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The FLSA Protects Colorado's Recreational Cannabis Workers

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The U.S. Court of Appeals for the Tenth Circuit recently held that cannabis workers employed in Colorado's recreational marijuana industry are protected employees under the Fair Labor Standards Act (FLSA), notwithstanding the prohibition of marijuana in the federal Controlled Substance Act (CSA).

In *Kenney v. Helix TCS, Inc.*, the Tenth Circuit upheld the district court's denial of the defendant employer's motion to dismiss. The defendant employer provides security and other services to the marijuana industry in Colorado. The plaintiff, a former security guard, brought a collective action under Section 216(b) of the FLSA, alleging that the employer misclassified him and other security guards as exempt from overtime.

The employer moved to dismiss the complaint under Rule 12(b)(6), arguing that because marijuana remains illegal under federal law and thus recreational marijuana runs afoul of the CSA, the FLSA does not apply to workers employed in Colorado's recreational marijuana industry. The district court denied the motion to dismiss, and on interlocutory appeal, the Tenth Circuit affirmed.

As a provider of services to the Colorado marijuana industry, the employer's argument that the Colorado marijuana industry's arguable illegality under the CSA put its employees beyond the purview of the FLSA is somewhat ironic. The court noted an employer may not excuse compliance with federal law by virtue of other federal violations.

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The Tenth Circuit also pointed out that the defendant employer did not argue that the employees at issue fell within one of the FLSA's enumerated exclusions. Since the CSA's enactment, Congress has amended the FLSA to specifically exclude other categories of employees, but not cannabis workers. Rather, the court explained, the employer advanced a reading of "the CSA as implicitly repealing the FLSA's overtime mandate for employers in the marijuana industry." The Tenth Circuit disagreed, rejecting the argument that "[e]xtending overtime benefits in this case would require the Court to find that Congress intended to both forbid (under the CSA) and reward (under the FLSA) the same conduct: drug trafficking."

Ultimately, the Tenth Circuit explained that there is no conflict between a "plain reading and the overall purposes of" the FLSA and the CSA proscriptions, and held that "accepting the plain language interpretation that [cannabis] employees are covered by the FLSA promotes the legislature's intent in enacting the statute."

The Tenth Circuit's decision underscores the "striking breadth" of the definition of employee under the FLSA, and serves as a reminder to employers in the cannabis industry that federal employment laws apply equally to their employees. In addition, while the court's opinion is ostensibly focused on Colorado's recreation marijuana employers, it marks yet another development in the panoply of workplace issues surrounding the legalization of marijuana.

UPDATE: On May 18, 2020, Helix TCS filed a petition for a writ of certiorari with the U.S. Supreme Court, arguing that employees of legal marijuana businesses should not be protected by federal employment law because marijuana remains illegal under federal law. In a somewhat ironic twist, the employer, which "provides armed security and transport services to the legal marijuana industry in Colorado," argued that because marijuana remains a Schedule 1 controlled substance under the Controlled Substances Act, "[i]In the absence of congressional action . . . this Court should rule that an individual perpetrating a federal drug crime is not entitled to federally mandated compensation for their efforts."