

## Ruling doesn't clear haze for Arizona employers

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*On June 15, the Colorado Supreme Court issued a long-awaited ruling on whether Colorado employers could enforce zero-tolerance policies on illegal drug use. The unanimous ruling in favor of the employer created a national buzz around the idea that businesses can still fire pot-smoking employees, even in states with liberal marijuana laws.*

*Arizona employers should be aware that the Colorado ruling has little application in the Grand Canyon State. Zero-tolerance policies remain problematic in Arizona because of significant differences between Arizona law and the Colorado statute at issue in the recent case.*

### ***Sympathetic seizure sufferer***

Brandon Coats worked as a telephone call center operator for Dish Network. He was partially paralyzed in a car crash as a teenager and is confined to a wheelchair. He started using medical marijuana when he discovered that cannabis calmed the violent seizures and muscle spasms he suffered. He did not use marijuana at work or go to work stoned before failing a random drug test in 2010. Dish Network has a zero-tolerance policy on illegal drug use and fired Coats under the policy.

Coats sued Dish Network under Colorado's lawful off-duty activities law, which prohibits employers from firing employees for engaging in legal activities outside work hours. Many states have enacted similar laws to protect cigarette smokers. Arizona, however, has no such statute.

The Colorado Supreme Court's ruling hinged on the fact that all marijuana use remains illegal under federal law. As the court noted, an activity is lawful only if it is legal under both state and federal law. Thus, Colorado employers can enforce zero-tolerance policies so long as marijuana remains illegal under federal law.

The Colorado Supreme Court's decision also applies to recreational marijuana users and employees who hold a state permit to use medical marijuana. A law authorizing adult recreational marijuana use was approved by Colorado voters in 2012.

### ***Extra Arizona protection***

When voters approved the Arizona Medical Marijuana Act (AMMA) in November 2010, they bestowed on registered medical marijuana users employment protections that do not exist in most states. In Arizona, an employer "may not discriminate against a person in hiring, termination

or imposing any term or condition of employment or otherwise penalize a person” based on the individual’s status as an AMMA cardholder or a cardholder’s positive drug test for marijuana components or metabolites. The law is codified at § 36-2813 of the Arizona Revised Statutes.

There are two key exceptions. First, if a federal law or regulation would cause the employer to lose a monetary- or licensing-related benefit for not taking action against a medical marijuana user or an employee who tests positive for drugs, the AMMA does not protect the employee. The exception is very narrow and likely applies only to employees who are subject to regulation by the U.S.

Department of Transportation (DOT). Second, Arizona employers can take adverse action against a medical marijuana cardholder who possesses or is impaired by marijuana while on company premises or during work hours. Remember that marijuana can show up on a drug test weeks after use, so a positive drug test is not proof of use or impairment at work.

Employers are not entirely without options, however. Another provision of Arizona law affords some protection to employers that have employees in safety-sensitive positions. The Drug Testing of Employees Act allows employers to exclude an employee from holding a safety-sensitive position based on a good-faith belief that the employee is currently engaged in the use of a drug that could cause impairment or otherwise decrease his job performance or his ability to perform his job duties. To take advantage of the protections for safety-

sensitive positions, however, employers must implement drug-testing policies that substantially comply with the provisions of the Act, which are quite detailed and specific.

### *Stay out of the weeds*

As of the end of June, more than 76,000 adults were licensed by the state to use medical marijuana.

During June, more than 3,000 pounds of marijuana were lawfully sold in Arizona. The data show that Arizona employers will inevitably face medical marijuana issues in the workplace.

Despite recent headlines that indicate the contrary, Arizona employers face big liability risks by enforcing zero-tolerance policies against workers who have a state license to use medical marijuana. On the other hand, Arizona employers are free to fire employees who travel to Colorado for vacation and legally use recreational marijuana. The rules are complicated and sometimes counterintuitive. Smart employers will consult with legal counsel when dealing with issues involving marijuana.

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