HR UP IN SMOKE:
THE INTERSECTION BETWEEN MARIJUANA LEGALIZATION AND EMPLOYMENT LAW

Michigan Municipal League
Michigan Association of Planning
2018 Annual Fall Convention
Grand Rapids, MI
September 20, 2018

Charles T. Mitchell
Assistant City Attorney
City and County of Denver, Colorado
COLORADO’S “GREAT EXPERIMENT”
FIVE YEARS LATER

AMENDMENT 20
NOVEMBER 2000
Voters Approve Medical Marijuana Use

AMENDMENT 64
NOVEMBER 2012
Voters Approve Recreational Marijuana Use
TRUE OR FALSE?
THERE ARE MORE MARIJUANA SHOPS IN DENVER THAN STARBUCKS.
## Denver Dispensary Count 2018

<table>
<thead>
<tr>
<th>Store</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rec Dispensaries</td>
<td>169</td>
</tr>
<tr>
<td>Med Dispensaries</td>
<td>195</td>
</tr>
<tr>
<td>Total</td>
<td>364</td>
</tr>
<tr>
<td>Starbucks</td>
<td>80</td>
</tr>
<tr>
<td>McDonald's</td>
<td>31</td>
</tr>
<tr>
<td>Total</td>
<td>111</td>
</tr>
</tbody>
</table>
TRUE OR FALSE?
IN ASPEN, MARIJUANA OUTPACES ALCOHOL IN TOTAL SALES
TRUE

$11.3\text{ MM}$  $10.5\text{ MM}$
TRUE OR FALSE?
SINCE LEGALIZATION OF MARIJUANA, COLORADO EMPLOYMENT LAW HAS RADICALLY CHANGED.
FALSE
Colorado Employers Still Call The Shots
COLORADO’S MARIJUANA LAWS

Amendments 20 and 64

➢ Provides an affirmative defense to criminal prosecution.
➢ No “Constitutional Right” to unlimited cultivation, use, purchase, or sale of medical or retail marijuana.
Home Grows For Personal Use

- Up to 6 Plants per Colorado Resident Age 21 (3 Flowering Stage)
- Residences Limited to Maximum of 12 Plants (Denver)
- Enclosed, Locked Area, No Open View -- Outside “Gardens” Prohibited
- Counties and Municipalities Can Pass More Restrictive Laws
- Separate Laws for Medical Users and Caregiver Status
- Homegrown Marijuana Cannot Be Sold
  - Only Licensed Grow Establishments Can Sell Marijuana Products
Commercial Cultivation And Sale

- State MEDICAL ENFORCEMENT DIVISION “MED” and Local Licensing Requirements
  - Cultivation, Sales, MIPS, and Testing

- Recreational Sales Limited to 1 oz of Flower per Transaction
  - Equivalency Set By MED Study
  - 1 oz Flower = 8g of Concentrate
  - 1 oz Flower = 800mg of Edibles

- Medical Transactions Require a Qualifying Medical Condition and “Red Card”
  - Cancer, Glaucoma, HIV or AIDS, Cachexia, Persistent Muscle Spasm, Seizures, Severe Nausea or Pain, PTSD
  - 2 oz limit (+ affirmative defense if “medically necessary”)
Consumption and Use

- Amendments Prohibit “Open and Public Use”
  - Similar to Open Container Laws

- Driving Under the Influence
  - Legal Limit of Active THC is 5 Nanograms per Milliliter of Blood
  - Marijuana DUIs have Decreased in 2017, but...
    - Marijuana Related Fatalities Have Increased since 2013

- “420 Friendly” Hotels, Townhomes and Airbnb Rentals

- Social Lounges and Clubs
COLORADO'S MARIJUANA LAWS

Employer Protection

Amendment 20 Controls Medical Use

“NOTHING IN THIS SECTION SHALL REQUIRE ANY EMPLOYER TO ACCOMMODATE THE MEDICAL USE OF MARIJUANA IN THE WORKPLACE.”

Amendment 64 Controls Retail, or Recreational Use

“NOTHING IN THIS SECTION IS INTENDED TO REQUIRE AN EMPLOYER TO PERMIT OR TO 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.”
STILL PROHIBITED IN THE WORKPLACE

➢ On-Premises Use Is Still Prohibited
➢ Workplace Impairment Is Still Prohibited

➢ Even with a Medical Marijuana Card
➢ Even with a Disability
➢ Even with Doctor’s Recommendation
➢ Even after work, in the privacy of your home, if use violates Employer’s Zero-Tolerance Drug-Free Workplace Policy
“Lawful” After-Work Activity

**Coates v. Dish Network**  
Colorado Supreme Court, June 2015

- Quadriplegic, admits to medical use in compliance with Colorado Law to manage seizures and pain
- Employer maintains Zero Tolerance Drug Policy
- Coates sued under Colorado’s “Lawful Activities” statute
- “Lawful” means lawful under State and Federal law
Unemployment Insurance Benefits

Beinor v. Industrial Claims Appeals
Colorado Court of Appeals, August 2011

- Downtown Denver Street Sweeper with Medical MJ Card
- Employer’s Zero Tolerance Drug Policy
- UIB Disqualification triggered by testing positive for controlled substance “not medically prescribed”
- Amendment 20: Doctor’s “written documentation” is not “prescribed”
- Marijuana Illegal Under Federal Law
ADA and CADA Exclude Marijuana Accommodations

“Qualified Individual” excludes “illegal” drug use

Curry v. MillerCoors, Inc.
D. Colo. 2013

- Employee’s Medical Use Violated Employer’s Written Drug Policy
- Terminated for Violating Policy, not for Disability Discrimination
Denver’s Drug and Alcohol Policy

➢ Policy prohibits City employees from possessing, consuming, or being impaired by marijuana **at work**.

➢ CDL Drivers are subject to DOT Regulations prohibiting marijuana use.

➢ Law Enforcement Departments have more specific Departmental rules prohibiting illegal drug use.
Denver’s Drug Testing Policy

➢ Pre-Employment Testing (CDL)
➢ Random Testing (CDL)
➢ Reasonable Suspicion Testing
➢ Post-Accident Testing
➢ Return To Duty Testing

“Impairment” based on confirmation of objective concentrations under DOT Regulations.
SO WHAT HAS
CHANGED IN
DENVER?

...Just about
everything!

➢ REVENUES
➢ FULL TIME EMPLOYEES
➢ SAFETY
➢ LICENSING
➢ INSPECTIONS
➢ LAW ENFORCEMENT
➢ BEHAVIORAL HEALTH
➢ CHILDREN’S AFFAIRS
➢ POLICE AND FIRE
➢ ENVIRONMENTAL HEALTH
➢ OFFICE OF MARIJUANA POLICY
➢ COMMUNITY PLANNING AND
  DEVELOPMENT
COLORADO’S 2017 MED/REC SALES EXCEED $1.5 BILLION

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Total Marijuana Sales</th>
<th>Total to Date</th>
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<tbody>
<tr>
<td>2014</td>
<td>$683,523,739</td>
<td>$683,523,739</td>
</tr>
<tr>
<td>2015</td>
<td>$995,591,255</td>
<td>$1,679,114,994</td>
</tr>
<tr>
<td>2016</td>
<td>$1,307,203,473</td>
<td>$2,986,318,467</td>
</tr>
<tr>
<td>2017</td>
<td>$1,507,702,219</td>
<td>$4,494,020,686</td>
</tr>
<tr>
<td>2018 (Jan)</td>
<td>$117,993,222</td>
<td>$4,612,013,908</td>
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## COLORADO’S TAXES, LICENSE, AND FEE REVENUE

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Total Revenue</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>$67,594,323</td>
</tr>
<tr>
<td>2015</td>
<td>$130,411,173</td>
</tr>
<tr>
<td>2016</td>
<td>$193,604,810</td>
</tr>
<tr>
<td>2017</td>
<td>$247,368,473</td>
</tr>
<tr>
<td>2018 (Jan - Feb)</td>
<td>$42,816,302</td>
</tr>
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WHERE DOES THE MONEY GO?

- Amendment 64’s Commitment to Building Excellent Schools Today (BEST)
- Excise Taxes:
  - First $40MM to Public Schools Construction Fund
  - Excess to Public School Fund
- Sales Taxes:
  - 15% to Local Governments
  - Remaining to General Fund, Marijuana Tax Cash Fund, and State Public School Fund
Revenue Supports Denver’s Operations

➢ 60 New Full-Time Employees
➢ Office of Marijuana Policy
➢ Excise and License Operations
➢ Community Planning and Development
➢ City Attorney’s Office
➢ Police and Fire
➢ Denver Health
➢ Environmental Health
➢ Finance
➢ Denver Health
➢ Office of Behavioral Health
➢ Technical Services
Energy/Water Use and Indoor Cultivation

- 4 Indoor Plants Can Use as Much Electricity as 29 Refrigerators
- Considerations:
  - *The Building’s Capacity to Draw Sufficient Electricity*
  - *Utility’s Ability to provide Sufficient Electricity*
  - *Utility’s Ability to Provide Region or Zone with Sufficient Electricity*
- Indoor Marijuana Grows Accounted for 4 Percent of Denver’s Total Electricity Use in 2016
- Water Consumption and Reclamation
What to Expect When You’re Expecting…

➢ Butane Extractions and “Closed Loop” Systems
➢ “MIPS” – Safety, Inspections, & Dosage Testing
➢ Pesticides
➢ Non-Licensed Grows
➢ Caregiver Loopholes
➢ Grey Markets and Black Market
➢ Public Consumption
➢ Pot Clubs and Restaurants
➢ Marketing
➢ Looping Transactions
Don’t Try This At Home!!!
Don’t Try This At Home!!!
Don’t Try This At Home!!!
GOOD LUCK!
AND THANK YOU FOR YOUR INTEREST

CHARLES T. MITCHELL
ASSISTANT CITY ATTORNEY
CITY AND COUNTY OF DENVER