Getting *Legally* High on Marijuana in Colorado May Not Actually be Legal

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Commonly known monikers for marijuana include weed; dope; grass; pot; green; wacky tabacky; Mary Jane; chronic; hemp; reefer; hooch, dime bag special; green monster; Bob Marley; sticky icky; afternoon delight; cannabis; space cowboy; puff the magic dragon; joint; purple haze; northern lights; skunk; roach; Maui wowie; Panama Red; Oscar the Grouch; train wreck; Yoda; doobie; THC; Cheech and Chong; kush; devil's lettuce; and puff. Whatever it is called, Coloradoans appear to be in Canna*bliss* with two major laws regulating, not prohibiting, the use of marijuana in the state.

From July 2013 through September 2013, Colorado medical dispensaries reported approximately $110 million worth of medical marijuana sales state-wide. Although official figures are not yet available for recreational marijuana sales which began in January, *one* dispensary reportedly sold $700,000 in recreational marijuana in just one month.

Canna*bliss* may come at a high price. In addition to the cost of the marijuana and the hefty tax Colorado imposes on marijuana sales, people who use marijuana in the state may be evicted from rental property, have their employment terminated, and be denied unemployment benefits.

Background

Medical Marijuana

In November 2000, Colorado voters legalized medical marijuana for use by patients with debilitating medical conditions and exempted such patients and their caregivers (a person other than the patient and the patient's physician, who has significant responsibility for managing the well-being of a patient with a debilitating medical condition) from *state* criminal marijuana penalties. In addition to de-criminalizing the possession and use of medical marijuana at the *state* level, with the passage of Amendment 20, Colorado's constitution was amended to allow patients and their caregivers to cultivate marijuana as well. Article 18, §14 of the state constitution allows a patient who has been issued a "medical marijuana registry identification card" or the patient's caregiver to possess up to two ounces of a usable form of marijuana and up to six marijuana plants, although no more than three of the plants can be producing a usable form of marijuana at any one time.

Medical marijuana was intended for patients with debilitating medical conditions. In practice however, medical marijuana was relatively easy to obtain. For example, people with only vague complaints of back or neck pain were referred to doctors being paid by marijuana dispensaries. Such physicians were willing to make medical marijuana recommendations (doctors cannot write prescriptions for marijuana) for generic symptoms, often without even examining the so-called "patient".

Reports by the Colorado Department of Public Health and Environment concluded that approximately 73% of medical marijuana patients in the state received marijuana recommendations from only fifteen different doctors and that five Colorado doctors were responsible. for authorizing 49% of the marijuana recommendations. To address this situation, COLO. REV. STAT. §25-1.5-106 ("The Doctor Bill") now requires physicians to conduct a

"personal physical exam" before issuing a recommendation for treatment with medical marijuana to ensure that a true doctor-patient relationship exists to justify the recommendation. The Doctor Bill also requires physicians to keep records of all of their medical marijuana recommendations so the CDPHE and/or the Colorado Board of Medical Examiners can investigate the legitimacy of the doctor's marijuana recommendations.

Recreational Marijuana

Colorado voters passed Amendment 64 in November 2012 and became the first state to de-criminalize recreational marijuana use. Since January 1, 2014, Colorado residents who are 21-years or older are allowed to possess, use and grow a limited amount of marijuana for their personal consumption. More specifically, relevant portions of C.R.S.A. Const. Art. l8, §16 provide as follows:

> 1) Purpose and findings.
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> > (a) In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.
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> > (b) In the interest of the health and public safety of our citizenry, the people of the state of Colorado further finds and declares that marijuana should be regulated in a manner similar to alcohol so that:
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> > > (I) Individuals shall have to show proof of age before purchasing marijuana;
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> > > (II) Selling, distributing, or transferring marijuana to minors and other individuals under the age of twenty-one shall remain illegal;
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> > > (III) Driving under the influence of marijuana shall remain illegal;
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> > > (IV) Legitimate, taxpaying business people, and not criminal actors, will conduct sales of marijuana; and
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> > > (V) Marijuana sold in this state will be labeled and subject to additional regulations to ensure that consumers are informed and protected.
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> > . . .
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> (3) Personal use of marijuana. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:

(a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.

(b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.

(c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.

(d) Consumption of marijuana, provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.

(e) Assisting another person who is twenty-one years of age or older in any of the acts described in paragraphs (a) through (d) of this subsection.

. . .

(6) Employers, driving, minors and control of property.

(a) Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.

(b) Nothing in this section is intended to allow driving under the influence of marijuana or driving while impaired by marijuana or to supersede statutory laws related to driving under the influence of marijuana or driving while impaired by marijuana, nor shall this section prevent the state from enacting and imposing penalties for driving under the influence of or while impaired by marijuana.

(c) Nothing in this section is intended to permit the transfer of marijuana with or without remuneration, to a person under the age of twenty-one or to allow a person under the age of twenty-one to purchase, possess, use, transport, grow, or consume marijuana.

(d) Nothing in this section shall prohibit a person, employer, school, hospital, detention facility, corporation or any other entity who occupies, owns or controls a property from prohibiting or otherwise regulating the possession, consumption, use, display, transfer, distribution, sale, transportation, or growing of marijuana on or in that property. . .

Possible Consequences of Using Medical or Recreational Marijuana

While both medical and recreational marijuana are legal in Colorado, potential users need to understand that marijuana remains illegal under federal law and is classified as a Schedule I substance (along with LSD) under the Controlled Substance Act. *See* 21 U.S.C. §801 *et seq*. Accordingly, purported lawful use may not ultimately be deemed lawful. *See People v. Watkins*, 282 P.3d 500 (Colo. App. 2012).

Housing

Despite the changes in marijuana laws in Colorado, property owners can still prohibit or otherwise regulate the possession, consumption, use and growth of marijuana on their property to ensure *inter alia* that leased premises are not damaged or used unlawfully. *See* C.R.S.A. Const. Art. 18, §16(6)(d); *In Re Rent-Rite Super Kegs West Ltd*., 484 B.R. 799 (2012) (In deriving roughly 25% of its revenue from leasing warehouse space to tenants who, to debtor's knowledge, were engaged in business of growing marijuana without certificate of approval from the Drug Enforcement Agency (DEA), debtor was engaged in conduct that violated the so-called "crack house" statute thereby subjecting warehouse property to forfeiture). Quasi-governmental entities who own/operate low-income housing and oversee Housing Choice Vouchers similarly can and must prohibit and regulate the use of medical and recreational marijuana on their properties.

In a January 20, 2011, memorandum regarding "Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing," the U.S. Department of Housing and Urban Development concluded that accommodation for medical marijuana users was not required. Such memo provided in pertinent part as follows:

> The Office of Fair Housing and Equal Opportunity (FHEO) requested our opinion as to whether Public Housing Agencies (PHAs) and owners of other federally assisted housing may grant current or prospective residents a reasonable accommodation under federal or state nondiscrimination laws for the use of medical marijuana (footnote deleted). Commensurate with the relatively recent upsurge of states passing medical marijuana laws, there has been a significant increase in the number of requests by residents of those states for exceptions to federal drug-free laws and policies to permit the use of medical marijuana as a reasonable accommodation for their disabilities. In 1999, this Office issued a Memorandum concluding that any state law purporting to legalize the use of medical marijuana in public or other assisted housing would conflict with the admission and termination standards found in the Quality Housing and Work and Responsibility Act of 1998 (QHWRA) (footnote omitted) and be subject to preemption (footnote omitted). With this Memorandum, we reaffirm the Laster Memorandum's conclusions, and we address those conclusions in the context of requests for reasonable accommodation under federal and state nondiscrimination laws.
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> [F]ederal and state nondiscrimination laws do not require PHAs and owners of other federally assisted housing to accommodate requests by current or prospective residents with disabilities to use medical marijuana. In fact, PHAs

and owners may not permit the use of medical marijuana as a reasonable accommodation because: 1) persons who are currently using illegal drugs, including medical marijuana, are categorically disqualified from protection under the disability definition provisions of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act; and 2) such accommodations are not reasonable under the Fair Housing Act because they would constitute a fundamental alteration in the nature of a PHA's or owner's operations. Accordingly, PHAs and owners may not grant requests by current or prospective residents to use medical marijuana as a reasonable accommodation for their disabilities, and FHEO investigators should not issue determinations of reasonable cause to believe a PHA or owner has violated the Fair Housing Act based solely on the denial of a request to use medical marijuana as a reasonable accommodation.

. . .

Accommodations that allow the use of medical marijuana would sanction violations of federal criminal law and thus constitute a fundamental alteration in the nature of the housing operation. Indeed, allowing such an accommodation would thwart a central programmatic goal of providing a safe living environment free from illegal drug use. Since the inception of the public housing program in 1937, Congress and HUD have consistently maintained that one of the primary concerns of public housing and other assisted housing programs is to provide "decent, safe, and sanitary dwellings for families of low income." United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937); 42 U.S.C. §1437a(a)(5)(C)(b)(1); *see also* 24 C.F.R. §880.101 (same with respect to Section 8 program). Congress has made it clear that providing drug-free housing is integral to the government's responsibility in this regard: "[T]he Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, safe and *free from illegal drugs*." 42 U.S.C. §11901(1) (emphasis added). Toward this end, Congress specifically vested PHAs and owners with the authority to take action against illegal drug use, including the use of medical marijuana. Illegal drug use renders the user ineligible for admission to public or other assisted housing (footnote omitted), conflicts with drug-free standards that PHAs and owners are required to establish for current tenants (footnote omitted), and would violate a user-tenant's lease obligation to refrain from engaging in any drug-related criminal activity on or off the premises (footnote omitted).

On February 10, 2011, another memorandum entitled "Medical Marijuana in Public Housing and Housing Choice Voucher Programs" was issued by HUD. Such memorandum provided in pertinent part:

New Admissions

Based on federal law, new admissions of medical marijuana users are prohibited into the PHA or HCV programs. The Controlled Substances Act (CSA) lists

marijuana as a Schedule I drug, a substance with a very high potential for abuse and no accepted medical use in the United States. The Quality Housing and Work Responsibility Act (QHWRA) of 1998 (42 U.S.C. §13661) requires that PHAs administering the Department's rental assistance programs establish standards and lease provisions that prohibit admission in the PHA and HCV programs based on the illegal use of controlled substances, including state legalized medical marijuana. State laws that legalize medical marijuana directly conflict with the admission requirements set forth in QHWRA and are thus subject to federal preemption.

Current Residents

For existing residents, QHWRA requires PHAs to establish occupancy standards and lease provisions that will allow the PHA to terminate assistance for use of a controlled substance. However, the law does not compel such action and PHAs have discretion to determine continued occupancy policies that are most appropriate for their local communities. PHAs can also determine whether to deny assistance to or terminate individual medical marijuana users, rather than entire households, for both applicants and existing residents when appropriate. PHAs have discretion to determine, on a case-by-case basis, the appropriateness of program termination of existing residents for the use of medical marijuana.

To address medical and recreational marijuana issues, housing authorities in Colorado should review and modify as needed, their rental criteria, lease documents and rental/lease policies. Depending on whether marijuana use will be allowed, all of the lease documents should be consistent about the policy that is in effect. For example, documents should make it clear that illegal substances and criminal activity are premised on state and federal law and that marijuana use is illegal under federal law and therefore prohibited on the leased premises. Moreover, since the process of growing marijuana may cause mold and excessive electricity use, lease documents should make it clear that growing marijuana plants on the premises is unlawful under federal law and therefore prohibited. Housing authorities should also consider "no smoking" provisions and the requirement that renters execute a form disclosing whether they are using medical marijuana.

Employment

Employees in Colorado cannot be prohibited from engaging in legal activities as a condition of employment. *See* COLO. REV. STAT. §24-34-402.5. According to the provisions of C.R.S. §24-34-402.5:

(1) 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) Relates 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) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

. . .

Notwithstanding the provisions of C.R.S. §24-34-402.5, employees can not only be terminated for their lawful use of marijuana, but their unemployment benefits can be denied as well. A case in point is *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013).

Mr. Coats was fired by his employer after testing positive for marijuana, which constituted a violation of his employer's drug policy. Mr. Coats was a quadriplegic who was licensed by the state of Colorado to use medical marijuana pursuant to the Medical Marijuana Amendment, Colo. Const. Art. 18, §14.

Mr. Coats maintained he was never under the influence of marijuana at work; that he used marijuana only within the allowable limits; and that he never used marijuana on his employer's premises. He therefore argued that his use had been lawful. The Colorado Court of Appeals disagreed and held that at the time of his termination, all of Mr. Coats' marijuana use was prohibited by federal law. *See* 21 U.S.C. §844(a); *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (State law authorizing possession and cultivation of marijuana does not circumscribe federal law prohibiting use and possession); *Ross v. RagingWire Telecommunications, Inc*., 42 Cal.4th 920 (2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users"). It additionally held that activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law. Accordingly, for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to both state and federal law. An activity that violated federal law but complied with state law could therefore not be deemed "lawful" under the ordinary meaning of that term. *Id.* at 150-151. Certiorari was granted by the Colorado Supreme Court on January 27, 2014. It is therefore unclear if the holding in *Coats* will be reversed.

Similarly, in *Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970 (Colo. App. 2011), the Colorado Court of Appeals held that the Plaintiff was lawfully terminated pursuant to his employer's zero-tolerance drug policy which prohibited "illegal drugs". Although the employee had a medical marijuana registry identification card and his off-duty marijuana use had been consistent with Colorado's constitutional amendment, the Court of Appeals reasoned that the constitutional amendment had no bearing on federal laws under which marijuana remained an illegal substance. *Id.* The Court additionally noted that medical marijuana is not obtained pursuant to a prescription and therefore it is not a "medically-prescribed controlled substance" within the meaning of the statute providing for disqualification from unemployment compensation benefits for the presence of "not medically prescribed controlled substances". *Id.*

A positive test for marijuana, regardless of whether it is from medical or recreational use, is a legitimate basis for discharging an employee under Colorado law. *See* Colo. Const. Art. 18 §16; S*laughter v. John Elway Dodge Southwest/Autonation*, 107 P.3d 1165, 1170 (Colo. App.

2005) (C.R.S. §8-73-108(5)(c)(IX.5) (It is acceptable for an employer to have a written drug policy and to terminate an employee as the result of a drug test showing the presence of marijuana in the employee's system during working hours). An employer must establish however that its "no drug" policy is uniformly applied and is in writing.

A request for "accommodation" pursuant to the Americans with Disabilities Act prior to a medical marijuana user's termination for off-duty marijuana use may lead to a different outcome. The employer however is not discriminating against an employee's disability; just the treatment for the same. 42 U.S.C.A. §12101 *et seq.*

Conclusion

As the only state that has legalized recreational marijuana, it is appropriate that "Rocky Mountain High", a folksong that was sung and co-written by John Denver, is one of Colorado's official state songs. Although medical and recreational marijuana use is legal in Colorado, such use remains illegal by the federal government. Accordingly, medical and recreational marijuana use may have surprising consequences. The loss of employment, unemployment benefits, and leased housing may be too high a price to pay for a "Rocky Mountain High".