

LEGAL CANNABIS AND THE WORKPLACE: WHAT SASKATCHEWAN EMPLOYERS SHOULD KNOW

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The Government of Canada is proceeding with the legalization of recreational cannabis. Bill C-45, the Cannabis Act is expected to come into full force and effect for July 1, 2018. An existing law related to medical use, the Access to Cannabis for Medical Purposes Regulations (ACMPR) remains unchanged. While the legalization of cannabis will create exciting new business opportunities for the private sector in the province, it also brings with it new challenges for employers. Given the lack of clarity on guidelines from all levels of government, employers across the province, particularly those operating in safety-sensitive sectors like construction, mining, oil and gas, forestry, and transportation have expressed uncertainty about what their rights and responsibilities will be if they suspect that a worker is impaired on the job.

Some of the potential issues that were identified by respondents in a Human Resources Professionals Association (HRPA) survey conducted in June 2017 included the following:

- Employees operating company vehicles while impaired
- Uncertainty surrounding disciplinary procedures
- Productivity and attendance-related issues
- Employees operating heavy equipment while impaired
- Admissibility of employees travelling cross-border into the United States

Legal Obligations

Workplace Health and Safety

Canadian employers under the Criminal Code are required by law to ensure a safe workplace by imposing a "legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task." Under the Saskatchewan Employment Act, employers must provide for a safe and healthy workplace. Part III of the Act includes "general duty" health and safety provisions which explicitly prohibit impairment in workplaces.

Duty to Accommodate

Under Canadian human rights legislation, medical cannabis is treated as a prescription drug for a medical condition. As a result, employers have a duty to

accommodate workers that have valid medical documentation from a medical professional. Accommodation is required up to the point of undue hardship (financial or otherwise), where the costs of reasonable steps are too difficult or expensive.

An employer's duty to accommodate is not limitless, however. An employee is not entitled to choose their preferred form of accommodation. The courts have made it clear that employers have a duty to accommodate a worker's needs, not their preferences. In other words, where multiple forms of accommodation are possible, the employer has the right to choose the less expensive or less onerous option. Recreational cannabis however, is not a prescription drug and is not subject to human rights legislation at the moment.

Drug Testing Protocols

Per the Supreme Court of Canada, employers are not permitted to carry out randomized testing. Legislation in Canada does allow employers to drug test under the following three conditions:

- Pre-employment screening
- Post-incident
- Under reasonable suspicion

At this time, there is no existing, let alone reliable, non-invasive testing method that can distinguish between those intoxicated at the moment as opposed to high residual amounts from off-hour use. There is currently no standard legal limit or a breathalyzer equivalent for cannabis. Only impairment, and not usage, is considered grounds for testing and subsequent disciplinary action.

Given the lack of clarity from all levels of government around workplace-related issues, it is recommended that proactive employers undertake the following actions in the meantime:

Recommendation 1: Employers should periodically review ongoing legislative developments and update their drug and alcohol policies accordingly. Drug and alcohol policies should address medical cannabis, recreational cannabis, opioids (Fentanyl, Oxycodone, Vicodin, etc.), alcohol, and other narcotics. Such policies should be developed in consultation with a labour and employment lawyer and/or an HR professional.

Recommendation 2: When developing workplace drug and alcohol policies, employers should treat medical cannabis use and recreational cannabis use separately to allow employers to properly determine their duty to accommodate. Medical cannabis is a recognized treatment option for many conditions. Policies on medical cannabis should be treated and enforced in a manner similar to other prescription drugs.

Recommendation 3: Employers should ensure that their drug and alcohol policies include a clear and functional definition of the term "impairment" that accounts for medical cannabis use, as well as where and when such use is appropriate. Managers only have a right to know about medical restrictions.

Information about diagnosis, treatment plans, etc. is confidential.

Recommendation 4: In workplaces that offer health benefit programs, employers should be ready to answer questions from employees around medical cannabis coverage. Employers might want to consider exploring the benefits of medical cannabis coverage for employees (if appropriate), as the costs of covering medical cannabis in some cases can be considerably less than conventional medications.

Recommendation 5: Employers should continually revisit their drug testing policies and procedures in light of the rapid changes in technology. Until there is a clear, reliable, and legally-sanctioned way to test for impairment, employers should be made aware of the testing methods that are currently available, along with their pros and cons. Zero-tolerance policies are not appropriate in every workplace, however an argument can be made for them in safety-sensitive sectors.

Recommendation 6: Employers should draft clear policies that address expectations around drug use for employees or contractors who must cross the border into the U.S. Employers should also offer training to employees who travel to the US regarding the consequences of drug use and possession. This is because Canadians who use legal cannabis can be barred from entering the US under the Immigration and Nationality Act. Admitting to cannabis use can lead to inadmissibility, as cannabis remains a controlled substance under US federal law despite state-level legalization efforts.