

# Marijuana and the Workplace: Ensuring the Safety of Workers and Businesses

## 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 to protect public health and public safety but does not specifically refer to the workplace.

In B.C., both the B.C. Human Rights Code<sup>90</sup> 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.<sup>91</sup> Accommodation is required up to the point of undue hardship, where the cost of reasonable and practical steps are too difficult or expensive.<sup>92</sup> The bar for employers to prove this is very high.<sup>93</sup>

Worksafe BC regulations provides some guidance:<sup>94</sup>

### 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.

<sup>89</sup> Holmes, Andrea and Josh Hjartarson. Moving Forward Together: an Employer Perspective on the Design of Skills Training Programs in Ontario. Ontario Chamber of Commerce. 2014.

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.<sup>95</sup> Under current Federal criminal law, the Access to Cannabis for Medical Purposes Regulations (ACMPR), medical marijuana patients must have a medical document from a health care practitioner to legally purchase and consume marijuana:

- 8 (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 and, if applicable, their facsimile number and email address;
  - 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, expressed in grams, that the practitioner authorizes for the person; and
  - e) The period of use.<sup>96</sup>

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 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.<sup>97</sup> 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."<sup>98</sup>

### **Safe Workplaces**

In safety-sensitive workplaces, drug use can lead to serious injury or death. In its submission to the Task Force, national oil and gas safety association Enform stated that, "marijuana use is incompatible with working in a safety-sensitive environment."<sup>99</sup> Employers have both a legal and a moral obligation to provide safe workplaces. This legal requirement is enshrined in provincial occupational health and safety legislation, and in Section 217.1 of the Criminal Code. Ensuring workers in safety-sensitive roles are not impaired by legal or illegal substances is a key component of fulfilling that obligation.

<sup>90</sup> BC Human Rights Code [http://www.bclaws.ca/Recon/document/ID/freeside/00\\_96210\\_01](http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01) and <http://www.bchrt.gov.bc.ca/human-rights-duties/index.htm>

<sup>91</sup> 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>

<sup>92</sup> <http://www.bchrt.gov.bc.ca/glossary/index.htm#undue-hardship>

<sup>93</sup> 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

<sup>94</sup> <https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation/part-04-general-conditions#SectionNumber:4.20>

<sup>95</sup> 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

## Limitations on Testing

Marijuana is a substance with complicated effects on the body, and legal substances like alcohol do not provide useful comparisons. Testing for alcohol impairment is straightforward – the quantity of alcohol in the bloodstream is a reliable indication of how intoxicated an individual is at the moment of testing. THC, the primary psychoactive component of marijuana, can remain in the bloodstream of users for days or weeks after the intoxicating effects have worn off. Furthermore, there is no “breathalyzer” equivalent for marijuana, which would provide a clear indication of current intoxication and impairment. Complicating matters further, there is no “.08” for marijuana, no standard legal limit or cutoff that can be used in impaired driving cases, for example.

The limits of testing technology have significant impacts on Canadian workplaces. *Entrop v. Imperial Oil* allowed random alcohol testing for safety-sensitive positions, but not random drug testing, because a breathalyzer can reliably prove current impairment, whereas drug testing techniques cannot.<sup>100</sup> This is further confirmed by the Canadian Human Rights Commission’s (CHRC) Policy on Alcohol and Drug Testing, which considers random drug testing an unreasonable infringement of privacy rights, as it cannot reliably determine current levels of impairment.<sup>101</sup> Under these guidelines, drug testing can only be carried out as a bona fide occupational requirement in safety-sensitive positions, with reasonable cause or after an accident has occurred.<sup>102</sup> As the federal government has not yet established a legal limit for marijuana impairment, or the necessary testing protocols, the validity of workplace testing has largely been left to the courts to decide. Federal legislation includes new provisions which would allow Cabinet to set *per se* limits for marijuana-impaired driving, similar to a 0.08 BAC for alcohol impairment. This is consistent with the advice of The Task Force, which recommended further investment and research into both a *per se* impairment limit and the development of a roadside testing protocol.<sup>103</sup> These innovations would serve as a major step towards rationalizing the conflicts that currently exist between an employer’s obligation to provide a safe workplace, and an employee’s right to privacy. We recommend that the research and development of impairment limits and roadside testing protocols be used to develop legal limits and testing protocols for safety-sensitive workplaces.

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 legislation in existence and anticipated.

## Recommendations

That the federal government:

1. Create a standard testing protocol to detect marijuana impairment, with legal limits for both traffic safety and workplace safety prior to the legalization of marijuana.
2. Work with provinces and territories to ensure consistent regulation across Canada.
3. Provide clarity for employers by developing regulations concerning the use of medical marijuana in the workplace and its impact on health and safety procedures in conjunction with relevant provincial and territorial regulators,
4. 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, in a manner that balances the rights and responsibilities of employers with the privacy and rights of employees.
5. Allow a two-year implementation window to address the workplace safety recommendations contained within the Framework for the Legalization and Regulation of Cannabis in Canada.

<sup>96</sup> <http://laws.justice.gc.ca/PDF/SOR-2016-230.pdf>

<sup>97</sup> Brown, Road Map. P.16

<sup>98</sup> Bhallo and Parmer, The Advocate. P.691

<sup>99</sup> [http://www.psc.ca/wp-content/uploads/Ltr-Marijuana\\_legalization\\_commission.pdf](http://www.psc.ca/wp-content/uploads/Ltr-Marijuana_legalization_commission.pdf)

<sup>100</sup> <http://www.canlii.org/en/on/onca/doc/2000/2000canlii16800/2000canlii16800.html>

<sup>101</sup> [http://publications.gc.ca/collections/collection\\_2009/ccdp-chrc/HR4-6-2009E.pdf](http://publications.gc.ca/collections/collection_2009/ccdp-chrc/HR4-6-2009E.pdf)

<sup>102</sup> Ibid.

<sup>103</sup> <http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/index-eng.php>