Weeding Out Risky Employees

Little Guidance for Arizona in Landmark Medical Marijuana Ruling

BY MICHAEL D. MOBERLY

On June 15, 2015, the Colorado Supreme Court issued its highly anticipated decision in *Coats v. Dish Network*.[1] In a unanimous ruling that undoubtedly will help "shape the contours of how much protection state law will offer those who use medical marijuana,"[2] the *Coats* court upheld the termination of an employee who failed a random drug test after using marijuana for medicinal purposes during his off-duty hours.[3]

The result in *Coats* reflects the view prevailing in most other states in which courts have addressed this issue.[4] The courts generally have upheld the right of employers to terminate an employee for using marijuana in violation of a drug-free workplace policy,[5] even if that use took place during nonworking hours and was authorized by state medical marijuana legislation.[6]

Nevertheless, this is unlikely to be the result reached by a court considering the issue in Arizona,[7] because the protection afforded employees by the Arizona Medical Marijuana Act ("AMMA")[8] is more explicit than that provided by most other states' medical marijuana laws,[9] and "broad enough that an employer is likely required to permit the offsite and off-duty use of medical marijuana."[10]

Employment Implications of Off-Duty Marijuana Use

From an employment perspective, the principal concern arising from an employee's off-duty use of marijuana stems from the residual or "carryover" effects of the drug.[11] One frequently cited study involving aircraft pilots suggests that even low to moderate marijuana use may significantly impair an individual's ability to perform complex tasks involving machinery for as long as 24 hours after ingestion.[12]

In *State v. Lucero*,[13] the Arizona Court of Appeals described the impairing effects of marijuana's primary psychoactive component, tetrahydrocannabinol or "THC,"[14] in the following manner:

> When marijuana is ingested, the concentration of THC in the blood increases rapidly, peaks, and then decreases rapidly to an undetectable level. … The absence of THC in the blood does not mean that the body is unaffected, however. Even when THC is no longer detectable in the blood, it remains for a time in the nervous system and continues to affect the user. It affects judgment, the ability to think, and the ability to solve problems. It can make the ability to perform multiple tasks, such as those performed while driving, difficult. Adverse effects endure as long as twenty-four hours after consumption.[15]

Many employee representatives and marijuana legalization advocates dispute these findings[16] and maintain that marijuana-related impairment actually subsides rather rapidly.[17] Reaching any firm conclusions concerning the likely duration of a particular user's impairment is, in fact, virtually impossible due to variations in consumption habits[18]—there is no medically accepted "dosage" of marijuana[19]—and because marijuana's status as a Schedule I Controlled Substance under federal law[20] significantly limits the ability to conduct research concerning that issue.[21] Nevertheless, virtually all interested parties acknowledge that the impairing effects of marijuana last for some period of time after ingestion.[22] There is also some empirical evidence that chronic marijuana use can have more lasting cognitive and physiological effects on the user.[23]

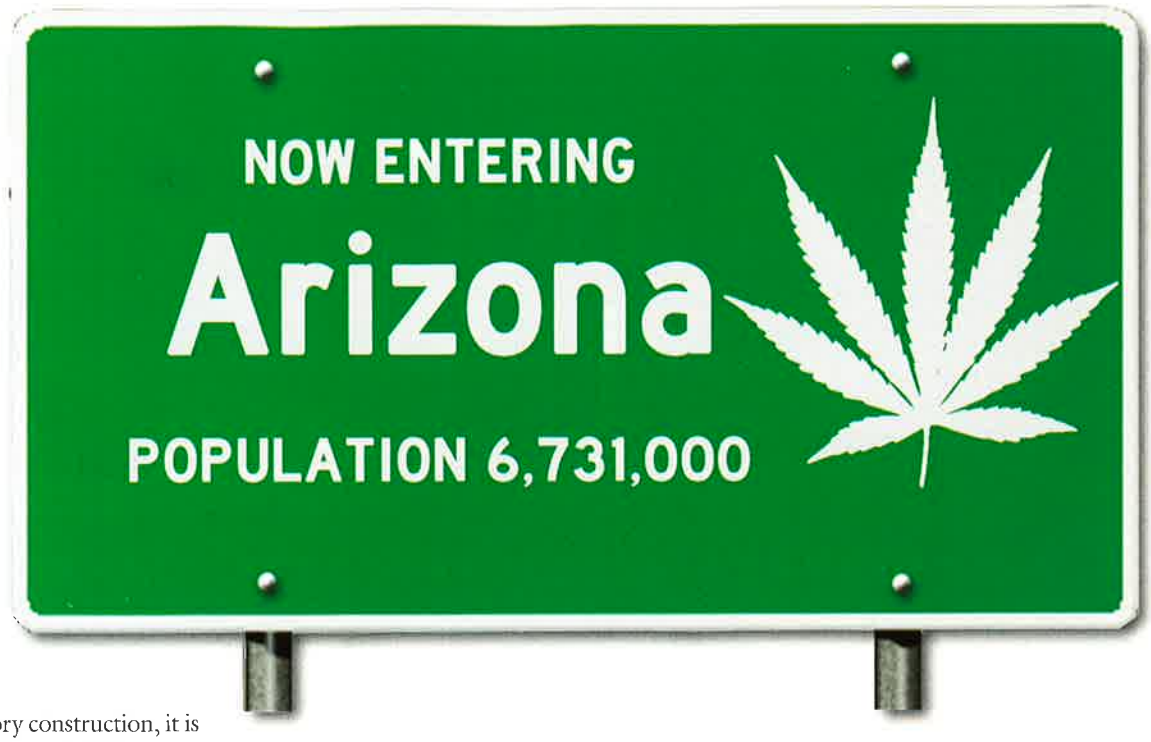
In view of the drug's impairing effects, an employee's off-duty use of marijuana, even for medicinal purposes, could have adverse and occasionally even catastrophic workplace consequences.[24] Although the urinalysis test often used by employers is an imprecise indicator of current impairment,[25] an employer that allows an employee to continue working after testing positive for marijuana could be placing the employee, the employee's coworkers, and innocent third parties at risk,[26] and subjecting itself to potential civil liability to those injured as a result of the employee's inability to work safely.[27]

Colorado Supreme Court and *Coats*

The plaintiff in *Coats* was employed as a telephone customer service representative.[28] A quadriplegic who used marijuana to alleviate painful muscle spasms,[29] he was terminated for violating the employer's drug policy after testing positive for THC during a random drug test.[30] He argued that because his off-duty use of medical marijuana was lawful under the Colorado Medical Marijuana Amendment,[31] he was protected from discharge under Colorado's "lawful activities" statute.[32] That statute, the Colorado Supreme Court noted, "generally prohibits employers from discharging an employee based on his engagement in 'lawful activities' off the premises of the employer during nonworking hours."[33]

Rejecting the employee's argument,[34] the court held that as used in Colorado's lawful activities statute, the term "lawful" refers to those activities that are lawful under both state and federal law.[35] Because marijuana use for any purpose remains unlawful under federal law,[36] the court held that employees who use marijuana, even for medicinal purposes, are not protected by the statute.[37]

It's worth noting that the *Coats* court found it unnecessary to address the potential workplace impact of an employee's off-duty marijuana use.[38] Indeed, apart from noting that, as a matter of federal law, marijuana is still deemed to have "no medical accepted use, a high risk of abuse, and a lack of accepted safety for use under medical



supervision,"[39] the court did not discuss any of the complex policy questions presented by the case.[40] The court instead focused exclusively on the language of the Colorado lawful activities statute.[41]

As a matter of statutory construction, it is difficult to quarrel with the court's interpretation of the statute[42] (which was, in fact, predicted in advance by at least one commentator).[43] And by affirming the right of employers to implement and enforce "zero tolerance" and other workplace drug policies that fit their particular needs,[44] as well as their right to terminate employees who violate those policies,[45] the *Coats* decision brought needed clarity to this important aspect of Colorado law.[46]

The Potential Impact of *Coats* in Arizona

Before *Coats* was decided, several observers predicted that the decision's impact would extend well beyond Colorado,[47] providing guidance to courts addressing the workplace implications of off-duty marijuana use in other states that have legalized the medical or even recreational use of the drug.[48] However, the court's opinion was crafted so narrowly that its precedential impact is likely to be rather limited.[49] In particular, the court's analysis is unlikely to provide useful guidance to employers and employees in Arizona and other states that, unlike Colorado,[50] provide explicit employment protections for individuals who use marijuana in compliance with state medical marijuana laws.[51]

The Present State of Arizona Law

Prior to the enactment of the AMMA, there was no statutory impediment to the termination of an Arizona employee who tested positive for marijuana,[52] even though in some cases a positive test result might reflect prior off-duty use that did not impair the employee's ability to work safely and productively.[53] As the Arizona Court of Appeals explained:

> In employment-at-will situations, an employee agrees to abide by the rules of his employer as a condition of employment. Therefore, an employee who violates the employer's rule may be terminated. Indeed, at-will employment may be terminated at the pleasure of either party with or without cause. Thus, an employer who terminates an at-will employee for failing a drug test ordinarily incurs no civil liability.[54]

Employers in Arizona still can terminate their employees who test positive for the nonmedical use of marijuana.[55] Because the medical use of marijuana gives rise to precisely the same workplace concerns as recreational use,[56] logic would suggest that employers also should be able to terminate their employees who use marijuana for medical reasons.[57] However, the AMMA now specifically prohibits Arizona employers from terminating a registered medical marijuana cardholder who tests positive for marijuana unless the cardholder was impaired by (or used or possessed)[58] the drug on the employer's premises or during working hours.[59]

Unlike in Colorado and other states that legalized the medical use of marijuana years earlier,[60] there are as yet no reported Arizona cases addressing the employment implications of the AMMA.[61] And in part because there is no statutory or other generally accepted standard for determining when an employee testing positive for marijuana can be deemed to be impaired,[62] the rights of employers and their employees who use medical marijuana remain largely unsettled in Arizona.[63] Because the clarity provided by a judicial decision mirroring *Coats* appears to be foreclosed by the language of the AMMA,[64] legislative amendment of the AMMA—itself a daunting prospect given that the AMMA was enacted by voter initiative[65]—may represent a more viable means of addressing the difficult unsettled employee drug testing issues arising from Arizona's legalization of medical marijuana.[66] Until further clarification is provided in some manner, employers, employees, and their attorneys should remain cautious in their approach to these issues.[67]

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1. 350 P.3d 849 (Colo. 2015).
2. John Campbell, Coats v. Dish: *A Chance to Clear the Legal Haze Surrounding Medical Marijuana*, 91 Denv. U. L. Rev. Online 79, 89 (Apr. 13, 2014) (anticipating the impact of *Coats*).
3. *See Coats*, 350 P.3d at 850-51.
4. *See generally* Kayla Goyette, *Recreational Marijuana and Employment: What Employees Don't Know Will Hurt Them*, 60 Gonz. L. Rev. 337, 340 (2015) ("At least for now, employers have the unfettered right to drug test and subsequently terminate employees for legal marijuana use, even marijuana use that takes place outside of work."); Melissa Brown, Comment, *The Garden State Just Got Greener: New Jersey Is the Fourteenth State in the Nation to Legalize Medical Marijuana*, 41 Seton Hall L. Rev. 1519, 1552-53 (2011) ("This has been an issue in other states, ... and courts have generally held that employers need not accommodate medical-marijuana use outside of the workplace.").
5. *See, e.g., Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 216 P.3d 1055, 1060 ¶ 20 (Wash. Ct. App. 2009) (declining to interpret the Washington State Medical Use of Marijuana Act "to prohibit private employers from maintaining a drug-free workplace and terminating employees who use medical marijuana"), *aff'd*, 257 P.3d 586 (Wash. 2011); *see also* John M. Husband, *State Marijuana Legalization Creates Dilemma for Employers*, 43 Lab. & Emp. L. 1, 1 (Summer 2015) ("Most cases involving an employee's use of marijuana have been decided in the employer's favor and have relied on the fact that marijuana remains illegal under federal law.").
6. *See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 524 n.7 (Or. 2010) ("Both the California and Washington courts have held that, in enacting their states' medical marijuana laws, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana. ... We reach the same conclusion, although our analysis differs because Oregon has chosen to write its laws differently.").
7. *See* Liana Abreu, Note, *No Employment Protection for Medical Marijuana Users*, 39 Seton Hall Legis. J. 389, 415 (2015) ("[T]he Arizona Medical Marijuana Act ... allows registered patients to obtain marijuana from a registered nonprofit dispensary and to possess and use medical marijuana to treat their disability without being terminated from their occupation.").
8. Ariz. Rev. Stat. Ann. §§ 36-2801 to 36-2819.
9. *Cf. Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 922 (W.D. Mich. 2011) (noting that the Michigan Medical Marijuana Act "says nothing about private employment rights"), *aff'd*, 695 F.3d 428 (6th Cir. 2012); Brown, *supra* note 4, at 1552 ("The [New Jersey Compassionate Use Medical Marijuana] Act is silent ... as to whether employers can fire or refuse to hire an individual for failing a drug test because of lawful marijuana use outside the workplace.").
10. Lori A. Bowman & Jonathan S. Longino, *Taking the High Road: The Healthcare Provider's Duty to Accommodate Employees' Medical Marijuana Use*, 5 J. Health & Life Sci. L. 34, 61 (Feb. 2012).
11. *See Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1139 (Alaska 1989) (Matthews, C.J., concurring) ("Those who use marijuana off duty are more likely to ... be influenced by marijuana on duty than those who do not use it at all."); *cf. Burka v. N.Y.C. Transit Auth.*, 680 F. Supp. 590, 611 (S.D.N.Y 1988) ("Helen Jones and Paul Lovinger, authors of *The Marijuana Question* (1985), argue that marijuana use disqualifies one from a position of responsibility in safety-related matters since, although the intoxication usually lasts only a few hours, the impairment does not end with intoxication.").
12. *See Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 585 (5th Cir. 2003) (discussing Jerome A. Yesavage et al., *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 Am. J. Psychiatry 1325 (1985)).
13. 85 P.3d 1059 (Ariz. Ct. App. 2014).
14. *See State ex rel. Montgomery v. Harris*, 346 P.3d 984, 985 n.1 (Ariz. 2014) (noting that "marijuana ... includes tetrahydrocannabinol ("THC"), its primary psychoactive component").
15. *Lucero*, 85 P.3d at 1063 ¶ 18 (summarizing expert testimony); *see also Lather v. Berg*, 519 N.E.2d 755, 763 (Ind. Ct. App. 1988) ("The harm caused by the use of marijuana is confirmed by scientific studies of its effects on drivers' abilities. Marijuana use impairs driver functions associated with visual search and recognition.").
16. *See, e.g.*, Edward M. Chen et al., *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 Geo. Mason U. L. Rev. 651, 679 n.14 (1990):

    > Some drug testing advocates have tried to forge the nexus between off-duty drug use and on-duty impairment by relying on studies which purportedly show "hangover" effects of, for example, marijuana, which can last 24 hours. But those studies have been criticized as methodologically flawed. For instance, the Yesavage study was admittedly "preliminary," had a small sample, and was neither controlled nor blind—a basic rule of study design.

    Id. at 679 n.14 (citations omitted).
17. *See, e.g., Hall v. Recchi Am., Inc.*, 671 So. 2d 197, 200 (Fla. Dist. Ct. App. 1996) (discussing expert testimony that "a person who smokes marijuana remains impaired for only four to six hours after ingestion of the drug"), *aff'd*, 692 So. 2d 153 (Fla. 1997).
18. *See In re* Jones, 110 Cal. Rptr. 765, 768 (Ct. App. 1974) ("Without knowing the amount of [the] drug consumed at a given time or the cumulative amount consumed over a period of years a scientific determination of its effect [is] difficult."); Stacy A. Hickox, *Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment*, 29 Hofstra Lab. & Emp. L.J. 273, 296 (2012) ("[R]esearch ... makes it clear that the effects of marijuana use vary considerably based on the amount used, the frequency of use, and the individual's body makeup.").
19. *See People v. Orlosky*, 182 Cal. Rptr. 3d 561, 568 (Ct. App. 2015) ("[D]octors do not typically recommend a specific dosage of marijuana because there is a high level of variability in patient tolerance levels and plant potency, and patients are normally told to use the amount that gives them pain relief."); *cf. United States v. Bindley*, 157 F.3d 1235, 1243 (10th Cir. 1998) ("[L]ike any street drug, marijuana is not subject to any governmental standard which would insure the potency or purity of any given quantity of marijuana."); *Washington v. Smith*, 610 P.2d 869, 873 (Wash. 1980) ("The level of THC in samples of marijuana varies, and this variation accounts in part for the differences in human reactions to the drug.").
20. *See Raich v. Gonzalez*, 500 F.3d 850, 865 (9th Cir. 2007) ("Congress placed marijuana on Schedule I of the Controlled Substances Act, taking it outside of the realm of all uses, including medical, under federal law.").
21. *See Grinspoon v. DEA*, 828 F.2d 881, 896 (1st Cir. 1987) ("[L]egal, administrative, and practical obstacles ... hinder researchers seeking to conduct experiments with Schedule I drugs. These obstacles include ... difficulty obtaining volunteers for clinical studies and, for academic researchers, difficulty in securing approval from institutional review boards.").
22. *See, e.g., Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d 586, 593 ¶ 25 (Wash. 2011) (noting terminated employee's acknowledgment that "the use of marijuana continues to influence a patient for some time after ingestion"); *see also Glide Lumber Prods. Co. v. Employment Div.*, 741 P.2d 907, 910 (Or. Ct. App. 1987) (observing that "the drug can affect safety and performance for a period of time after its ingestion").
23. *See* Deborah J. La Fetra,

Medical Marijuana and the Limits of the Compassionate Use Act: Ross v. RagingWire Telecommunications, 12 CHAPMAN L. REV. 71, 77-78 (2008) ("While many effects of marijuana dissipate over a short period of time, others—such as respiratory ailments and decreased cognitive ability resulting from prolonged exposure to marijuana—remain concerns over the long term."); Annaliese Smith, Comment, *Marijuana as a Schedule I Substance: Political Ploy or Accepted Science?* 40 SANTA CLARA L. REV. 1137, 1142 (2000) ("Many studies focus on the effects of marijuana in the brain that may result in changes in cognition, learning and attention. … In chronic users, data indicate that long-term marijuana use impairs the ability to efficiently process information.") (citations omitted).

24. *See generally Weller v. Ariz. Dep't of Econ. Sec.*, 860 P.2d 487, 495 (Ariz. Ct. App. 1993) ("[E]mployers have a legitimate interest in prohibiting employees from working while they are physically or mentally impaired by drugs. Impaired workers are not only a menace to the vitality of our economy but also to the safety of the community and other workers."); La Fetra, *supra* note 23, at 75 ("Employer fears of employee absenteeism, shiftlessness, or malfeasance while under the influence of marijuana, even when recommended for medical purposes, rest on medical studies demonstrating a wide range of impacts that can occur, especially with prolonged ingestion of the drug.").
25. *See Burka v. N.Y.C. Transit Auth.*, 739 F. Supp. 814, 821 (S.D.N.Y. 1990) (observing that "urinalysis is not necessarily determinative of impairment from marijuana while on-duty"); *Nat'l Fed'n of Fed. Emps. v. Carlucci*, 690 F. Supp. 46, 49 (D.D.C. 1988) ("[U]rinalysis drug testing detects any recent use of tested-for drugs, off-duty as well as on-duty. … [I]t cannot show that off-duty use necessarily has an effect on work performance.") (emphasis omitted), *aff'd in part and vacated in part sub nom. Nat'l Fed'n of Fed. Emps. v. Cheney*, 884 F.2d 603 (D.C. 1989); Jay S. Becker & Saranne E. Weimer, *Legalization of Marijuana Raises Significant Questions and Issues for Employers*, 291 N.J. LAW. 66, 68 (Dec. 2014) ("Typically, marijuana is tested through a urine sample. … However, marijuana can remain in the individual's system for weeks. Hence, a urinalysis is not a reliable way to determine whether an individual is currently impaired.").
26. *See, e.g., Peterson v. Neb. Dep't of Health & Human Servs.*, 805 N.W.2d 667, 675 (Neb. Ct. App. 2011) ("It was of the utmost importance, for his safety and the safety of others, that [the plaintiff] remain alert and unimpaired at work. Clearly, his use of marijuana prior to reporting to work had the potential to affect his job performance and jeopardize the safety and security of [the workplace]."); *see also Kehde v. Iowa Dep't of Job Serv.*, 318 N.W.2d 202, 207 (Iowa 1982) ("[T]he intoxicating effect of marijuana poses obvious risks to an employee who is under the influence of the drug and to coworkers.").
27. *See* La Fetra, *supra* note 23, at 73-74 ("Impaired employees … are more likely to make mistakes when they are at work. Employers may become liable for misdeeds committed by their drug-using employees."); Thomas H. Barnard & Martin S. List, *Defense Perspective on Individual Employment Rights*, 67 NEB. L. REV. 193, 202 (1988) ("[E]mployers have become more acutely concerned with the direct and indirect costs of drug use in, or affecting, the workplace. Additional costs can occur through liability to third parties for injuries caused by employees under the influence of drugs, whether directly or on the theory of negligent hiring.") (citations omitted).
28. *See Coats*, 350 P.3d at 850.
29. *See id.*
30. *See id.* at 850-51.
31. The Colorado Medical Marijuana Amendment is a state constitutional provision that created a limited exception to the application of the state's

criminal laws for registered patients who engage in the "medical use of marijuana." COLO. CONST. art. XVIII, § 14(2)(b). The plaintiff argued that this constitutional provision made his medical use of marijuana lawful "notwithstanding any federal laws prohibiting medical marijuana use." *Coats*, 350 P.3d at 850. The trial court rejected this argument, finding that the provision merely "provided registered patients an affirmative defense to state criminal prosecution without making their use of medical marijuana a 'lawful activity[.]'" *Id.* at 851. Because the use of medical marijuana remains unlawful under federal law, the Colorado Supreme Court ultimately found it unnecessary to decide whether the use of medical marijuana is "lawful" as a matter of Colorado state law. *Id.* at 853.

32. COLO. REV. STAT. § 24-34-402.5(1).
33. *Coats*, 350 P.3d at 851. For a critical examination of Colorado's lawful activities statute, *see* Jessica Jackson, Comment, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143 (1996).
34. *See Coats*, 350 P.3d at 853 ("Coats's use of medical marijuana was unlawful under federal law and thus not protected by section 24-34-402.5.").
35. *See id.* at 852 ("Nothing in the language of the statute limits the term 'lawful' to state law. Instead, the term is used in its general, unrestricted sense, indicating that a 'lawful' activity is that which complies with applicable 'law,' including state and federal law.").
36. *See id.* ("Coats does not dispute that the federal Controlled Substances Act prohibits medical marijuana use." (citing 21 U.S.C. § 844(a))); *cf. Ross v. RagingWire Telecomms., Inc.*, 174 P.3d 200, 204 (Cal. 2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users.") (citations omitted).
37. *See Coats*, 350 P.3d at 853 ("[W]e find nothing to indicate that the General Assembly intended to extend section 24-34-402.5's protection for 'lawful' activities to activities that are unlawful under federal law. In sum, because Coats's marijuana use was unlawful under federal law, it does not fall within section 24-34-402.5's protection for 'lawful' activities.").
38. The amicus brief the author submitted in *Coats* argued, among other things, that in order to assure the safety of their workplaces (and often to comply with federal safety regulations), employers in the mining and other safety-sensitive industries should be entitled to terminate employees for off-duty marijuana use, even if that use is permissible under state law. *Cf. Weller*, 860 P.2d at 497 (Jacobson, J., dissenting) (asserting that where an employee's job duties include "operating heavy equipment, … the potential for misuse could have disastrous effects"). For a discussion of the challenges employee drug use poses for employers in the mining industry, *see* Barbara L. Krause, *Drug and Alcohol Abuse in Mining: An Employer's Dilemma*, 3 J. MIN. L. & POL'Y 465 (1988).
39. *Coats*, 350 P.3d at 852 (citing 21 U.S.C. § 812(b)(1)(A)-(C)); *see also Forest City Residential Mgmt. v. Beasley*, 71 F. Supp. 3d 715, 727 (E.D. Mich. 2014) ("The [Controlled Substances Act] contains no provision allowing for the 'medical' use of marijuana; indeed, as a Schedule I drug, Congress deems marijuana to have no medically acceptable uses.").
40. *See* Campbell, *supra* note 2, at 91 (asserting that *Coats* provided the Colorado Supreme Court with "a chance to clarify the law, [and] make sound policy choices"). *But see Stoesz v. State Farm Mut. Auto Ins. Co.*, 2015 Colo. App. 86, ¶ 18 (2015) ("Absent ambiguity [in the language of a statute], a court … may not consider policy implications.").
41. *See Coats*, 350 P.3d at 851 ("The term 'lawful' as it is used in section 24-34-402.5 is not restricted in any way, and we

decline to engraft a state law limitation onto the term. Therefore, an activity such as medical marijuana use that is unlawful under federal law is not a 'lawful' activity under section 24-34-402.5.").

42. *Cf. Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (concluding that an activity "is 'unlawful' if it violates an underlying state *or federal* statute") (emphasis added); *Avila v. Cmty. Bank of Va.*, 143 S.W.3d 1, 5 (Mo. Ct. App. 2003) ("The term 'lawful' means to be 'in harmony with the law' or 'constituted, authorized, or established by law.' … [T]he term does not imply a limitation as to a particular type of law, *i.e.*, federal, state, local or otherwise." (quoting MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 658 (10th ed. 2000)).
43. *See* Matthew D. Macy, *Employment Law and Medical Marijuana—An Uncertain Relationship*, 41 COLO. LAW. 57, 60 (Jan. 2012) ("An employee using medical marijuana … will have difficulty proving that the use of medical marijuana is a lawful activity. … The illegality under federal law likely will be sufficient to remove the employee from the protection of [the statute].").
44. *See, e.g., Sosa v. Indus. Claim Appeals Office*, 259 P.3d 558, 559 (Colo. Ct. App. 2011) ("Employer has a zero tolerance policy regarding drugs and alcohol use because employees use knives and potentially hazardous machinery in the workplace.").
45. *Cf. Slaughter v. John Elway Dodge Sw./Auto Nation*, 107 P.3d 1165, 1170 (Colo. Ct. App. 2005) ("[I]t 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.").
46. *See* Macy, *supra* note 43, at 61 ("The intersection of medical marijuana and employment law is a relatively new and evolving area. The split between federal and state law, as well as the dearth of case law in Colorado [prior to *Coats*], create[d] uncertainty for employers and employees."). One commentator noted that the Colorado Court of Appeals' decision in the *Coats* case offered employers "the first direct guidance on their ability to enforce drug-free workplace policies despite the legalization of both medical and recreational marijuana use in Colorado." John M. Husband, *Off-Duty Medical Marijuana Use Not Protected Under Lawful Activities Statute*, 42 COLO. LAW. 103, 103 (July 2013) (discussing *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. Ct. App. 2013), *aff'd*, 350 P.3d at 849 (Colo. 2015)). In affirming the Court of Appeals' decision, the Colorado Supreme Court has solidified this guidance. *See* Campbell, *supra* note 2, at 91 (asserting that "the certainty gained from an unequivocal ruling" from the Colorado Supreme Court "should reduce litigation … dealing with medical marijuana").
47. *See, e.g.*, Becker & Weimer, *supra* note 25, at 69 ("Although the decision's impact will initially be limited to Colorado, the court's decision in *Dish Network* will likely influence decisions in states across the country with similar lawful activities statutes, when these states are presented with the same issue.").
48. *See, e.g.*, Alexis Gabrielson, *The "Right to Use" Takes Its First Hit: Marijuana Legalization and the Future of Employee Drug Testing*, 18 EMPLOYEE RTS. & EMP. POL'Y J. 241, 283 (2014) ("So far, Colorado is the only state that has had to grapple with this [issue], but the Colorado Supreme Court's decision could have an impact on other states with similar statutes.") (citation omitted).
49. *See* Campbell, *supra* note 2, at 81 ("The Colorado Supreme Court's resolution of the case likely won't answer all the questions that exist around medical marijuana, but it could be a good start.").
50. *See* Linda Obele, *Arizona Going to Pot: Firms Grapple with Legal Ramifications of Medical Marijuana*, PHX. BUS.

J., Jan. 14, 2011, at 14 (noting that the Colorado Medical Marijuana Amendment "says nothing about employers having to accommodate workers who are using marijuana for medical conditions"); Macy, *supra* note 43, at 57 (noting that the Colorado Medical Marijuana Amendment "is silent on an employee or job applicant's use of medical marijuana off the employer's premises").

51. *See, e.g.,* Becker & Weimer, *supra* note 25, at 67 ("Arizona and Delaware explicitly bar an employer from discriminating against an employee who is a registered and qualified patient but fails a drug test due to marijuana usage."); *see also Hall v. A.N.R. Freight Sys., Inc.*, 717 P.2d 434, 447 (Ariz. 1986) ("[O]ur sister states' decisions, while informative, … are not particularly relevant to our own decision[s], which must be shaped by Arizona's unique constitutional and statutory calculus.").
52. *See Robinson v. Fred Meyers Stores, Inc.*, 252 F. Supp. 2d 905, 916 (D. Ariz. 2002) ("[T]here is not a per se rule in Arizona precluding drug-related terminations."); *Weller*, 860 P.2d at 490 ("The Legislature has not precluded employers from terminating employees who use drugs either on the job or off."). For a pre-AMMA examination of the issue in which the author concluded that employers had "more latitude to impose drug-testing programs in Arizona than in other jurisdictions," *see* Donald M. Peters, *Drug Testing by Employers in Arizona: Some Limits and Concerns*, 22 Ariz. B.J. 28, 28 (Jan. 1987).
53. *See Weller*, 860 P.2d at 493 ("[A] positive test result revealing that marijuana of unknown quantity inhaled or ingested at an unknown prior time may reflect only off-duty activity and may be entirely unrelated to work."); Peters, *supra* note 52, at 28:

    > A positive test may reveal someone who is significantly impaired at the time of the test, or it may inculpate an individual who tried the first and only marijuana cigarette of his life, the night before, as an experiment. … [Drug tests] measure the presence of substances ingested at some prior time, which may or may not be having any ongoing material effect on the employee's job performance.

54. *Weller*, 860 P.2d at 490 (citation omitted); *cf. Garner v. Rentenbach Constructors Inc.*, 515 S.E.2d 438, 441 (N.C. 1999) ("Under the doctrine of employment at will, an employer who may fire an employee for any reason or no reason at all may certainly terminate an employee for suspected drug use as part of an effort to maintain a drug-free workplace.").
55. *See* Becker & Weimer, *supra* note 25, at 69 ("There is currently no requirement through statute or legal precedent, anywhere in the country, that has indicated employers cannot discipline employees for off-site, off-hours use of *recreational* marijuana, even where the employee is not impaired at the employer's place of business.").
56. *See* La Fetra, *supra* note 23, at 75 ("American Medical Association studies state that marijuana ingested for medicinal purposes may have the same biological side-effects as marijuana ingested for recreational purposes."); *cf.* Paul F. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 Am. Crim. L. Rev. 453, 468 n.63 (2015) ("The term 'medical marijuana' is actually a misnomer. There is no special strain of marijuana used for medical purposes. Recreational users consume the same cannabis used by patients to relieve some of the symptoms of their illnesses.").
57. *See Weller*, 860 P.2d at 497 (Jacobson, J., dissenting) ("[T]he potential of employees who are marijuana users causing harm to [an employer's] business is, on its face, a sufficient justification … for a drug-free work environment"); *cf. Fred Meyers Stores, Inc.*, 252 F. Supp. 2d at 912 ("[T]he state [of Arizona] favors drug testing and the implementation of drug testing programs because '[t]he abuse of illegal drugs … is a matter of substantial public concern.'" (quoting Ariz. Rev. Stat. Ann. § 23-493, Historical and Statutory Notes)).
58. *See* Ariz. Rev. Stat. Ann. § 36-2813.B.2; *cf. Bond v. Dep't of Pub. Safety & Corr. Servs.*, 867 A.2d 346, 354 (Md. Ct. Spec. App. 2005) ("The inference that [an employee] used or possessed marijuana at work cannot reasonably be drawn from the bare fact that she tested positive for marijuana use.").
59. *See* Ariz. Rev. Stat. Ann. § 36-2813.B.2.
60. The AMMA was not enacted until 2010, making Arizona "the 16th jurisdiction (15 states and the District of Columbia) to adopt a medical-marijuana law." State Bar of Ariz., Ethics Op. 11-01 (2011). For the author's prior discussion of Arizona's historical efforts to legalize the use of marijuana for medical purposes, *see* Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?* 5 Phx. L. Rev. 415, 418, 430-37 (2012).
61. *Cf.* Goyette, *supra* note 4, at 339 ("In both [Colorado and Washington], medical marijuana has been legal for more than a decade. As such, there is developed case law dictating employer and employee rights when the employee is legally using marijuana outside of work and is subsequently subject to a drug test for employment purposes.") (citation omitted). *See generally* Husband, *supra* note 5, at 1 ("Courts are only now beginning to address the intersection of state and federal laws regarding marijuana and employment laws.").
62. *See Darrah v. McClennen*, 337 P.3d 550, 553 ¶ 14 (Ariz. Ct. App. 2014) (Cattani, J., concurring) ("[T]here is no consensus or agreement within the scientific community regarding the amount of THC in a person's body that would always indicate impairment."), *vacated on other grounds*, No. CV-14-0303-PR, 2015 WL 7759889 (Ariz. Dec. 1, 2015); *Shepler v. Indiana*, 758 N.E.2d 966, 970 (Ind. Ct. App. 2001) ("[T]here is no accepted toxicological agreement as to the amount of marijuana … necessary to cause impairment.").
63. *See Darrah*, 337 P.3d at 553 n.3 (Cattani, J., concurring) ("Unless and until Arizona adopts a more specific standard, … a factfinder … must rely on evidence (presumably from experts) regarding whether a specific concentration of marijuana in the blood is sufficient to cause impairment."); *cf. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d at 593 ¶ 25 ("One would expect any statute creating employment protections for authorized medical marijuana users might include … permissible levels of impairment on the job.").
64. *See* Evan Bolick, *In Marijuana-Friendly Col., Employees Can Get Fired for Use … What?* The Rec. Rep., July 8, 2015, at 4 ("[T]he legal landscape varies dramatically. Arizona's anti-discrimination law differs significantly from the one at issue in the Colorado case, and any similar lawsuit initiated [in Arizona] is likely to lead to a very different outcome.").
65. *See* Ariz. Const. art. 4, pt. 1, § 1(6)(C) ("The legislature shall not have the power to amend an initiative measure … unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house … vote to amend such measure.").
66. *See, e.g.*, Abreu, *supra* note 7, at 416 ("[G]iven that Arizona does not offer [a means of determining] whether one is 'impaired,' a new statute should create an 'impairment threshold.' … [W]henever one's metabolism exceeds the threshold, he or she would be considered 'impaired' and could be terminated from his or her job by their employer."); *see also Darrah*, 337 P.3d at 553 n.3 (Cattani, J., concurring) (noting that "other states that also authorize marijuana use have adopted 5ng/ml of marijuana in the bloodstream as a standard for determining impairment").
67. *See* Husband, *supra* note 5, at 10 ("With no foreseeable change in federal law regarding marijuana's illegality, practitioners and their clients need to proceed cautiously until further clarity is achieved through judicial, legislative, or agency interpretation.").