

LAW

How decriminalizing marijuana will impact management strategies.

BY LISA BOLTON

The Trudeau government has committed to passing and implementing the Cannabis Act (Bill C 45) year. In addition to making recreational use of the drug legal, the legislation will regulate marijuana production, distribution and retail sale.

Legalization of cannabis compounds concerns many employers already have about medicinal marijuana in the workplace, particularly in hazardous and safety sensitive environments.

Relying on testing to address workplace drug use or impairment may seem appealing; however, it's currently permitted only in limited circumstances and, depending on the methods used, results may not be considered reliable.

Drug testing's primary purpose is to indicate the presence and extent of on-the-job impairment. Historically, courts and arbitrators have taken a cautious approach to permitting testing. Methods were not able to measure current impairment due to the long period of time some drugs take to metabolize.

However, a recent Ontario Divisional Court decision favourably commented on the



Decriminalized pot, federal target July 1.

PHOTO: FOTOLIA

Workplace DRUG USE

LEGALIZED POT A BUZZ-KILLER FOR EMPLOYERS

reliability of oral fluid testing to measure recent drug use and impairment. The court also accepted that obtaining fluid via mouth swab for testing was less invasive than more traditional testing of blood or urine samples. Several Canadian police forces implemented oral swab testing as a pilot study to

assess its reliability for roadside applications.

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.

Duty to accommodate

When can an employer test? Note the following:

Pre-employment and pre-access testing. Canadian 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. It's only permitted in rare circumstances. An employer must demonstrate a unionized workplace is dangerous and there's evidence of an ongoing drug problem. Canadian courts have permitted random alcohol testing in

a non-unionized workplace where: an employee works in a safety-sensitive position in a dangerous work environment; and there's an alcohol abuse problem in that workplace.

Post-incident and reasonable cause testing. If, after a significant workplace accident or near miss, there's a reasonable basis to suspect impairment as a factor, an employer may require testing of those involved. Similarly, if an employee whose actions suggest impairment (slurred speech and/or the smell of marijuana), an employer may wish to test. In both of these contexts testing is generally permissible provided the employee works in a safety-sensitive position and the workplace has appropriate policies in place identifying the circumstances in which testing may occur.

Return to work testing. It's typically part of a return to work program or a condition of a last chance agreement stipulating 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.

Special considerations apply when marijuana is used to treat a disabling medical condition such as epilepsy, chronic pain or post-traumatic stress disorder. Human rights legislation requires an employee to be accommodated unless it would result in undue hardship for the employer. This may mean permitting an employee to use marijuana during working hours if it's medically required (subject to safety considerations).

However, an employer may implement 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

Prepare for legalized pot

Ensure drug and alcohol policy is broad enough to address impairment from prescription, illegal and legal recreational drugs. A minimum 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 safe work performance, including proactive disclosure of drug use by an employee with a dependency.
- 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.
- Ensure the employee (and union, if applicable) participates in the accommodation process.
- Identify appropriate restrictions on the use of marijuana.
- Identify consequences in the event of a breach of the policy (discipline and termination).

while in uniform, in public view, in a company vehicle, or in the vicinity of others who may come into contact with the smoke or lingering odour.

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 reasonable precaution to protect the health

and safety of workers. This includes identifying hazards that may result from an employee working while under the influence of medical marijuana.

Duty to accommodate

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.

Drug dependency can be a disability triggering the duty to accommodate. To evaluate the need for accommodation and address any potential safety risks, an employer may 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 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, finding 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 employers that may wish to require proactive disclosure of drug or alcohol use as a means of reducing the potential for workplace accidents.

If passed, the Cannabis Act's removal of incidental marijuana consumption and possession from the Criminal Code will present challenges for employers. Manufacturers should prepare by updating management controls that cover policy, accommodation, discipline and discharge.

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