

Marijuana and the Canadian Workplace

The possession, use and sale of marijuana in Canada presently remains unlawful under the *Controlled Drugs and Substances Act*, but its use for medical purposes is permitted under the *Regulations to the Act*. The Canadian government has now introduced legislation legalizing the possession, use and sale of marijuana for non-medical, recreational use (See Bill C-45). That law is proposed to come into effect on July 1, 2018. What does this all mean for Canadian employers? This brief article addresses some of the questions that employers are asking about legal marijuana.



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What Does it Mean to “Legalize” Marijuana?

The Government's proposed *Cannabis Act* amends both the *Criminal Code* and the *Controlled Drugs and Substances Act* to “de-criminalize” marijuana. The legislation also sets out a full regulatory framework designed to control the production, sale and distribution of marijuana for both medical and non-medical purposes.

Under this regulatory framework, cannabis is considered to be “illicit” where it is not produced, sold or distributed by an organization licensed by the Government. Only licensed operators will be allowed to lawfully produce and sell marijuana.

While the personal possession and use of marijuana will be de-criminalized, there is actually much that will continue to be unlawful about the substance.

Will there be any rules at all?

Under the new regime (See ss. 8, 9, 10, 11 for legal restrictions on lawful possession, sale, distribution etc...), it will be unlawful for any “adult” (18 years or over) to:

- possess cannabis in public of more than 30 dried grams;
- possess any cannabis that they know to be illicit;
- distribute cannabis of more than 30 dried grams;
- distribute cannabis to persons younger than 18;
- distribute cannabis to an organization; or
- distribute cannabis they know to be illicit.

It will also be unlawful for “young persons” (12 to 18 years) to:

- possess cannabis of more than 5

dried grams; or

- distribute cannabis of more than 5 dried grams.

It will, furthermore, be unlawful for all individuals to:

- possess in public or distribute a budding or flowering cannabis plant;
- possess or distribute more than 4 non-budding or flowering cannabis plants; or
- distribute cannabis to an organization.

What are the potential penalties?

Violations of these restrictions may result in significant fines or incarceration, in some cases as much as 14 years in prison. Where an "organization" commits a violation, any director, corporate officer or agent of the organization who directed, authorized or acquiesced in the violation will be liable (See s. 121). Significantly, employers may also be liable for violations of the *Act* committed by their employees or agents where they are acting in the course of their employment or within the scope of their agency (See s. 122). It is important to note that the exercise of "due diligence" to prevent a violation taking place is not a defence.

What are the effects of marijuana on performance?

Studies show that the short term performance effects of marijuana use may include problems with memory and learning, distorted perception, difficulty in thinking and problem-

solving, and loss of coordination. Heavy users may have increased difficulty sustaining attention, shifting attention to meet the demands of changes in the environment, and in registering, processing and using information.

How long do the effects last?

Effects from smoking cannabis products can normally be felt within minutes and can reach their peak in 10-30 minutes. Typical marijuana smokers experience a high that can last approximately 2 hours. While most behavioral and physiological effects can be expected to return to baseline levels within 3-5 hours after drug use, some studies have demonstrated residual effects lasting up to 24 hours.

Do I have to let my employees be or get "high" at work?

Non-medical use of marijuana (although it will be legal) may continue to be treated in substantially the same way as the use of alcohol or illegal drugs under an organization's Workplace Drug & Alcohol Policy. Employers will continue to have the right to fully prohibit the use of marijuana during work hours, and to further prohibit attendance at work while impaired. Violation of these prohibitions can be made the subject of progressive discipline. In appropriate cases, violations may result in termination of employment for just cause.

What if an employee is addicted?

As in the case of alcohol, an employee's use of marijuana that amounts to a physical or psychological

dependency will constitute a "disability" under provincial and federal human rights legislation, triggering the employer's duty to accommodate the employee's disability to the point of undue hardship.

There have already been a number of Canadian arbitration decisions where unionized employers have been required to reinstate employees fired for drug use, based on the employer's failure to properly identify, address and accommodate the employee's substance addiction as a disability.

Is a claim of addiction a full shield for employees?

In a recent case (See *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30), however, the Supreme Court of Canada upheld a termination for cause where a coal mine loader driver had a workplace accident while high on cocaine, to which he was addicted.

The employer had a "no free accident" policy, requiring employees to either: a) disclose any drug dependencies or addictions (in which case they would be offered treatment); or b) if they failed to disclose and then had an accident under the influence, they would be subject to termination for cause. The employee had not disclosed his cocaine addiction, but later claimed that his failure was due to his "inability" to disclose on account of his denial of his own addiction. He argued that the employer had failed to accommodate his addiction by not taking into account these reasons for his failure to disclose.

The Court rejected this argument, finding that the employee was capable of disclosure in accordance with the policy but deliberately failed to do so. In the circumstances, the Court found that the employer's decision was based on a breach of policy and not on the addiction, and furthermore that the employer had not failed to accommodate the employee's addiction.

The Court's endorsement of this type of "no free accident" policy provides useful guidance for employers, and particularly those in safety sensitive environments.

What about medical marijuana?

With the relatively recent advent of legitimately recognized medical marijuana use, the situation for employers is now further complicated.

Medical Marijuana is regularly prescribed to aid a variety of conditions including attention deficit disorder, arthritis, back and neck problem, chronic pain, colitis, Chron's disease, eating disorders, head injuries, HIV, fibromyalgia, migraines and sleep disorders.

On the one hand, employers must have policies in place permitting the medical use of marijuana in the workplace where supported by appropriate medical evidence, as a form of accommodation.

On the other hand, employers continue to have the right to prohibit impairment on the job, particularly in safety sensitive positions. It will not always be

easy to balance these competing interests.

What does accommodation involve?

Where an employee claims medical need for marijuana, the request will have to be treated in the same manner as any other request for medical accommodation.

As part of the inquiry employers should, at a minimum, have protocols in place requiring:

- medical proof of prescription
- sufficient medical indication that the employee actually has to ingest marijuana during working hours
- sufficiently detailed information regarding the frequency, volume and method of ingestion relating to such prescribed medical use
- to the degree possible, a medical assessment of the impairment that will be associated with the prescribed medical use, and the resulting restrictions on the employee's ability to safely perform the functions of their job

All of this information will be important for the dual purpose of structuring appropriate accommodation, as well as the assessment of safety and performance issues related to impairment.

How can we assess impairment on the job?

There are at least 6 ways to use cannabis products other than

traditional smoking (these include vaporizing, edibles, oils, tinctures, topicals and dabbing). Because Marijuana can easily be ingested in ways other than traditional smoking, its use is less readily detectable by simple observation or smell.

Assessment of impairment will very likely pose one of the greatest challenges in the crafting and implementation of policies concerning medical (and possibly non-medical) marijuana use in the workplace.

Unlike alcohol, marijuana can be detected in the bloodstream days or even weeks after ingestion, but levels of TCH (the active ingredient in marijuana) do not accurately correspond with levels of impairment. This means that there is currently no medical test that reliably indicates the level of a person's impairment due to marijuana use.

Are we allowed to drug test?

Current provincial and federal human rights law in Canada does not permit pre-employment or random testing for drug or alcohol use or impairment.

In some jurisdictions, like Ontario, "lawful" testing is typically limited to "reasonable cause" or "post-incident" testing, where safety-sensitive positions are involved.

It remains to be seen whether "random" testing will become permissible for certain safety-sensitive positions or assignments, such as those involving the use of heavy machinery, hazardous materials or working at heights.

Time and litigation will provide employers with more guidance as to the scope of their right to require testing and to deal with issues relating to real and perceived impairment in the workplace due to marijuana use.

What do we need to do?

Canadian employers should be reviewing and updating their existing framework of policies to adequately address issues relating to both the medical and (soon to be legal) non-medical use of marijuana at work.

At a minimum, employers should:

- update drug & alcohol policies to specifically address marijuana use (or resulting impairment) at work, including a duty to disclose (and not to conceal) any use of marijuana in the workplace, as well as the consequences of non-compliance;
- modify human rights and accommodation policies to specifically deal with issues relating to marijuana dependency;
- introduce protocols for the accommodation of medical marijuana use at work, including the requirement for qualified proof of prescription and appropriate medical indication of necessary ingestion at work;
- establish a framework for testing for impairment, including triggering circumstances and testing methods, possibly including mandatory independent

medical examination in appropriate circumstances; and

- train management and supervisory staff on the application of all policies relating to medical and non-medical use of marijuana in the workplace.

In establishing policies and protocols, employers may also wish to consult with medical professionals in order to:

- adopt a workable definition of “impairment”;
- establish a checklist of non-medical verbal or physical inquiries that managers and supervisors could use to help determine impairment; and
- create standard medical marijuana forms to be completed by treating physicians, describing the method of required ingestions, dosage, frequency, anticipated level of impairment and restrictions on performance of regular job duties, duration of anticipated usage and recommended accommodations.

What if we have no existing policy?

With the advent of legal marijuana, it is time for employers to update their drug and alcohol policies. For employers who are starting from scratch, here are 10 important components of any such policy:

1. **Purpose:** A statement explaining the importance of employees being fit for work and of maintaining a safe and

accident-free workplace.

2. **Scope:** A statement confirming that the policy is applicable to all employees of the organization.

3. **Employees Obligations:** A section outlining all employees’ duty not to violate the policy, and to disclose and/or report violations (and not conceal them).

4. **No Exception for Legal or Medical Marijuana:** A statement confirming that the legalization of (or a prescription for) marijuana is not a license to violate the policy.

5. **Medical Marijuana:** A section establishing the protocol for disclosing the need for accommodation of medical marijuana consumption at work and what information will be required of the employee and/or their medical professionals in order to facilitate the accommodation process and assess the potential safety risks associated with the required use.

6. **Mechanism for Self-Reporting:** A system for employee self-reporting of addiction or dependency, triggering the accommodation process.

7. **Testing for Safety Sensitive Jobs:** In appropriate circumstances (safety sensitive environments), a system for drug or alcohol testing, whether “post-accident”, for “reasonable cause”, “pre-assignment” or “random”.

8. **Investigation:** A section describing the process of investigation of reported or suspected violations of the policy.

9. **Penalties for Violation:** A description of the penalties associated with violations of the policy, including false reporting, failed self-reporting, intoxication at work or retaliations, up to and including termination for just cause.

10. **Accommodation:** A statement confirming that the policy will at all times be applied in the context of the employer's legal duty to accommodate disability under *Human Rights* legislation.