WHAT DOESN'T FLY WITH YOUR SUPPLY

JEAN E. FAURE
FAURE HOLDEN HENKEL TERRAZAS, P.C.
Bozeman, Helena, Great Falls and Missoula
jean@fhht.law
406-452-6500

The legalization of marijuana and the use of legal products outside of employment has created challenges for employers but is there arguably a "no fly" zone under Montana law? This article discusses statutory provisions and protections, case law, and potential strategies in navigating this brave new world.

I. MONTANA'S STATUTES

Montana law for decades has prohibited discrimination against any individual who legally uses a lawful product off the employer's premises during nonworking hours. Mont. Code Ann. §39-2-313. "Lawful product" did not include marijuana until 2021, when the legislature amended Section 39-2-313 to reflect the legalization of recreational marijuana in Montana. The current version of Mont. Code Ann. §39-2-313 (2023) provides in relevant part:

> (1) For purposes of this section, "*lawful product*" means a product that is legally consumed, used, or enjoyed and *includes* food, beverages, tobacco, and *marijuana*.
>
> (2) *Except as provided in subsections (3) and (4)*, an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally

uses a lawful product off the employer's premises during nonworking hours.

(3) *Subsection (2) does not apply to*:

(a) use of a lawful product, that:
(i) *affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees*; or

(ii) *conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;*

(b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or

(c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

(4) An employer does not violate this section if the employer takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

Hence, the statute permits employers to regulate employees' use of marijuana **outside of the workplace** if, among other reasons, doing so: (i) "affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees"; or (ii) "conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment." Mont. Code Ann. § 39-2-313(3)(a)(i)-(ii) (2023).

In 2021, the Montana Legislature enacted the Montana Marijuana Regulation and Taxation Act. Title 16, Chapter 12 of the Montana Code Annotated contains the Act's new statutory scheme regulating both recreational and medical marijuana production. Under Montana Code Annotated § 16-12-108(5) (2021), the Act cannot be construed to:

• require an employer to permit or accommodate conduct otherwise allowed by this chapter in any workplace or on the employer's property;

• prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;

• prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or

privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;

• prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or

• permit a cause of action against an employer for wrongful discharge pursuant to 39-2-904 or discrimination pursuant to 49-1-102.

Accordingly, the Act safeguards employers' rights to prohibit both medical and recreational marijuana use by employees in the workplace. It is true the Act establishes that marijuana is now a "lawful product," which generally means employers cannot discriminate against employees who use "off the employer's premises during non-working hours." See Mont. Code Ann. § 39-2-313(1) (2021).

That general rule, however, is subject to certain exceptions enumerated in the Act amending Montana Code Annotated § 16-12-108(4) (2021) and § 39-2-313(3) (2021). The Act's revisions to Montana Code Annotated § 16-12-108(5)(b) (2021) effectively permits employers with drug testing policies to regulate marijuana use outside of the workplace. If employees are subject to mandatory drug tests that cannot distinguish between marijuana use inside the workplace and outside of the workplace, then those employees effectively are barred from all marijuana use.

II. LEGAL AUTHORITY

A. COURT DECISIONS

There are many states besides Montana which have passed marijuana laws that include explicit anti-discrimination protections from adverse employment actions. See, e.g., Ariz. Rev. Stat. § 36-2813; Colo. Rev. Stat. Section 24-34-402.5; Conn. Gen. Stat. § 21a-408p(b); Del. Code Ann. tit. 16, § 4905A; 410 Ill. Comp. Stat. 130/40; Me. Rev. Stat. tit. 22, § 2423-E; Nev. Rev. Stat. § 453A.800; N.Y.

PUB. HEALTH LAW § 3369; MINN.STAT. § 152.32; P.S. § 10231.2103(b)(1); R.I. Gen. Laws § 21-28.6-4.

In a Montana Supreme Court non-cite decision, *Johnson v. Columbia Falls Aluminum*, 2009 MT 108N, the Court rejected an employee Johnson's claims for violations of the Montana Human Rights Act and the Americans with Disabilities Act. Johnson alleged that CFAC violated the ADA and MHRA when it failed to accommodate his medical marijuana use by waiving terms of its Drug Testing Policy allowing termination of employees who test positive for marijuana. Citing Montana's Medical Marijuana Act, Section 50-46-205(2)(b), MCA, the Court noted that an employer is not required to accommodate an employee's use of medical marijuana. *Johnson* of course predates the legalization of recreational marijuana and Montana's 2021 legislative amendments.

More specific to Montana's current lawful use statute, the Colorado Supreme Court in 2015 ruled that an employer could lawfully terminate an employee who tested positive for marijuana in a random drug test, even though the employee's use of marijuana was off-duty and lawful. *Coats v. Dish Network, LLC*, 350 P.3d 849, 2015 CO 44 (2015). While Colorado generally is an at-will employment state, like Montana, Colorado has a Lawful Off-Duty Activities Statute. C.R.S. § 24-34-402.5(1) provides, in part:

> 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 during nonworking hours unless such a restriction: (a) [r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) [i]s necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

Brandon Coats is quadriplegic. In 2009, he obtained a Colorado state-issued license to use medical marijuana to treat painful muscle spasms. He consumed the prescribed medical marijuana in accordance with his license and the state law. He was employed by Dish Network from 2007 to 2010 as a telephone customer service representative. In May 2010, Coats tested positive for a component of medical marijuana during a random drug test. He informed Dish that he was a registered medical marijuana patient. Dish terminated his employment under its drug policy.

Coats sued Dish, claiming that he was wrongfully terminated under Colorado's "lawful activities statute" (Colo. Rev. Stat. Section 24-34-402.5). Coats argued that because his use of medical marijuana was "lawful" and protected under Colorado law, the termination violated the lawful activities statute. The trial court and appellate court rejected his claim.

In a unanimous decision, the Colorado Supreme Court affirmed the dismissal of Coats' lawsuit. Although Coats' use of medical marijuana was lawful under Colorado's medical marijuana law, marijuana is a "controlled substance"

under the federal Controlled Substances Act and its use, even for medicinal purposes, is a federal criminal offense. As a result, the Court held that Coats' use of medical marijuana was not "lawful" and he was not protected from termination because of his use of medical marijuana. The Court also rejected arguments that use of medical marijuana was no longer unlawful because: (a) the U.S. Department of Justice announced that it will not prosecute certain patients who use medical marijuana in accordance with state law; and (b) in December 2014, Congress passed an appropriations bill that prohibits the Department of Justice from using funds appropriated under the act to prevent states with medical marijuana laws (like Colorado) from implementing those laws.

Other jurisdictions have similarly followed the Colorado Supreme Court. See, e.g., *Lambdin v. Marriott Resorts Hosp. Corp.*, No. 16-00004 HG-KJM, 2017 U.S. Dist. LEXIS 149570, at 24–25 (D. Haw. Sep. 14, 2017) ("[Hawaii's] state law decriminalizing marijuana use does not create an affirmative requirement for employers to accommodate medical marijuana use."); *Roe v. Teletech Customer Care Mgt.* (Colorado) LLC, 171 Wn.2d 736, 760, 257 P.3d 586 (2011) (holding that Washington State's medical marijuana law did not create a private right of action and did not proclaim a public policy prohibiting the discharge of an employee for medical marijuana use) lawful" to mean lawful under both state and federal law); *Casias v. Wal-Mart Stores, Inc.,* 695 F.3d 428, 435-36 (6th Cir. 2012)

(Michigan's medical marijuana statute, which provides protection against disciplinary action by a "business," does not impose restrictions on private employers, as a matter of textual interpretation); *Stanley v. Cty. of Bernalillo Comm'rs*, 2015 U.S. Dist. LEXIS 109979, 2015 WL 4997159, at *5 (D.N.M. 2015) (citing additional cases in which courts have "rejected the plaintiff's claims that state anti-discrimination laws prohibit private employers from terminating employees for state authorized medical marijuana usage as a matter of statutory interpretation).

B. ARBITRATION DECISIONS

In *Flathead City/County Health Dept. v. Employees Local 7794, MFPE,* ARBITRATION NO. 2025DRS0013 and NO. 2025DRS0169 (Arb., G. Fleischli, August 2025), the County sent Jennifer Mahlum, a "Breastfeeding Peer Counselor" for a random drug test. Mahlum did not manifest any behavior or symptoms that morning that might suggest she was under the influence of alcohol or amphetamines, marijuana, opioids, cocaine and phencyclidine. She was not tested for the use of alcohol. Mahlum's sample tested "positive" for "Marijuana." When confronted with the result, Mahlum admitted that she had smoked marijuana while off duty a couple of days before she was tested.

Based on the positive test result, the County disciplined Mahlum and she grieved her suspension. Her grievance argued that random drug testing for off duty

use of legalized marijuana by non-DOT employees cannot serve as the basis for discipline. Rather for "just cause", an employer must be able to show that a "nexus" exists between the employee's off duty behavior and its legitimate business interests.

The County defended its policy and practice in reliance on the County's "zero tolerance" policy and consistent with the County's promise to maintain a drug free workplace. The County maintained that Mahlum's job does affect public health; the policy is reasonable and compliant with Montana law, which expressly authorizes employers to maintain drug-free workplaces, and drug-testing policies adopted in the wake of the legalization of medical and recreational marijuana.

Arbitrator Fleischli sided with the Grievant and Union, finding the County did not have just cause to discipline because it was undisputed that the test employed for marijuana use--the common if not universal test used for random testing--is not capable of establishing whether the employer was under the influence of marijuana when the urine sample was provided or even establish approximately when the marijuana was inhaled or ingested. Standing alone, a positive test is insufficient to overcome an affirmative defense advanced by the employee or on her behalf, that the marijuana was consumed off duty and off premises.

III. STRATEGIES

As my Mama always said, "just because you can doesn't mean you should." Do you pre-employment test for cannabis and eliminate a large segment of potential candidates? A District of Columbia law, in effect since 2015, prohibits employers from testing job applicants for marijuana before making a conditional offer of employment, unless otherwise required by law. Nevada has enacted changes to its Lawful Product Use Law that prohibits employers from failing or refusing to hire a job applicant solely because he or she tests positive for marijuana. If marijuana use precludes someone from being hired, on a national basis that a 35-million-person chunk of the working population that the company is ruling out from the start. With a labor shortage of 7 million, it's becoming harder to justify excluding marijuana users.

Does a positive result for cannabis following random testing qualify as "good cause" under Montana law? Is an employee impaired while at work simply because she consumed marijuana over the weekend? What if an employee uses marijuana to treat a qualified disability? None of us wants to be the legal guinea pig.

If you are allowed to drug test under Montana Workforce Drug and Alcohol Testing Act (§§ 39-2-205 through 39-2-211, MCA), you need to rethink your testing protocols. Cannabis drug tests look for THC, not cannabis. So, the amount of THC that a person consumes is a significant factor. Tests can detect relatively

small quantities of THC, and the effects of THC are cumulative. A person who uses several times over several days has consumed a higher THC dose than someone who consumes once, so they are more likely to test positive. The detection windows for THC also can be as long as 90 days, in particular if using hair follicle testing which is the most sensitive test.

Employers need to rethink their testing protocols. One option is removing marijuana from your urine drug screen panel, while continuing to test for other substances. A traditional urine analysis looks for a THC metabolite known as THC-COOH. This byproduct produced by your body when you consume THC is stored in fat cells before ultimately getting passed through the kidneys. An option is using oral fluid (saliva) testing—a method that can detect active marijuana in the system rather than the leftover metabolites. Saliva tests aim to detect activated THC itself. Mouth swab drug tests will only detect THC in your saliva for between 24-48 hours after an employee has consumed marijuana.

Train on reasonable suspicion and test under that criteria, remembering that objectivity and documentation is critical. Train supervisors to look for physical signs of marijuana use, including red eyes, poor muscle coordination, delayed reaction times, and of course smell. Or rather than drug test, use tests that measure performance impairment—focusing on marijuana's impact on qualities such as short-term memory.