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# Marijuana in the Workplace

Strategies to Manage Medicinal and Recreational Use

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# Outline

1. Introduction to Marijuana in the Workplace:  
Primer and Issues for Employers
  1. Marijuana and The Duty to Accommodate
  2. Drug and Alcohol Policies
  3. Practical Considerations

# Introduction

- Medical Marijuana has been legal since 2001
- In 2016 the Federal Government passed “Access to Cannabis for Medical Purposes Regulation” which spawned the proliferation of unlawful cannabis dispensaries and thus Canadians had greater access to medical marijuana
- In July 2018, Bill C-45 will become effective, thereby legalizing marijuana for recreational use

# Marijuana: a Primer

**Cannabinoids** = the natural chemical compounds found in the marijuana plant

Two types of cannabinoids:

1. Tetrahydrocannabinol (THC) - psychoactive component (used for pain management, sleep aid, nausea suppressant)
2. Cannabidiol (CBD) – therapeutic component (used for epilepsy, anti-psychotic, depression)

## Marijuana: a Primer cont'd

- Dozens of strains of marijuana
- Over last 20 years, marijuana potency – expressed as a percentage of THC by weight of substance – has increased from approx. 3% in 1980s to approx. 15% today
- THC can be detected in bloodstream days or weeks after ingestion

## Marijuana: a Primer cont'd

- Health Canada estimates that >50,000 Canadians currently use medicinal marijuana and by 2024 that numbers will grow to >500,000 will
- Currently, Canadians who have been authorized by their medical practitioners may legally buy marijuana from licensed producers, or grow their own
- Dispensaries are illegal, but 'licensed' by various municipalities
- Recreational use of marijuana (i.e. used for a "high") remains illegal until July 1, 2018

# Marijuana & Impairment

Testing can indicate ingestion within 4-6 hours, however no accepted test to assess or predict impairment

Impairment affected by:

- Strain & potency of Marijuana
- Physical characteristics of the user
- Environmental surroundings
- Frequency of use
- Method of consumption

# Marijuana & Impairment cont'd

Health Canada/Feds: proposing a blood test for drivers based on probable cause (swab indicating recent use/signs impairment)

It is expected these tests will face challenges based on:

1. Proposed limits not reliable indication of impairment, and
2. Privacy

# Implications for Employers:

## The Duty to Accommodate

1. Requirement to ensure employees: (a) are not impaired at work, and (b) can perform their duties safely;
2. When and how does the duty to accommodate arise?

# Implications for Employers

Employers must ensure the health and safety of workers. Key considerations include:

- Is the employee in a safety sensitive position?
- Does the employee have a verified medical condition requiring medical marijuana? Or is the employee using recreationally?

If there is a verified medical condition, the employer must examine if it can accommodate the employee's condition. Including, if that condition is addiction.

# Impact on the Workplace

While updates to drug and alcohol policies will be needed, the basic principles regarding impairment in the workplace continue-

e.g. Employees are not permitted to be impaired at work or pose a safety risk to their co-workers or the public, regardless of whether they have a prescription and regardless of whether marijuana is legal

Anti-smoking laws will apply to marijuana the same way as regular cigarettes

# The Duty to Accommodate

Two competing obligations on the employer:

1. the duty to accommodate employees with a disability; and
2. the duty to ensure a safe workplace for all

# The Duty to Accommodate cont'd

- Requirements to trigger the duty to accommodate marijuana prescribed employees:
  1. the employee must have a disability;
  2. the employee must have been legally prescribed marijuana in accordance with regulations; and
  3. the employee is using marijuana in accordance with the prescription
- Employees alleging a marijuana addiction-treat like other substance abuse issues

## The Duty to Accommodate cont'd

- The duty to accommodate is not unlimited
  - Employers must accommodate an employee up to the point of undue hardship
  - Employers are required to accommodate employees' medical marijuana but only to the extent that it does not endanger the health and safety of other employees

# The Duty to Accommodate cont'd

- Factors to consider: safety sensitive positions, size/resources of the employer, financial cost of administration, potential disruption on operations of the business
- Courts and tribunals – generally, the larger an organization, the greater the means available to accommodate
- In other words, larger companies may be held to higher standards

# Case Law- Duty to Accommodate

*Calgary (City)* (2015), 261 L.A.C. (4<sup>th</sup>) 1

## Facts

- Unionized employee operated heavy equipment, suffered from degenerative neck disease causing chronic pain
- Doctor provided employee with necessary medical declaration for Health Canada permit to possess and use marijuana
- Told supervisors of use and worked without incident or signs of impairment

# Case Law cont'd

## Facts cont'd

- Two years later, management becomes aware of use and removes him from safety sensitive duties – employee grieves
- Employee agreed to independent medical examination but the expert could not provide clear direction about whether he could return to safety sensitive position because of conflicting information given from the employer to the employee

# Case Law cont'd

## Decision:

- Majority determines employee was fit to return to his former safety sensitive position
- Board was critical of the employer's investigation
- Found there was no evidence that:
  - employee's marijuana use for medical purposes had any impact on his ability to perform his safety sensitive duties; or
  - the employee exhibited signs of impairment while on duty

## Case Law cont'd

- However, the Board noted the serious consequences of operating equipment under the influence
- Board ordered reinstatement with conditions including, among others:
  - the employee was to submit to random substance testing; and
  - employer was permitted to conduct random work performance monitoring

# Drug and Alcohol Policies

- Currently, most drug and alcohol policies lump marijuana together with the prohibited use of other illegal and illicit drugs
- Once legalization occurs, the legal use of marijuana will have to be treated in a similar manner to rules around alcohol consumption
- Zero tolerance no longer justifiable vis a vis medical marijuana (i.e. pre-employment drug screening)
- Once legalization occurs, zero tolerance no longer justifiable vis a vis recreational marijuana

# Drug and Alcohol Policies cont'd

Use of medical marijuana to treat medical conditions must be treated in a similar manner to other prescription drugs that can cause impairment – including requirement to:

- report use/prescription of such medically prescribed drugs, and
- provide medical information on disability and type/amount/frequency of marijuana prescribed

# Drug and Alcohol Policies cont'd

*United Steel Workers of America, Local 7656 v. Mosaic Potash Colonsay ULC* 2016 CanLii 18320 (SK LA )

- Grievor/Employee with anxiety disorder and headaches, disclosed he used medical marijuana
- Grievor refused to provide Employer-requested medical information to assess accommodation/fitness for work
- Arbitrator held Employer should be permitted to determine what information the Grievor's doctor had about employer's fitness for work requirements, whether recommendations made on strain potency and frequency of use made, and whether alternative treatments available

# Practical Considerations

- Avoid decisions based either on stigma around marijuana or on assumptions about the use of marijuana and its impact on employees' ability to do their jobs
- Like all employees with disabilities, the focus should be on whether the use of medical marijuana impairs the ability of the employee to perform the job
- Ensure relevant drug policies are updated and sufficiently address new marijuana reality

## Practical Considerations cont'd

- Act on concerns immediately and conduct fair, thorough, and impartial investigations
- Know what a patient requires to be legally authorized to possess medical marijuana
- Beware of the self-prescribing employee
- Don't be afraid to question the simple prescription

# Practical Considerations cont'd

Get doctor to confirm:

- Employee suffering from disability (and doctor treating them for same)
- No other remedies/medication that is non-impairing that can be used instead of cannabis
- Ask doctor what dosage/day required form ingestion/frequency per day
- Ensure doctor understands employee's job duties

# Practical Considerations cont'd

Train supervisors on how to recognize signs of marijuana impairment:

- Euphoric/increased sense of well being
- Lack of motivation
- Lowered inhibitions, talkativeness
- Dry mouth and throat
- Increased appetite/munchies
- Impaired coordination, concentration and memory
- Increased heart rate

Act quickly in cases of suspected impairment

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