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Marijuana Laws Liberalized in Colorado, Washington – But Effect on Workplace Policies Likely Small

By Nancy Delogu and Chris Leh

The 2012 elections placed a number of marijuana initiatives before state voters around the United States, ranging from efforts to legalize the sale and use of marijuana for recreational purposes to further expansion of the “medical marijuana” laws that currently exist in 17 states and the District of Columbia. Voters in Colorado and Washington passed initiatives directing their states to decriminalize the possession of marijuana by adults for recreational use. The new laws, which contemplate each state setting up a regulatory system to administer the sale and distribution of marijuana by the state in a manner similar current state laws on the use and sale of alcohol, are unique in the nation and, according to news sources, broader than the laws permitting the purchase of small amounts of marijuana in Amsterdam.¹ Oregon voters, in contrast, rejected a ballot initiative that would have legalized marijuana for recreational use.

Massachusetts has adopted a “medical marijuana” law that decriminalizes the use and possession of marijuana by state residents with debilitating medical conditions. Montana voters have authorized amendments to that state’s existing medical marijuana law that narrow who is eligible to use marijuana for medical reasons.

Summary of Initiatives & Their Possible Impact

Despite the “buzz” about Colorado and Washington’s new laws, including snarky references to the Colorado state song, “Rocky Mountain High,” predictions suggesting a dramatic effect of these laws on drug-free workplace policies are likely little more than hot air. Colorado law does prohibit employers from terminating employees for engaging in “any lawful activity off the premises of the employer during nonworking hours” unless the employer’s decision relates to a bona fide occupational requirement, the employee’s specific duties, or the employer’s efforts to avoid a conflict of interest.² However, Colorado’s Amendment 64 not only states, “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,” it also disclaims any intent to “affect the ability of employers to have policies restricting the use of marijuana by employees.” The new law also states that it will not affect the right of an employer (or other entity) that occupies, owns, or controls a property to prohibit the use, possession, transfer, and

1 Jonathan Martin, [Voters approve I-502 legalizing marijuana](#), Seattle Times, Nov. 6, 2012.

2 COLO. REV. STAT. § 24-34-402.5(1).

a number of similar activities involving marijuana on that property. Nor does the law allow individuals to drive while impaired by or under the influence of marijuana, or excuse them from criminal penalties if they do so.³ Similarly, while Washington's measure I-502 decriminalizes recreational marijuana use, it also stiffened the penalties for driving under the influence of marijuana. Any adult driver with a low concentration of marijuana's active ingredient in his or her blood will be considered to be driving under the influence, and drivers under the age of 21 will continue to be charged if they have any amount of marijuana in their systems while operating a vehicle.⁴

Of course, the real issue is whether states can declare conduct "lawful" when the same conduct is considered criminal as a matter of federal law, a question that was answered by the U.S. Supreme Court in 2005 when it declared, in *Gonzales v. Raich*, 545 US. 1 (2005), that the federal government had the power to criminalize marijuana-related conduct even when the marijuana was grown and used entirely within a single state. If state law conflicts with federal law, can the state compel employers to ignore behaviors that are still illegal as a matter of federal law?

Although several states have adopted medical marijuana laws that suggest employers may be obligated to accommodate medical marijuana use by disabled workers, any duty to so accommodate has been soundly rejected by each of the state supreme courts asked to consider the issue. The highest courts in California, Montana, Oregon, and Washington have ruled, in various contexts, that as long as federal law prohibits the use of marijuana for medical reasons, the states cannot actually legalize marijuana use and therefore cannot require employers to accommodate such use.⁵ Unsurprisingly, the U.S. Court of Appeals for the Sixth Circuit reached the same conclusion in reviewing a case alleging that Michigan's medical marijuana law required an employer to accommodate the medical use of marijuana by its employees, and the U.S. Court of Appeals for the Ninth Circuit rejected an argument that the Americans with Disabilities Act's public accommodations provisions prohibited municipalities in California from refusing to license medical marijuana dispensaries.⁶ If states cannot force employers to accommodate the medical use of marijuana by disabled individuals, a protected class, it seems unlikely that a state's authority to prohibit employers from disciplining individuals engaged in lawful, off-duty conduct can extend to conduct that remains unlawful as a matter of federal law. Nevertheless, litigation designed to challenge the limits of state authority seems inevitable.

More immediately, efforts to implement the Colorado and Washington laws will take time, if they are permitted to go into effect at all. In a statement released the day after the election, Colorado's Attorney General, John Suthers, cautioned Coloradans that, "the ability of the federal government to criminally sanction possession, use and distribution of marijuana, even if grown, distributed and used in a single state, was recognized by the U.S. Supreme Court in [*Raich*]. Therefore, absent action by Congress, Coloradans should not expect to see successful legal challenges to the ability of the federal government to enforce its marijuana laws in Colorado." Suthers went on to ask the U.S. Department of Justice "to make known its intentions regarding prosecution of activities sanctioned by Amendment 64 (particularly large wholesale grow operations) as soon as possible in order to assist state regulators and the citizens of Colorado in making decisions about the implementation of Amendment 64."⁷ The measure decriminalizing the possession of marijuana in the State of Washington will take effect on December 6, 2012, but regulations detailing state-approved sale of the drug are not expected until December 2013.

Massachusetts' new medical marijuana law does not, on its face, appear to require employers to accommodate medical marijuana in the workplace, as the Secretary of the Commonwealth reports the law will not only not give immunity to any person for violations of federal law, but also not require any accommodation of the medical use of marijuana in any workplace.⁸ The law, which will go into effect on January 1, 2013, will allow patients who obtain written certification from a physician that they suffer from a debilitating medical condition (such as cancer, glaucoma, HIV, AIDS, hepatitis C, Crohn's disease, Parkinson's disease, ALS, and multiple sclerosis) to register with the Health Department for approval to obtain a 60-day supply of marijuana for personal medical use.

3 [Colorado Amendment 64](#) (2012).

4 [Washington Initiative Measure 502, § 31](#).

5 See *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 926 (2008); *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus.*, 348 Or. 159 (2010); *Johnson v. Columbia Falls Aluminum Co.*, 213 P.3d 789 (Mont. 2009); and *Roe v. Teletech Customer Care Mgmt., Inc.*, 257 P.3d 586 (Wash. 2011).

6 *Casias v. Wal-Mart Stores*, 2012 U.S. LEXIS 19634 (6th Cir. Sept. 19, 2012); *James v. City of Costa Mesa*, 2012 U.S. App. LEXIS 22598 (9th Cir. Nov. 1, 2012).

7 Matt Stafford, [CO Attorney General sounds off on legalizing marijuana](#), KOAA, Nov. 7, 2012.

8 See Secretary of the Commonwealth of Massachusetts, [2012 Information for Voters](#), Massachusetts Question 3 (2012).

Montana voters were asked whether they wanted to repeal the state's current medical marijuana law and enact, instead, a more limited version of the law that specifically would ban those who implement it from profiting on the sale of marijuana or receiving compensation for their services.⁹ At the time of publication, with 93.58% of precincts reporting, the measure looks likely to pass, with 57.13% of Montanans favoring proposed restrictions.¹⁰ Arkansas voters reportedly rejected a ballot measure that would have permitted the use of medical marijuana in the state.¹¹

Communicating with Employees

Despite the dramatic headlines, a close look at the measures approved reveals that it is unlikely that employers in the affected states will need to take any swift action to amend their drug-free workplace policies or their drug-testing programs on account of these laws. It may be important, however, for employers to communicate to employees and applicants what effect, if any, the changes to the laws will have on the employer's existing policies. Employees may understandably be confused as to whether their use of marijuana in accordance with these state initiatives is acceptable to their employer, and employers should be prepared to answer questions from employees, applicants, and employee representatives.

Moreover, employers with written drug-free workplace policies may wish to review those policies to ensure that they clearly express the employer's policy on marijuana use. For example, a policy that prohibits the use of drugs "that are illegal to obtain, or that are not legally obtained," may understandably cause an employee to assume that marijuana use is acceptable, provided he or she complies with state law in obtaining that marijuana. A policy that prohibits the use of drugs "made illegal as a matter of federal, state, or local law, including marijuana" is far more clear. Federal regulations requiring employers to test safety-sensitive workers working in the transportation industry for illegal drug use already make it clear that marijuana use is unacceptable and will disqualify those workers from performing safety-sensitive work in the transportation industry.

Inquiries concerning the State of Washington's law can be directed to Jim Zissler, Office Managing Shareholder of the Seattle office, at jzissler@littler.com. Inquiries concerning Colorado's law can be directed to Chris Leh, Of Counsel in the Denver office, at cleh@littler.com. Inquiries concerning general, national drug-free workplace issues can be directed to Ms. Delogu, a Shareholder in the Washington, D.C., and Northern Virginia offices, at nndelogu@littler.com, or Dale Deitchler, a Shareholder in the Minneapolis office, at ddeitchler@littler.com.

[Nancy Delogu](#) is a Shareholder in Littler Mendelson's Washington, D.C., and Northern Virginia offices, and [Chris Leh](#) is Of Counsel in the Denver office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Delogu at nndelogu@littler.com, or Mr. Leh at cleh@littler.com.

9 See Montana Secretary of State, *Voter Information Pamphlet* (2012).

10 Montana Secretary of State, *Unofficial Results: General Election – November 6, 2012*.

11 Alison Vekshin, *Voters Decide Measures Governing Marriage, Death, Taxes*, Bloomberg Businessweek, Nov. 7, 2012.