

# Avoiding the lows of employees getting high

***Employers must balance the rights of employees and their own concerns about health and safety and productivity in the era of legal marijuana***

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## BACKGROUND

**IT'S NOW BEEN** more than half a year since marijuana was legalized in Canada. Things are still in flux as consumers and jurisdictions adapt to the new reality. Employment lawyer Nathaniel Marshall reviews the key issues for employers to keep in mind in this era of employees having legal access to another impairing substance.

As all employers should now be aware, the green rush is here. As a result of the federal government bringing the Cannabis Act, 2018 into force, the cultivation, possession, acquisition and consumption of marijuana for recreational purposes has been legal in Canada since October 2018. The models for purchasing legal marijuana vary by province and, as of April 1, 2019, licensed retail stores can now operate in Ontario. Given the ease with which employees can now purchase and consume recreational marijuana, employers should ensure that they have effective policies in place which address the potential risks and limitations on marijuana in the workplace. This article will provide employers with a brief overview of the law regarding marijuana in the workplace, as it is a topic that will surely become increasingly prominent in the coming months.

### It's really about impairment

Notwithstanding the legalization of recreational marijuana is a recent phenomenon, when we express concerns about marijuana use in the workplace (or prior to attending at work), what we are really talking about is impairment. In this regard, employees have an obligation to attend work fit for duty and free from impairment. This is the case re-

gardless of the substance. Consider, for example, alcohol. Even though alcohol has been legally available to purchase for decades, employees are not permitted to attend work under its influence. Subject to potential issues surrounding the duty to accommodate, as discussed below, employees are not permitted to attend work while under the influence of marijuana. Instead, it is the employees' duty to ensure that they show up for work, ready to perform their job duties safely and competently.

In terms of addressing marijuana in the workplace, employers should outline in a policy, in the same manner they do for other substances, that employees are prohibited from attending work while impaired. Employers should also make employees aware that, absent any potential human rights issues, they may be subject to progressive discipline up to and including termination for breaching the policy.

### Off-duty use of marijuana

While the law is clear that an employer can and should prohibit employees from being impaired by marijuana while in the workplace, an employer's ability to regulate off-duty use of the drug is less clear. Employers should be cognizant not to adopt knee-jerk, overbroad or unreasonable policies that unne-

cessarily intrude into employees' personal affairs. Doing so is detrimental to workplace morale and it may also produce unforeseen legal risk. Unless the employee occupies a safety-sensitive position, employers generally should not concern themselves with their employees' off-duty behaviour as it pertains to substance use.

### Drug testing

Although there has been very limited scrutiny of policies that regulate off-duty use of marijuana given the short time in which recreational marijuana has been legal, courts have been clear for some time about an employer's limits to test employees for drugs and alcohol in the workplace.

As a starting point, employers must balance workplace safety and employee privacy. As courts and arbitrators have repeatedly noted, this is no easy task. As noted above, employees are not permitted to be impaired in the workplace. Therefore, where the employer believes an employee in a safety-sensitive position is impaired at work, testing of that employee may be permitted where just cause exists to do so (i.e. the employee was observed smoking marijuana). On-the-spot testing may also be permitted as a part of a return-to-work program following a course of treatment.

With respect to random drug testing, the jurisprudence states that employers are not typically permitted to conduct it in the workplace. Further, in unionized environments, most collective agreements prohibit random testing and in non-unionized environments, random testing policies almost always run afoul of the applicable human rights legislation. Therefore, in order to justify a random testing policy, an employer will need to demonstrate that the employees who are subject to the testing occupy safety-sensitive positions and there are enhanced safety risks in those positions, including a general problem with substance abuse in the workplace.

The law continues to evolve in the area of drug and alcohol testing, and decisions are usually fact-specific. As a result, employers must proceed with caution when implementing any form of marijuana testing in the workplace, as it will only be found to be permissible in limited circumstances.

### Accommodating medical marijuana in the workplace

Pursuant to provincial and federal human rights legislation, employers are required to ensure their workplace is free from discrimination on the basis of disability. Consequently, employers have a duty to accommodate an employee's dis-

ability to the point of undue hardship. Determining what constitutes undue hardship will depend on the particular facts of each situation and the characteristics of the particular workplace. However, there are general principles that employers should consider when faced with accommodating the use of medical marijuana.

Employers should start from the proposition that they are obligated to accommodate medical marijuana in the same way that they accommodate employees who use other prescription medicine. First, employers must consider whether the employee, who has a corresponding duty to participate in the process of finding reasonable accommodation, has provided sufficient information regarding the accommodation they need. Once the employer

has sufficient information, it must consider how the employee's disability can be accommodated. This analysis requires the employer to make reasonable efforts to determine if the employee can stay in their current position with modifications to that position, or if the employee should be placed in a different position with modifications, if necessary.

Insofar as the duty to accommodate concerns the use of medical marijuana, the following principles should be kept in mind:

- Provincial and municipal laws prohibit smoking in the workplace
- A prescription for medical marijuana does not automatically entitle an employee to use marijuana in the workplace
- A prescription for medical marijuana does not entitle an em-

ployee to be impaired or under the influence of medical marijuana at work

- Employee health and safety, as well as the health and safety of others, cannot be compromised by the employee's use of medical marijuana.

Aside from employees who use medically prescribed marijuana, employers must also be cognizant that some employees may have dependence issues or an addiction to marijuana, which is considered a disability under human rights legislation and requires a similar duty to accommodate to the point of undue hardship.

Ultimately, employers are not required to create a perfect accommodation solution, or to even provide the employee with their ideal accommodation. What they must do, however, is make reasonable ef-

forts to provide accommodation to the point of undue hardship.

### **The takeaway for employers**

Not long ago, the idea of an employee walking into a retail store on a break to purchase recreational marijuana seemed like a distant possibility. Nonetheless, it is now a reality that employers must be cognizant of and consider the impacts that recreational marijuana use may have on the workplace. As the law continues to evolve in this area, employers must ensure that any policies they implement with respect to marijuana in the workplace are carefully drafted and do not infringe on employee privacy or violate the applicable human rights legislation. In the short term, and at least for employers who choose to act in haste, this will likely cause more lows than highs.