

## Decriminalizing of Marijuana Creating a Buzz for Employers

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Earlier this year the Federal Government announced it will make good on the Liberal Party election promise to remove marijuana consumption and incidental possession from the *Criminal Code*. Although details have yet to be released, the Government has committed to introduce new legislation in early 2017. In addition to making recreational consumption of the drug legal, the legislation is expected to regulate marijuana production, distribution and retail consumption.

However, regardless of what regulations are implemented, the worry for facility and property managers remains the same: *how to manage employees who use marijuana, particularly in an industry where employees may interact with customers, tenants and members of the public, and operate automated machinery and vehicles, and where impairment can lead to catastrophic consequences?*

Relying on drug testing to combat workplace drug use or impairment may *seem* appealing. However, testing is currently only permitted in limited circumstances and with inconsistent results. As such, other management controls, such as policies and protocols, should 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. However, existing testing methods for drugs are not able to measure current impairment – only that a drug is present in the body, which in some cases may include trace amount from several days or weeks prior, having no impairing effect on the employee. In addition, when balanced against the potential privacy implications of compelling an employee to provide a personal sample (*e.g.*, blood, urine, saliva, breath, *etc.*) courts and arbitrators have taken a cautious approach to permitting workplace drug testing.

### 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; and (ii) workplace supervision is non-existent or minimal.

**Post-Incident and Reasonable Cause Testing:** After a 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.

### ***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.

## 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
- 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 and alcohol 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.

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