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## Coats v. DISH: A chance to Clear the Legal Haze Surrounding Medical Marijuana

# COATS V. DISH: A CHANCE TO CLEAR THE LEGAL HAZE SURROUNDING MEDICAL MARIJUANA

JOHN CAMPBELL<sup>†</sup>

## SECTION 1. INTRODUCTION

This article examines the history of medical marijuana in Colorado, the current state of the law, and the case of *Coats v. Dish Network, L.L.C.*<sup>1</sup>—a case that marks the first time the Colorado Supreme Court will weigh in on medical marijuana.

On November 7, 2000, Colorado voters, by a margin of 54% for and 46% against, voted to legalize medical marijuana.<sup>2</sup> This represented a little over 900,000 votes in favor.<sup>3</sup> That vote was the beginning of a grand experiment that was guaranteed to be interesting because the state law did not fit comfortably into the federal scheme of drug regulation. Marijuana was, and is, listed as a Schedule I drug under federal law.<sup>4</sup> This created uncertainties as to how the federal government would interact with the state.

Today, the friction between state and federal law continues to be addressed by Colorado courts. But, surprisingly, the friction is not where some expected. Initially, many worried that the Drug Enforcement Administration might raid medical marijuana dispensaries or that businesses, caregivers, or patients involved with medical marijuana might be prosecuted. By and large, these things did not come to pass.

Instead, the federal government has largely left Colorado alone. In fact, it has issued two different memorandums addressing Colorado's law that suggest it would be a waste of federal resources to interfere in what is a heavily regulated, carefully monitored program.<sup>5</sup>

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1. 303 P.3d 147, 149 (Colo. App. 2013), *cert. granted*, 2014 WL 279960 (Colo. Jan. 27, 2014).

2. MARIJUANA POLICY PROJECT, STATE BY STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST 8, 20 (2013), <http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2013.pdf>.

3. *Colorado Medical Use of Marijuana, Initiative 20 (2000)*, BALLOTPEdia (Mar. 14, 2014), [http://ballotpedia.org/Colorado\\_Marijuana\\_Act\\_Amendment\\_20\\_\(2000\)](http://ballotpedia.org/Colorado_Marijuana_Act_Amendment_20_(2000)).

4. Schedules of Controlled Substances, 21 U.S.C. § 812 (2012).

5. Memorandum from David W. Ogden, Deputy Attorney Gen., to Selected U.S. Attorneys (Oct. 19, 2009), *available at* <http://blogs.justice.gov/main/archives/192>. It is likely not an efficient use of federal resources to focus enforcement efforts on “individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law,” or their caregivers. Indeed, in its most recent memorandum, the federal government has gone so far as to suggest that state legalization might fit within the federal approach to drug regula-

As a result, the continued tension over medical marijuana and the Medical Marijuana Amendment (MMA) is playing out largely in the civil setting. The questions pop up in strange places. Can an employer terminate an employee who tests positive for THC but is performing his work satisfactorily and is taking medical marijuana pursuant to the MMA? Is renting space to medical marijuana growers the functional equivalent, at least in a bankruptcy proceeding, of running a crack house? Can unemployment benefits be denied if someone is terminated for using medical marijuana?

And one can imagine many more questions. Does a person endanger his Social Security disability benefits if he uses medical marijuana to treat his disability? Can an insurer refuse to pay claims when medical marijuana crops are damaged by negligence? May a party sue for breach of contract if someone refuses to deliver medical marijuana? Is a bank liable for doing business with enterprises that grow or sell marijuana?

Some of these questions have been answered, or at least addressed, but many have not. The result is that over a decade since the MMA became effective, significant issues still need to be resolved. As discussed in this article, the current law is probably best described as muddled. Several courts have referred to medical marijuana as “lawful.” Some courts, including some of those same courts concluded, however, that medical marijuana was not really legal. Others suggest there *might* be a constitutional right to medical marijuana, while two dissents explicitly reach this conclusion. Although many years have passed, the Colorado Supreme Court has not addressed any of these questions. But that will soon change. In January 2014, it granted certiorari on its first medical marijuana case—a case styled *Coats v. DISH Network, L.L.C.*<sup>6</sup>

In *Coats*, a paralyzed man who uses medical marijuana to control painful muscle spasms was fired for testing positive for THC. He argues that his behavior is lawful under the MMA and is therefore protected under the Lawful Activity Statute (LAS)—a statute that prohibits employers from terminating workers for lawful behavior outside the work place. DISH asserts that the termination is justified because medical marijuana is not lawful.

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tion. Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys (Aug. 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. *See also* James M. Cole, Deputy Attorney General, Address before the Senate Committee on the Judiciary (Sept. 10, 2013) (“Indeed, a robust system may affirmatively address those federal priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for.”), *available at* <http://www.justice.gov/iso/opa/dag/speeches/2013/dag-speech-130910.html>.

6. 2014 WL 279960 (Colo. Jan. 27, 2014).

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. Based on the issues the court accepted for review, the decision could clarify two important questions. The issues accepted for review are:

1. Whether the Lawful Activities Statute, section 24-34-402.5,<sup>7</sup> protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance.<sup>8</sup>
2. Whether the [MMA] makes the use of medical marijuana “lawful” and confers a right to use medical marijuana to persons lawfully registered with the state.<sup>9</sup>

The first issue arises directly from the case below. But the second, larger question of whether the MMA makes medical marijuana lawful and whether it grants a right to use it, was not addressed by the majority in *Coats* and was only briefly discussed by the minority. This issue is arguably central to *Coats*, but it also has the potential to impact the analysis in a variety of other cases.

For example, if possession and distribution of medical marijuana is lawful, then perhaps it is insurable. Perhaps it can be the subject of contract action. Perhaps it can be reported stolen. On the other hand, if the Colorado Supreme Court were to determine that medical marijuana is not fully lawful, even under state law, it may require a more careful evaluation of the state's regulation of a potentially illegal activity. It would also certainly implicate the ability of people like Mr. Coats to use medical marijuana, while also calling into question the security of the investment of anyone engaged in the business of medical marijuana.

The remainder of this article provides a basic review of the MMA, examines the statutes that implement it, provides an overview of existing case law, reviews the facts and law in *Coats* to date, and briefly discusses how *Coats* could be decided in a way that promotes sound policy and is consistent with existing law.

## SECTION 2. THE MEDICAL MARIJUANA AMENDMENT

The MMA provides a relatively complete guide to how medical marijuana should operate in Colorado. But fourteen years later, central questions about its meaning remain. Courts continue to wrestle with whether the statute makes the use of medical marijuana lawful or whether it simply creates an affirmative defense to criminal prosecution. Of course, this

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7. COLO. REV. STAT. § 24-34-402.5 (2007).

8. *Coats*, 2014 WL 279960.

9. *Id.*

is a distinction only lawyers can dream up. To most people, to say that one cannot be prosecuted for using medical marijuana, within certain limits, is to say that it is legal. Closely connected—and perhaps contemporaneous with this debate—is the debate about whether the MMA creates a state constitutional right to use medical marijuana within prescribed limits. I begin by briefly reviewing the MMA and the statutes that were passed to implement it.

### *SECTION 2.1. The Text of the MMA*

The MMA is the 14<sup>th</sup> Amendment to the Colorado Constitution. Its central provisions are summarized in the table below, along with a few quotes from its text. The quotes focus largely on sections that might address the lawful question.<sup>10</sup>

Section 2(a)	Affirmative defense to criminal prosecution. <b>SELECTED TEXT:</b> “[A] patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation [when the patient has a debilitating medical condition, a doctor recommends medical marijuana, and the amounts are as allowed in another section].”
Section 3	Requires confidential registration and provides guidelines and penalties.
Section 4(a)	Makes use lawful and identifies amounts allowable. <b>SELECTED TEXT:</b> “A patient's medical use of marijuana, within the following limits, is lawful . . . .”
Section 5(a)	Prohibits use that would harm public and prohibits use in public; if violated, loss of registration card for one year. <b>NOTE:</b> This is not a criminal penalty. It could be read as a loss of the <i>right</i> to use medical marijuana.
Section 6	Prescribes a minimum age for medical marijuana and exceptions.

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10. COLO. CONST. art. XVIII, § 14.

Section 9	Requires production of a form for registration.
Section 10	Exempts medical insurers from covering medical marijuana.

### SECTION 2.2. *The Colorado Medical Marijuana Code*

The MMA is complemented by statutes designed to implement it.<sup>11</sup> They are collectively known as the “Colorado Medical Marijuana Code” and span hundreds of pages.<sup>12</sup> However, the “Legislative Declaration” section is pertinent in answering the question of whether medical marijuana is lawful. That section states:

The general assembly further declares that it is unlawful under state law to cultivate, manufacture, distribute, or sell medical marijuana, except in compliance with the terms, conditions, limitations, and restrictions in section 14 of article XVIII of the state constitution and this article or when acting as a primary caregiver in compliance with the terms, conditions, limitations, and restrictions of section 25-1.5-106, C.R.S.<sup>13</sup>

As evidenced above, the MMA and the Colorado Medical Marijuana Code establish at least some circumstances in which medical marijuana is lawful. The section that follows reviews some of the leading cases and other sources of legal guidance as to how these sections are actually being interpreted.

### SECTION 3. LEGAL GUIDANCE TO DATE

A number of cases provide some guidance regarding the MMA, or the interface between state and federal law. Similarly, a formal opinion by the Colorado Attorney General also provides guidance. A variety of these sources use words like lawful, authorize, legal, and some either overtly state (in dissents) or suggest that the MMA might create a constitutional right. Each source is summarized below, providing some emphasis on the sections that might inform the court’s decision in *Coats* regarding the import of the MMA.

#### SECTION 3.1. *Attorney General – Formal Opinion No. 09-06 – November 16, 2009*

In 2009, Governor Bill Ritter, Jr. requested an opinion from the Attorney General’s office regarding the applicability of state sales tax to the purchase and sale of medical marijuana.<sup>14</sup> The request was framed as six

11. COLO. REV. STAT. §§ 12-43.3-100–1102 (2010).

12. COLO. REV. STAT. ANN. § 12-43.3-101 (West 2010).

13. COLO. REV. STAT. § 12-43.3-102(2) (2010).

14. Formal Opinion No. 09-06, Op. Att’y Gen. 2009 WL 6084227 (Colo. A.G. Nov. 16, 2009).

questions from the Governor's Chief Legal Counsel.<sup>15</sup> Most interesting among the questions were questions one and five and their corresponding answers.

**Question 1.** Is medical marijuana “tangible personal property” subject to the state sales tax under the Colorado tax code, section 39-26-104(1)(a), C.R.S.?

**Answer 1.** Yes. Medical marijuana is tangible personal property and is subject to the state sales tax, unless eligible for a specific sales tax exemption.<sup>16</sup>

**Question 5.** Regardless of the legality of the activity, are individuals and enterprises that engage in the sale of medical marijuana pursuant to Amendment 20 required to obtain a license and otherwise comply with the requirements of section 39-26-103, C.R.S.?

**Answer 5.** Yes. Unless subject to a particular exemption, it is unlawful under section 39-26-103(1)(a), C.R.S., for any individual or enterprise to engage in the business of selling at retail without first having obtained a retail sales license issued by the Colorado Department of Revenue.<sup>17</sup>

The opinion also provided explanations for each answer. The explanation for the answer to Question 1—addressing whether medical marijuana is tangible personal property—is relatively straightforward. It concludes that Colorado's definition of “‘tangible personal property’” embraces all goods, wares, merchandise, products and commodities.”<sup>18</sup>

The answer to Question 5—asking whether, regardless of legality, medical marijuana sales and purchases are subject to sales taxes—is a bit more complex and potentially relevant to Colorado's ongoing examination of whether medical marijuana is legal. The opinion states that medical marijuana remains illegal under federal law.<sup>19</sup> It also notes that, except where allowed under the MMA, it remains illegal under state law. This at least suggests the opinion holds that medical marijuana is legal, within prescribed limits, under state law. The opinion also asserts that “regardless of the legality,” parties must obtain a retail sales license and pay sales tax.<sup>20</sup> The opinion concludes that even if medical marijuana is illegal, “state tax law should not allow an individual or business engaged in an unlawful activity or potentially unlawful enterprise to avoid tax liability.”<sup>21</sup>

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (citing COLO. CODE REGS. § 201-4 (2014)).

19. *Id.* at 4.

20. *Id.*

21. *Id.* at 5.



SECTION 3.2. *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 803  
(Bankr. D. Colo. 2012)

In *Rent-Rite Super Kegs*,<sup>22</sup> a creditor argued that the debtor's decision to lease to growers of marijuana violated federal statutes—known as the “crack house” statute—and that these violations could result in forfeiture of the property, putting the creditor's property at risk.<sup>23</sup> The bankruptcy court noted that although this risk may be small due to the federal government's suggestion that it would not typically seek indictments under the Controlled Substances Act, it could not force the creditor to “bear even a highly improbable risk of total loss of its collateral in support of the Debtor's ongoing violation of federal criminal law.”<sup>24</sup> The court concluded that although it assumed the medical marijuana operations were “lawful under Colorado state law,” it concluded that the case should either be converted to a Chapter 7 or dismissed, and set a hearing to reach a final conclusion.<sup>25</sup>

SECTION 3.3. *People v. Watkins*, 282 P.3d 500 (Colo. App. 2012)

In *Watkins*,<sup>26</sup> the defendant, who agreed as a condition of his probation that he would not “commit another offense,” sought permission to use medical marijuana. The court of appeals considered whether a condition of probation requiring a probationer not to “commit another offense” included an offense under federal law.<sup>27</sup>

The court concluded that the term offense, in the probation context, was expansive.<sup>28</sup> It noted that the term could even include the violation of local ordinances, if confinement was a potential penalty.<sup>29</sup> What is most interesting about the decision is its dicta. The court overtly stated that the use of medical marijuana is lawful, and it even suggested it might be a constitutional right.<sup>30</sup> It concluded that this would not change the outcome of this case—holding that “even if we were to agree with defendant that the [MMA] gives him a general constitutional right to use marijuana for medical purposes,” this would not be decisive because “probation is a privilege, not a right.”<sup>31</sup> However, such a holding could have broad reaching implications in other cases.

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22. *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 802 (Bankr. D. Colo. 2012).

23. *Id.* at 806 (citing *Maintaining Drug-Involved Premises*, 21 U.S.C. § 856 (2003)).

24. *Id.*

25. *Id.* n.1; *accord id.* at 811.

26. *People v. Watkins*, 282 P.3d 500, 501 (Colo. App. 2012).

27. *Id.*

28. *Id.* at 503.

29. *Id.* (citing *People v. Slayton*, 878 P.2d 106, 107 (Colo. App. 1994)).

30. *Id.*

31. *Id.* at 504 (internal quotation marks omitted).

SECTION 3.4. *Beinor v. Industrial Claims Appeals Office*, 262 P.3d 970 (Colo. App. 2011)

In *Beinor*,<sup>32</sup> the court of appeals considered a question of first impression:

[W]hether an employee terminated for testing positive for marijuana in violation of an employer's zero-tolerance drug policy may be denied unemployment compensation benefits even if the worker's use of marijuana is "medical use" as defined in article XVIII, section 14 of the Colorado Constitution.<sup>33</sup>

The court concluded that the benefits could be denied.<sup>34</sup> In reaching its conclusion, the court engaged in an analysis of whether the MMA made the use of medical marijuana lawful and whether the use of medical marijuana is subject to a "prescription"—an important question because unemployment law allows for termination of benefits for the use of controlled substances that are not medically prescribed.<sup>35</sup> The court first noted that under the MMA, a physician does not prescribe medical marijuana.<sup>36</sup> Instead, she can only provide "written documentation" stating that it might help.<sup>37</sup> It also noted that under the Controlled Substances Act, such a prescription is impossible because marijuana is a Schedule I drug—meaning that federal law does not recognize any medical benefit.<sup>38</sup>

After dispensing with these fairly obvious conclusions, the court of appeals then interpreted the MMA. Its most important conclusion was that the amendment does not create an "unfettered right to medical use of marijuana."<sup>39</sup> Interestingly, in support of this, it stated the MMA expressly prohibits use of medical marijuana in a way that endangers the health or well-being of any person and prohibits the use of medical marijuana in places open to the general public.<sup>40</sup>

Perhaps recognizing that the reasoning was not especially persuasive—after all, speech can be zoned, guns are banned from some places, and prayer can't occur at all times in all places—the court of appeals bolstered its position by referring to the legislation that was enacted by the Colorado General Assembly to implement the MMA.<sup>41</sup> The court stated that the General Assembly's reading of the amendment should be

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32. *Beinor v. Indus. Claim Appeals Office*, 262 P.3d 970, 971 (Colo. App. 2011).

33. *Id.*

34. *Id.*

35. *Id.* at 972–73.

36. *Id.* at 973 (internal quotation marks omitted).

37. *Id.*

38. *Id.* at 974 (citing Schedules of Controlled Substances, 21 U.S.C. § 812(c)(10) (2012)).

39. *Id.* at 975.

40. *Id.* (citing COLO. CONST. art XVIII, § 14(5)(a)(I)).

41. *Id.*

given deference.<sup>42</sup> And it stated that the General Assembly viewed the amendment as one that “creates limited exceptions to the criminal laws of this state for patients, primary care givers, and physicians concerning the medical use of marijuana.”<sup>43</sup>

Finally, the court cited the MMA for the proposition that “[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any work place.”<sup>44</sup> The court apparently read this language to unambiguously allow employers to choose not to accommodate an employee’s use of medical marijuana, even *outside* the workplace.<sup>45</sup> The court of appeals concluded that denial of unemployment benefits was appropriate but noted that it was not deciding whether an employee could be fired for using medical marijuana.<sup>46</sup>

The *Beinor* opinion contains a vigorous dissent by Judge Gabriel. The dissent asserted that it was far from clear that the MMA created only an affirmative defense to prosecution.<sup>47</sup> Instead, the dissent stated that the MMA is ambiguous and requires reference to outside aids to determine the voter’s intent.<sup>48</sup>

Turning first to the Ballot Title, the dissent noted that although the language of the title might not be crystal clear, it certainly suggested that the amendment authorized the use of medical marijuana.<sup>49</sup> Next, the dissent noted that the Blue Book stated the amendment allows patients to “legally possess” marijuana for medical purposes and doctors to “legally provide” the same.<sup>50</sup> Similarly, in the Blue Book section entitled “Arguments For,” the proponents of the MMA stated that “[u]sing marijuana for other than medical purposes will still be illegal in Colorado. Legal use of marijuana will be limited to patients on the state registry.”<sup>51</sup>

The dissent concluded that these provisions made clear that the MMA is intended to make medical marijuana legal and to create a constitutional right to possess medical marijuana pursuant to the limitations contained in the MMA.<sup>52</sup> Based on the plain language of the MMA, ac-

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42. *Id.* at 976 (citing *Zaner v. City of Brighton*, 899 P.2d 263, 267 (Colo. App. 1994), *aff’d*, 917 P.2d 280 (Colo. 1996)).

43. *Id.* at 975–76 (quoting COLO. REV. STAT. §18-18-406.3(1)(b) (2010) (internal quotation marks omitted)).

44. *Id.* at 976 (quoting COLO. CONST. art. XVIII, 14(10)(b) (internal quotation marks omitted)).

45. *Id.*

46. *Id.*

47. *Id.* at 978 (Gabriel, J., dissenting).

48. *Id.*

49. *Id.* at 979.

50. *Id.*

51. *Id.* at 980 (internal quotation marks omitted).

52. *Id.* at 981.

tual use of medical marijuana in the workplace is prohibited but not marijuana in a person's bloodstream while at work.<sup>53</sup>

*SECTION 3.5. Coats. v. DISH Network, L.L.C., 303 P.3d 147, 149 (Colo. App. 2013), cert. granted, 2014 WL 279960 (Colo. Jan. 27, 2014)*

Plaintiff Brandon Coats is a quadriplegic who uses medical marijuana to control painful muscle spasms.<sup>54</sup> Coats worked at DISH as a customer service representative until he was fired by DISH after he tested positive for THC.<sup>55</sup> There was no evidence of impairment, and there were no problems with his job performance.<sup>56</sup>

Coats argued that his termination violated the Lawful Activities Statute, section 24–34–402.5, an employment discrimination provision of the Colorado Civil Rights Act.<sup>57</sup> The statute prohibits an employer from firing an employee for “engaging in any lawful activity off the premises of the employer during nonworking hours.”<sup>58</sup> DISH argued that Coats’ behavior was not lawful because the use of medical marijuana is illegal under federal law.<sup>59</sup>

The court of appeals engaged in a surprisingly simple analysis. It asserted that lawful is defined in the dictionary to mean “authorized by law and not contrary to, nor forbidden by law.”<sup>60</sup> The court stated that since the use of medical marijuana is not lawful under federal law, at least some law forbids it.<sup>61</sup> As a result, the court reasoned that Mr. Coats’ behavior was not lawful.<sup>62</sup> Because the court took this approach, it never addressed whether the MMA makes such use lawful under state law.

Like *Beinor*, the majority opinion drew a lengthy, carefully reasoned dissent. Judge Webb argued that the term lawful is ambiguous.<sup>63</sup> He took issue with using a dictionary to define the term, instead suggesting that it should be read in context.<sup>64</sup> He searched for “the spirit of a statute and not simply the letter of the law.”<sup>65</sup> He also noted that case law requires that the statute be read broadly, but the majority’s reading improperly narrowed it.<sup>66</sup> Based on a variety of factors, the dissent conclud-

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53. *Id.*

54. *Coats v. Dish Network, L.L.C., 303 P.3d 147, 149 (Colo. App. 2013), cert. granted, 2014 WL 279960 (Colo. Jan. 27, 2014).*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* (quoting COLO. REV. STAT. § 24-34-402.5 (2014) (internal quotation marks omitted)).

59. *Id.*

60. *Id.* at 150 (citing *BLACK’S LAW DICTIONARY* 797 (5th ed. 1979)).

61. *Id.* at 151.

62. *Id.* at 149.

63. *Id.* at 155 (Webb, J., dissenting).

64. *Id.*

65. *Id.* at 156 (internal quotation marks omitted).

66. *Id.* (citing *Watson v. Public Service Co., 207 P.3d 860, 864 (Colo. App. 2008)*).

ed that the LAS should only refer to whether something is lawful under state law.<sup>67</sup>

Based on this conclusion, Judge Webb turned to whether the LAS makes medical marijuana lawful.<sup>68</sup> He began by referencing Judge Gabriel's dissent in *Beinor*—in which Judge Gabriel concluded there is a constitutional right to use medical marijuana within prescribed limits.<sup>69</sup> Judge Webb then noted a number of reasons why, at a minimum, the use of medical marijuana was lawful. These included the fact that the MMA specifically uses the term lawful, the Blue Book refers to being able to legally possess medical marijuana, and the statement in *Watkins* that the use of medical marijuana is lawful.<sup>70</sup>

### Section 3.6. Emerging Trends

After reading the case summaries, it is clear that the law remains in flux. However, a few patterns emerge. Although courts continue to wrestle with the state and federal interplay, most courts reach the conclusion that the MMA makes medical marijuana use lawful under state law. Several other courts or judges have implied, or explicitly held that the MMA may go further, creating at least a limited right to use medical marijuana. *Coats*, then, is critical because it will either confirm that medical marijuana use is lawful or depart from this trend, and it will then start to shape the contours of how much protection state law will offer those who use medical marijuana.

#### SECTION 4. *COATS V. DISH*—COLORADO SUPREME COURT

The briefs are not yet filed in *Coats v. DISH*, but a few things seem clear. The Colorado Supreme Court has the opportunity to answer two important questions. First, are Colorado employees who use medical marijuana protected by Colorado law or can they be fired? Second, does the MMA, at least under Colorado law, make medical marijuana lawful and does it therefore confer a right to use it within prescribed limits?

DISH is certain to argue the answer is no to both questions, and Mr. Coats is certain to argue the contrary. I leave that fight to the briefs and the resolution of the dispute to the Court's wisdom. However, this article is an opportunity to explore some of the policy implications of the decision.

Employers are rightly concerned that if they are required to employ people who use medical marijuana, they may lose business because of the federal law. But there seem to be simple solutions to this potential conflict. The LAS allows for termination of an employee, even if he is

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67. *Id.* at 157.

68. *Id.*

69. *Id.*

70. *Id.* (internal quotation marks omitted).

engaging in lawful activity, if (a) his activity would interfere with bona fide occupational qualifications or (b) it would create a conflict of interest for the employer.<sup>71</sup> These outs seem sufficient to ensure that no employer has to lose business in order to comply with state law, and no employer has to risk public safety either.

Similarly, given that the federal government has largely declined to enforce drug laws in Colorado, so long as Colorado maintains a strong regulatory scheme, it seems unlikely that DISH or other employers will face federal pressure to terminate people like Mr. Coats. In addition, a review of the existing laws applying to federal contractors suggests that DISH does not have to test its employees and, even if it did, it does not have to fire an employee who tests positive for THC.<sup>72</sup> As a result, the overall risks of reading the LAS to protect employees who use medical marijuana outside of work and who perform their jobs satisfactorily seem minimal.

Similarly, the downside to reading the MMA as making medical marijuana lawful is similarly small. Although one might argue that it will limit the state's ability to control the use of medical marijuana, this doesn't seem true. Even the most sacred federal constitutional rights are subject to regulation. Speech is zoned in time and place, guns are prohibited in some areas and regulated carefully, assembly sometimes requires preapproval, and due process is limited and expanded based on the situation. The same types of limits on medical marijuana will remain permissible even if it is lawful.

Conversely, the upside to a determination that the MMA makes medical marijuana lawful is significant. First and foremost, it would likely mean that the LAS protects people like Mr. Coats. This is a good thing, as he and others often depend on medical marijuana to work. Promoting the dignity of work is good for people and for the economy, both because it produces consumers and because it avoids relegating people like Mr. Coats to relying on welfare.

Reading the MMA and the LAS to protect Mr. Coats also avoids a potential risk that is looming. It is likely that until now many employers have not fired employees who test positive for THC for fear of a legal fight. But if the Colorado Supreme Court were to hold that such terminations are legal, a rash of such firings could follow. Moving people out of work and onto government assistance is not sound economic or social policy.

Beyond the work setting, interpreting the MMA to make medical marijuana lawful would promote certainty and ensure that people who

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71. COLO. REV. STAT. § 24-34-402.5 (2007).

72. See generally Drug-Free Workplace Requirements for Federal Contractors, 41 U.S.C. § 8102 (2011); Employee Sanctions and Remedies, 41 U.S.C. § 8104 (2011).

invest in the trade can do so confidently. Knowing that contracts matter, that insurance can be obtained, and that, in general, property rights are intact is critical to a functioning economy. The state has a significant financial interest in seeing that this hold true, as medical marijuana generates roughly \$2 million per quarter in tax revenue.<sup>73</sup> Finally, the certainty gained from an unequivocal ruling should reduce litigation and the transactional costs built into contracts dealing with medical marijuana.

#### SECTION 5. CONCLUSION

Colorado law regarding medical marijuana has evolved slowly, and to date it has been less than clear. But the Colorado Supreme Court's upcoming decision in *Coats* could be the turning point—a chance to clarify the law, make sound policy choices, respect the will of the people, and create a more certain future.

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73. COLO. DEP'T OF REVENUE, COLORADO MEDICAL MARIJUANA DISPENSARIES (MMD), RETAIL SALES AND STATE SALES TAX BY COUNTY, FIRST QUARTER, FY 2012–13 (July 2013), available at [http://www.colorado.gov/cs/Satellite?c=Document\\_C&childpagename=Revenue-Main%2FDocument\\_C%2FXRMAddLink&cid=1251638149614&pagename=XRMWrapper](http://www.colorado.gov/cs/Satellite?c=Document_C&childpagename=Revenue-Main%2FDocument_C%2FXRMAddLink&cid=1251638149614&pagename=XRMWrapper).