

Roll ahead with workplace pot policies

Focus on: Labour & Employment Law: Legal uncertainty no reason to wait

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Shana French says employers who try to address marijuana's new legal status in their workplace policies will be in a much better position once the law changes.

Employers shouldn't let uncertainty around the legalization of marijuana stop them from crafting workplace policies about its use, according to employment lawyers.

Earlier this year, the federal government tabled bill C-45, the Cannabis Act, in Parliament. The law will govern the sale and use of marijuana for recreational purposes, setting a July 2018 target date for implementation.

With details of the new legal regime only gradually emerging as the deadline quickly approaches, Shana French, a lawyer with Toronto employment and labour law boutique

Sherrard Kuzz LLP, says many employers are feeling overwhelmed.

“It presents this fear for them that there’s going to be chaos and anarchy, with people smoking up in the middle of the day and nothing they can do about it,” she says. “That’s not the case, but few employers have given any real thought to what legalization will mean for them.”

Laurie Jessome, an employment lawyer with Cassels Brock and Blackwell LLP, says some people’s fears about rampant absenteeism and impairment among marijuana users following legalization is driven by outdated stereotypes about the drug.

“I don’t think there’s any need to panic. Not much is likely to change in terms of how workers function,” she says.

French says there’s still time to act and that those employers who do attempt to address the drug’s new status in their workplace policies will put themselves in a much better position once the law changes.

“The end of the year is often when people will review their policies, so as 2017 comes to a close, it’s a good time to be forward-thinking,” French says. “If you can turn your mind to these issues now, it’s a great opportunity to implement policies on a proactive basis.”

For those concerned that legalization will not actually occur by the target date, French says they can account for both eventualities by drafting policies that distinguish between “legal” and “prohibited” substances.

“Employers would be well advised to focus their attention on developing and implementing policies about the use and possession of marijuana. They don’t have to reinvent the wheel, but they should make sure that it is tailored to their own workplaces,” French says. “One size doesn’t fit all when it comes to these policies, particularly when you’re in litigation and suddenly all the little details matter.”

Although many expect marijuana use following legalization to increase across the population as a whole, George Waggott, a member of the employment and labour relations practice group at McMillan LLP in Toronto, says it’s hard to predict the extent to which any rise will impact on particular workplaces.

“A lot of employers just don’t know if this is going to change workers’ ability to do their jobs,” says Waggott, who acts exclusively for employers. “It’s a big question mark, so they just put it in the ‘too-hard’ pile and are waiting to see how it plays out.”

In fact, he says, he was surprised that only 46 per cent of respondents to a survey by the Human Resources Professionals Association said their current workplace policies weren’t up to the job of dealing with the issues legalization will bring.

The survey was commissioned as part of a white paper on marijuana legalization by the group, entitled “Clearing the Haze.”

“While a year may sound like a lot to prepare for the legalization of marijuana, we are urging employers to act now. In terms of legalization on a broad scale, Canada is in uncharted territory,” Bill Greenhalgh, CEO of the HRP, said in a statement. “The sooner employers can communicate clear policies to employees, the better.”

In the report, the HRPA identifies the distinction between recreational and medicinal use of marijuana as one of the chief areas of concern for employers. Zero tolerance policies for use and possession could cause problems, it notes, because of the duty of accommodation employers owe to employees with disabilities. As a result, the HRPA recommends that government regulation of marijuana is carried out in two separate streams.

“A separate medical stream allows employers to more easily verify when they have a duty for medical purposes,” the report reads.

The HRPA survey says just 11 per cent of the 650 members it questioned had previous experience with medical marijuana, but Waggott says those who are new to it may benefit from thinking about how they deal with other prescribed medicines.

“Marijuana generates strong reactions in people, but in its medicinal form, it shares many of the attributes of other over-the-counter drugs,” he says. “If someone on your staff is taking Tylenol 3s, you don’t all of a sudden dive into all kinds of HR issues. If it’s taken in a properly managed way and doesn’t affect how they do their job, then there aren’t too many problems.”

French says employers with safety-sensitive workplaces may be able to take a more restrictive approach to marijuana possession and use.

“They can look at other measures that they can implement to ensure the safety of the public and their workers,” she says, noting that two recent decisions provided guidance on when drug testing and discipline for drug use are appropriate.

In *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, an Ontario Superior Court judge declined the union’s motion for an injunction to halt the TTC’s random testing regime pending the outcome of an arbitration, after the employer demonstrated the value of testing and the existence of a culture of drinking and drug-taking among its workforce.

And in *Stewart v. Elk Valley Coal Corp.*, the Supreme Court of Canada upheld the firing of a truck operator dismissed for cocaine use, despite his claim that he was addicted to the drug. The company’s workplace policy offered immunity from discipline for self-disclosed dependency, but only if the admission came before an accident and positive test.

“There is lots of useful information in those decisions for drafting policies and determining impairment,” French says.

However, Jessome says marijuana presents its own unique challenges because of the difficulty of testing for impairment.

“There is no currently recognized medically recognized test for impairment, so that is going to challenge people,” she says.

While breathalyzers offer an accurate reflection of the amount of alcohol in a subject’s bloodstream and how it affects them, experts have yet to develop a reliable version for marijuana, thanks to the way Tetrahydrocannabinol, its active ingredient, breaks down in the body.

Some metabolites of the drug can linger in the blood long after use in amounts that vary from person to person, meaning there is little correlation between the amount detected and the level of impairment at the time of testing.

The HRP report notes that a “per se” limit on drug levels in the blood is still seen as the most likely way forward, but it expresses concern about the lack of consensus around where that threshold should be set.

“The government should set a clear legal definition of ‘impairment’ and the grounds under which an employee can be tested in relation to cannabis use. Special considerations for safety-sensitive industries may be necessary,” the report recommends, adding that recreational cannabis should come labelled with its THC content.

Waggott says that could prove challenging, since THC content can vary wildly on a plant-by-plant basis. However, he says, the growth and professionalization of the industry could improve the situation over time.

“By allowing big businesses in marketing, sales and distribution are going to become much more regulated and standardized, which will make it easier to say: ‘This quantity of the drug will lead to this expected level of impairment,’” he says.