

Member's Quarterly

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Feature

Cannabis at Work: Your New Drug and Alcohol Policy

Employers strike the perfect balance

As of October 17, 2018, recreational use of cannabis was legal in Canada. To prepare for the legalization, the Government of Ontario has passed the *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act*. This legislation addresses how, where and who can buy, possess and consume cannabis in the province. In particular, this legislation explicitly prohibits consumption of non-medical cannabis in workplaces, vehicles and boats or any public places.

While it is imminent that these changes will impact our workplaces, employers will continue to have the right to prohibit an employee's attendance at work while under the use of cannabis and prohibit its use at work. Consuming recreational cannabis at work will continue to be illegal after the legalization on October 17, 2018. Even after the legalization, marijuana and other cannabis products will continue to be controlled substances under Canadian and provincial laws.

Medical vs. Recreational Cannabis

Employers should be cautious not to confuse medical cannabis with recreational use. Medical cannabis has been legal since 2001. In Ontario, the duty to accommodate under the *Human Rights Code* ("Code") extends to disabled employees who are prescribed medical cannabis. An accommodation request for medical cannabis must be treated like any other accommodation. This means that employees with a prescription for medical cannabis must be accommodated up to a point of undue hardship. In assessing undue hardship, the employer should canvass cost considerations, availability of external funding and whether the accommodation poses any safety concerns. To assess safety concerns, employers must consider the employee's position and nature of work. In this regard, up-to-date job descriptions are critical, especially if an employee is working in a safety-sensitive position.

When employees request accommodations for medical cannabis, employers should remind them that the accommodation process is meant for workplace parties to work together to find solutions. As part of that process, the employee will be required to provide medical reports outlining their prognosis and limitations/restrictions to safely carry out their duties. Similarly, the person seeking accommodation for medical cannabis should be reminded that they are responsible for letting their employer know if their condition or treatment for the condition may affect their judgement or ability to properly perform their job.

Occupational Health and Safety Act

Impairment at the workplace has been a longstanding occupational health and safety concern. In Ontario, employers have a duty to "take every precaution reasonable in the circumstances for protecting employees in the workplace". This obligation extends to protecting employees from an unsafe working environment caused by impairment. To meet its obligations, employers should routinely assess the workplace and identify potential hazards. Once the hazard has been identified, the employer must protect its workers by taking every precaution reasonable in the circumstances. The actions that will be deemed "reasonable in the circumstances" will depend on the nature of the workplace as well as the role/actions of the worker who may be impaired.

Health and Safety in the workplace is a shared responsibility. In this regard, it would be useful to train and remind employees, supervisors and managers about their OHSA obligations regarding workplace hazards which may include impairment from medical and non-medical cannabis.



Sreya Roy
J.D.

Associate,
Bernardi Human
Resource Law LLP

Feature continued

Balancing Act

Employers must strike a balance between maintaining a safe workplace and its duty to accommodate under the *Code*. Employers should review and update their Drug and Alcohol Policy to address use, possession and distribution of non-medical cannabis at work. The policy should explicitly prohibit recreational use of cannabis or products that contain cannabis. However, employers should exercise caution when implementing a blanket Zero-Tolerance Policy against use of all cannabis.

Particular attention should be paid to the definition section of the policy. For example, the policy should define concepts such as "recreational use", "medical use", "impairment", "workplace", "fitness to work", "safety sensitive positions", etc.

Similar to other seminal workplace policies, the revised Drug and Alcohol Policy should explicitly communicate that a violation of the policy may lead to discipline, up to and including termination for just cause or wilful misconduct. The policy should also recognize that the proper use of medical cannabis is not grounds for disciplinary action but may necessitate an accommodation including modified duties for the duration of the treatment.

Sreya Roy is an Associate at Bernardi Human Resource Law LLP and can be reached via email at sroy@hrlawyers.ca.