
Colorado Supreme Court: State's Off-Duty Statute Does Not Prevent Marijuana Termination

The Colorado Supreme Court ruled that the state's lawful off-duty statute doesn't prevent a termination for use of medical marijuana even if there is no evidence that the use affects job performance. Because it's still illegal under federal law, employers can use a zero-tolerance policy to eliminate the possibility of violating federal law. The case is *Coats v. Dish Network*, 13 Colo. S. Ct. 394 (June 15, 2015).

In the dynamic confusion of marijuana laws these days, this ruling provides breathing room for counties that already have zero-tolerance policies in place in the workplace. This enables counties to ensure that even in an accommodation case, the specific issue of legal marijuana medical use will not cause any further complications in determining a "reasonable accommodation." No reasonable accommodation is required for federally illegal medical marijuana use.

In addition, employers should review their testing policies to ensure that they are compliant with the general guidelines below:

1. Take care to avoid invasion of privacy or other privacy claims in the handling of drug testing procedures, records and decisions.
2. Don't single out employees or groups of employees for testing or action in a way that might violate EEO protections for race, color, gender, national origin, religion or creed, disability, age or any other protected status such as genetic information.
3. Don't talk about these matters publically as such talk could result in a defamation claim.

4. Only use the type of tests authorized under law for certain circumstances.

5. Reasonable suspicion testing must be based on objective facts provided by a reliable source or sources, including direct observation using a checklist, by trained members of staff and management. Have a review level and be wary of using disability-related symptoms that may be mistaken for "drug use."

6. Random drug testing is only allowed for safety sensitive positions and MUST follow state or federal rules in most cases in counties.

7. Post-accident testing should be limited to safety sensitive positions, or to jobs that require driving as an "essential function." The definitions of what type of accident triggers a test, what jobs have driving duty as an essential duty, and so forth, should be carefully reviewed and defined to only go as far as needed to ensure a safe workplace. Employees should be tested in the least invasive manner first, and all standard protections for test samples similar to, but often required to be separated from CDL procedures, should be followed regardless of job category.

8. Applicant testing processes and records should be controlled for privacy protection and should also be safeguarded against release of information that could lead to possible defamation claims.

What this means to counties

Counties should follow these guidelines and contact CTSI if further information is needed.