

# Lawful Off-duty Activities Statute HB 20-1089

## *Protecting employee privacy while preserving employer autonomy*

### **Summary - Coats v Dish Network**

Brandon Coats is a quadriplegic medical marijuana patient who was terminated from his job with Dish Network after failing a random drug test, despite only using cannabis during his personal time outside the workplace. Brandon brought a lawsuit against Dish Network, claiming that Dish violated the lawful off-duty activities statute. In 2015, the Colorado Supreme Court found that Brandon's termination was authorized under the statute because Brandon's activities were not 'lawful' under federal law and the court "[declined] to engraft a state law limitation onto the term."

This bill does not overturn the court's decision, in the court's opinion they wrote the Colorado Legislature needed to clarify if lawful meant state law or federal law. The bill is directly written to address the Colorado Supreme Court's concern.

### **History of the Lawful Off-duty Activities Statute (employee privacy)**

Adopted in 1990, Colorado's lawful off-duty activities statute was first passed by the Colorado General Assembly to strike a balance between the legitimate business interests of employers and the privacy rights of employees. The statute is broad and protects employers from terminating employees for all lawful off-duty activities including ones that employers may find personally distasteful but are legal and unrelated to an employee's job duties.

This bill doesn't violate the Colorado Constitution as the article in the Constitution only deals with the workplace. Lawful Off-duty deals with actions outside of said workplace.

### **What This Bill Does**

This bill clarifies that for purposes of the lawful off-duty activities statute, the term 'lawful' refers to state law and not federal law. This protects Coloradans from being terminated by their employer for lawful cannabis use outside the workplace. Employers can still terminate employees for using cannabis at work or being impaired on duty.

This bill in no way conflicts with the federal drug-free workplace requirements (41 U.S. Code 8102). The federal code only requires that an employer publish a policy that drugs are prohibited in the workplace, establish a drug-free awareness program, notify employees that if they are convicted of a drug related crime they are violating the drug-free workplace policy and can be disciplined or even terminated, notify the contracting or granting agency if an employee has been convicted of a drug related crime, and make an ongoing, good faith effort to maintain a drug-free workplace.

The federal drug-free workplace requirements do not mandate an employer to drug test an employee, nor discipline an employee for activities done off duty and not in the workplace.

### **Why This Bill is Necessary**

Amendment 64 directs Colorado to regulate marijuana in a similar manner to alcohol. Alcohol use is protected by the lawful off duty activities statute. Thus, cannabis should also be protected. In the spirit of this call, HB 1089 would allow responsible Coloradans to engage in private behavior, legal under the Colorado Constitution, without fear of losing their livelihoods, like responsible alcohol consumption.

### **Exemptions in Statute**

The "exemptions" you were asking about are in subsections (1)(a) and (1)(b).

24-34-402.5. Unlawful prohibition of legal activities as a condition of employment.

(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.