Marijuana law in Colorado and throughout the country is an ever changing, seemingly moving target and needs to be checked every day and counsel must keep abreast of the rapid developments. An underlying reason stems from the fact marijuana remains illegal under federal and most state laws, and there are no reliable tests to determine current impairment. The rapidly emerging marijuana market embraces nearly every aspect of the law, particularly employment law.

The principle marijuana issues in employment arise from testing, termination and discipline, Americans with Disabilities Act, workers compensation and unemployment benefits.

Policies and Drug Testing for Marijuana: An Overview

Workplace drug policies are essential to establish clarity of expectations for both the employee and employer. Appropriate employer policies should include alcohol and drug rules, focus on safety in the workplace, account for prohibited use under federal law, specify types of tests, whether notice is provided prior to testing, consequences of a violation of the policy, confidentiality, uniformity of enforcement and non-discriminatory testing. Some examples of situations commonly subject to testing are pre-employment, random, reasonable suspicion, return to duty, post-accident and/or follow-up. If there is a new policy, or change in existing policy, the employer should provide at least thirty days’ notice and copies, with the employees’ acknowledgment of receipt of the policy. Furthermore, employers should notify job applicants of the policy and any testing, preferably in writing.

The use of marijuana in the employment context usually occurs in three ways: on the clock use, off-the-clock use but under the influence at work and off-the-clock use and tests positive at work, but not under the influence. This last use is currently a major issue in Colorado employment law. The first two situations are clearly problematic for employees.

Current Marijuana Testing

Tests for other drugs that are water-soluble and, thus, quickly eliminated from the body, clear the body’s system rapidly, often times within a few hours after ingestion. The drugs are not detected after clearing the body. However, the fat-soluble tetrahydrocannabinoids (THC) component in marijuana that causes a euphoria, remains in the system much longer. Thus, testing for THC will likely produce a positive drug test even though the person has not recently experienced marijuana exposure and is not currently impaired. There are different types of marijuana drug tests. Hydroxy THC (H-THC) is an active metabolite that may show up initially and may indicate that a person has partaken in marijuana over the past few hours. On the other hand, Carboxy-THC (C-THC) can remain in the system for thirty days or more. It is an inactive metabolite and does not cause intoxication. It may test positive over a period of time. However, there is still no reliable test for current impairment.
Another means of testing for marijuana is via the hair. Blood nourishes the hair as it grows. If marijuana is in the blood, it will reach the hair and embed in the hair shaft. It takes about a week after drug use for the drug affected hair to grow above the scalp. Accuracy requires at least 100-120 strands of hair, cut as closely to the scalp as possible and must be at least a half-inch long. This provides a proximate thirty-day history since hair grows about a half-inch per month. One and a half inches of hair gives a ninety-day drug history.

Testing Litigation and Resources

Another area of law certain to change as a result of marijuana legalization is testing.

The conflict in types of testing was addressed in an Arizona DUI case in which the driver had C-THC metabolites in his system, but no H-THC, thus showing the driver was most likely not intoxicated. The trial court dismissed the case based on evidence showing the man was not intoxicated, and, therefore, not guilty of a DUI. The appellate court reversed the dismissal under the theory the Arizona legislature intended strict liability against users of illegal drugs. The Arizona Supreme Court overturned the appeals court and determined that drivers must have the active metabolites (H-THC) in their systems to prove DUI. The dissent argued that the law should punish marijuana patients regardless of whether or not they are impaired.

Presently, there are a few federal agency traffic position statements that may prove to be helpful in representing an employee with a positive drug test for marijuana.

The National Highway Traffic Safety Administration (NHTSA) states testing for marijuana is not reliable to determine current impairment. The NHTSA released recent research in November 2014 indicating that per se DUI limits for drugs, including marijuana, is inappropriate because knowing the person tested positive for marijuana does not indicate that the person was impaired at the time. The inference is if the drug test is not reliable, then other factors, such as behavior, are indicators that can support the drug test. Also, according to the NHTSA fact sheet on marijuana for blood and urine testing it is difficult to establish a relationship between the person’s THC level and performance impairing effects.

An important distinction to make when evaluating impaired driving data is the mere presence of a drug in a person’s system, as compared to the person being impaired by a drug in his/her system. ... Date identifying a driver as “drug positive” indicates only that the drug was in her/her system at the time of the crash. It does not indicate that a person was impaired by the drug (Compton & Berning, 2009). The presence of some drugs in the body can be detected long after any impairment. For example, traces of cannabinoids (marijuana) can be detected long after any impairment. For example, traces of cannabinoids (marijuana) can be detected in blood samples long after use. Thus, knowing that the driver tested positive for cannabinoids does not necessarily indicate that the person was impaired by the drugs at the time of the crash.” (Emphasis added.)

“Current knowledge about the effects of drugs other than alcohol on driving performance is insufficient to make judgments about connections between drug use, driving performance, and crash risk.”

“Caution should be exercised in assuming that drug presence implies driver impairment. Drug tests do not necessarily indicate current impairment.
Also, in some cases, drug presence can be detected for a period of days or weeks after ingestion.”

Additionally, the United States Government Accountability Office Report to Congressional Committees of 2015 concludes that drug testing for marijuana is not reliable to test for current impairment. “It is difficult to establish a relationship between a person’s THC blood or plasma concentration and performance impairing effects.”

“It is inadvisable to try and predict effects based on blood THC concentrations alone, and currently impossible to predict specific effects based on THC-COOH concentrations.”

Expert Testimony

In addition, the services of an expert may be useful to disprove impairment. The expert may be a physician, preferably a toxicologist, or another qualified professional with the education, background and experience to serve as an expert on the issue. There are several issues for the expert to consider. Marijuana impairment is not the same as alcohol, thus, detection is not the same and cannot be correlated. Marijuana has many psychoactive components - most notably is THC - and numerous non-psychoactive components that do not cause intoxication. THC is immediately taken up by fat cells and is released slowly over time which is generally not a contributor to intoxication, but is a reason why it can be detected so long after consumption. There is difficulty in accurately establishing an absolute correlation between some measured value and intoxication. Behavioral tests may or may not have been performed to compliment the drug test. Are the behavioral tests reliable or subjective? Some states have instituted legal limits of THC, which is not based on intoxication or impairment, but a zero tolerance drug policy.

Can a Colorado Employee be Terminated for Using Medical Marijuana in Compliance with Colo. Const. Art XVIII, §14 Off Premises and Off Hours?

The sentinel case currently awaiting decision by the Colorado Supreme Court on medical marijuana and employee rights is Coats v. Dish Network, LLC. Mr. Coats is a wheelchair-bound quadriplegic victim of an automobile crash. He has a valid medical marijuana license under Colo. Const. Art XVIII, §14. He was employed by Dish Network, LLC (Dish) for approximately three years handling telephone calls. He had good employee evaluations and no disciplinary actions. He used marijuana for tremors and to help relax at night so he could sleep. He never used marijuana on Dish premises. He never used marijuana during work hours. He was never under the influence of marijuana at work. Mr. Coats was fired from his position after testing positive for marijuana which Dish claims was a violation of its drug policy. Since the case was dismissed at the trial court level, there was very little discovery. There was no other reason given by Dish for his termination.

Mr. Coats brought a wrongful termination claim in Arapahoe County District Court alleging violation of Colorado Lawful Activities Statute, C.R.S. §24-34-402.5 which states “It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer and during non-working hours.” His complaint was dismissed for failure to state a claim and Dish’s motion for attorneys’ fees in the amount of about $44,000.00 was granted.

Mr. Coats appealed both rulings, and the court of appeals announced its decision on April 25, 2013. The court of appeals determined Mr. Coats’ state-licensed use of marijuana was not “lawful activity within the meaning of the Lawful Activities Statute.”

The next question before the court of appeals was whether a federally prohibited but state-licensed medical marijuana use is a “lawful activity” under C.R.S. §24-34-402.5. The court concluded that such activity is not “lawful activity.” The Lawful Activity Statute is an employment discrimination provision of the Colorado Civil Rights Act which prohibits an employer from discharging an employee for “engaging in any lawful activity off premises of the employer during non-working hours.” The court disagreed with Mr. Coats’ argument on the plain language of the law that his use was a “lawful activity” because the state’s statutory term refers only to state and not federal law, and finding no legislative intent to extend employees’ protection to those engaged in activity that violate federal law.

The court of appeals determined §24-34-402.5 is not an invasion of privacy tort and does not exhibit sufficient general tort characteristics. Thus, the court reversed the trial court’s decision granting attorneys’ fees to Dish under C.R.S. §13-17-201.

Mr. Coats pled the single Lawful Activity Statute claim which is an employment discrimination provision of Colorado Civil Rights Act. Mr. Coats’ complaint did not refer to or imply a tort claim. The only damages specifically requested were back pay and benefits, which are the sole remedies authorized by Lawful Activities Statute. The court rejected Dish’s argument that the Lawful Activity Statute was analogous to a claim for intrusion upon seclusion and an unreasonable disclosure of private facts. The court
continued its reasoning in determining that in contrast to the broad compensation for pain and suffering, harm to reputation, emotion distress and other injuries which are often available in a tort claim, the Lawful Activity Statute authorizes only back pay and benefits that would have been due absent the discriminatory termination. Thus, Dish’s request for attorneys’ fees under §13-17-201 on appeal was rejected.15

Judge Webb wrote a compelling dissent in Coats arguing that “lawful activity” under the Lawful Activity Statute should be measured by state law, and the use of medical marijuana is permitted under the Colorado Constitution, thus, making it a lawful activity under Colorado law. Judge Webb argued that Colorado criminal law is not coterminous with federal criminal law. The Lawful Activity Statute does not define “lawful activity,” thus, making the statute ambiguous because the phrase could incorporate state law, federal law or both. Judge Webb also argued that the court’s reliance on the dictionary definition of “lawful” was misguided, cautioning that dictionary definitions must be used as sources of statutory meaning only with great caution. For these reasons, Judge Webb looked at “the spirit of the statute and not simply the letter of the law.” In the case of the Lawful Activities Statute, the legislative discussion of off-duty conduct reflected a desire to protect employees’ autonomy in their off-the-job activities, such as smoking and eating patterns that led to obesity, as opposed to empowering employers to discharge employees. Judge Webb furthermore agreed with the dissenting opinion in Beinor v. Industrial Claim Appeals Office16 where it was argued the Medical Marijuana Act establishes a right to possess and use medical marijuana. Judge Webb further argued that to be lawful under the off-duty conduct statute, the conduct may not rise to the level of a constitutional right, and the use of marijuana in compliance with state law is “lawful” under the Lawful Activity Statute.17


Enabling legislation states that the MMA “sets forth the lawful limits on the medical use of marijuana.” §18-18-406.3(1)(f), C.R.S. 2012.

A division of the court of appeals has recognized under §18-18-4-6(1), C.R.S. “A patient’s medical use of marijuana within the limits set forth in the Amendment is deemed ‘lawful’ under Subsection (4)(a) of the Amendment.” People v. Watkins, 2012 COA 15, ¶23, 282 P 3d. 500.18

Judge Webb would reverse the dismissal of Mr. Coats’ off-duty conduct claim, and concurs with the majority’s conclusion that Dish is not entitled to recover attorney fees, either at the trial court level or on appeal.19

Note: Shortly before publication, the Colorado Supreme Court affirmed lower courts’ rulings that businesses can fire employees for the off-duty use of medical marijuana. We will publish an article about the ruling in the next issue.

American with Disabilities Act

Another compelling issue in employment matters and marijuana is the application of the Americans with Disabilities Act (ADA).20

To establish a prima facie claim of discrimination under the ADA, a discharged employee must prove 1) that he has a disability, 2) that he was qualified for the job from which he was discharged, and 3) that his discharge was the result of his disability.21 In cases involving medical marijuana use, the question arises whether or not an employee has a disability under the ADA.

In Zenor v. El Paso Healthcare system, Ltd., the Fifth Circuit addressed whether the ADA excludes persons who are currently using illegal drugs from its protection. Mr. Zenor was an employee who was addicted to cocaine and unable to report to work one evening because of his addiction. He enrolled himself in the drug rehabilitation program offered through his employer. Because Mr. Zenor’s job required access to pharmaceutical cocaine, Mr. Zenor’s employment was terminated after he returned from drug rehabilitation. Mr. Zenor sued on a variety of claims, including violation of the ADA. According to the Zenor court, the ADA specifically exempts current illegal drug users from being considered “qualified individuals.” The court further determined that “federal law does not proscribe an employer’s firing someone who currently uses illegal drugs, regardless of whether or not that drug use could otherwise be considered a disability.” Noting that Texas law has a strong presumption in favor of at-will employment, the court held that the creation of a drug rehabilitation program did not create an enforceable contract granting rights beyond that of at-will employment. For contractual rights to be created, a policy must “specifically and expressly limit the employer’s ability to terminate the employee.”22 “The policy must contain
Colorado Trial Lawyers Association

Trial Talk

June/July 2015

51

an explicit contractual term altering the at-will relationship, and must alter that relationship in a meaningful and special way.”

Since marijuana use is still considered illegal by the federal government, it seems clear that marijuana users, even those registered through a state’s medical marijuana program may be excluded from ADA protection under 42 U.S.C. §12114(a). This issue has not yet been decided by the courts and may ultimately be decided based on a choice of competing interpretations of the ADA.

Under a “competing federal interests” theory, the federal government’s current position to keep marijuana illegal would compete with the ADA’s right to provide relief for a person “handicapped” by diseases such as cancer and glaucoma that are two conditions for which medical marijuana is often recommended. While marijuana proponents could point to federal acceptance of known pain relievers such as morphine, the federal government would likely counter by asserting that these “handicapped” individuals could properly be treated with Marinol, which is a legal synthetic marijuana. Given these compelling arguments on both sides, it seems likely that any court decision will be appealed and the United States Supreme Court may ultimately be asked to decide whether medical marijuana use is permitted under the ADA.

Federal case law thus far has supported an employer’s right to discharge an employee for marijuana use, even if that employee were disabled according to the ADA. The ADA excludes from its protection “any employee or application who is currently engaging in the illegal use of drugs.” The ADA recognizes an employer’s right to test for drug use and to prohibit illegal drug use in the workplace. The federal government’s refusal to declassify marijuana as a Schedule I drug makes it likely that ADA protection will not be afforded to employees terminated for medical marijuana use.

Can a Colorado Injured Worker Receive Workers’ Compensation Benefits for Use of Medical Marijuana?

Doctor’s order for back pain: “Smoke two joints and call me in the morning.”

This very real scenario will most assuredly drive workers compensation carriers crazy. “Do they have to pay for it?” “If so, how much do joints cost?” “Does this constitute medical marijuana?” “How do they pay?” “What if the worker goes to work high?” “Do they have any liability?” “Can the worker get fired for a positive drug test for marijuana?” Because so many states are approving medical marijuana and guidelines vary from state to state and are so vague, it has the potential for becoming a very big deal. The lack of approval from the U.S. Food and Drug Administration and current federal law banning marijuana could be used as an argument for carriers not to pay for medical marijuana as a treatment for injured workers. Often pharmacy benefit managers have workers compensation prescription formularies that typically exclude marijuana as a permissible medication. However, carriers can still agree to pay for medical marijuana.

On the other side, federal law may not be enough to stop claims for payment for medical marijuana from coming into the workers compensation system. There are also concerns that the medication could impair injured workers while increasing compensation costs and lengthening the time period within which workers can return to work. There is currently no determination that the increasingly acceptance of marijuana as a recognized treatment will increase the likelihood of its payment in the workers compensation arena. Furthermore, medical marijuana can be used in most jurisdictions under the radar of insurers, third-party administrators and pharmacy benefit managers. Workers compensation benefit systems vary from state to state, and many general employment and drug enforcement laws arise under state statutes.

Other questions: “Is the injury compensable if the claimant’s post-accident drug test is positive for marijuana?” Some states adopt the theory that marijuana is a dangerous controlled substance with no medical benefit under federal law, so it is illegal regardless of state law. Thus, if the employer can prove marijuana is the cause of the injury, most likely it is not a compensable claim. Whereas, other states adopt the theory that if marijuana is a legal medication under state law and properly prescribed or recommended by a licensed health care provider, the claimant is entitled to take it even if it was a cause of the injury, and thus, the injury is compensable. This is followed by the pervasive question—even though there was a positive drug test, how can it be determined if the claimant was impaired at the time of the accident? Since impairment cannot currently be determined by a test and marijuana remains in the system long after it was ingested, how is it determined if marijuana was a cause of the accident? Since impairment cannot currently be determined by a test and marijuana remains in the system long after it was ingested, how is it determined if marijuana was a cause of the accident? However, even if the claim is compensable, the claimant can still be terminated/disciplined by the employer for a positive test under current Colorado law.

A related question: “What if the injured worker with a compensable injury tests positive for marijuana, but it did not cause the injury?” The answer turns on the precise language of
EMPLOYMENT LAW | Klein

the law. The Oklahoma Supreme Court held that the state’s workers compensation statutes allowed employees who test positive for medical marijuana to demonstrate that such use was not the cause of the injury. If proven not to be the cause of the injury then obtaining benefits for an otherwise compensable injury would be allowed.

“Does the workers’ compensation carrier have to pay for medical marijuana prescribed for a claimant in a state where it is legal?” As of this time, and subject to change, generally medical marijuana in most states is not a compensable benefit. No appellate court or appellate workers’ compensation appeal board has yet upheld a worker’s right to be reimbursed for the cost of medically prescribed marijuana in the state the claim was made. Language in Colorado law is typical of that in other states, including Oregon, Michigan, Montana and Vermont, which provides there is nothing in the law that requires a government medical assistance program or private health insurer to reimburse a person for the costs associated with medical marijuana. “No governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.”

Whereas, Washington law provides for insurers to enact coverage or non-coverage criteria for payment or non-payment in its sole discretion. “Nothing in this chapter establishes a right of care as a covered benefit or requires any state purchased health care as defined by RCW 41.05.022 or other health carrier or health plan as defined in Title 48 RCW to be liable for any claim for reimbursement for the medical use of cannabis. Such entities may enact coverage or non-coverage criteria or related policies for payment or non-payment of medical cannabis in their sole discretion.”

However, New Mexico law provides that the workers compensation system is required to pay for an employee’s medical marijuana in a workers’ compensation case.

Cases run the gamut. However, at this point most workers compensation panels or judges asked to determine if payers have to pay for medical marijuana have determined they do not have to pay. Issues that are being addressed are the lack of basis of paying for medical marijuana, no formal way to pay for it like there is for other medications, no reference to state fee schedules for reimbursement, lack of standard billing practices, Medicare set-aside, to name a few.

In California, a workers’ compensation judge ordered reimbursement to a claimant for medical marijuana. However, the Workers Compensation Appeals Board returned it to the trial level with instructions to consider a state law provision in the Health and Safety Code Sec. 11362.785(d) stating “Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.”

In New Mexico, Mr. Maez suffered two back injuries in February and March, 2011 while working at Riley Industrial Services, Inc., insured by Chartis, Inc. Mr. Maez received temporary disability workers compensation benefits, and a workers compensation judge determined he was entitled to ongoing reasonable and necessary medical care. Mr. Maez’s physician authorized his use of medical marijuana after other treatments failed because, in part, Mr. Maez already tested positive for marijuana and would use it anyway. Thus, the workers compensation judge ruled that in this case medical marijuana was not reasonable and necessary because the physician did not “prescribe” it. However, the three judge panel for the New Mexico Court of Appeals unanimously reversed the decision January 13, 2015, finding that New Mexico’s compassionate use law allows Mr. Maez’s medical marijuana use, and it is treated as a prescription for workers compensation. The court also relied on New Mexico law that qualifies medical marijuana as a “functional equivalent of a prescription” since it is not a prescription drug in the state. The court also determined that medical marijuana was a reasonable and necessary treatment since other treatment modalities failed to alleviate Mr. Maez’s back pain, and he was authorized by a physician to use it.

In Iowa, a deputy workers compensation commissioner allowed an employee who was living in Oregon to recover for an Iowa workers compensation claim for medical marijuana in Oregon under Oregon’s medical marijuana laws.

It is conceivable that an injured worker with a credible workers compensation claim who has a medical marijuana card to treat a compensable condition may be entitled to reimbursement for the medication. By example, a cancer patient with an accepted cancer claim has a medical marijuana card to stimulate appetite during chemotherapy, would have a pretty good chance of being compensated. However, at this time, that same worker could lose his job for testing positive for marijuana if a zero-tolerance drug policy is in effect with the employer even though the use was compensable under workers’ compensation.

On the other hand, the use of medical marijuana that causes a workplace injury will most likely be a bar to recovery as any other impairment. Workers compensation carriers may rely on the following arguments to deny medical marijuana benefits:
Marijuana is a Schedule I drug, and it is illegal to prescribe, purchase, distribute it in the United States.

Marijuana is not FDA approved.

Medical marijuana is not approved in the Official Disability Guidelines (ODG), American College of Occupational and Environmental Medicine (ACOEM), or any of the state treatment guidelines.

The status of marijuana as a Schedule I substance prohibits the assigning of a National Drug Code (NDC) or a procedure code for billing purposes.

Workers’ compensation carriers are not currently required to cover the cost in several states, including Colorado.

Workers’ compensation carriers need to establish medical marijuana policies so claim handlers use uniform standards rather than personal opinions.

According to a study published in the Journal of the American Medical Association, it was determined that states with permissible medical marijuana had a nearly 25 percent lower annual rate of overdose deaths from opioids, including prescriptive pain killers such as oxycodone, hydrocodone, morphine and street opiates like heroin.35

In a 2008 court of appeals case, the claimant was denied continuing workers’ compensation benefits of temporary total disability benefits because he was responsible for the termination of his employment. The claimant was released to modified employment approximately a month after his work-related injury. However, he was since terminated from his employment shortly after testing positive for marijuana. “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributed to the on-the-job injury.”36

Currently, the state of the law in Colorado is that an injured worker does not have to be compensated for medical marijuana. However, the state of the law is a moving target requiring frequent updates.

**Can a Colorado Unemployed Worker Receive Unemployment Benefits for Being Terminated for Testing Positive for Marijuana at Work?**

In this rapidly evolving dance between state and federal unemployment and marijuana law, states are divided on the issue whether or not an employee terminated for testing positive for marijuana in violation of the employer’s zero-tolerance drug policy when he has a valid and current medical marijuana card can collect unemployment benefits.

The Colorado Court of Appeals affirmed the Industrial Claim Appeals Office (Panel) decision to disqualify Mr. Beinor from unemployment benefits under section C.R.S. §8-73-108(5)(e)(IX.5) which allows for the disqualification of unemployment benefits with “The presence in an individual’s system, during working hours, of not medically prescribed controlled substances … as evidenced by a drug or alcohol policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests.” Mr. Beinor was pro se. He had a valid medical marijuana card for severe headaches under Colo. Const. art. XVIII, Sec. 14(2)(b). The deputy initially denied the request for benefits, but a hearing officer reversed the decision finding that Mr. Beinor was not responsible for the separation because there was no reliable evidence to suggest he was not eligible for the medical marijuana card or that use of marijuana negatively impacted his job performance. This determination was reversed by the court of appeals saying that the use of medical marijuana by an employee holding a registry card under Amendment XVIII, §14 is not pursuant to a prescription, and, therefore, does not constitute the use of a “medically prescribed controlled substance” within the meaning of C.R.S. §8-73-108(5)(e)(IX.5). Accordingly, the presence of medical marijuana in an individual’s system during work hours is currently grounds for disqualification from unemployment benefits.37

Furthermore, Mr. Beinor unsuccess fully argued that he had the right to use marijuana under the Colorado constitution and was, thus, not responsible for his separation from employment. However, the court determined that the constitutional provisions “address exceptions to criminal laws” and not broad protections of an unlimited right to use marijuana.38

There were strong dissents holding a patient’s use of marijuana for medical purposes is lawful. The language is ambiguous and the intent of the voters was to authorize the medical use of marijuana. The claimant’s lawful use of medical marijuana outside the workplace with no evidence for impairment of performance in the workplace cannot constitutionally be used as a basis for denying unemployment benefits.39

In *Curry v. Miller Coors, Inc.*, the Motion to Dismiss was granted, upholding *Beinor*, because the employee tested positive for marijuana which violated the employer’s written drug policy.40

In 2011, the Colorado Court of Appeals determined the employer must comply with C.R.S. §8-73-108(5)(e)(IX.5) and prove the “presence in an individual’s system, during working hours, of not medically prescribed controlled substances.” Employer must produce evidence that the laboratory performing the drug test was licensed or certified.
EMPLOYMENT LAW | Klein

as expressly required under C.R.S. §8-73-108(5)(e)(IX.5). The court was, furthermore, not persuaded by the employer’s assertion that this case is very similar to a precedential opinion issued by the Panel titled “Concerning Fault for Separation Caused by Off-the-Job Use of Medical Marijuana.” Department of Labor and Employment Reg. No. 11.2.16.1, 7 Code of Colorado Regulations 1101-2. In this case the employer failed to present such evidence regarding the qualifications of the laboratory, thus, the employee received unemployment benefits.

The current state of Colorado law is that unemployment benefits are awarded on a case by case basis. However, there is law supporting the denial of unemployment benefits for a worker who tested positive for marijuana.

CONCLUSION

When is the last time the United States has undergone such an emerging shift in law, medicine, society, attitude and policy? The marijuana laws remain unsettled and are continuously being made and modified. Therefore, it is critical for the lawyer to research the latest and greatest, or not so greatest authority, before reliance.

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Endnotes:
2 State ex rel Montgomery v. Harris, 322 P.3d 160 (Ariz. 2014).
5 Supra n. 3.
7 Id.
9 Id.
10 Coats v. Dish Network, LLC, 303 P.3d 147 (Colo. App. 2013)
11 Id.
12 C.R.S. § 24-34-402.5; Coats, 303 P.3d 147.
13 Coats, 303 P.3d 147.
14 Id.
15 Id.
17 Coats, 303 P.3d at 155; see C.R.S. § 24-34-402.5.
18 Coats, 303 P.3d at 157-158.
19 Id.
20 42 U.S.C. §12101 et seq.
22 Zenor, 176 F.3d at 862.
23 Id.
24 Collings v. Longview Fibre Co., 63 F.3d 828, 832-33 (9th Cir. 1995) (employer’s termination of employees who used, sold and purchased marijuana on company property was upheld on the basis that the discharge was the result of misconduct, not the employees’ claims of disability).
25 42 U.S.C. § 12114(a)
26 See Id. § 12114(b), (d); See Id. § 12114(d) (2)
27 Coats v. Dish Network, 303 P.3d 147 (Colo. App. 2013)
28 Hogg v. Oklahoma County Juvenile Bureau, 292 P.3d 29 (Okla. 2012)
29 Colo. Const. Art XCIII §14(10) (a)
30 Wash. Rev. Code §69.51A.060(2)
31 Talpaondo v. Ben’s Auto Servs., 331 P.3d 975 (N.M. App. 2014)
33 Miguel Macz v. Riley Indus. and Chartis, 2015 N.M. App. Lexis 7
38 Id.
39 Id.