

MARIJUANA AND THE WORKPLACE: ENSURING THE SAFETY OF WORKERS AND BUSINESSES (2017)

Introduction

Drug impairment on the job is a complex challenge for employers at the best of times. With the pending legalization by the federal government of recreational marijuana usage, employers are reviewing what they know and what they need to know to be prepared. With that purpose at the forefront, these recommendations encompass general and specific requests for clarity and guidance for employers large and small, unionized or not, safety-sensitive or not.

Background

A preliminary review of recent (within the past 5 years) and relevant (Canadian) literature (including peer reviewed academic literature) reveals three general foci: adolescent usage concerns, non-alcoholic drug-impaired driving, and accommodation for medical marijuana usage. Workplace research is minimal and tends to be reliant on case law findings arising from appealed dismissals.

The recently released report of the Task Force on Cannabis legalization and Regulation, “A Framework for the Legalization and Regulation of Cannabis in Canada,” likewise concerns itself with adolescence and impaired drivers. The section on workplace safety is 1½ pages and from which, three of the Task Force’s 83 recommendations are relevant:

- Facilitate and monitor ongoing research on cannabis and impairment, considering implications for occupational health and safety policies,
- Work with existing federal, provincial and territorial bodies to better understand potential occupational health and safety issues related to cannabis impairment, and
- Work with provinces, territories, employers and labour representatives to facilitate the development of workplace impairment policies. (P. 29)

In April the federal government introduced Bill C-45 respecting cannabis and set out the purpose of the Act as to protect public health and public safety, but did not specifically refer to the workplace.

In B.C., both the B.C. Human Rights Code¹ and WorkSafe BC have bearing on employment guidance. In the Human Rights Code, there is no specific definition for impairment; however, Section 13 (1) states “A person must not (b) discriminate against a person regarding employment or any term or condition of employment because of ... physical or mental disability... ; nor can any person discriminate in regard to accommodation (Section 8) based on physical or mental disability without reasonable justification.” This is relevant to marijuana usage as drug dependence (addiction) is considered a disability.² Accommodation is required up to the point of undue hardship, where the cost of reasonable and practical steps are too difficult or expensive.³ The bar for employers to prove this is very high.⁴

1 BC Human Rights Code http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01 and <http://www.bchrt.gov.bc.ca/human-rights-duties/index.htm>

2 Lynch QC, Jennifer. Human Rights and Employer Responsibility to Accommodate Disability in the Workplace, *Visions: BC's mental Health and Addictions Journal*, 2009, 5 (3), pp 9-10. <http://www.heretohelp.bc.ca/visions/workplaces-vol5>

3 <http://www.bchrt.gov.bc.ca/glossary/index.htm#undue-hardship>

4 Bhalloo, Shafik, and Alisha Parmar. Medical Marijuana in the Workplace—Don't Weed Out Your Employees Just Yet! *The Advocate*. 74, 2016. Pp 687-696

Worksafe BC provides some guidance⁵:

4.20 Impairment by alcohol, drug or other substance

- (1) A person must not enter or remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.
- (2) The employer must not knowingly permit a person to remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.
- (3) A person must not remain at a workplace if the person's behaviour is affected by alcohol, a drug or other substance so as to create an undue risk to workers, except where such a workplace has as one of its purposes the treatment or confinement of such persons.

Note: In the application of section 4.20, workers and employers need to consider the effects of prescription and non-prescription drugs, and fatigue, as potential sources of impairment. There is a need for disclosure of potential impairment from any source, and for adequate supervision of work to ensure reported or observed impairment is effectively managed.

While various guidelines exist and templates can be found for employers to use to develop onsite alcohol and substance use policies, (with caveats in the literature regarding which ones would be better), what is lacking in all the literature is clarity in definitions and clear guidelines for employers.

There are two separate issues to consider: medical marijuana users and recreational usage on the job. For medical marijuana, the rules are quite clear regarding accommodation. Insofar as an employer can, those with appropriate medical documentation are accommodated and only actual impairment at work, not usage, would be grounds for further action up to dismissal. The challenge is determining what constitutes impairment.⁶ Under current federal criminal law, the Marihuana for Medical Purposes Regulations (MMPRs), the required document, similar to a prescription, must:

129. (1) A medical document provided by a health care practitioner to a person who is under their professional treatment must indicate
- a) The practitioner's given name, surname, profession, business address and telephone number, facsimile number and email address, if applicable, the province in which the practitioner is authorized to practise their profession and the number assigned by the province to that authorization;
 - b) The person's given name, surname, and date of birth;
 - c) The address of the location at which the person consulted with the practitioner;
 - d) The daily quantity of dried marihuana to be used by the person, expressed in grams; and
 - e) The period of use.⁷

For medical marijuana usage, therefore, the challenge for an employer is to determine whether the documentation and allowable amounts can lead to impairment up to the point, as expressed by WorkSafe BC, of undue risk. This does not address potential decreased productivity, the impact of usage and/or accommodation on other employees, and the overall costs of accommodation even if not up to point of undue hardship. What employers and employees need is a workable definition of impairment, and a tool to assist in determining impairment, such as a universally applicable checklist for non-medically trained supervisors. Further, employers and employees, particularly those without an in-house Human Resources

⁵ <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation/part-04-general-conditions#SectionNumber:4.20>

⁶ Brown, Shelley. Road Map to Weed in the Workplace: legal Considerations as Legalization Approaches. Canadian HR Reporter; Oct 31, 2016. 29, 18 ProQuest. P.16

⁷ Bhalloo and Parmer, The Advocate. P.688

department – such as small and medium sized entities – would greatly benefit from having a readily identifiable regulatory authority that could provide consistent, standardized documentation and up to date information.

Recreational users (legalized or not) would be treated as other substance users and potential abusers, according to the literature.⁸ However, again, it is the level of impairment, rather than usage itself, that provides grounds for employer action up to and including dismissal. Key to whether employers have any sway is the existence of written policies outlining a clear statement of drug usage on the job, the levels of graduated disciplinary steps, and an invitation for disclosure with accommodation considered. Recreational users may or may not be addicted – a determination that is difficult without self-disclosure; and addiction is considered a disability requiring accommodation. Until that point, an employer’s “duty to accommodate does not extend to the point of accommodating an employee that is not properly medically authorized.”⁹

There are many guides and helpful suggestions available online. What is lacking, however, is clarity for employers along with guidance that provides assurance that the information by which they operate is best practice and in line with existing and anticipated legislation.

THE CHAMBER RECOMMENDS

That the Provincial Government:

1. work with the Federal Government to ensure the consistency and standardization of regulations across all provinces and territories;
2. identify the appropriate provincial regulatory authority and develop regulations concerning the use of medical marijuana in the workplace and its impact on health and safety procedures in conjunction with the implementation of federal legislation; and
3. consult with industry, business and their representative associations to identify standardized policies and processes to deal with medical marijuana requirements and recreational usage that may lead to impairment in the workplace.

⁸ Brown, Road Map. P.16

⁹ Bhallo and Parmer, The Advocate. P.691