee could be held liable for the accident – and so could the employer. Employers should take care to protect themselves and ensure that employees engaged in physical labor, driving, or other work where safety is involved are not impaired on the job. Ensuring workplace safety (and thereby limiting liability) is a key driving force behind policies promoting a drug-free workplace.

## **Is it OK to Continue Your Policies on Drugs and Alcohol?**

Yes. While the use of drugs or alcohol may seem to be a purely personal issue, employer policies promoting a drug-free workplace are rooted in the commitment to and benefits of a safe and quality-oriented work environment. Additionally, having a policy in place can also protect your company from liability arising from on-the-job accidents. Finally, some federal and state laws require employers in some industries to have policies addressing drugs and alcohol use by workers, including in some cases drug testing programs.

### Important Note for Denver and Colorado Employers

- Employees can be fired from their jobs for failing a drug test, even if the test reveals only minimal amounts in their system, and even if that could have been consumed legally outside the workplace.
- An employee who is terminated for failing a drug test in violation of the employer's drug policy is not generally entitled to unemployment compensation.
- As with all workplace conduct policies, employers should make sure their policies are clear, apply the policies consistently, and remind employees and applicants of the policies to minimize confusion.

### **Employers Currently Do Not Have to Permit Employees to Use Marijuana, Even Outside of Work**

One of the biggest questions employers and Denver staffing agencies who employ tens of thousands of people in a year is whether they must ignore or permit off-the-job use of marijuana by employees. This issue often arises when an employer or prospective employer learns that the employee failed a drug test. Since Colorado employers may continue to implement drug and alcohol policies, including drug testing of employees and applicants, and although marijuana use is legal under state law by adults 21 and over, it is still illegal for everyone under federal law. Therefore in Colorado, it is legal and appropriate to terminate (or refuse to hire) employees:

- if they test positive for marijuana
- regardless of whether they used the drug off duty

Recent studies have borne out the employer's ability to enforce discipline, including termination, resulting from a failed drug test. A 2014 survey of Denver-based employers revealed that approximately 20 percent of employers have actually increased their drug testing policies and protocols in the wake of enactment of the recreational marijuana law. And in perhaps a corollary fashion, the number of employees and applicants testing positive for marijuana use appears to have increased in Colorado in approximately the past six months. As discussed below, the intersection between zero tolerance testing policies and the legalization of marijuana use has only recently been addressed by the Colorado courts.

### **This Law Could Change – Soon**

The off-duty use of marijuana recently came to the fore in a case heard by the Colorado Court of Appeals, and as a result the current state of the law allowing employers to terminate employees who test positive for marijuana could change, as soon as this year. It is anticipated that in the latter part of 2014, the Colorado Supreme Court will hear the case, which involves a quadriplegic former employee of Dish Network who was terminated after a random drug test showed he had been using marijuana.

The issue presented by this case is whether the employer's drug testing policy, applied to marijuana use that is otherwise legal in this state, violates Colorado's "Lawful Off-Duty Activities" statute. This Colorado law is fairly unique among U.S. states because it is broadly

written to prohibit discipline of employees for engaging in off-duty conduct that is considered legal.<sup>[1]</sup> The employee argued that this statute protected his licensed use of medicinal marijuana, but his argument can be extended to include recreational use as well.

### **Colorado Supreme Court Will Rule On the Legality of Off Duty Marijuana Use**

The intermediate Court of Appeals rejected the employee's argument and decided that use of marijuana is not considered a "lawful" activity because it is still illegal under federal law. Therefore, under the Court of Appeals' ruling, using marijuana -- even medical marijuana -- is not protected and the employer had a right to terminate. As noted, the case is currently on appeal to the Colorado Supreme Court, and the outcome will likely create a broad statement on the legality of off duty marijuana use, whether recreational or medicinal.

#### **How Will the Court Rule?**

##### **Court Ruling May Require Re-thinking of Drug Test Policies**

- Of course, no one knows for sure how or when the court will rule, but if the justices reverse the decision, the law in Colorado could be that marijuana use outside of work is considered a lawful activity, like smoking or drinking alcohol, for which employees may not be terminated.
- This would be a significant change for many employers, and would require re-thinking and significant modification of drug testing policies.

### **Conclusion**

What is perhaps the most important to understand is that despite the prevailing level of uncertainty of the new system, employers and Denver staffing companies should continue to implement and apply workplace and hiring policies that promote a safe and productive environment. This includes having written policies covering substances such as drugs and alcohol. Cover the gamut:

- A drug and alcohol policy should apply to any drugs that are illegal under state, federal, and local law.
- Similarly, the policy should prohibit any detectable amount of illegal drugs.
- The policy should steer clear of a difficult to enforce "impairment" or "under the influence" standard.
- If you have locations in multiple states, be sure to have one consistent policy and be sure that your internal human resources personnel know how to handle issues with marijuana.
- Finally, as with all policies, strive for clear communication and even-handed application.

### **About the Author**

[Stephen DeHoff](#) is a business and employment partner at the Denver-based firm [Fortis Law Partners LLC](#). He routinely reviews and prepares drug and alcohol policies for businesses and frequently counsels human resources professionals on the creation and implementation of

workplace policies. Mr. DeHoff was assisted in the preparation of this article by firm associate Adrienne Schwisow.

[\[1\]](#) Approximately 29 states have laws protecting employees' rights to use tobacco and/or other lawful products outside of work, but only a handful – Colorado New York, California, and North Dakota – have laws protecting employees' legal conduct outside of work more generally. Even outside of the marijuana context, employers in Colorado should be aware of this important law. It prohibits the termination of employees for engaging in “any lawful activity” off the employer's premises during nonworking hours, unless: (1) the restriction relates very closely to the job requirements, activities, or responsibilities, or (2) is necessary to avoid a conflict of interest or appearance of conflict of interest. The protection can apply to a large variety of activities, including (to name just a few) using tobacco, drinking alcohol, complaining about the employer, participating in politics, sexual activities, and communicating on social media.

The information above does not constitute legal advice.

Employers and staffing agencies should consult a Colorado labor or employment attorney with additional questions, or for guidance and more information.