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Cannabis in the Workplace: *A Primer for Employers*

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Presenters:

Sara Parchello
Talia Bregman
Tyler Henderson
Steven Lewis

Background

- › Employer apprehension regarding widespread use – impairment (how to detect) and potential performance issues
- › Particular concerns for “safety-sensitive” positions
- › No scientific consensus on what constitutes safe consumption
- › Large variance in physiological reactions to cannabis among individuals

Scenario

- › New employee in probationary period
 - › Attends onboarding meeting
 - › Signs of impairment
 - › No prior disclosure
 - › What should you do?
 - › What if the employee denies issue?
 - › What if you take job-related action?
 - › Employee claims addiction to cannabis?
 - › What if you take job-related action and then the employee produces a medical certificate/prescription for medical usage?



Topics

Part 1

- › Overview: What is Cannabis?

Part 2

- › Workplace Impact and Accommodation

Part 3

- › Expectations and Policy Considerations

Questions

Overview

- › Tremendous press coverage over the past year
- › Surrounding law and regulations generally not considered to the same extent
- › Essential for employers to become knowledgeable in this area
 - › Employment, human rights and other legal implications
 - › Consider nature of workplace and roles



<https://www.thestar.com/news/gta/2018/01/29/two-toronto-police-officers-accused-of-consuming-marijuana-edibles-while-on-duty.html>

Police sources tell CBC News the officers began to complain of "hallucinations" and one made a call for an officer needing assistance. Both officers were found in a police vehicle and later treated in hospital.

<http://www.cbc.ca/news/canada/toronto/two-toronto-police-officers-suspended-pot-hallucinating-marijuana-cannabis-1.4509048>

The Basics

- › Two primary compounds used in cannabis products:
 - › Tetrahydrocannabinol ("**THC**"): produces psychoactive effects (most popular characterization of cannabis)
 - › Cannabidiol ("**CBD**"): generally considered to be non-psychoactive
- › Effects tends to last between 2 to 6 hours
 - › Highly variable

The Basics

- › Medical and therapeutic qualities suggested by research:
 - › acute and chronic pain
 - › nausea
 - › sleep disorders
 - › anxiety
 - › post traumatic stress disorder
- › Increasingly covered under benefits plans



Overview

- › Presently listed as a Schedule II controlled substance under the *Controlled Drugs and Substances Act*
- › Non-medical possession remains illegal (for the time being)
- › Federal legislation set to make recreational purchase and possession legal
- › Creates two regimes: (i) medical and (ii) recreational

Medical Cannabis

- › Medical cannabis has been legal in Canada since 1999
- › Regulated under the *Access to Cannabis for Medical Purposes Regulations* (formerly the *Marihuana for Medical Purposes Regulations*)
 - › Patients must obtain a prescription from a healthcare practitioner and may order from a “licensed producer”, grow a limited amount of medical cannabis for personal use or designate someone else to grow for them
- › Not classified under a DIN by Health Canada
- › *R. v Smith*, 2015 SCC 34: restricting authorized patients to only “dried marihuana” is a *Charter* infringement

Recreation

- › April 13, 2017: Bill C-45, *The Cannabis Act*
 - › retail purchase
 - › possess 30 grams of cannabis in public
 - › share up to 30 grams
 - › cultivate up to 4 plants
 - › does not cover edible products
- › Passed 3rd reading on November 27, 2017
- › Currently before the Standing Senate Committee on Social Affairs, Science and Technology
- › Proposed final vote on June 7, 2018
- › Regulations for edibles forthcoming (estimated for July 2019)

What's going to happen?

- › Provinces will retain the ability to set:
 - › minimum age requirements
 - › possession limitations
 - › “home-grown” rules
 - › limitations on where cannabis may be consumed
- › Retail distribution channels will be defined at the provincial level
 - › Ontario sales will occur through the Ontario Cannabis Retail Corporation (an LCBO subsidiary)
 - › Alberta will have private retailers, rather than sales via provincial retailer



What's going to happen?

› Ontario

- › The *Cannabis Act, 2017* (yet to be proclaimed)
- › Cannabis may not be “consumed” in:
 - › public places
 - › workplaces (as defined in the OHS Act: “any land, premises, location or thing at, upon, in or near which a worker works”)
 - › vehicles and boats
- › Exceptions for workplaces that are “primarily a private dwelling” and “other types of residences”
- › Medical cannabis consumption restrictions are governed by regulations in the *Smoke-Free Ontario Act, 2017* (yet to be proclaimed)



What's going to happen?

› Ontario

- › The *Smoke-Free Ontario Act* prohibits smoking or holding “lighted medical cannabis” in:
 - › any enclosed public space
 - › any enclosed workplace
 - › schools, common areas of condominiums and apartments, child care centres, sports arena/entertainment reserved seating areas
- › “prescribed products and substances” are also prohibited
- › Exemptions for “indoor room[s] in a residence that also serves as an enclosed workplace”, subject to certain conditions



Workplace impact

- › 2017 study by the Human Resources Professionals Association
 - › 54% of respondents believe they have adequate policies in place to address cannabis-related issues
 - › 11% of respondents have a cannabis-specific policy in place
- › Bottom line: how will this impact current workplace policies and practices?
 - › Employer obligations
 - › Revising (and/or creating) workplace policies

Human Resources Professionals Association, "Clearing the Haze: The Impacts of Marijuana in the Workplace"

Part 2:

Workplace Impact and Accommodation



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What does legalization mean for employers?

- › **The legalization of cannabis does not mean employees can consume cannabis at work or be impaired at work**
- › Employers will retain the right to set rules for the recreational use of cannabis in the workplace

Is there a duty to accommodate someone who uses cannabis?

- › It depends. Employers need to determine which track to take as an initial step (culpable versus non-culpable)

- › If non-culpable:
 - › Employers have a duty to accommodate an employee who has a disability, short of undue hardship
 - › A “disability” includes a physical or mental condition requiring treatment
 - › An addiction is also a “disability”

- › Thus, cannabis use can trigger an employer’s duty to accommodate in two ways:
 1. For employees authorized to use cannabis for medical reasons
 2. For employees suffering from a cannabis addiction



What is the “duty to accommodate”?

- › It is a **multi-party and iterative process**

- › There is no “perfect accommodation”

- › There are two components to the process:
 1. Procedural component
 - Is there a duty to inquire?

 2. Substantive component
 - What steps can you take?

How is the duty to accommodate triggered?

- › The obligation **is normally on an employee** to make accommodation needs known
 - › Workplace policy to enforce this obligation
- › The duty may also arise when an employer **knew, or ought reasonably to have known**, that the employee may need accommodation
- › In both situations, reasonable efforts need to be made to obtain relevant information to assess (i) whether an employee has a disability that needs to be accommodated; and (ii) whether accommodation is possible

What can I ask?

- › As part of the procedural component, cannot ask employees to disclose their diagnosis or medical history
- › But can ask for additional information to assess the employee's needs:
 - › proof of medical prescription
 - › method and regularity of use
 - › prognosis for recovery
 - › how cannabis use may affect performance, impairment, workplace safety or efficiency
 - › possible accommodations
- › **Can you ask if the employee has a disability?**

Is it appropriate to obtain a second opinion?

- › Seek medical expertise if it is necessary to understand the employee's ability to meet the core duties of their job in the workplace
 - › Consider *Bray v. Ontario (Ministry of Community Safety and Correctional Services)*, 2017 HRTO 752 (CanLII): @ para 32: "He agreed that he had no diagnosis when he obtained the medical note [...] rather, the note was based on what the applicant had told the doctor about [...]"
- › Accept medical note? Reject medical note?
 - › Obtain a second opinion
- › Overall, need to balance the employee's right to privacy with the employer's legitimate business interests and obligations
- › This balance must be done in light of employer's operations and employee's role (i.e., safety sensitive, customer facing, etc.)

What if there is a suspected cannabis addiction?

- › At an initial meeting with the employee, consider:
 - › approaching the concern as a performance issue focusing on core duties
 - › giving the employee an opportunity to disclose
 - › reviewing workplace policies
 - › scheduling time to meet again to review performance
 - › documenting each meeting and next steps to employee
- › **Do not treat as a dependency issue if there is insufficient information/medical evidence to substantiate**
 - › What if employee denies having an addiction or dependency on cannabis?

What are examples of accommodations?

- › The substantive component requires workplace modification, up to the point of undue hardship, to allow an employee to participate more fully in the workplace
- › What constitutes “undue hardship” is determined on a case-by-case basis
- › Factors to consider are: costs, outside sources of funding and health and safety
- › Types of accommodations:
 - › flexible scheduling
 - › modifying duties
 - › allowing more breaks
 - › tolerating reduced productivity
 - › providing a leave of absence



Does this mean employees can consume cannabis at work?

- › When exploring accommodations, need to keep other obligations in mind (i.e., health and safety, individual's role, the obligation to abide by smoke-free laws)
- › Accommodations must only be reasonable, not necessarily the employee's preference
- › Confirm the medical restrictions and ask "why"
 - › For example, what times must employee ingest their medication?
 - › Is the employee able to perform their core duties?

What if the use of medical cannabis impacts job safety?

- › Employers must maintain a healthy and safe work environment
- › Medical cannabis does not alter this obligation
- › Possible accommodations:
 - › temporary or permanent reassignment of job duties
 - › altering duties
 - › providing more breaks
 - › changing schedules
 - › doing more check-ins
 - › providing a leave of absence

What if an employee fails to participate in the process?

- › An employee's duty in the accommodation process extends beyond notifying an employer of the need for accommodation
- › An employee must participate in discussions and work with the employer to determine appropriate accommodations, including providing additional information and accepting reasonable accommodations
- › An employee's unwillingness to participate and facilitate the accommodation process *may* relieve the employer of its duty to accommodate
 - › Employer can make a determination/decision on the information (or lack of information) provided to them

Let's revisit our scenario

- › New employee in probationary period – impaired at orientation meeting
 - › Meet with employee
 - › Indicate objective observations
 - › Obtain employee explanation
 - › Employee denies being impaired
- › What are your options?
 - › What if employee acknowledges impairment; Produces medical note?

What are some practical tips to keep in mind?

- › Employee generally must participate; Employer must participate in good faith
- › Employee to provide medical proof of psychological or physiological condition requires medical cannabis
- › Proactively seek out information to understand the nature of the employee's disability and to investigate accommodation options
- › "Undue hardship" - consider workplace/consider role (i.e. safety sensitive)
- › Seek medical expertise if it is necessary to understand the employee's ability to function in the workplace
- › Keep written records of all steps taken throughout the process

Part 3:

Policy Considerations



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Drug Testing

- › Generally allowable for:
 - › “pre-access”
 - › reasonable cause
 - › post-accident / near miss situations
 - › self-identification
- › Personal privacy rights
- › State of the law on random drug testing is in flux (e.g., the *Suncor* saga, TTC drug testing policy)

Drug Testing

- › A complex issue
 - › Cannabis use can impact different people in different ways
 - › Testing cannot determine the *extent* of impairment
 - › Several different testing methods (e.g., saliva, urine, sweat, hair), each with different “windows of detection”
 - › Some methods can detect cannabis in a person’s system long after it has been consumed (e.g., up to 100 days afterward through hair analysis)
 - › Employees who test positive may not be impaired (e.g., it may be the result of consumption from days or weeks ago)

Drug Testing

- › Establish steps to be taken following a positive test
- › A “zero tolerance” policy may not align with the duty to accommodate
- › Ensure that drug testing programs are linked to a justifiable safety concerns

- › **Workplace policies are key, including any disclosure obligations**

Workplace Policies: What to include

- › Emphasize employer expectations (i.e., a prescription does not excuse employees from carrying out duties or the right to be impaired, absent/late without reasonable explanation)
- › Where to use? Address Smoke-Free Ontario Act, Ontario Human Rights Code, OHSA
- › Drug testing (if any)
 - › Address Safety sensitive positions
- › Establish when persons must disclose disability (*Elk Valley, Bray*) (“Accommodation Code of Conduct”)
 - › Establish procedures to be taken following disclosure of cannabis use, even if no accommodation requested
 - › Zero-tolerance not advisable
- › Disciplinary consequences for policy breaches

Remember...

› Workplace Considerations

- › Nature of workplace
 - › Special considerations ? (safety sensitive roles, customer facing, etc.)
- › Policies
- › Orientation
- › Ongoing training and compliance

› Individual Considerations

1. Gather information
2. Thoughtful/strategic approach – ask yourself: What can I ask? What should I ask?
3. Take action: range of possibilities (i.e. discipline to frustration)



Questions



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