

Buzz Kill: Employee Legally Fired For Off-Duty Marijuana Use

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The Colorado Court of Appeals issued a precedent-setting decision today upholding an employee's firing for off-duty marijuana use. Citing federal law, the court held that using pot during non-working hours is not "lawful activity" under the state's lawful off-duty activity statute. The decision provides the first direct guidance on terminating workers for off-duty marijuana use since Amendment 64 legalized the drug's use and possession last November.

The case involved a quadriplegic employee licensed to use pot under the state's medical marijuana amendment. The company terminated his employment after he tested positive for drugs in violation of company policy. The terminated worker claimed that he used the drug within the limits of his license, had never smoked on his employer's premises, and had never been under the drug's influence at work.

In the lawsuit, the terminated worker claimed that the company's actions violated Colorado's lawful off-duty activity statute, which prohibits termination for any "lawful activity" conducted off an employer's premises during nonworking hours. Before today, Colorado courts had never squarely addressed whether the statute prohibits termination for off-duty marijuana use, when it is permitted under Colorado law.

Invoking a dictionary definition of the term "lawful," the Court of Appeals held that "for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law." Because marijuana use remains illegal under federal law, termination for off-duty pot-smoking does not violate the statute. The court also noted that its interpretation maintained the "balance between employer and employee rights" reflected elsewhere in Colorado law.

The decision is hugely important for Colorado employers. Amendment 64, like the medical marijuana amendment before it, did not require employers to "permit or accommodate" pot use, and expressly permitted policies restricting such use. But before today, courts had never previously decided whether state or federal law defines "lawful activity" under the statute.

The decision may not be the final word. Further appeal to the Colorado Supreme Court is possible, and other legal theories based on disability and similar laws remain untested. But for now, the decision provides the best guidance yet on terminating marijuana users, suggesting that courts will protect employers' rights to enforce drug policies notwithstanding Colorado's legalization of marijuana. It further reinforces the importance of

employers defining illegal drugs as those prohibited under both state and federal law in drug policies.

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