

Cannabis Legalization and Employment

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Legalization of Marijuana

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CANNABIS LEGALIZATION AND EMPLOYMENT

INTRODUCTION

As we anticipate the upcoming legalization of cannabis for recreational use in Canada, we need to consider how that legalization will impact the workplace. This paper addresses the impact on workplace policies, an employer's duty to accommodate employees' use of cannabis for medical purpose, and how to deal with workplace misuse that may lead to termination.

i. Workplace Policies

This portion of the paper provides an explanation of some issues employers may face with the legalisation of cannabis and what policies and procedures they may implement in the workplace so as to manage cannabis usage by employees.

MEDICINAL VS. RECREATIONAL USE

Both medicinal use and recreational use of cannabis in the workplace need to be considered in the context of whether an employee may be impaired at the workplace and whether such impairment may impact the employee's performance, their safety, the safety of others, the environment, and the reputation of the company.

With respect to medicinal use of cannabis, there are now several ailments and diagnoses for which the treatment includes a prescription for medicinal cannabis. As with any health condition, employers will have an obligation to accommodate those employees with their prescribed treatment plans (which may include cannabis) as best as reasonably possible, to the point of undue hardship. In its accommodation analysis, the employer must give due consideration to the nature of the position and potential consequences for the use of cannabis and/or being under the influence of cannabis at the workplace.

With respect to recreational use of cannabis, employers may approach that issue as they have with alcohol. That is, there ought to be no difference in an employer's approach to the management of recreational use of cannabis in the workplace versus alcohol consumption in the workplace. The employer may prohibit both in the workplace, subject to the terms of its Controlled Substances Policy. An employer has no obligation to accommodate an employee using cannabis for recreational purposes since such use is neither related to a health issue nor a disability.

EMPLOYEE DISCLOSURE OF MEDICINAL USE AND ACCOMMODATION

In Controlled Substances Policies we recommend that employers include language that invites employees to voluntarily disclose the fact that they have been prescribed medicinal cannabis and to provide a copy of their “cannabis card”/legal authorization to possess card, along with their prescription, to their employer in order that their employer is well aware of the treatment plan. This allows the employer to assess whether there are any safety concerns associated with the medicinal use, to ask for additional details from the employee’s treating physician if needed, and to understand any applicable restrictions arising for the employee as a result of the treatment so that the employer can then accommodate the employee as needed. Advance disclosure is extremely productive to the employment relationship since it prevents a situation where the prescription is learned about after an incident, which tends to then turn the employer’s analysis more toward disciplinary considerations versus a collaborative approach.

Employers can request proof of a prescription and the legal authorization to possess cannabis when an employee discloses that they are using cannabis for medicinal purposes. The employee needs to cooperate with the employer in terms of providing reasonable information about the restrictions that either the treatment plan or the disability itself might impose on that employee in their workplace, and how those restrictions may impact their performance of their duties, so that the employer has the necessary information to accommodate the employee.

While an employer cannot compel its employees to disclose their use of medicinal cannabis since that would be too great of a privacy invasion, drafting the Controlled Substances Policy so as to support and encourage such voluntary disclosure is prudent and will lead to better collaboration between the employer and the employee.

The British Columbia Human Rights Tribunal decision of 2015, *French v. Selkin Logging*, is a case where a self-prescribing employee in a safety sensitive position used cannabis to manage cancer pain but did not disclose that use to his employer. The Tribunal found that there was an obligation on that employee to disclose his condition to his employer, to obtain a medical prescription and to ensure compliance with the criminal drug laws in the use of that medicinal cannabis. The Tribunal also found that the failure of the employee to follow those rules meant that it was an undue hardship on the employer to accommodate that employee and that the employer was correct in having taken the employee to have resigned.

It is important to remember though that simply because an employee is in a safety sensitive position an employer cannot automatically deem it to be an undue hardship to accommodate that employee