Labor and Employment Alert: Even 'Lawful' Employees Can Still Be Fired for Using Medical Marijuana

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UPDATE: COURT RULES THAT EMPLOYER NEED NOT ACCOMDATE MEDICAL MARIJUANA USE

On January 21, 2016, a update regarding the issue of accommodating medical marijuana users in the workplace. For more information on this alert, click here.

ORIGINAL ALERT:

On June 15, 2015, the Colorado Supreme Court unanimously held that employers may still terminate employees who use medical marijuana – even though medical marijuana use is specifically authorized by the Colorado Constitution and Colorado law protects employees' lawful off-duty conduct. The Court held that marijuana use (whether for medicinal or recreational use) remains unlawful under federal law and therefore medical marijuana use cannot be deemed "lawful" under the state's off-duty conduct law.

In *Coats v. Dish Network*, the plaintiff Brandon Coats worked as a customer service representative for Dish Network. Coats had a state-issued license to use medical marijuana, and used marijuana at home, after work and in accordance with his license. As a part of a random drug test at work, Coats tested positive for tetrahydrocannabinol (THC), a component of medical marijuana. There was no evidence that Coats was impaired at work or otherwise under the influence of marijuana while working, Coats informed Dish that he was a registered medical marijuana patient. Dish terminated him for violating the company's zero-tolerance drug policy.

Coats sued Dish for wrongful termination, arguing that his termination violated Colorado's law protecting employees who engage in off-duty "lawful activities." Because his medical marijuana use was lawful under Colorado law, it must therefore be a "lawful activity" for which he could not be terminated. The trial court, appellate court, and ultimately the Colorado Supreme Court all disagreed.

The Court explained that medical marijuana use, even though legal under Colorado law, remains a federal criminal offense under the federal Controlled Substances Act. The Court then held that the term "lawful" under Colorado's "lawful activities" law refers only to activities that are lawful under *both* state and federal law. Thus, employees who use medical marijuana as permitted under Colorado law – but unlawful under federal law – are not protected from termination for that use.

The Colorado Supreme Court did not address the interplay between federal law, the state's off-duty conduct law, and the recent amendment to the Colorado constitution permitting the recreational use of marijuana. However, the same reasoning the Court applied to medical marijuana use applies to the use of recreational marijuana – it remains unlawful under federal law and so remains unlawful under state law. This means that Colorado employers may continue to enforce drug-free workplace policies.

Employers in Washington, Oregon, and Alaska where recreational marijuana has been legalized, as well as employers in the 23 states that currently authorize medical marijuana, may look to the *Coats* decision for support in defending against similar wrongful termination claims by marijuana-using employees. Before doing so, employers should review their policies on illegal and prescription drug use to ensure that marijuana and medical marijuana are covered. Employers also need to be aware that the marijuana landscape is rapidly changing. In Ohio, for example, several constitutional amendments have been introduced recently to legalize marijuana. Contact your Vorys lawyer for questions about the potential impact of marijuana "legalization," marijuana use in the workplace, or for assistance in crafting workplace policies to address that use.