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The doobies and don'ts – Legalized and medical marijuana in the workplace

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March 15, 2018

Agenda

1. Overview of marijuana legalization
2. Effects of marijuana use
3. Issues facing employers
4. Nature of the positions
5. Medical marijuana
6. Proactive steps for employers

Overview of marijuana legalization

- Bill C-45 - *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*
- Highlights:
 - Individuals can possess up to 30 grams of cannabis on hand at a time
 - Individuals can grow up to four plants in their own home
 - Harsh penalties for illegally supplying pot to minors (up to 14 years in jail)
 - Age of use can align with provincial drinking ages

Overview of marijuana legalization (cont'd)

- Bill 26 - *An Act to Control and Regulate Cannabis*
- Highlights:
 - Legal age for purchase and consumption will be 18 in Alberta
 - Ability to purchase recreational marijuana from privately-run retail stores or government-operated online sales
 - Consumption of marijuana may only occur in homes and in some public spaces where smoking tobacco is permitted
 - Consumers may grow up to 4 plants per household
 - Consumers may possess up to 30 grams of marijuana

Effects of marijuana use

- Tetrahydrocannabinol (THC) versus cannabidiol (CBD)
- Short term versus long term effects
- Risk of addiction



Issues facing employers

- The use of marijuana by employees creates new questions for employers
- Unlike alcohol, serious issues over ability to test present impairment
- Current testing only measures level of THC or metabolites
- THC affects people differently
- Lack of consensus on lingering impairing effects
- No real parameters on the measurement of THC levels in product or dosage, frequency of use

Factors to consider

- Nature of the position
 - Non-safety sensitive
 - Safety sensitive
- Medical marijuana and disability
 - Accommodation

Non-safety sensitive positions

Clarify workplace expectations

- No coming to work impaired
- No using marijuana at the workplace, or immediately prior to entering the workplace
- No unexcused absences or lateness
- Employee must continue to carry out duties of employment in acceptable fashion

Safety sensitive positions

Implementing zero tolerance policy

- Most effective way to prevent impairment in the workplace
- Often use US Department of Transportation THC cut off levels
- Policy could cover all employees, or only safety sensitive employees
 - Beware! Can only drug test safety sensitive positions
- Unique considerations apply to medical marijuana license holders
 - Duty to accommodate does not equal perform duties impaired

Safety sensitive positions (cont'd)

Drug and alcohol testing policies

- Generally limited to safety sensitive positions, and only in certain situations (i.e., after an incident, as a pre-condition of employment, etc.)
- Case law suggests employer must demonstrate, through concrete data, a workplace problem with drug and alcohol use to justify random testing
- Random testing not allowed as proactive measure to avoid accidents or injuries in workplace

Safety sensitive positions (cont'd)

Random drug and alcohol testing

- *Irving Pulp* (2013)
 - Random alcohol testing by an employer, without proper justification, is not permitted
 - Employer must demonstrate evidence of enhanced safety risks to justify random alcohol testing
- *Amalgamated Transit Union, Local 113 v TTC* (2017)
 - Injunction denied

Safety sensitive positions (cont'd)

Random drug and alcohol testing – The Suncor saga continues

- *Unifor, Local 707A v Suncor Energy Inc* (2018)
 - Injunction granted
- Conclusion – significant restrictions and barriers to implementing random alcohol and drug testing policies

Medical marijuana in the workplace

- Law regarding use and access to medical marijuana has evolved greatly since 2000
- Current regulation - *Access to Cannabis for Medical Purposes Regulation*
 - Easy access to medical marijuana



Medical marijuana in the workplace (cont'd)

Accommodating medical marijuana in the workplace

- Used to treat a variety of illnesses that may meet the definition of a “disability” under human rights legislation
 - Epilepsy, nausea from cancer treatment, arthritis, chronic pain, or sleeping disorders
- Thus, use of medical marijuana may engage the issue of workplace accommodation
- Same principles of accommodation as any other doctor prescribed drug
- Recreational use of marijuana does not require accommodation

Medical marijuana in the workplace (cont'd)

Dependency issues

- *City of Calgary and CUPE, Local 27 (Hanmore)* (2015) - Following an employee's disclosure of medically authorized marijuana, the employer must carefully assess accommodation and whether the employee's use of cannabis renders the employee unfit to perform his or her job duties. The assessment must be based on objective medical evidence.
- *Brown v Bechtel Canada* (2016) - an employer has a duty to inquire whether a disability or other protected characteristic may be posing a barrier to an employee's performance in the workplace. While the employer in question was only informed of the employee's medically authorized cannabis usage after he had been found smoking on site, the employer failed to make meaningful inquiries as to whether the complainant's use was related to a disability.

Medical marijuana in the workplace (cont'd)

Dependency issues (cont'd)

- *Stewart v Elk Valley Coal* - employers in Canada can rely on the provisions of a drug and alcohol policy that require employees in safety-sensitive positions to self-report their addictions, and/or use of substances that may cause impairment to their ability to perform their job duties, prior to a workplace accident. An employee cannot always rely on denial of his or her disability when claiming an employer has failed to accommodate the disability.

Proactive steps for employers

Implementing drug and alcohol policies

- At minimum, policy should prohibit marijuana use before and during work and prohibit possession in the workplace
- Employers should create a new policy or revise current policy to include recreational marijuana as a prohibited drug
- Policy should detail disciplinary action available to employer where policy is violated (see *Elk Valley Coal*)
- Determine which positions are safety sensitive

Proactive steps for employers (cont'd)

Education and training – Employees

- Provide updated policies well in advance and have employees sign acknowledgements
- Educate employees on cannabis and how it will affect performance
- Advise employees in safety sensitive procedures of the consequences for being impaired while on the job
- Address acceptable use of prescription drugs (including medical marijuana) and non-prescription, impairment inducing substances (including marijuana)

Proactive steps for employers (cont'd)

Education and training – Supervisors and managers

- Provide training on spotting symptoms/signs of use, and administering impairment test
- Determine specific indicators for job-specific impairment. For example:
 - Hand-eye coordination?
 - Difficulty maneuvering equipment?
 - Testing for mental comprehension?



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