

# Cannabis at work

*One year after legalization, what do we know?*

A year into legalized recreational cannabis, and now with the legalization of cannabis edibles on Oct. 17, 2019, employers continue to wrestle with the question of how to strike the right balance between a safe and productive workplace and the privacy and human rights of workers.



**Sundeep Gokhale and Thomas Gorsky**  
LEGAL VIEW

As courts and arbitrators continue to clarify (and in some cases, muddy) the law, there are several things we know:

**Cannabis in the workplace is no different than any other potentially impairing drug:** The overarching question is whether the worker is fit for duty.

**There is no duty to accommodate recreational cannabis use:** An employer has no duty to accommodate recreational cannabis use and may enforce restrictions including a no tolerance policy at the workplace (subject to the duty to accommodate, discussed below).

**There is a duty to accommodate a substance use disorder (such as addiction to cannabis) or a disability requiring the authorized use of medical cannabis:** Under human rights law, an employer has a duty to accommodate the use of medical cannabis, or a worker with a substance use disorder, to the point of undue hardship to the employer. What constitutes undue hardship depends on the circumstances of the business. However, we know that cost is rarely considered sufficient undue hardship, whereas health and safety considerations often are (more about this below).

**The duty to accommodate must be balanced against the duty to protect workers:** Under health and safety law, an employer has a duty to take all reasonable precautions to protect workers. If an employer has a legitimate concern for the safety of others or for the business, the employer can impose restrictions on the

use of cannabis, even if used for medical purposes. In the recent decision *Aitchison v. L & L Painting and Decorating Ltd.*, 2018 HRTO 238, the Ontario Human Rights Tribunal held there is no “absolute right” to use cannabis at work even if it has been medically authorized. The worker, a painter who worked on a swing stage some 37 floors high, consumed medical cannabis at work for chronic pain. He did not disclose this to his employer and his termination was upheld because the employer had a zero-tolerance policy for drugs and alcohol, of which the worker was aware, and there was a legitimate safety concern which took precedent over the worker’s medical condition.

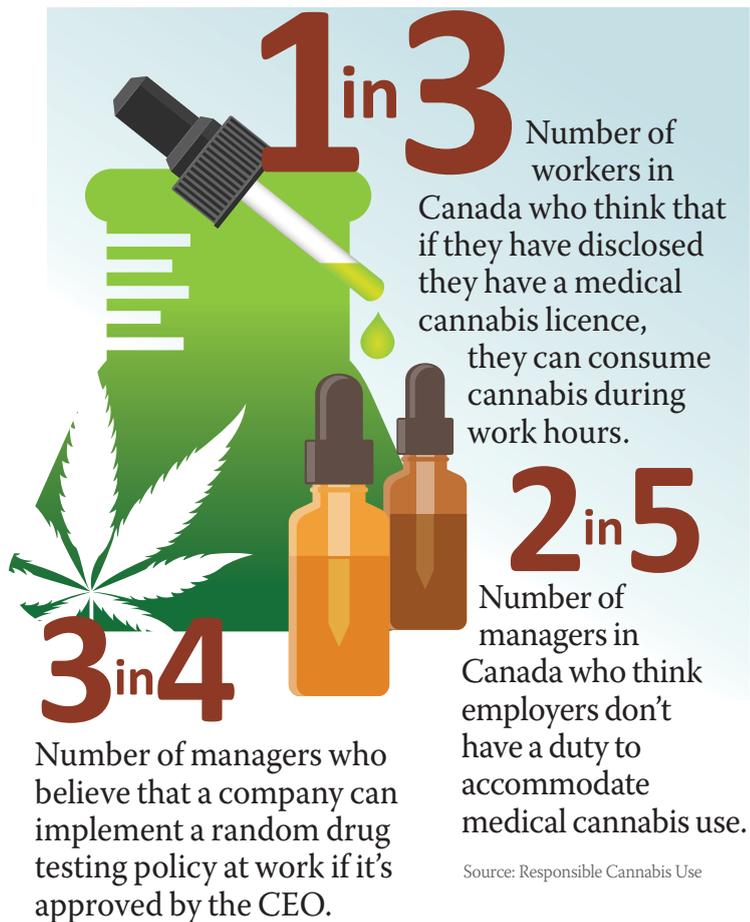
**An employer can require a worker in a safety-sensitive position to proactively self-disclose the use of medically authorized or recreational drugs (even in the case of substance use disorder):** In a well-known decision, affirmed by the Supreme Court of Canada (*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30), the termination of a worker in a safety-sensitive position was upheld not because the worker was found to have been unfit for duty (the worker had a substance use disorder disclosed only after a workplace accident) but because he breached the workplace policy that required proactive self-disclosure. The employer’s drug and alcohol policy

required workers to proactively disclose drug dependency without fear of discipline or termination, with the promise of rehabilitation assistance. However, if a worker did not disclose until after an incident or positive test, the worker would not be shielded from discipline or termination. Central to the decision was the court’s view that addiction does not necessarily mean the inability to comply with a company policy.

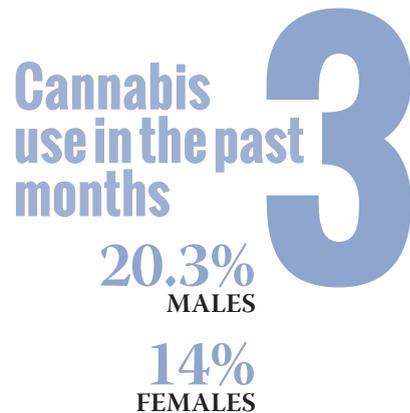
**Drug and alcohol testing of a worker in a safety-sensitive position is permissible in certain circumstances:**

- Random drug and alcohol testing is only permissible as a component of a broader policy to address drug and alcohol use in a dangerous workplace shown to have a general drug and alcohol problem.
- Post-incident or near miss testing may be permissible if a worker has been involved in a workplace accident or significant incident or near miss and there is reason to believe alcohol or drugs may have been a contributing factor.
- Return-to-work testing may be

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Source: Responsible Cannabis Use



Source: Statistics Canada

**22%**  
Number of employers with 100 to 499 employees that have experienced a cannabis-related incident in the workplace since legalization.

**34%**  
Number of employers that do not have a drug and alcohol policy in place.

Source: CFIB

## Notable cases

**International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers’ Association Inc., 2019 NLSC 48 (N.L. S.C.).**

An employee was found to have been properly terminated for failing to reveal his possession and use of medical marijuana in contravention of a construction project’s Drug and Alcohol Standard, which required employees to “report any medication being taken... (that) may impair the employee’s ability to work safely.” The Canadian model required workers to report to a supervisor the use of any drugs with potential unsafe side effects. There was no evidence the employee had been impaired at work but he denied the employer the ability to evaluate whether there was an actual adverse effect based on the level of THC in his system during his shift. Had the employee disclosed his marijuana use, the employer could have made arrangements to test him or to obtain a medical opinion on potential adverse effects. The arbitrator’s decision was upheld by the Newfoundland and Labrador Supreme Court.

**North American Palladium and USW (Waldon), Re, 2018 Carswell Ont 9422 (Ont. Arb.).**

A miner in northern Ontario said he had a marijuana problem after failing a post-incident drug test. He went to rehab and returned to work under a last-chance agreement, but tested positive for cocaine on his first day back and was fired. The worker said after his rehab, a family member who used cocaine stayed at his house, which led to him using the drug. The arbitrator acknowledged the worker had “a serious drug abuse habit” which he had some success treating before he returned to work. The worker wasn’t honest about his cocaine use, but he was open about his use of marijuana. It’s likely that “having a regular job could be a central feature in the (worker’s) efforts to establish a new drug-free life for himself,” said the arbitrator, in ordering him reinstated with strict conditions for rehab and treatment.

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# Enforce workplace rules consistently with workers

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permissible if the worker is returning to work after treatment for substance abuse and testing is a condition of the return-to-work arrangement.

- Reasonable cause testing may be permissible if the employer has reasonable cause to believe the worker is not fit for duty (such as slurred speech, difficulty concentrating or the smell of alcohol or drugs).
- Pre-employment testing is generally not permissible in a unionized workplace. In a non-unionized workplace, testing may be permitted in limited circumstances provided a worker who fails a test due to a substance use disorder has the opportunity for further medical assessment and accommodation.

**There is no catalogue of “safety-sensitive” work:** The term “safety-sensitive” is not defined in any of Canada’s health and safety laws. However, a safety-sensitive position has been described by the Canadian Human Rights Commission as one that “if not

performed in a safe manner, can cause direct and significant damage to property and/or injury to the worker, others around them, the public and/or the immediate environment.” Generally, this includes a job that requires the worker to be alert, physically coordinated and exercise good judgment, such that impairment could affect the health, safety or security of the worker, other persons, property or the environment.

## Employer best practices

Rather than wait for an incident to arise, best practice is to proactively ensure workers understand the conditions under which they are expected to work, and enforce workplace rules consistently. Here is what we recommend:

**Drug and alcohol policy:** Prepare a written Drug and Alcohol Policy. The policy should:

- prohibit a worker from working when not fit for duty due to the use of illegal drugs, legal drugs or alcohol
- prohibit a worker from possession or use of any illegal drug, legal drug or alcohol in the work-

place (this includes the possession of edibles)

- require the disclosure of any drug or medication that may render a worker unfit for work
- advise that accommodation may be provided if a worker has a substance use dependency or is required to use a drug for medical reasons
- advise that it may be necessary to obtain additional medical information to facilitate accommodation
- address any permissible reasonable alcohol consumption for work-related purposes (such as a client event, work-related party or function)
- if testing is contemplated for a safety-sensitive position, set out when and how testing will occur (for example, reasonable cause, post-incident or return to work), and what measures will be taken to protect privacy
- address discipline for a violation of the Drug and Alcohol Policy.

**Testing:** If the Drug and Alcohol Policy contemplates testing, identify a third-party testing provider and confirm:

- the steps for testing
- the substances to be tested
- what constitutes a “positive” test with respect each substance and how this will be determined
- how test results will be provided to the employer and the estimated timelines.

## Implementation

- Train supervisors on the Drug and Alcohol Policy, including the obligation to report when it is suspected a worker is not fit for duty, and how to address the worker.
- Consider providing supervisors with additional training on how to recognize when a worker may not be fit for duty.
- Inform workers about the Drug and Alcohol Policy, including the obligation to report.
- Have each worker sign an Acknowledgment and Consent to comply with the Drug and Alcohol Policy (and a Consent to testing, if applicable).

## Compliance

- Ensure each new worker is trained on the Drug and Alcohol Policy and signs the Acknowledgment and Consent.

- If a worker requests accommodation under the Drug and Alcohol Policy, determine whether accommodation is for substance use dependency (which would not require continued use of the drug or alcohol) or a disability for which the drug is being used medically. Engage in the appropriate accommodation process based on the underlying medical information.
- Before imposing discipline for a violation of the Drug and Alcohol Policy, ensure any human rights or accommodation issue has been considered.
- Revise the Drug and Alcohol Policy as necessary based on legislative changes, case law developments and the needs of the workplace.

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