

Retail Sales of Marijuana Legal in Colorado, but Employers May Still Test, Fire Employees for Use

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Effective January 1, 2014, state-licensed retail establishments are permitted to sell marijuana to the general public under Colorado's "**Amendment 64: The Regulate Marijuana Like Alcohol Act of 2012**," which on November 6, 2012, Colorado voters approved as an amendment to the state constitution. For information, see our article, [Marijuana Legalization Ballot Initiatives Passed by Colorado and Washington Voters: 'Medical Marijuana' Passed in Massachusetts](#).

The amendment allows persons over 21 of age to possess up to one ounce of marijuana and grow up to six marijuana plants for personal use, and authorizes the licensing of retail facilities for the sale of marijuana to adults (regardless of whether they reside in Colorado). The personal-use-and-cultivation provisions became effective in December 2013. Public consumption and unlicensed sales remain illegal.

How does this affect Colorado employers? Amendment 64 provides, "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." Accordingly, employers may continue to enforce their drug testing policies against employees and applicants who test positive for marijuana, to publish and enforce policies prohibiting the possession or consumption of marijuana during working hours, and to discipline any employee whose job performance is impaired because of the use of marijuana.

In December 2013, the **Colorado Court of Appeals** reinforced employers' right to lawfully discharge employees who test positive for marijuana, even where the employee has a medical marijuana card and there is no evidence of "impairment" on the job. **Coats v. DISH Network, L.L.C.**, Nos. 12CA0595 & 12CA1704. Brendan Coats, a quadriplegic, sued his employer after he was fired in 2010 for failing a drug test. Since 2009, Coats used marijuana to treat ailments of his condition pursuant to Colorado's Amendment 20, which legalized the medical use of marijuana. The Court of Appeals affirmed the dismissal, explaining, "For an activity to be lawful in Colorado, it must be permitted by, and not contrary to, both state and federal law."

While medical (and recreational) marijuana use may be permitted under state law, it is still a Schedule I substance under the **Federal Controlled Substances Act** (21 U.S.C § 801, *et seq.*) (“CSA”) and, thus, unlawful under federal law. In other words, regardless of state law, employers may follow federal law in prohibiting employee drug use.

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