What Employers Should Know About Colorado's New Marijuana Use Law

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On November 6, 2012, Colorado voters passed Amendment 64 to the Colorado Constitution by a 55 to 45 percent margin, making Colorado one of the first states in the nation to legalize the recreational use of marijuana. Prior to Election Day, 17 states—including Colorado and the District of Columbia—had laws allowing for the use and possession of medical marijuana. The passage of Amendment 64 does not affect the medical marijuana laws already on the books in Colorado. Along with Colorado, Washington State also approved the recreational use of marijuana.

Amendment 64 regulates the use of marijuana similarly to the way in which alcohol is regulated. Persons 21 years of age or older will be legally allowed to possess up to an ounce of marijuana, as well as six marijuana plants, with up to three of those in flower at any given time. The law also contains provisions for granting licenses to marijuana establishments.

The new law will become effective when Governor John Hickenlooper ratifies the ballots, which will take place within 30 days of the election. However, the law is already affecting marijuana users—the district attorneys of Denver and Boulder have announced that they will stop prosecuting marijuana possession cases of less than an ounce for those over 21 years of age, as well as the possession of marijuana paraphernalia.

Many employers are concerned about what the new law means for them and whether they need to make any changes to their drug policies. However, neither Amendment 64 nor Colorado's medical marijuana law affords affirmative employee work rights with respect to marijuana. In fact, Amendment 64 specifically states: "Nothing in this section is intended to require an employer to permit or accommodate the use . . . of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees."

Under Colorado Revised Statute § 24-34-402.5, it is unlawful for an employer to terminate an employee for engaging in lawful activity off the premises of the employer during nonworking hours. Employees could potentially use this statute to argue that because recreational marijuana use is now legal under Colorado law, an employer cannot prohibit an employee from engaging in such use while the employee is off duty.

However, employers should keep a couple of things in mind with respect to their ability to drug test and/or regulate employees' marijuana use under § 24-34-402.5. First, marijuana possession and use remains illegal under the federal Controlled Substances Act (21 U.S.C. § 811). In an official statement after the election, the U.S. Attorney's Office stated that the U.S. Department of Justice's enforcement of the marijuana laws remains unchanged, and that "[i]n enacting the Controlled Substances Act, Congress determined that marijuana is a Schedule I controlled substance. We are reviewing the ballot initiative and have no additional comment at this time." Therefore, even with the passage of Amendment 64, recreational marijuana use may not be a "lawful" off-duty activity under C.R.S. § 24-34-402.5.

Second, the lawful off-duty activity statute is subject to a couple of exceptions: (1) where the restriction relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee; and (2) where the restriction is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest. Both of these provisions could potentially allow for the prohibition of recreational use of marijuana by a company's employees.

Finally, at least two Colorado court decisions have held that the use of medical marijuana does not constitute lawful off-duty conduct and that employees cannot claim protection under the statute. In *Beinor v. Industrial Claim Appeals Office*, No. 10CA1685 (Colo. Ct. App. Aug. 18, 2011), the Colorado Court of Appeals affirmed the Industrial Claim Appeals Office's denial of unemployment benefits to the claimant and concluded that, although the Colorado Constitution precluded a claimant from being criminally prosecuted for using marijuana for medical purposes, "it does not preclude him from being denied unemployment benefits based on a separation from employment for testing positive for marijuana in violation of an employer's express zero-tolerance drug policy." Similarly, in June 2011, Judge Thomas Kane, El Paso County District Court, found that using medical marijuana does not qualify as "lawful" off-duty conduct because medical marijuana was not *per se* legal in Colorado. *See Hall v. Direct Checks Unlimited*, No. 11CV1302 (El Paso County Dist. Ct. June 27, 2011).

Therefore, drug testing for marijuana is still permissible, and employers can still take action against employees found to be in violation of carefully crafted drug policies. To make an employer's position as clear as possible, we recommend including references to federal law, specifically the Controlled Substances Act, in drug testing policies to ensure that employees are aware of the substances for which a positive test will result in termination or other discipline.

Additional Information

Should you have any questions about the new law, contact the Ogletree Deakins attorney with whom you normally work or the Client Services Department at clientservices@ogletreedeakins.com.

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