

Canada moves to legalize cannabis

Many employers have been questioning how their drug policies will stand up once marijuana is no longer illegal

On April 13, the federal government made a significant step toward legalizing marijuana when it introduced the Cannabis Act. While the amendment has been praised by many, some employers have been left wondering how their workplace drug policies will be affected.

"Employers are currently assessing what the proposed legislation means for them and their businesses," says Daryl Cukierman, a partner with Blake, Cassels & Graydon in Toronto. "If the legislation passes, it can be expected that employee attitudes may change regarding what constitutes acceptable workplace behaviour."

While employee attitudes may change, employer expectations might not have to – Cukierman says organizations will still be within their rights to ban the use of recreational cannabis in the workplace.

"The Cannabis Act does not require an employer to allow employees to use cannabis for recreational purposes at work," Cukierman says. "Employers will therefore continue to have the ability to prohibit the use of recreational cannabis in the workplace."

However, that doesn't mean that current policies can stay the same. "Employer expectations about the relationship between cannabis use and the work-

place should be clearly communicated to employees, and updates to workplace policies may be required," Cukierman says.

Examples of workplace policies that should be reviewed, he says, include those related to possession and use of drugs at work, those related to reporting the use of drugs for medical purposes that could lead to potential impairment, drug testing poli-

"Employee attitudes may change regarding what constitutes acceptable workplace behaviour"

cies, OHS policies related to both smoking at work and workplace impairment, vehicle use policies, and client entertainment and social host policies.

Cukierman says drug testing policies may become particularly pertinent if the Cannabis Act leads to increased usage by employees – however, he says employers must be wary of violating employment law.

"As with testing for other substances that can impair an employee's ability to perform his or her duties safely and effectively, employers seeking to implement cannabis testing should carefully consider the legality of the testing and the testing methods to be used," he says.

If passed, the Cannabis Act is likely to come into force at some point before July 2018. While that's still some time away, Cukierman urges employers to begin reviewing their policies now.

"Employers would be wise to start considering now if they need to be implementing any changes to their workplace policies and procedures in preparation for the new legislation," he says.



Erin Kuzz
Founding member
SHERRARD KUZZ LLP

Fast fact

Widely recognized as one of Canada's leading employment and labour lawyers, Kuzz wrote the Bar Admission Licensing Examination study materials for labour law and served on the human resource committee for the 2015 Pan/Para Pan American Games

Q&A

Random testing: how to get it right

● Under what circumstances can an employer introduce random drug or alcohol testing?

Although we are on the eve of the legalization of marijuana in Canada, there are still very limited circumstances where it is permissible to engage in random workplace testing. Generally speaking, an employer must be able to meet the following criteria: First, that the workplace is inherently dangerous, and employees who will be subject to testing work in safety-sensitive positions; second, the employer can demonstrate that there is a significant issue with the use of drugs or alcohol in the workplace; and third, that less intrusive means, including initiatives like education programs, have not been successful in addressing the issue.

One other circumstance where random testing is permitted is as part of a return-to-work program established after an employee has participated in an addiction treatment program.

● Are there any common mistakes that render such policies unfair or unlawful?

Some of the most common mistakes employers make when crafting random testing policies are failing to ensure the least intrusive testing method is used (i.e. a Breathalyzer test versus a mouth swab); failing to ensure the testing method can actually demonstrate that the employee is impaired at the time of the test, as opposed to simply having the intoxicant in their system, which may not actually mean the employee is impaired; and failing to treat the possession of intoxicants (such as drugs or alcohol) in the workplace as a separate issue from being under the influence of an intoxicant.

While an employer is generally allowed to tie disciplinary consequences to possessing illegal drugs or alcohol in the workplace, an employee being under the influence of an intoxicant needs to be treated differently and should not automatically lead to disciplinary results. Where an employee is found to be under the influence, the first step should be exploring whether or not they have an addiction and, depending on the surrounding circumstances, the next step may require the employer to engage in accommodation of the employee's disability, such as an unpaid leave of absence to seek treatment.

● What risks do employers face if their policy is deemed unreasonable or discriminatory?

If an employer's policy is off-side, it can mean that an arbitrator or human rights tribunal can strike it down and order the employer to stop doing any testing until the policy is compliant. Depending on the circumstances, it can also mean that the employer has to pay damages to employees who were subjected to testing under the faulty policy.

Finally, to the extent that the employer has disciplined or terminated an employee under a non-compliant policy, that action can be reversed, and the employee can be reinstated to employment, including the payment of back wages and potentially additional damages for any breach of the employee's human rights protections.

