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What to Expect at Work with the Legalization of Cannabis

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Topics to cover

- 1) Does anything really need to change at work with cannabis legalization?
- 2) The new legal regime for cannabis
- 3) Drug testing
- 4) Medical marijuana
- 5) Questions?

Does anything really need to change at work?

Pre-legalization marijuana use in Canada

Health Canada survey (2013)

- “use of marijuana is common in Canada”
- Survey says that 11% of respondents 15 years and older used marijuana in the past year
 - 15-24 year-olds more likely to use than 25+ year olds
 - Men 2x more likely than women to use marijuana

Pre-legalization marijuana use in Canada

Marijuana isn't new, so what's going to change because it is legal?

- Will legalization increase usage rates or change usage patterns by Canadians?
 - TBD
- Employer safety and health concerns are increasing
 - Media reporting
 - Employer counsel's phones are ringing off the hook

Employer preparations ...

Possible outcomes to anticipate:

- New and amended drug and alcohol policies in workplaces
 - Canadian Center on Substance Abuse and Addiction survey: many employers presently lack policies
 - Rules on use and possession at work or during working hours
 - Enforcement actions? *Agrium Vanscoy (2015), 249 L.A.C. (4th) 185 (canine detection)*
 - Rules on employee use on personal time
 - Canadian military, Air Canada
 - Expanded drug testing?
- Education about drug use and safety
- What is happening in your workplaces?

The New Legal Regime for Cannabis in Canada



The New Legal Regime for Cannabis in Canada

- Bill C-45, The Cannabis Act, will come into force on October 17, 2018.
- The sale, use and possession of cannabis will be legal in Canada as of that date.

The New Legal Regime for Cannabis in Canada

- The *Cannabis Act* creates a legal framework for controlling the production, distribution, sale and possession of cannabis in Canada.
- The Act has several objectives:
 - Prevent youth from accessing cannabis;
 - Protect public health and safety through strict product safety and product quality requirements
 - Deter criminal activity by imposing serious penalties for individuals operating outside of the legal framework.
 - Reduce the burden on the criminal justice system regarding cannabis related offences.

Controlling Access

- As of October 17, 2018, adults in Canada will be able to legally:
 - possess up to 30 grams of legal cannabis (dried cannabis or oils (non-dried))
 - share up to 30 grams of legal cannabis with other adults
 - purchase dried or fresh cannabis and cannabis oil from a provincially-licensed retailer
 - grow up to 4 cannabis plants per residence for personal use (not in MB)
 - make cannabis products such as food and drinks at home as long as organic solvents are not used to create concentrated products

Criminal Penalties Under the Cannabis Act

Illegal distribution or sale of cannabis	Tickets for small amounts Up to 14 years in custody
Possession over the legal limit	Tickets for small amounts Up to 14 years in custody
Production of cannabis beyond personal cultivation limits or with combustible solvents	Tickets for small amounts Up to 14 years in custody
Taking cannabis across Canada's borders	Up to 14 years in custody
Giving or selling cannabis to a youth	Up to 14 years in custody
Using a youth to commit a cannabis-related offence	Up to 14 years in custody

Who is Responsible for Cannabis Regulation in Canada?

- Both federal and provincial/territorial governments are responsible for different aspects of the new system:
- **The Federal Government is responsible for:**
 - Setting strict requirements for producers who grow and manufacture cannabis
 - Setting industry-wide rules and standards

Who is Responsible for Cannabis Regulation in Canada?

- Provinces and territories are responsible for:
 - developing, implementing, maintaining and enforcing systems to oversee the distribution and sale of cannabis.
 - implementing their own safety measures

Cannabis for Medical Purposes

- The current regime for medical cannabis will continue to allow access to cannabis for people who have the authorization of their healthcare provider.

Impaired Driving

- Bill C-46 An Act to amend the Criminal Code
 - Part 1 came into force on June 21, 2018
 - Amends the provisions of the *Criminal Code* that deal with offences and procedures relating to drug-impaired driving
 - enact new criminal offences for driving with a blood drug concentration that is equal to or higher than the permitted concentration
 - Part II comes into force on December 18, 2018
 - authorizes police officers to use roadside oral fluid drug screeners to test impairment without first requiring the driver to undergo a drug recognition evaluation.

The Legal Framework in Manitoba



The Legal Framework in Manitoba

- The Provincial Government has created further restrictions and safety measures regarding cannabis use in Manitoba:
- *Safe and Responsible Retailing of Cannabis Act* (Liquor and Gaming Control Act and Manitoba Liquor and Lotteries Corporation Act Amended)
 - Affirms Liquor and Gaming Authority as regulating the cannabis industry in Manitoba
 - Affirms Manitoba Liquor and Lotteries managing the processing and distribution to authorized retailers
 - Private sector retailers operate retail locations.
 - All businesses that sell cannabis are required to be provincially licensed.

The Legal Framework in Manitoba

- The Act amends *The Liquor, Gaming, and Cannabis Control Act* to prohibit anyone under 19 from purchasing, possessing or consuming cannabis.
- The Act also amends *The Liquor, Gaming and Cannabis Control Act* to prohibit the cultivation of cannabis at home
- The penalties for offences under *The Liquor, Gaming and Cannabis Control Act* are increased.

The Legal Framework in Manitoba

- *Cannabis Harm Prevention Act:*
 - amends various acts to address health and safety issues that will arise when cannabis is legal

The Legal Framework in Manitoba

- *The Non-Smokers Health Protection and Vapour Products Act*: amends to prohibit smoking of cannabis in enclosed public places and indoor workplaces (in force)
- *Non Smokers Health Protection and Vapour Products Amendment Act*: amended to ban cannabis use in outdoor public places (not in force yet)

The Legal Framework in Manitoba

- *The Highway Traffic Act*: Creates restrictions on the transportation of cannabis in motorized vehicles (in force)
 - Prohibits consumption of cannabis in a motorized vehicle on a highway
 - Creates a 24 hour roadside suspension when an officer believes on reasonable grounds that a person is unable to operate a motor vehicle safely due to being under the influence of a drug
- *The Off-Road Vehicles Act*: Amended to create similar prohibitions on transportation and consumption for off-road vehicles as those added under *The Highway Traffic Act* (in force)
- *The Drivers and Vehicles Act*: amended to require registrar of motor vehicles to determine whether to suspend if person receives 24 hr roadside suspension

The Legal Framework in Manitoba

- *The Mental Health Act*: Cannabis listed as an intoxicant under the Act (not in force)
- *The Child Sexual Exploitation and Human Trafficking Act*: Cannabis listed as an intoxicant under the Act (not in force)
- *The Public Schools Act*: Cannabis added to list of products that are prohibited in public schools. (not in force)

The Legal Framework in Manitoba

- Bill 26, Impaired Driving Offences Act: amends The Drivers and Vehicles Act and The Highway Traffic Act
 - Includes new administrative licence suspensions and disqualifications for drug impaired driving (similar to penalties for over alcohol limit)
 - Introduces provincial sanctions for drivers who fail oral fluid drug screening devices and drivers that commit a new driving offence under the Criminal Code.

The Legal Framework in Manitoba

Pre-Set Cannabis Fines

Supplying Cannabis to a young person under 19	\$2,542
Growing non-medical cannabis in a residence in Manitoba	\$2,542
Smoking and vaping in provincial parks	\$672
Driver carrying cannabis in or on vehicle	\$237
Driver carrying in or on off-road vehicle	\$237
Failing drug screening tests as a novice driver	\$113
Failing drug test as a supervising driver	\$672

Legislation Surrounding Cannabis and the Workplace

- *S. 4(1) of The Workplace Health and Safety Act*
 - employers must “ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his workers.”
 - It is up to employers to determine appropriate conduct and policy procedures related to cannabis, much like they do with alcohol.
- *S. 5 (1) of The Act:*
 - Workers shall “take reasonable care to protect his safety and health and the safety and health of other persons who may be affected by his acts or omissions at work”
 - Employees remain under a duty to be safe at work and to protect the safety and health of other workers

SAFE WORK MANITOBA

- **Does the legalization of cannabis give employees the right to be impaired at work?**
- **NO**
 - Employers need to update their drug and alcohol policies to reflect their position on using, possessing or being impaired at work
 - if an employee uses for medical purposes or has an addiction, employer must accommodate up to undue hardship. Accommodation could mean moving them to a non-safety sensitive position or looking at alternative treatment.
- **What does legalization mean for the workplace?**
 - Impact is currently unknown
 - It should not have an effect on a workplace with a strong drug and alcohol policy in place.

Legislation Surrounding Cannabis and the Workplace

- S. 4.9(2) of WSHA *Operation of Mines Regulation*
 - Employer must take all reasonable steps to ensure that a worker does not work at a mine while under the influence of a drug that impairs or could impair their ability to work safely
 - Must take all reasonable steps to ensure that a worker does not bring drugs to a mine or consume or keep drugs at a mine
 - S. 4.9(4) A worker must not work at a mine while under the influence of alcohol or a drug that impairs or could impair the worker's ability to work safely
 - Must not bring drugs to a mine
 - S. 4.9(3) Exception for worker with a prescription, but they must give their employer evidence of their need to take the drug and a medical opinion concerning any possible impairment of their ability to work safely

Legislation Surrounding Cannabis and the Workplace

- *The Human Rights Code*
 - For employees that are legally authorized to use cannabis to treat a medical condition, employers must accommodate to the point of undue hardship.
 - Drug testing procedures must not violate *The Human Rights Code* (discrimination based on a disability)

Drug Testing

Factors affecting drug test results

Many factors affect drug test results for marijuana, including

- Type of test administered (urine test v. oral fluids etc.)
- How was the drug taken: inhaled? Ingested?
- Quantity used and frequency of use
- Body factors: metabolism, body fat etc.
- This is an area for expert evidence

What is in marijuana?

- 100+ cannabinoids in marijuana
 - delta-9-tetrahydrocannabinol (THC) which provides the “high”
 - Cannabidiol (CBD), does not provide the high, can block the effects of THC, and is reputed to have some therapeutic benefits
 - Impact of consumption depends on levels of THC and CBD in marijuana strain

Duration of impairing effects?

- Impairment can depend on THC v. CBD in marijuana strain
- <https://www.canada.ca/content/dam/hc-sc/documents/services/campaigns/27-16-1808-Factsheet-Health-Effects-eng-web.pdf>
 - Smoking: within minutes of smoking, can last up to 6 hours (or longer)
 - Ingesting: within 30 to 120 minutes, can last up to 12 hours

Types of drug tests and windows of detection of marijuana use

(According to Intrinsic Analytics Inc.)

- Urine: tests for marijuana metabolite (which is inactive)
 - Point of collection and laboratory confirmation
 - Metabolite detected within hours of use and for days or even weeks
 - Single use: 3 days
 - Moderate use: 5-7 days
 - Daily use: 10-15 days
 - Long term heavy use: 30+ days

Types of drug tests and windows of detection of marijuana use

- Oral fluids: Minutes to 48 hours
 - Point of collection and laboratory confirmation
- Blood: Minutes to 48 hours
- Hair: Weeks to months
- Nails: Weeks to months

Do Drug Tests Measure Impairment?

- Drug tests do not (currently) measure present impairment
 - Do not confirm amount of use or time of use
 - Evidence of past use
- But types of tests with smaller windows of detection will have a closer overlap with potential windows of impairment from the time of consumption
- Drug tests plus observational or other evidence may be relied on to suggest impairment

Common Drug Test Circumstances in the Workplace

- Random
- Pre-access/pre-employment
- Post incident/near miss
- Reasonable cause
- Testing as part of an accommodation

General Legal Principles Applicable to Drug Testing

- 1) Reasonableness = weighing/balancing of employer v. employee interests
 - Usually workplace safety v. employee privacy and dignity
 - Dangerousness of the work does not automatically justify testing
 - Rather, it triggers the balancing of interests analysis
 - See *Irving Pulp and Paper v. CEP*, 2013 SCC 34
- Reasonableness of drug testing considers:
 - Nature of the employer's interest
 - Impact on employees
 - Whether lesser intrusive means are available
- Employer has the onus to justify the privacy intrusion (even in a union policy grievance)

General Legal Principles Applicable to Drug Testing

2) Human Rights

- Drug testing (or other aspects of D&A policies) can arguably discriminate on the basis of disability (addiction) or perceived addiction
- Discriminatory testing must be justified under human rights analysis as a bona fide occupational requirement
- Employers have a duty to accommodate employees with additions to the point of undue hardship
 - Tri-partite duty involving the Union and Employee in accommodation process

Random Drug Testing

- Employees (typically safety sensitive) randomly selected to be tested without notice
- *Irving Pulp and Paper, 2013 SCC 34*
 - random alcohol testing, recognized as privacy invasive
 - to justify random testing, employer must establish a general problem with alcohol (or drugs) in the workplace (direct, cogent, non-anecdotal evidence)
 - Employer must first exhaust less intrusive measures to deal with the problem
 - Danger of the work alone has never justified unilaterally imposed random testing

Random Drug Testing

- Random testing is very litigious, employers have a significant onus
 - Suncor re-arbitration is pending
 - Toronto Transit Commission arbitration is pending in Ontario (interim injunction denied)
 - *Teck Coal*, 2018 CanLII 2386
 - *Teck Coal* (2015), 265 L.A.C. (4th) 1 (Alexander-Smith)

Pre-Access/Pre-Employment Drug Testing

- Negative drug test required to access a job site or as a condition of hiring
 - In hiring halls, unions are typically dealing with pre-access testing
 - Arbitral jurisdiction re: testing of proposed employees, and third party site access policies
- *Mechanical Contractors Assn' Sarnia v. U.A. Local 663 (Surdykowski)*
 - Applied the random testing approach from Irving Pulp & Paper
 - Pre-access testing not justified
 - Judicial review to the courts denied
- But see *BC Hydro, 2018 Carswell BC 1549*
 - Arbitrator found it was reasonable to require existing employees to undergo testing when seeking promotion/transfer to safety sensitive position
 - Positive test cannot automatically justify denial of transfer, but can be a “red flag” for investigation

Post Incident/Near Miss Drug Testing

- Testing done to investigate whether drugs contributed to a workplace accident or near miss
- Highly litigious type of testing
- *Weyerhaeuser v. CEP Local 447* (2006), 154 L.A.C. 3 (Sims) is a leading case

Post Incident/Near Miss Drug Testing

Hallmarks of unreasonable testing include:

- Testing being automatic instead of discretionary response to incident
- Testing in circumstances of minor property damage or personal injury
 - Conversely, testing easier to justify for significant property damage or personal injury
- Testing without a fulsome employer investigation into cause of incident
- Testing when a non-drug related cause is reasonably apparent

Reasonable Cause Testing

- Testing because of indicia of impairment or evidence of drug use
 - Smell of marijuana
 - Observed use
 - Appearance or behavior suggesting impairment, including
 - Red eyes
 - Uncoordinated
 - Inarticulate
 - Be cautious of the “unreasonableness” of many employer “reasonable grounds checklists”

Drug Testing as part of an Accommodation

Unannounced drug tests may be part of a post-treatment return to work accommodation plan

- Rely on medical practitioner recommendations regarding drug testing as part of a treatment plan

Parting Words of Advice on Drug Testing

- Drug tests DO NOT establish impairment
 - Consider the utility served by the drug test, the impact on privacy
 - Consider other means available to address safety concern
- Positive tests DO NOT, without more, provide just cause for discipline
- Results of drug tests performed without cause or unreasonably cannot be used by the employer
- Obtain expert advice

Medical Marijuana



(photo source: <https://d3atagt0rnqk7k.cloudfront.net/wp-content/uploads/2017/06/28113548/canada-medical-marijuana-guidelines-1280x800.jpg>)

Medical Marijuana

- Cannabis for medical purposes CURRENTLY legal if you are:
 - authorized by a health professional; and
 - registered with a licensed producer or Health Canada.
- Access to cannabis for medical purposes will CONTINUE after the Cannabis Act comes into force.
- Under the new *Cannabis Act*, individuals will still be able to:
 - purchase cannabis directly from a federally licensed producer;
 - register to produce a limited amount of cannabis for their own medical purposes; or
 - designate someone to produce it for them.

Health Effects of Cannabis

- Lack of information/research available regarding the health effects of cannabis
- Health Canada recognizes there is “some evidence of potential therapeutic uses for cannabis”

Health Canada is encouraging research with the aim of developing cannabis-based products for market authorization as drugs.

Health Effects of Cannabis

- Health Canada recognizes both short-term and long-term health effects, including an increased risk of addiction
- Effects can be felt within seconds to minutes of smoking, vaporizing or dabbing cannabis
 - These effects can last up to 24 hours
- If you eat or drink cannabis, these effects can occur within 30 minutes to 2 hours
 - These effects can last up to 24 hours

Employer Obligations

- Section 4(1) of *The Workplace Safety and Health Act*: employers must “ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his workers.”
- *The Human Rights Code*: duty to accommodate
- These statutory obligations may conflict in relation to medical marijuana

Employee Obligations

- Section 5 of *The Workplace Safety and Health Act*: employees while at work must “take reasonable care to protect his safety and health and the safety and health of other persons who may be affected by his acts or omissions at work.”
- No entitlement to be impaired at work
- Duty of disclosure
- Duty to facilitate the accommodation process

Employer's Duty to Accommodate:

Calgary (City) v Canadian Union of Public Employees (Cupe 37), 2015 CanLII 61756

- Grievor worked as an equipment operator for the City
- Medical marijuana prescription/legal authorization
- Removed from safety-sensitive position
- After investigation, given 2 options:
 1. Continue in his accommodated non-safety-sensitive position; or
 2. Meet with the City's preferred doctor for substance dependency treatment

Employer's Duty to Accommodate:

Calgary (City) v Canadian Union of Public Employees (Cupe 37), 2015 CanLII 61756

- Arbitrator concluded that the City's investigation was "flawed" and lacked "fairness and reasonableness throughout the process"
- City had not established that the grievor:
 - had a marijuana dependency,
 - was impaired while on duty, or
 - posed a safety risk
- Reinstated, with compensation for lost wages and overtime opportunities, subject to certain conditions

Employee's Duty to Facilitate:

French v. Selkin Logging, 2015 BCHRT 101

- Employee smoking marijuana at work for pain relief from cancer
- Terminated pursuant to zero-tolerance policy
- Human Rights Tribunal:
 - With legal authorization, medical marijuana treated like any other medication
 - Workplace safety and health legislation still applies
 - Strict application of a zero-tolerance policy, without consideration of accommodation, may offend human rights legislation

Employee's Duty to Facilitate:

French v. Selkin Logging, 2015 BCHRT 101

- French:
 - Had no legal authorization; and
 - Did not inform his Employer
- Duty to accommodate is not a stand-alone obligation upon an Employer
- French breached duty to facilitate accommodation process
- Smoking of marijuana at work, without legal and medical authorization, was not a reasonable accommodation and amounted to undue hardship.

Employer's Entitlement to Information:

Mosaic Potash Colonsay ULC and USW, Local 7656, Re, 2016 CarswellSask 209

- Preliminary decision: pre-hearing production request for employee's medical records.
- The grievor was a journeyman welder at the employer's potash mine
- Prescription and legal authorization for medical marijuana
- Grievor given two options:
 1. Explore other treatment options; or
 2. Unapproved, unpaid LOA

Employer's Entitlement to Information:

Mosaic Potash Colonsay ULC and USW, Local 7656, Re, 2016 CarswellSask 209

- Discrimination Grievance
- Employer: duty to accommodate met by opportunity to explore other treatment options
- Union ordered to produce the grievor's medical records pertaining to his *treatment plans and recommendations*, but not his complete medical records
- Records arguably relevant to:
 - Alternative treatment options; and
 - Whether grievor impaired at work

Inability to Test for Impairment = Undue Hardship:

International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard), Re, 2018 CarswellNfld 198

- Employer had a duty to accommodate employee's medical marijuana use on individualized basis
- Expert evidence established:
 - “[T]here is currently no effective or practical means to accurately measure impairment in the workplace from evening cannabis use”
- Conclusion: Undue hardship due to inability to quantify and manage the risk of harm associated with impairment from the marijuana
- Note that this was an “all-or-nothing” case

A Case Similar to *Lower Churchill* Yet to be Heard

- 'I feel betrayed by my company': TTC subway operator barred while using medicinal cannabis

(<https://www.cbc.ca/news/canada/toronto/medical-marijuana-ttc-subway-driver-opioids-pain-1.4827525>)



Want more info?

Consider registering for the MFL Health & Safety Conference, November 13 & 14, 2018

- <http://mfl.ca/node/1844>

Questions???



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Thank You