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'Hazy' Days ahead for Colo. Hospitality Employers

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Colorado employers have it anything but easy these days. Recent legislative and case law developments, combined with an increasingly employee-friendly federal agency environment require employers to keep on their toes. Given their large employee pools and high-turnover rates, hospitality employers must be particularly vigilant. Some key issues to consider:

1. Marijuana. It seems to be all anybody in Colorado is talking about lately. Stay tuned for even more discussion later this summer when the Colorado Supreme Court hears the case of *Coats v. Dish Network*. In a split opinion issued on April 25, 2013, the Colorado Court of Appeals upheld Dish Network's firing of an employee who tested positive for THC during a random drug test. The employee at issue, a quadriplegic telephone operator, had a valid medical marijuana card and there was no allegation he was under the influence at work. The Appeals Court decided that Colorado's Lawful Off-Duty Conduct statute did not protect the employee from losing his job based on his off-duty conduct because marijuana is still illegal under federal law.

The Supreme Court will consider whether off-duty marijuana use that does not affect job performance is, in fact, protected as lawful conduct under state law. If the Supreme Court reverses the Appeals Court decision, Colorado employers may be limited in their ability to terminate employees who use marijuana in their off-duty time. If that happens, hospitality employers will have to turn their focus to identifying employees who are actually impaired while on the job, not just employees who test positive for the presence of marijuana metabolites. Employers who have federal contracts may continue to find themselves caught between seemingly conflicting state and federal law.

2. The Wage Protection Act. Employers in Colorado are already subject to the Wage Claim Act, C.R.S. § 8-4-101 *et seq.*, which provides former employees with an avenue to sue in court for unpaid wages. A successful former employee can recover not only the wages owed, but also penalties and their attorneys' fees.

By the time this article appears, Colorado Gov. John Hickenlooper will most likely have signed into law the Wage Protection Act (S.B. 14-005). The act amends the Wage Claim Act and adds an additional avenue for some employees to pursue in order to recover wages before going to court.

The new law is applicable to wages earned after Jan. 1, 2015, and only for amounts of $7,500 or less, exclusive of penalties and fines. Employees, both current and former, can file a complaint with the Colorado Department of Labor and Employment. Similar to the unemployment process, the CDLE will issue an initial finding regarding unpaid wages. Either party can appeal that decision to a hearing officer who will take evidence from witnesses. The decision of the hearing officer is a final agency action that can then be appealed to the district court on a limited basis.

Given the convenience and anticipated speed of the new administrative process, as well as its applicability to both current and former employees, this will most likely result in more wage claims filed against employers in Colorado, particularly by lower wage employees.

3. Background Checks. On March 10, 2014, the Equal Employment Opportunity Commission and Federal Trade Commission issued joint guidance regarding the process for conducting background checks and how employers may use the information they learn. "Ban the box" laws continue to be passed in various states and localities, limiting what employers can ask applicants about their criminal backgrounds at the application stage. Multi-state employers who use a uniform employment application or an online application process need to be particularly sensitive to this issue.

4. Interns. Several recent high-profile cases against companies in the entertainment industry act as reminders that unpaid internships in the for-profit sector are a risky proposition for employers. In order to be exempt from the wage and hour laws, an unpaid internship must foster an educational environment for the intern, and otherwise meet the six-factor test established by the Wage and Hour Division of the U.S. Department of Labor. An employer who views unpaid interns as a way to save on its labor costs or to beef up its workforce during tourist season is likely on the wrong side of the law. The cost of getting this wrong can be huge for employers – entitling the interns to minimum wage, overtime pay and other perks of employment, as well as subjecting the employer to penalties and attorneys' fees. Some jurisdictions also have their own local laws related to unpaid internships.

Staying on top of these issues and ensuring your place of business is in compliance takes time and effort, but in this arena playing it safe is always wiser than taking chances.