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Pot Topics: Legalization of Cannabis

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ISBN-10: 1-55093-705-7
ISBN-13: 978-1-55093-705-3

Legalization of Cannabis – Implications for Employers

Pot Topics: Legalization of Cannabis

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For presentation in:

Calgary, Alberta – November 16, 2018

Edmonton, Alberta – November 22, 2018



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LEGALIZATION OF CANNABIS – IMPLICATIONS FOR EMPLOYERS

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INTRODUCTION

This paper discusses the general legal framework and common issues that arise in relation to managing the risks associated with the use of cannabis and other drugs in the workplace. In particular, this paper explores:

- the competing interests to be balanced when determining the legality of workplace drug and alcohol policies; and
- practical considerations in the implementation and enforcement of drug and alcohol policies.¹

LEGAL FRAMEWORK FOR WORKPLACE DRUG AND ALCOHOL POLICIES

The misuse of alcohol and other drugs (“substances”) can compromise workplace safety, productivity and overall job performance. Workplace accidents, increased absenteeism and illnesses, poor job performance and higher workers’ compensation and insurance costs are a few examples of the ways in which alcohol or drug misuse negatively impacts workplaces. Canadian adjudicators recognize that employers have a legitimate interest in attempting to minimize the extent to which these problems arise in their workplace.

Of paramount importance is the obligation of employers to take adequate steps to address workplace health and safety risks arising from substance misuse. Employers owe a duty of care at common law to protect their workers against workplace hazards.² They may also be vicariously liable for any injury or property damage caused by their employees to third parties.³ Perhaps most importantly, employers have a statutory duty to maintain a safe workplace under occupational health and safety legislation⁴ and the *Criminal Code*.⁵ In this regard, drug and alcohol misuse is a workplace

¹ This paper is based on the current state of the law. The law in this area continues to evolve.

² However, most hazardous workplaces must participate in a legislated workers’ compensation insurance scheme which includes, as a fundamental component, employer immunity from civil liability for workplace accidents.

³ Employers also face liability under environmental protection legislation, such as the *Alberta Environmental Protection and Enhancement Act*, R.S.A. 2000, c E-12, for actions that damage the environment.

⁴ For example, under section 3 of the *Alberta Occupational Health and Safety Act*, SA 2017, c O-2.1, an employer must take all reasonably practicable steps to ensure the safety of its employees and other workers present at its worksites.

⁵ Section 217.1 of the *Criminal Code*, R.S.C., 1985, c. C-46, places employers (and any person who undertakes, or has the authority, to direct how another person does work or performs a task) under a legal duty to take reasonable steps to prevent bodily harm arising from the performance of their work.

hazard which employers must assess and take steps to eliminate or minimize.⁶ Employers failing to meet to these obligations can be convicted and sentenced to significant penalties.⁷

Drug and alcohol testing is increasingly utilized by employers as one component of their overall approach to addressing work-related drug and alcohol misuse. Drug and alcohol testing can help identify employees who are unfit to work in a safe manner or otherwise violating an employer's drug and alcohol policy. It can also help identify employees who are in need of an assessment and treatment for drug or alcohol addiction, and it can also help deter the misuse of drugs and alcohol in the workplace.

Because of the safety risks posed by drug and alcohol misuse in certain industries, drug and alcohol testing has become a mandatory aspect of doing business for some employers. For example, in the construction industry, project owners often dictate minimum drug and alcohol testing programs that must be complied with by all contractors on their project. Similarly, in the transportation industry, the United States Department of Transportation ("DOT") requires any motor carrier coming into the U.S to have minimum drug and alcohol testing programs in place.

On the other hand, Canadian adjudicators also recognize that employers must not offend the privacy and human rights of employees.

Privacy has recently been recognized as an important value deserving of protection under the law. *Canadian Charter of Rights and Freedoms*⁸ jurisprudence recognizes three distinct privacy interests deserving of protection: personal privacy, territorial privacy and informational privacy. Personal privacy, grounded in the right to bodily integrity, protects the right not to have one's body touched or explored. Territorial privacy extends similar protection to the home and other spaces where the individual enjoys a reasonable expectation of privacy. Information privacy, protects persons' right to

⁶ For example, section 7 of the *Alberta Occupational Health and Safety Code*, Alta Reg 87/2009, requires an employer to assess and identify potential hazards before work begins, and section 9 requires an employer to take measures to eliminate or (if elimination is not reasonably practicable) control any hazards identified. A hazard is defined broadly under section 1 of the *Occupational Health and Safety Code* to include any situation, condition or thing that may be dangerous to the safety or health of workers.

⁷ Section 74 of the *Alberta Occupational Health and Safety Act* provides that the maximum sentence for a first offence under that legislation is \$500,000 or 6 months' imprisonment. An employer can also be found criminally negligent under s. 219 of the *Criminal Code* if it fails to meet its legal duty (under s. 271.1) to prevent bodily harm to its employees, and shows wanton or reckless disregard for the safety of its employees in the process. There is no monetary limit on the amount of fine that can be imposed on an employer found to have committed the indictable offence of causing death or bodily harm by criminal negligence. Individuals convicted of causing death by criminal negligence face the possibility of imprisonment for life.

⁸ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.