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Decriminalization of Marijuana Creating a Buzz for Employers

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By Lisa Bolton

On April 13, 2017, the Federal Government introduced Bill C-45, the *Cannabis Act*, which, once passed, will remove incidental marijuana consumption and possession from the *Criminal Code*.

The Government of Canada has committed to passing and implementing the *Cannabis Act* by July 1, 2018. In addition to making recreational use of the drug legal, the legislation will regulate marijuana production, distribution and retail sale.

The proposed changes compound the issues already concerning employers dealing with *medicinal* marijuana. With the legalization of recreational marijuana, now, more than ever, employers must find strategies to manage employee use of marijuana, particularly if an employee works in a hazardous environment where impairment can significantly increase the risk of a serious incident or injury.

Relying on drug testing to address workplace drug use or impairment issues may seem appealing. However, testing is currently only permitted in limited circumstances and, depending on the methods used, results may be subject to questions about reliability. As such, other management controls, such as policies and protocols, should also be considered.

Testing Limitations

An employer's primary purpose for imposing employee drug testing is to indicate the presence and extent of an employee's impairment on the job. Historically, courts and arbitrators have taken a cautious approach to permitting workplace drug testing primarily because testing methods were not able to measure *current* impairment due to the long period of time some drugs take to metabolize.

However, in a recent Ontario Divisional Court decision (*Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2017 ONSC 2078), the Divisional Court favourably commented on the reliability of oral fluid testing to measure recent drug use and impairment. The Divisional Court also accepted that obtaining fluid *via* mouth swab for testing was less invasive than more traditional testing of blood or urine samples. Oral swab testing has also recently been implemented as a pilot study by several Canadian police forces to assess the test's reliability for road-side testing.

Although advances are being made to improve testing reliability and minimize privacy concerns, it remains to be seen whether oral fluid testing will gain widespread acceptance by other courts and adjudicators.

When Can An Employer Test?

Pre-Employment and Pre-Access Testing: An employer may wish to test an individual before hiring or permitting access to a work site. However, in Canada, courts and arbitrators have typically held this type of testing is *not permitted* because it neither demonstrates impairment at work (testing occurs before work begins); nor predicts future impairment.

Random Testing: An employer may seek to implement random testing to deter employees from working while under the influence of drugs. However, due to the testing and privacy issues identified above, random testing is *only permitted in very rare circumstances*. In a unionized workplace, an employer must demonstrate the workplace is dangerous and there is evidence of an ongoing drug problem at the workplace. In a non-unionized workplace, Canadian courts have permitted random *alcohol* testing where: (i) an employee works in a safety-sensitive position in a dangerous workplace; and (ii) there is a general substance abuse problem in that workplace.

Post-Incident and Reasonable Cause Testing: After a significant workplace accident or "near miss," if there is reasonable basis to suspect impairment may have been a factor, an employer may require testing of the employee(s) involved.

This is called 'post-incident' testing. Similarly, if an employee's actions suggest impairment (*e.g.*, slurred speech and/or the smell of marijuana), an employer may wish to test the employee. This is called 'reasonable cause' testing. Testing in both of these contexts is *generally permissible* provided the workplace has appropriate policies in place identifying the circumstances in which testing may occur.

Return to Work Testing: Testing may be appropriate when an employee returns to work following treatment for drug dependency. Such testing is typically part of a return to work program or a condition of a *last chance agreement* stipulating that a positive test result will result in termination. Ongoing testing for monitoring purposes may also be an appropriate requirement for an employee returning to work from drug dependency treatment.

The Special Case of Medical Marijuana

When marijuana is used to treat a disabling medical condition such as epilepsy, chronic pain or post-traumatic stress disorder, special considerations apply. An employer has a duty under human rights legislation to accommodate the employee unless the accommodation would result in undue hardship for the employer. Subject to safety considerations resulting from potential impairment, this *may* mean permitting an employee to use marijuana during working hours if it is medically required.

However, an employer may still implement workplace rules regarding the use of medical marijuana, so long as appropriate accommodation is provided. This may include exploring alternatives to smoking such as ingesting marijuana, or requiring the employee to smoke in a designated area, during scheduled breaks or meal periods, and restricting the employee from smoking while in uniform, in public view, in a company vehicle, or in the vicinity of other workers or customers who may come into contact with the smoke or lingering odour.

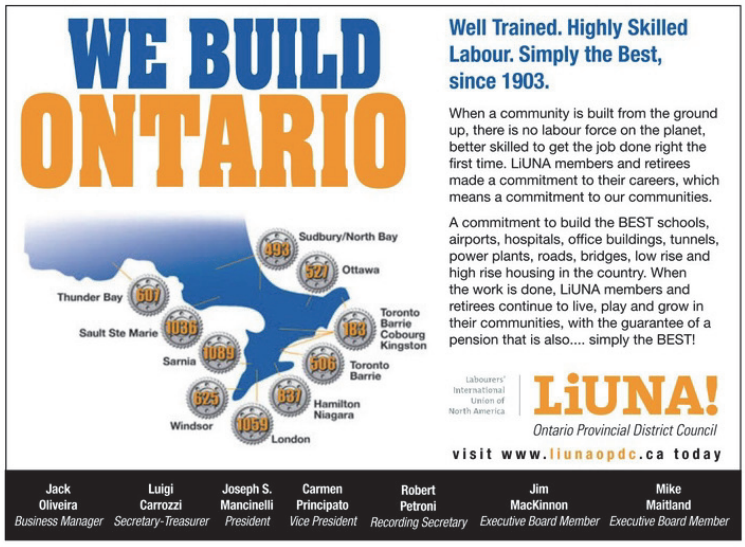
Impairment on the Job

Accommodation does not mean allowing an employee to carry out his or her duties while impaired. Under Ontario's *Occupational Health and Safety Act* ("OHSA") an employer has an obligation to take every precaution reasonable in the circumstances to protect the health and safety of workers. This includes identifying hazards which may result from an employee working while under the influence of medical marijuana. Bottom line: an employer must consider health and safety when assessing possible accommodation options for an employee who uses medical marijuana for treatment of a disability. In the case of a safety-sensitive position, this may mean considering whether the employee can be reassigned to a non-safety-sensitive position.

Duty to Disclose

A drug dependency is itself a disability. Thus, to evaluate the need for accommodation and address any potential safety risks, an employer can implement a policy requiring proactive disclosure of drug or alcohol dependency and use.

In a recent Supreme Court of Canada decision, the court found an employer did not discriminate against a truck driver when it terminated his employment following a positive drug test administered in response to a workplace accident. The employer's drug and alcohol policy required employees to proactively disclose drug or alcohol dependency without fear of discipline or termination with the promise of rehabilitation assistance. However, the policy stated if disclosure occurred after an incident and positive test, the employee would not be protected from discipline or termination.



The employee, who advised of his drug dependency and use only after the accident, was terminated for failing to comply with the disclosure requirement in the policy. The Supreme Court of Canada upheld the dismissal. The court found the employee's addiction did not prevent or shield him from complying with the employer's policy. While each situation must be assessed on its own facts, this decision is welcome news for an employer that may wish to require proactive disclosure of drug or alcohol use as a means of reducing the potential for a workplace accident.

Steps Employers Should Consider

To help manage risk resulting from the anticipated increase in employee use of marijuana, employers should ensure their drug and alcohol policy is broad enough to address impairment not only from the use of illegal drugs, but also prescription and legal recreational drugs. While there are many nuances to be addressed and tailored to the specific workplace, at a minimum the policy should:

- Prohibit an employee in a safety-sensitive position from working while impaired
- Require an employee to disclose information about any drug use that may impair his or her ability to perform work safely, including proactive disclosure of drug use by an employee with a drug dependency
- Set out a process to obtain information regarding the use of impairing drugs in a way that respects privacy and encourages compliance
- Set out a process for obtaining additional medical information to facilitate accommodation for medical marijuana users
- Ensure the employee (and union if applicable) participates in the accommodation process
- Identify appropriate restrictions on the use of marijuana (*e.g.*, where, how and when, keeping in mind different restrictions may be needed for medical marijuana)
- Identify consequences in the event of a breach of the policy (*i.e.*, discipline and termination).

To learn more and for assistance addressing drug issues in your workplace, including **how** and **when** to prepare and enforce a workplace drug and alcohol policy, accommodating employees, and discipline and discharge, contact a member of Sherrard Kuzz LLP. ■

Sherrard Kuzz LLP is one of Canada's leading employment and labour law firms, representing management. *Lawyers can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.*

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