

FOSTER PEPPER

**Legalization of Marijuana:  
Impact on the Washington  
Workplace**

PRESENTATION MATERIALS  
June 14, 2016

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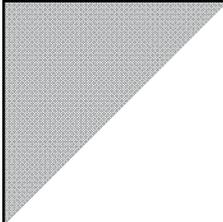
Presented by:

**FOSTER PEPPER**

FOSTER PEPPER



# Presentation



# LEGALIZATION OF MARIJUANA: IMPACT ON THE WASHINGTON WORKPLACE

June 14, 2016

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## Hot Topics Update

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- Federal Updates
    - DOL – Final Overtime Rules
    - EEOC – Wellness Programs Guidance
    - Defend Trade Secrets Act

## Hot Topics Update

- Local Updates
  - Seattle Driver Representative Organizations
  - Seattle Hotel Initiative124

## Marijuana in the Workplace: What We'll Cover

- History of cannabis
- Legal status of marijuana possession, sale and use
- Discrimination / accommodation rights of users
- Drug testing – science and the workplace
- Variations in the union workplace
- Impact of health and safety laws
- Employer policies

## History of Marijuana – Ancient

- Used for thousands of years
- Europe at least as early as A.D. 500



## History of Marijuana – America

- 1545: Spaniards bring to the New World
- English/Jamestown 1611: Cash crop for fiber
- Late 1800s: Cotton replaces hemp
- Patent medicines



## History of Marijuana – 20th Century

- Some medicinal purposes
- Prohibition
- Government and popular culture opposition

## History of Marijuana – Prohibition



## History of Marijuana – 1950s



Beats groove to bongos on nearby Grant Avenue.

## History of Marijuana – 1960s

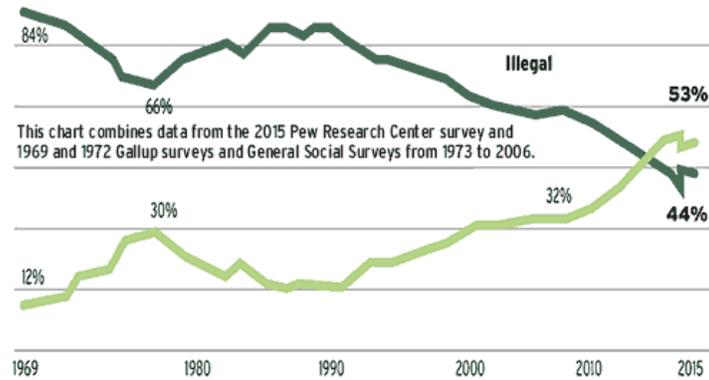


Cheech and Chong in a scene from Up in Smoke

## History of Marijuana – Now

### OPINIONS ON LEGALITY

In 2015, 53 percent of people surveyed by Pew Research Center said the use of marijuana should be legal.



Source: <http://www.oeregister.com/articles/marijuana-709055-money-.html>

## Legal Status of Recreational Marijuana – WA

- Regulated by the Washington State Liquor and Cannabis Board
- Sales began July 8, 2014
- Possession up to one ounce for personal use for individuals 21 and over
- Cannot open, display, or use in public
- Home grown marijuana remains illegal



## Financial Impact of Marijuana – WA

According to the Washington State Liquor and Cannabis Board, the marijuana industry has already generated **over \$885 million in total sales and \$169 million dollars in tax revenue for 2016.**

Source: <http://lcb.wa.gov>

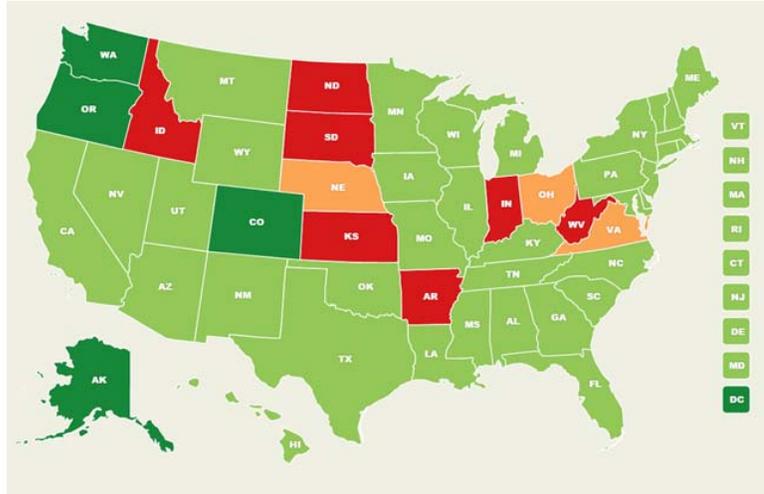


## Legal Status of Medical Marijuana – WA

- Cannabis Patient Protection Act (SB 5052) goes into effect July 1, 2016
- Incorporates medical marijuana with existing recreational system
- Qualifying patients 18 and older
- Establishes voluntary medical marijuana authorization database managed by the Department of Health
- Can have up to 48 oz. of product (more than recreational levels)



## Legal Status of Marijuana – Other States



Source: <https://www.leafly.com/stateoftheleaf>

## Legal Status of Marijuana – Other States

States most likely to vote on legalization of marijuana in 2016:



Of these states Nevada is the only one to have a qualified a legalized-marijuana initiative for the Nov. 8 ballot.

## Legal Status of Marijuana – Federal Law

- Controlled substance
- Still illegal to manufacture, distribute, sell or possess
- DOJ downplayed federal enforcement
- Will this change with the new administration?



## ADA Analysis

- Definition of disability
- “Qualified person” excludes current user of illegal drugs
- Determine illegality under federal law



## WLAD Analysis

- Broader definition of disability
- Does not exclude current user of illegal drugs
- Arguable accommodation duty for addiction, but not abuse
- However: “Employers may establish drug-free work policies. Nothing in this [law] requires an accommodation for the medical use of cannabis if an employer has a drug-free work place.”



## Protection Against Termination for Marijuana Use

- Statute protects users and prescribers from state criminal prosecution
- Does not limit employer right to terminate for drug use
- *Roe v. Teletch*: no right to sue for wrongful discharge
- Similar rulings in CA, CO, MI, MT, OR, and likely others



## Drug Testing – the Science

- Common urine testing: EMIT and GC/MS
- Measure THC metabolite, not current impairment
- Metabolite remains for days or weeks
- Other testing methods not readily available



## Union Setting

- CBA controls drug testing process and consequences
- “Just cause” for termination – arbitrators may not apply zero tolerance



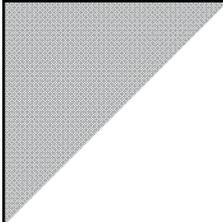
## Government Safety Requirements

- Federal agencies (DOD, DOT, FAA) require testing and specific consequences; no exceptions even in medical marijuana states
- Employers reiterating zero-tolerance policies (Boeing, Puget Sound Naval Shipyard, City of Seattle)



## Steps for Washington Employers

- Review and update policies
  - Watch for “legally prescribed drugs”
  - “Illegal” reference to federal and state law
  - Specifically address marijuana
  - Apply across states?
- Negotiate CBA language
- Review drug testing protocol
- Enforce policies



# LEGALIZATION OF MARIJUANA: IMPACT ON THE WASHINGTON WORKPLACE

June 14, 2016

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FOSTER PEPPER



# Speaker Bios

## Steven R. Peltin

MEMBER



### SEATTLE

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### SERVICES

Business (Chair)

Employment & Labor  
(Chair)

Financial Institutions

Nonprofit & Tax-Exempt  
Organizations

### PRACTICE OVERVIEW

Steve chairs the firm's Business and Employment & Labor practices. His work covers the gamut of employment and labor law. His advice practice is dedicated to helping employers solve problems such as employee discipline and discharge, leaves of absence, discrimination and harassment claims, and threats of employee violence. Steve enhances employee handbooks and prepares and negotiates employment, confidentiality and non-compete agreements. He also counsels executives and professionals on employment and separation agreements, and assists with corporate transactions such as purchases and sales of businesses.

Steve has extensive litigation experience and represents public and private employers in lawsuits claiming discrimination, harassment, wrongful discharge and violations of wage and hour, employee benefits, trade secrets and non-compete obligations. He also appears before local, state and federal administrative agencies and arbitrators in employment and labor matters.

### REPRESENTATIVE WORK - Cases

- Won jury trial for an employer accused of age discrimination by laid-off union employee.
- Prevailed in hearing before the U.S. Department of Labor brought by a union business agent who claimed that the company conspired with the union to discharge him.
- Co-counsel in class action claiming pay for commuting in company vehicle; certification defeated and individual claim resolved promptly.
- Co-counsel for large employers in two U.S. Department of Labor collective actions claiming that employees worked off the clock; summary judgment obtained in one case, and the other settled favorably.
- Won summary judgment on discrimination / harassment claims for financial services companies.
- Obtained temporary restraining orders in two cases where employees refused to return computerized documents and information.
- Won summary judgment on sex bias claim by male employee of performing arts client.

Steven R. Peltin MEMBER

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- Convinced OSHA that a safety whistleblower on a construction site was not subject to a hostile work environment.
- Obtained anti-harassment orders against former employees. Defended company in ERISA cases brought by former executive seeking payments under a Supplemental Executive Retirement Plan and by pension funds seeking payment of withdrawal liability.

## REPRESENTATIVE WORK – Transactions

- Employment and labor counsel in sales of business, including due diligence drafting of purchase agreement language, preparation of offer letters, executive employment agreements and employee communications.
- Assistance to client in reductions in force.
- Counseling of clients facing threat of workplace violence.
- Creation of documentation for background investigations, hiring, leaves of absence, requests for disability accommodation, last chance agreement and severance agreements.
- Preparation of policies such as travel pay, use of cell phones and social media.
- Management training on employment law topics, including avoiding harassment and discrimination, performance management and hiring.

## RECOGNITION

- *The Best Lawyers in America*®
  - + Labor Law – Management, 2012-2016
  - + Litigation – Labor & Employment, 2013-2016
- Best in the Business: Leading Lawyers in the Puget Sound Region, *Seattle Business* magazine
  - + Labor – Management, 2013
  - + Litigation – Labor & Employment, 2013

## ACTIVITIES

- Seattle Theatre Group
  - + Board of Directors
- University Preparatory Academy
  - + Board of Directors, 2011-2012
  - + Chair of Personnel Committee, 2011-2012

## QUOTED

- [“Court Overturns Loan Officer Overtime Ruling in ‘Win’ for MBA,”](#) Quoted in *Reverse Mortgage Daily*, July 2013
- [“‘In Person’ Feature - Best Practices for Employers to Comply with the City of Seattle’s Paid Sick and Safe Time Ordinance,”](#) Interviewed in *Puget Sound Business Journal* - November 2012
- [“It’s Not Just Paid Time Off – It’s the Law: Attorneys explain what Seattle’s new sick leave ordinance means for employers,”](#) Quoted in *Puget Sound Business Journal* - September 2011
- “Your Office Away from the Office,” Quoted in *Utah CEO Magazine*
- “Keeping violent employees out of the workplace,” Quoted in *Risk Management* magazine
- “10 Considerations in Developing Telecommuting Policies and Agreements,” Quoted in HR.COM

Steven R. Peltin MEMBER

SEATTLE T 206.447.6215 F 206.749.2094 [steve.peltin@foster.com](mailto:steve.peltin@foster.com)

## PUBLICATIONS

Steve Peltin is a frequent contributor to Foster Pepper's [Washington Workplace Law](#) blog.

- “Effective Negotiation of Executive Employment Agreements,” Author, *Inside the Minds: Negotiating and Employment Agreements, Leading Lawyers on Constructing Effective Employment Contracts*, 2012 Edition
- “Employers: Beware of High School Diploma Requirements,” Author, *WIB HR & Training Digest*, February 2012
- [“Hidden Threats – There are steps you can take to prevent violence in the workplace,”](#) Co-author, *Washington CEO* magazine
- “Bad Acts: Smaller Employers Should Confront Threats of On-The-Job Physical Assaults,” Author, *Washington Journal*
- “Telecommuting: Legal and Management Risks For Employers,” Author, *Corporate Counsel Magazine*
- “Reducing Telecommuting Management Risks,” Author, *National Underwriter* magazine
- “How To Reduce Workplace Violence,” Author, *National Underwriter* magazine
- “50-State Survey of Employment Libel and Privacy Law, Washington Chapter,” Author, Media Law & Resource Center
- “Hiring Employees: Disability Questions and Medical Exams,” Author, *Realty & Building*

## PRESENTATIONS

- [“My Ex-Employee Did WHAT? – Preventing and Addressing Post-Employment Misconduct,”](#) Moderator and Speaker, Foster Pepper Client Briefing, October 2015
- [“Top Emerging Issues in Employment and Labor Law,”](#) Speaker, 2015 WHAAP Annual Conference, October 2015
- [“Employee Handbooks: 2015 and Beyond,”](#) Speaker, American Public Power Association, September 2015
- [“FMLA and Leave Law Update,”](#) Speaker, 18<sup>th</sup> Annual Labor & Employment Law, The Seminar Group, August 2015
- [“Top 3 Employment Law Issues for 2015 That Should Keep You Up at Night,”](#) Speaker, Foster Pepper’s 10<sup>th</sup> Annual Bankers Briefing, May 2015
- [“Thriving Through Legal Resilience,”](#) Speaker, Washington State Nonprofit Conference, May 2015
- [Association of Washington Housing Authorities Spring Meeting,](#) Speaker, April 2015
- [“Is Your Employee Handbook Ready for Prime Time?”](#) Speaker, Foster Pepper Client Briefing, April 2015
- [“Privacy in the Workplace: Managing Employees in the Digital Age,”](#) Moderator and Speaker, Foster Pepper Client Briefing, November 2014
- “The Alphabet Soup of Federal Employment Law,” Speaker, Tribal Employment Rights & Law: Sovereignty, Jurisdiction and Best Practices, July 2014
- [“Social Media and the Workplace - Protecting the Hospital in the Digital Age,”](#) Speaker, Washington State Hospital Association’s NW Council’s Hot Topics Meeting, June 2014
- “Filling the Empty Chairs: Legal and Effective Hiring,” Presenter, Northwest Marine Trade Association - Professional Development Series
- “What You Should Know About Executive Director Employment Agreements,” Speaker, Association of Washington Housing Authorities
- [“Bullying and Violence in the Workplace: Prevention and Intervention Strategies,”](#) Speaker, Foster Pepper Client Briefing, March 2014
- “Legalization of Marijuana - The Impact on Washington Employers”
  - + Speaker, South King County Human Resources Association December Meeting, 2013
  - + Speaker, Employee Assistance Professionals Association Pacific Northwest Chapter November Meeting, 2013
- [“Employment Discrimination Law – Hear From The Agencies,”](#) Speaker/Moderator, Foster Pepper Client Briefing
- [“Managing Employee Performance While Reducing Legal Risks,”](#) Speaker, Northwest Marine Trade Associations

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- [“Wage & Hour Compliance – Beyond the Basics \(Part I\)”](#), Speaker/Moderator, Foster Pepper Client Briefing
- [“Wage & Hour Compliance – Beyond the Basics \(Part II\)”](#), Speaker/Moderator, Foster Pepper Client Briefing
- [“Filling the Empty Chairs: Legal and Effective Hiring”](#), Speaker/Moderator, Foster Pepper Client Briefing
- “Out of Sight But Not Out of Mind: Untangling Leave of Absence Requirements,” Speaker, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Annual Labor & Employment Law Seminar, The Seminar Group
- “Understanding Seattle Paid Sick and Safe Time”
  - + Speaker, Washington Trucking Associations
  - + Speaker, Northwest Marine Trade Association
- [“Seattle Paid Sick and Safe Time: Practical Guidance Employers Need to Know,”](#) Speaker/Moderator, Foster Pepper Client Briefing
- “Legal Issues for Startups: Employment Law,” Speaker, SURF Incubator
- “Employment Law Challenges for Public Employers and Current Developments under the Public Employees Collective Bargaining Act,” Speaker, 2012 Association of Washington Housing Authorities (AWHA) Meeting
- [“Reasonably Accommodating Employees with Disabilities,”](#) Speaker/Moderator, Foster Pepper Client Briefing
- “High-Stakes Employment and IP Protections: Protect your Company from Increasing Employment Risks and Shield Your Valuable Intellectual Property,” Speaker, Foster Pepper and Washington State Chapter of ACC America
- [“Conducting Effective Workplace Investigations,”](#) Speaker/Moderator, Foster Pepper Client Briefing
- “Managing the Process of Labor Negotiations,” Speaker, Washington Fire Commissioners Association 63rd Annual Conference
- [“Out of Sight but Not Out of Mind: Untangling Employer Obligations under FMLA and Other Leave Statutes,”](#) Speaker/Moderator, Foster Pepper Client Briefing
- [“Social Media in the Workplace,”](#) Speaker/Moderator, Foster Pepper Client Briefing
- “Payroll Management,” Speaker, Lorman Educational Services
- “Time Off: State and Federal Laws on Employee Leave, Vacations and Holidays,” Speaker, Lorman Educational Services
- “Recent Developments under the Family and Medical Leave Act,” Speaker, National Council of State Housing Agencies
- “10 Scary Issues You Need to Know About Your Employees,” Speaker, ASTRA Women’s Business Alliance
- “New Developments in Employment Law,” Speaker, Seattle CFO Arts Roundtable
- “Best Practice in FMLA Administration,” Speaker, Council on Education in Management
- “Conducting Effective Investigations Into Employee Complaints,” Speaker, PUD and Municipal Attorneys Association
- “Cyberstalking: The Washington Employer’s Perspective,” Speaker, King County Bar Association
- “Workplace Investigations,” Speaker, Council on Education in Management
- “Email and the Internet – Legal Challenges for Employers,” Speaker, PUD and Municipal Attorneys Association

## EXPERIENCE

- Foster Pepper PLLC, Member, 2010-Present
- K&L Gates LLP (formerly Preston Gates & Ellis, LLP), Partner, 1998-2010
- Georgia-Pacific Corporation, Senior Counsel, 1996-1998
- Altheimer & Gray (Chicago, IL), Associate and Partner, 1986-1996
- Isham Lincoln & Beale (Chicago, IL), Associate, 1983-1986
- U.S. District Court for the Western District of Wisconsin, Law clerk for the Hon. John C. Shabaz, 1982-1983

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## BAR ADMISSIONS

- Washington, 1999
- Illinois, 1983 (Inactive)

## EDUCATION

- J.D., Cornell Law School (*cum laude*), 1983
- B.A., University of Wisconsin-Madison (with distinction), 1978
  - + Phi Beta Kappa

# Alicia M. Feichtmeir

## ASSOCIATE



### SEATTLE

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### SERVICES

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Venture Capital

Employment & Labor

Media, Entertainment &  
Games

Nonprofit & Tax-Exempt  
Organizations

Ports

Retail & Consumer  
Products

Transportation

### PRACTICE OVERVIEW

Alicia's litigation practice focuses on resolution of civil cases, including employment, commercial litigation, environmental and regulatory disputes. She counsels clients on all aspects of the litigation process, including case strategy, risk evaluation, discovery and trial planning.

In her employment practice, Alicia advises public and private employers on compliance with various federal, state and local employment laws including wage-and-hour, leave, and anti-discrimination regulations. She has defended employers in agency and court proceedings involving harassment and discrimination, whistleblower actions, wrongful discharge, trade secret misappropriation, and unemployment claims. She regularly assists employers in drafting and revising employee handbooks, management policies, and employment agreements, including talent and production agreements for local and national film projects.

### RECOGNITION

– Rising Star, Washington Super Lawyers list, 2014-2016

### ACTIVITIES

– ArtsWest Gallery and Playhouse, Board Intern, 2014-Present

– ArtsFund Associates Program, 2012-Present

– Federal Bar Association of the Western District of Washington,  
Website/Communications Committee Co-Chair, 2011-2013

– Solid Ground Family Assistance Program, Advisory Board Member, 2009-2011

### QUOTED

– “Are WYLD Members Too Green for Pro Bono?” Three young lawyer volunteers are proving otherwise DeNovo, Washington State Bar Association, August 2011

## PUBLICATIONS

– Foster Pepper [Washington Workplace](#) Blog

+ Alicia Feichtmeir is a contributor to Foster Pepper's Washington Workplace Law blog. Recent blog posts include:

- [City Auditor Report: Seattle Sick and Safe Leave Compliance Leaves Room for Improvement - for Employers and Office of Civil Rights](#), October 2014
  - [Seattle \\$15 Minimum Wage Update: Referendum Efforts Rejected, and Airport Workers Get a Raise](#), July 2014
  - [Seattle Passes \\$15 Minimum Wage, Highest of Any Major U.S. City](#), June 2014
  - [The Minimum Wage Debate Rages in Seattle, Washington state, and the Nation](#), February 2014
  - [Will Seattle Really Have a \\$15 Minimum Wage?](#) December 2013
  - [Food for Thought: Wage Theft Protests Serve As Reminder of Importance of Wage & Hour Compliance](#), October 2013
  - [Revenge of the Intern: Wage and Hour Class Actions Keep Employers on Their Toes](#), May 2013
  - [Access Denied: Legislation Prevents Employers from Demanding Employees' Social Media Passwords](#), April 2012
  - [Preventing and Addressing Workplace Bullying](#), March 2012
  - [Washington State Supreme Court Orders Disclosure of Investigative Reports Alleging Police Misconduct](#), September 2011
  - [Check Your Files: U.S. Supreme Court Narrows FOIA Exemption for Internal Personnel Rules](#), March 2011
- [“Defend Trade Secrets Act \(DTSA\) Signed Into Law: Federal Law Offers Greater Protections and New Obligations for Employers,”](#) Author, Foster Pepper News Alert, May 2016
- “Judicial Candidates Pledge Ethical Campaigns,” Foster Pepper News Alert, May 2010
- “Advocating for the Native American Child: Comprehensive Overview of the Indian Child Welfare Act,” Chapter Contributor, Native American Practice Group and CASA CLE Manual, November 2008

## PRESENTATIONS

- [“Is Your Employee Handbook Ready for Prime Time?”](#) Speaker, Foster Pepper Client Briefing, April 2015
- [“Privacy in the Workplace: Managing Employees in the Digital Age,”](#) Presenter, Foster Pepper Client Briefing, November 2014
- [“Bullying and Violence in the Workplace: Prevention and Intervention Strategies,”](#) Presenter, Foster Pepper Client Briefing, March 2014
- [“Employment Discrimination Law – Hear from the Agencies,”](#) Presenter, Foster Pepper Client Briefing, September 2013
- [“Wage & Hour Compliance – Beyond the Basics \(Part II\),”](#) Presenter, Foster Pepper Client Briefing, May 2013
- “Intellectual Property Ownership and Public Employment,” Co-presenter, Association of Washington Cities, 33rd Annual AWC Labor Relations Institute, May 2013
- [“Wage & Hour Compliance – Beyond the Basics \(Part I\),”](#) Presenter, Foster Pepper Client Briefing, February 2013
- “Mandatory/Permissive Bargaining and Public Records/Information Disclosure,” Presenter, Managing the Process of Labor Relations, October 2011

## EXPERIENCE

– Foster Pepper PLLC

- + Associate, 2010-Present
- + Summer Associate, 2008

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- Solid Ground (Fremont Public Association), Legal Intern, 2007-2008
- Immigrant Families Advocacy Project, University of Washington School of Law, Volunteer Advocate, 2007-2009
- Seattle Art Museum, Community Campaign Coordinator, 2005-2006
- Seattle Children's Museum, Group Sales Manager, 2003-2005

## BAR ADMISSIONS

- Washington, 2009
- U.S. District Court
  - + Eastern District of Washington, 2011
  - + Western District of Washington, 2011
- 9th Circuit U.S. Court of Appeals, 2012

## EDUCATION

- J.D., University of Washington School of Law, 2009
  - + *Washington Law Review*, Articles Editor
  - + Law Women's Caucus, Alumnae Event Chair
- B.A., Wesleyan University, 2003

## Yan Perng

## ASSOCIATE



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## SERVICES

Business  
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 Games

## PRACTICE OVERVIEW

Yan is an associate in the firm's Business and Intellectual Property practice groups. Her primary practice includes a broad range of transactional business services to both emerging and established companies with an emphasis on the protection, enforcement, and commercialization of intellectual property. In particular, her experience covers counseling clients on patent matters for a variety of businesses, including deep-sea exploration and drone technology and product design. As part of the firm's Media, Entertainment, and Gaming industry group, she advises clients in the competitive video game industry, known as eSports. Yan also has experience drafting agreements associated with international yacht and business sales transactions and represents Mandarin-speaking clients on a variety of different matters.

## RECOGNITION

- 2014 AIPLA Giles Sutherland Rich Memorial Moot Court Competition
  - + Best Appellate Brief
  - + Western Regional Competition Winner
  - + National Competition Semifinalist
- Finalist, 2012 Peterson Wampold Rosato Luna Knopp Mock Trial Competition
- Best Brief & Semifinalist, 2011 Hillis Clark Martin & Peterson Appellate Advocacy Competition

## ACTIVITIES

- Alliance of Women Achieving Knowledge and Excellence (AWAKE), Secretary, 2015-Present
- Seattle IP Inn of Court, Associate Member, September 2014-Present
- Snohomish County Legal Services, Paralegal Volunteer, 2011
- Asia Pacific American Legal Resource Center, Legal Intern Volunteer, 2011

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## PUBLICATIONS

- [“NLRB: Employers Cannot Ban Employees From Using Company’s Email System for Union-Related Communications,”](#) Co-author, Foster Pepper News Alert, December 2014

## PRESENTATIONS

- [“Account Takeover, Allocation of Loss and Loss Prevention Strategies,”](#) Speaker, Current Management Liability Issues of Interest to Community Bankers, April 2015

## EXPERIENCE

- Foster Pepper PLLC
  - + Associate, 2014-Present
  - + Summer Associate, 2013
- U.S. Court of Appeals Federal Circuit, Judicial Clerk Extern for the Hon. Chief Judge Randall Rader, 2013
- University of Washington Center for Commercialization, Copyright and Trademark Legal Extern, 2012
- Patterson Buchanan Fobes Leitch & Kalzer, Inc., P.S., Summer Associate, 2012
- Center for Advanced Study & Research on Intellectual Property, Teaching Assistant, 2012-2013
- Office of Oregon Senator Jeffrey Merkely, Legislative Assistant Intern, 2011
- Taiwan Legislature & National Chiao-Tung University, Research Assistant, 2010
- Asia FM (Broadcasting Network), Radio DJ, 2008-2011
- Videoland Television Network, Performing Artist, 2004-2008

## BAR ADMISSIONS

- Washington, 2014
- U.S. Patent Office, 2016

## EDUCATION

- J.D., University of Washington School of Law, 2014
  - + Moot Court Honor Board
  - + VP of Professional Development, Minority Law Student Association
  - + Entrepreneurial Law Clinic
  - + Technology Law and Policy Clinic
- B.S. Biochemical Engineering, National Taiwan University, 2008

## LANGUAGES

- Chinese (Mandarin), fluent

FOSTER PEPPER



# Additional Materials

June 26, 2015

# Colorado Supreme Court Upholds Employer's Right to Discharge Employee for Marijuana Use

Medical and recreational marijuana is legal in Washington and Colorado; however, the highest courts in both states have ruled that employers can still discharge employees for using it.

Most recently, in [Coats v. Dish Network, LLC](#), the Colorado Supreme Court ruled that Dish Network properly discharged an employee for failing a drug test. At the time of his discharge, Brandon Coats (who suffers from quadriplegia), held a valid Colorado license to consume marijuana for [medical purposes](#). As a result of Coats' positive test for marijuana, Dish discharged him for violating its zero tolerance drug policy. Coats did not use marijuana on Dish's premises, he did not use it during working hours, nor was he under its influence while at work. Instead, Coats' urine test detected traces of THC metabolites, the chemical residue of THC, which is the active ingredient in marijuana. These metabolites can remain in the body anywhere from several days to several weeks after last consuming marijuana.

Coats argued that Dish improperly discharged him for engaging in a legal activity. Colorado law prohibits an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours" (the Lawful Activities Statute – 24-34-402.5). Under state law, Coats' marijuana usage was completely legal. However, marijuana is an illegal controlled substance under [federal law](#). The Colorado court ruled that, in determining what is lawful and unlawful under the Lawful Activities Statute, it must consider both state and federal law. Since marijuana consumption is illegal under federal law, the court found that Dish was within its rights to discharge Coats.

The Washington Supreme Court came to a similar conclusion in 2011, in *Roe v. TeleTech Customer Care Management*, which we previously covered [here](#). Roe was discharged for testing positive for marijuana use under the company's drug free workplace policy. The employee had legally consumed marijuana under [Washington's Medical Use of Marijuana Act](#). The court ruled that state law did not provide a claim for an employee discharged for use of medical marijuana. The court also made clear that Washington State's Human Rights Commission would not investigate employee claims of discrimination due to medical marijuana use because federal law prohibits marijuana possession and use.

## AUTHORS:

[Tom Francis](#)

## RELATED SERVICES:

[Employment & Labor](#)

*June 26, 2015*

## Colorado Supreme Court Upholds Employer's Right to Discharge Employee for Marijuana Use

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*Coats* and *TeleTech* show that courts are not likely to fault employers who discharge employees for failing a drug test, even if marijuana is legal under state law for medical or recreational use. As long as marijuana is a controlled substance under federal law, employees will likely have no protection against discharge for failing a drug test due to marijuana use. Indeed, Washington employers may establish drug-free workplace policies that prohibit marijuana use (i.e., prohibiting any detectable amount of any illegal substance, including marijuana, in one's system). Washington law does not require an accommodation for medical use of marijuana if an employer has a drug-free workplace, nor does it limit an employer's right to terminate employees for violating its drug policy.

For more information on marijuana in the workplace, please contact Foster Pepper's [Employment & Labor](#) group.

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May 13, 2016

# Defend Trade Secrets Act (DTSA) Signed Into Law: Federal Law Offers Greater Protections And New Obligations For Employers

On Wednesday, May 11, 2016, President Obama signed the Defend Trade Secrets Act (“DTSA”) into law, a first step in creating federal oversight of trade secrets laws, which have been exclusively handled at the state level. The DTSA does not preempt existing state laws, but is an additional tool to protect employers with trade secrets related to products or services used in interstate or foreign commerce.

## DTSA Protections

Employers threatened by trade secret misappropriation by competitors or employees can now:

- File a civil action in Federal Court for trade secret misappropriation (the DTSA also includes potentially new protections for party filings and even court proceedings/rulings related to trade secrets to be sealed). This will also have the effect of allowing associated breach of contract and employment law claims to be heard in Federal Court;
- Seek actual damages or restitution for unjust enforcement due to misappropriation of trade secrets;
- Seek attorneys’ fees and exemplary damages of up to twice the amount of actual damages or restitution if the misappropriation is wilful and malicious (note that the DTSA also provides for attorneys’ fees to a defendant if claim is asserted in bad faith);
- Obtain a full range of injunctive relief (note that the DTSA excludes injunctive relief restraining an employee from working for a competitor or relief that conflicts with state laws imposing restraints on trade);
- In extraordinary circumstances, obtain a civil seizure order on an ex parte basis to prevent dissemination of a trade secret;
- Obtain penalties for criminal violation of \$5 million or three times the value of the misappropriated trade secrets;
- Continue to obtain existing remedies under state trade secrets laws.

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### Whistle Blower Immunity – Notice Requirement

The DTSA also provides for immunity from liability for disclosure to the government or to an attorney for the purpose of reporting or investigating a suspected violation of a law. The immunity also extends to an employee who files a lawsuit against an employer for retaliation for whistleblowing. The employee may disclose the trade secret for the legal proceeding, provided court records are filed under seal.

*The DTSA requires that employers notify employees and independent contractors about this immunity.* Under the DTSA, employers are required to provide the immunity notice in any contracts with employees and independent contractors that address the use of trade secrets. Alternatively, the DTSA provides a less burdensome option for employers to provide the notice via reference to a policy document. Employers that do not provide the required notice lose the right to two of the most useful remedies in the new law: exemplary damages and attorneys' fees against an employee who was not provided with such notice.

The notice provision applies to all contracts and agreements entered into or updated after the date of enactment (May 11). Therefore we recommend that employers take immediate steps to add the special "immunity notice" clause to all employee and independent contractor agreements dealing with confidential information, as well as in employee policies addressing trade secrets.

If you have any questions about the DTSA, trade secret protection, or need assistance complying with the new regulation, please contact [Alicia Feichtmeir](#) or [Ben Hodges](#) at Foster Pepper.

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May 25, 2016

# EEOC Issues New Rules for Employer Wellness Programs

Employer wellness programs are the latest subject of EEOC regulatory efforts. Last week, the Equal Employment Opportunity Commission (“EEOC”) issued final rules explaining how wellness programs must comply with the Americans with Disabilities Act (“ADA”) and the Genetic Information Nondiscrimination Act (“GINA”). The new rules: (1) address the extent to which an employers may pay incentives or provide rewards to encourage participation in a wellness program that involves disability-related inquiries; and (2) clarify when a wellness program is “voluntary.”

Key provisions are as follows:

- Scope. The rules apply to wellness programs (whether or not they are part of an employer health plan) that condition eligibility on providing certain information—such as responding to disability-related inquiries, completing health risk assessments, or submitting to a medical examination or biometric screening—and provide an incentive for participation or a penalty for not providing such information. Wellness programs without an incentive/penalty gateway requirement are not affected by the new rules.
- Effect on Existing Rules. Existing regulations regarding HIPPA and ACA compliance are supplemented by the new rules. However, differences under the ACA rules remain, which creates challenges for employers to design compliant wellness programs.
- Use of Information. Under the new rules, if a wellness program collects health information about employees and/or spouses, the information must be used (or reasonably designed to be used) for health promotion or disease-prevention, and feedback is provided to the employee. There is no other permissible reason for collecting such information from employees or spouses, and any information provided to the employer must be general and cannot reveal the identity of the employees or spouses.
- Rewards/Penalties. Participation in a wellness program cannot be a requirement for participation in the employer’s health benefits plan, but rewards/penalties for participation are permitted within specified limits. Generally, rewards/penalties are limited to 30% of the total cost of single coverage. The 30% cap applies if the employee is tested for tobacco use, but not if tobacco use only is self-reported.

## AUTHORS:

[Scott Galloway](#)

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*May 25, 2016*

## EEOC Issues New Rules for Employer Wellness Programs

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The rules pertaining to rewards and penalties, as well as required notices regarding employer information-gathering, go into effect as of the first plan year beginning on or after January 1, 2017. The remainder of the rules are considered clarifications of current regulations, and are immediately applicable. Employers should promptly assess the impact of the rules on their wellness program and make any design changes necessary to achieve compliance.

For more information about employer wellness plans, please contact [Scott Galloway](#), or Foster Pepper's [Employment & Labor](#) group.

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May 25, 2016

## Agency "Final Rule" Roundup

The past week involved a flurry of activity from the federal agencies responsible for promulgating and enforcing employment and labor rules. Click below for more information:

- [DOL](#) issued the final version of its new overtime rule, raising the minimum salary threshold required for “white collar” exemptions to \$47,476 per year, effective December 1, 2016.
- [EEOC](#) issued final rules on employer wellness programs. For more in-depth coverage of this issue, read our blog post [here](#).
- [OSHA](#) issued a new final rule modernizing data collection by requiring employers to electronically submit information about injuries and illness.

Employers that need assistance navigating these new rules should contact Foster Pepper’s [Employment & Labor](#) group.

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