
Decriminalization of cannabis creating a buzz for employers

By Lisa Bolton
Special to the Barrie Construction Report

On June 18, 2018, the Government of Canada passed Bill C-45, the Cannabis Act, which will remove incidental cannabis consumption and possession from the Criminal Code when the act comes into force on October 17, 2018. In addition to making recreational use of the drug legal, the legislation regulates cannabis production, distribution and retail sale. The Government of Ontario has also passed cannabis legislation that, once in force, will restrict the consumption of cannabis (not including medical marijuana) in a number of areas, including any public space or workplace.

In light of these new laws, more than ever employers must find strategies to manage employees' use of cannabis, including medicinal cannabis. Particularly in a workplace where impairment can significantly increase the risk of a serious incident or injury (e.g., a hazardous workplace or where the employee works in a safety sensitive position), the time to prepare is now.

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 not be considered reliable. As such, other management controls, such as policies and protocols, should also be considered.

When can an employer test?

Pre-employment and pre-access testing: In Canada, courts and arbitrators have typically held that 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, 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 alcohol 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 permissi-

ble 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: 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 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 cannabis

When cannabis is used to treat a disabling medical condition 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 cannabis, so long as appropriate accommodation is provided. This may include exploring alternatives to smoking such as ingesting cannabis or requiring that the employee 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 cannabis.

Bottom line: an employer must consider health and safety when assessing possible accommodation options for an employee who uses medical cannabis 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.

Steps employers should consider

To help manage risk resulting from the anticipated increase in employee use of cannabis, every employer should ensure its 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 the policy must always be 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 any medical cannabis user (or other prescription drug use);
- ensure the employee (and union, if applicable) participates in the accommodation process;

- identify appropriate restrictions on the use of cannabis (e.g., where, how and when, keeping in mind different restrictions may be needed for medical cannabis); and
- identify consequences in the event of a breach of the policy (i.e., discipline and termination).

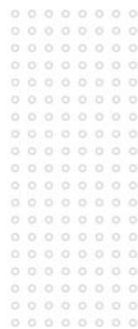
To learn more and for assistance addressing drug issues in your workplace, including how and when to prepare and enforce a workplace drug and alcohol policy, accommoda-

tion, 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. Lisa Bolton is an accomplished litigator with significant experience acting for organizations of all sizes, operating in a variety of industries.



Your world is complex. Let us make it simple.
Put yourself at the center of our network and get a tailored insurance solution.



#LetsDoSomething

Phone: (705) 726-0231

hubinternational.com



Business Insurance • Employee Benefits • Risk Services • Personal Insurance