

Marijuana in the Workplace: A Balancing Act

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Overview

- The current state of the law
- Who's using medical marijuana and why
- Drug use and fitness for duty
- The human rights duty to accommodate
- Alcohol and drug testing policies



The current state of the law

Recent Developments

- **2014:** Doctors are allowed to prescribe medical marijuana to their patients (no longer need a permit from Health Canada)
- **2015:** *R. v. Smith* – Supreme Court ruled that restricting legal access to only dried marijuana was unconstitutional
- **2016:** *Allard v. Canada* – Federal Court ruled that Individuals who require marijuana for medical purposes should have "reasonable access"

Recent Developments

- **August 24, 2016:** Access to Cannabis for Medical Purposes Regulations came into force
- Individuals with medical needs, and who have the authorization of their health care practitioner, are now able to access cannabis in 3 ways:
 1. They can continue to access quality-controlled cannabis by registering with licensed producers
 2. They can register with Health Canada to produce a limited amount for their own medical purposes
 3. They can designate someone else to produce it for them

Recent and Future Developments

- **April 13, 2017:** Federal government introduced Bill C-45 (Cannabis Act) to legalize and regulate the production, distribution, sale, and possession of cannabis in Canada
- **April 13, 2017:** Federal government introduced Bill C-46 to:
 - ensure that a robust drug-impaired driving regime is in place before Bill C-45 comes into force
 - reform the entire Criminal Code transportation regime to create a new, modern, simplified, and more coherent system to better deter drug and alcohol-impaired driving

Who's using medical marijuana and why

Why Discuss this Now?

- Employee drug use – especially medical marijuana – is on the rise
- Health Canada had already predicted a 10-fold growth in the country's legal marijuana supply industry in the next 10 years, leading to as many as 450,000 medical marijuana users
- ...and that was prior to the Federal Government's announcement of its plan to legalize marijuana for **recreational** use!

What is employee drug use?

- Employees may use drugs:
 - To treat a mental or physical condition (e.g., anxiety, sleep disorder, chronic pain, arthritis, cancer, etc.)
 - Because they are addicted
 - Recreationally
- Employers must avoid making assumptions about
 - Who uses drugs
 - Why
 - How the drugs impact the individual's ability to work safely

Drug use and fitness for duty

Legal Framework

- The law distinguishes between 2 types of drug use:
 - Culpable (blameworthy)
 - Non-culpable (innocent)

Culpable Use

- Example:
 - Recreational marijuana use at work or coming to work under the influence
- Employer response: progressive discipline

Non-Culpable Use

- Examples:
 - Employee uses marijuana due to medically-supported addiction
 - Employee uses marijuana to treat illness or injury
- Employer response: accommodation

What to do when you suspect drug usage at work

- Observe the employee in the presence of management staff
- Speak with the employee privately
- If you continue to suspect the employee is under the influence of drugs, send him or her home with pay while you investigate
- Ensure the employee has safe transport home
 - Call for a cab
 - Ask if the employee has someone who can offer a ride

What to do when you suspect drug usage at work (Cont'd)

- If the investigation confirms the employee was using mind altering drugs at work:
 - Meet with the employee
 - Explain the consequences of attending work under the influence or using at work
 - If employer discovers that consumption was done to treat a disability or due to a medically-supported addiction, discipline may not be warranted
 - Triggers accommodation obligations

What to do when you suspect drug usage at work (Cont'd)

- Obtain appropriate documentation to ensure employee is medically cleared
 - Request written medical documentation from employee's treating physician that speaks to the ability to safely carry out assigned duties
- Do not take an employee's statement at face value

OHS considerations

- Employees do not have a right to be impaired in the workplace, especially where their impairment may endanger their own safety or the safety of others
- Employers must consider their obligations under applicable provincial or territorial OHS legislation
- Employers must also consider the consequences for failing to take the appropriate steps:
 - Injuries in the workplace
 - Prosecutions for contravening or failing to comply with OSH legislation

Examples – OSH language

- An employer **shall take every precaution reasonable in the circumstances** for the protection of a worker (Ontario)
- Every employer **must take the necessary measures** to protect the health and ensure the safety and physical well-being of his worker (Quebec)
- An employer **shall ensure, where it is reasonably practicable,** the health, safety and welfare of his or her workers (Newfoundland and Labrador)
- Every employer **shall ensure** that the health and safety at work of every person employed by the employer is protected (Canada)

Do employees have OHS obligations?

- ▣ **YES!**

- ▣ In many jurisdictions, while at work, employees shall:
 - ▣ take “every reasonable precaution” or “reasonable care” to protect their health and safety and that of others
 - ▣ co-operate with their employer for the purposes of protecting their health and safety and that of others

R. v. Metron Construction Corporation (Criminal Case)

- Workers had been restoring concrete balconies on a high-rise building (involved the use of swing stage)
- 5 workers + site supervisor were on the swing stage when it collapsed fourteen floors
- The normal, usual and safe practice = 2 workers to be on a swing stage at any one time
- There were only 2 lifelines
- 4 workers died and 1 sustained serious injuries
- toxicological analysis determined marijuana use (including site supervisor)

R. v. Metron Construction Corporation (Cont'd)

- Deceased site supervisor was a “senior officer” of Metron within the meaning of the *Criminal Code*
- Metron plead guilty to Criminal Negligence Causing Death because the site supervisor failed to take reasonable steps to prevent bodily harm and death by:
 - Directing and/or permitting workers to work on the swing stage, when he knew or should have known that it was unsafe to do so
 - Directing and/or permitting workers to board the swing stage knowing that only two lifelines were available; and
 - **Permitting persons under the influence of drugs to work on the project**
- At trial, Metron received a fine of \$200,000.

R. v. Metron Construction Corporation (ONCA)

- The sentence of a fine of \$200,000 was manifestly unfit
- The sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender
- A fine of \$200,000 was at the lower end of the OHS cases involving fatalities
- A sentence consisting of a fine of \$200,000 failed to convey the need to deliver a message on the importance of worker safety
- Metron was sentenced to pay a fine of \$750,000

The human rights duty to accommodate

Legal Framework

- Human rights legislation requires equal treatment and prohibits discrimination in the workplace on the basis of disability
- Employers must accommodate employees' disabilities to the point of undue hardship
- Note, “disability” includes:
 - Drug dependence
 - Use of medical marijuana to treat a disability

Accommodating Medical Marijuana

- The art of balancing competing interests:
 - Privacy concerns
 - Safety concerns
 - Human rights concerns

The Accommodation Process

- Apply the same human rights/accommodation principles you would for any other disability
 - If an employee has a disability and is prescribed medical marijuana, an employer must accommodate this in the same way they would any other medical prescription
- Take an individualized approach
- Everyone has a role in the accommodation process

The Accommodation Process (Cont'd)

- Seek information – confirm:
 - Requirement to use marijuana
 - Amount, form and frequency of use
 - Duration of prescription
 - ***Level and type of impairment: confirm that there will be no significant, meaningful impairment of the cognition, judgment, perception, coordination or other ability that is central to the employee performing their job safely and effectively
- Consider whether and how to accommodate the employee safely

Possible Accommodations

- Offer a modified work schedule and/or modified duties
- Transfer to less safety-sensitive duties
- Offer a leave of absence for treatment or recovery (paid or unpaid)
- Employee assistance program and/or extended health benefits
- Use of ingested marijuana (e.g. oral ingestion) vs. smoking
- Explore other treatment options that do not impair the employee

- Accommodation = Needs, **NOT** Preferences

Additional Considerations

- Is avoiding drug usage a “Bona Fide Occupational Requirement”? (e.g., with respect to safety, cognition, judgment, perception, coordination, etc.?)
- The nature of the employment – is it safety-sensitive?

Calgary (City) v. CUPE 37 (Arbitration – 2015)

- City employee was employed in a safety-sensitive position
- In 2009, the employee was prescribed marijuana for medical purposes; he later informed 2 of his supervisors
- In 2011, management became aware of the employee's medical marijuana use
- He was immediately removed from his position and placed in a non-safety sensitive position (pending investigation)

Calgary (City) v. CUPE 37 (Cont'd)

- Following the investigation, the City determined that the employee had a marijuana dependency that required treatment
- He was provided with 2 options:
 - continue in a non-safety sensitive position; or
 - consult with a doctor for further assessment of his dependency
- Union filed a grievance

Calgary (City) v. CUPE 37 (Cont'd)

- No evidence that the use of marijuana for medical purposes had any impact on the employee's ability to perform his safety sensitive duties in a safe manner
- No evidence that the employee had at any time exhibited signs of impairment while on duty
- He worked without incident and no reported signs of dependency
- Employee reinstated

Alcohol and drug testing policies

Why Implement a Policy

- Do you work in a safety and security sensitive industry?
- Workplace culture of substance abuse?
- Past instances of employee impairment at work?
- Accidents in the workplace?

The Canadian Landscape

- There is no general law permitting workplace testing
 - A “balancing of interests” approach is used
 - An employer’s right to a safe workplace
 - An employee’s right to privacy
- Highest threshold for random workplace testing

Guiding Principles

- No employee is to be subject to random drug testing unless part of an agreed rehabilitative program
 - Testing a legitimate part of employment contract for employees found to have a drug problem
- Employer may require testing where reasonable cause
- Testing generally permitted in post-incident / accident situations

Template Drug (and Alcohol) Testing Policy

- Policy
- Definitions
- Guiding principles
- Responsibilities
- Policy Standards
- Training
- Searches
- Testing
- Confidentiality
- Appendix A – Substance Testing Procedures

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Q & A

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