

Preparing for the legalization of recreational cannabis in Canada: What employers should know

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After a number of stops and starts, the recreational use of cannabis will be legal in Canada on October 17, 2018. On that date, the federal government's *Cannabis Act* comes into force, ushering in a new regulatory model for the possession and use of certain types of cannabis. At the same time, provincial governments will enact their own provincial cannabis statutes, such as Ontario's *Cannabis Act*.

The approaching legalization of the recreational use of cannabis in Canada brings with it a new era for employers across Canada, who will now have to deal with the potential impact of this legal change on their workplaces. The following sets out some of the most important facts about legalized recreational cannabis which employers should know, and then lists some best practices to start a proactive and effective management of the issues that may arise from such legalization.

Facts to know

- For individuals under 18 years of age, it is still illegal to possess, buy, use, grow or make cannabis products.
- For individuals 18 years of age or older, possession is limited to up to 30 grams of dried cannabis.
- The distribution and sale of cannabis is strictly regulated, both under the federal and provincial legislation.
- Only cannabis sold, produced or distributed by persons permitted to do so under the federal and provincial legislation is "legal."
- Not all cannabis is legal. Cannabis edible products and concentrates will not be legal for

sale until approximately one year after the *Cannabis Act* has come into force on October 17, 2018.

- The new laws do not affect medical use of cannabis, which was already legal.
- The use and consumption of recreational cannabis is limited to certain locations. The new Ontario provincial government, for example, has introduced legislation that would allow the use of recreational cannabis only in private residences, certain outdoor public spaces, designated guest rooms in hotels, residential vehicles and boats, and certain controlled areas in retirement homes and hospices. These locations DO NOT include enclosed workplaces within the meaning of the *Smoke Free Ontario Act, 2017*.
- Driving while under the influence of cannabis remains illegal. Police officers will be authorized to use oral fluid screening devices as roadside tests. Commercial drivers will not be allowed to have ANY cannabis in their system. While it could be challenged in court, Canada's federal justice minister has approved the Draeger Drug Test for roadside impairment tests. This test uses a saliva swab to test for THC, the main psychoactive ingredient in cannabis, for a period of six hours following use.

Best practice checklist for employers

In view of these facts, how should employers react to the challenges that legalized recreational cannabis use may pose? The following are some best practices:

1. Build on existing policies

Even if recreational cannabis use is now legal, it can be addressed in a manner consistent with how employers have addressed drug and alcohol use up to now.

2. Know the provincial cannabis legislation and guidelines that apply to the provinces in which you operate

Each province will be enacting, or has enacted, provincial cannabis legislation in conjunction with the federal *Cannabis Act*. While there will be many similarities amongst these provincial statutes, it is important for employers to know what these pieces of legislation say and how they apply specifically in the context of workplaces.

This knowledge will also serve employers in knowing when prohibitions under the statutes (e.g., related to age or amount of cannabis being used) are crossed by employees.

3. Supervise and manage as usual

Occupational health and safety legislation still requires employers to ensure a workplace that is safe for employees, contractors and visitors.

The legalization of recreational cannabis is not a licence for impairment or inappropriate conduct and behaviour in the workplace. Just as your organization does not need to tolerate alcohol or smoking in the workplace, it does not need to tolerate

- any recreational cannabis use (which in fact remains illegal in the workplace!);

- impaired employees or customers (subject to disability considerations); or
- cannabis or cannabis paraphernalia.

In the context, it is important for supervisors and managers to manage, as they have in the past, poor behaviour which may be or is the result of cannabis use. Even if not criminal conduct, bad behaviour can still very well be disciplinable conduct in the workplace, up to and including termination of employment.

4. Review and revise your policies

With the new legislative regimes, both federal and provincial, employers should review their workplace policies to ensure they are adapted to address the changes brought by such regimes.

Strong and clear workplace policies may be your most effective tool to address cannabis in the workplace. Good policies will help set expectations, control workplace use of medical cannabis or recreational cannabis outside of the workplace, provide a basis for disciplining employees, and help your organization comply with its legal obligations, including with respect to occupational health and safety and human rights legislation.

The most important policies to review are:

- **the drug and alcohol policy**

Generally, recreational cannabis should be treated the same way you treat alcohol, and medicinal cannabis should be treated the same way you treat other medications which can cause impairment.

Establish clear rules that the use, possession and distribution of drugs are not permitted in the workplace, nor is drug paraphernalia or other drug-related equipment.

Consider putting in disclosure obligations in respect of employees who use cannabis or any other drug, and make clear for employees that while recreational cannabis may be legal outside the workplace, it is not permitted in the workplace.

Ensure that your drug and alcohol policy provides that the use of medications will be permitted, subject to the terms of the policy. Those terms should include mandatory disclosure to a supervisor of the use of any medications that may cause impairment, including cannabis. This is required as a full ban on medical cannabis may be offside human rights legislation. Employers may be required to accommodate employees who have a legitimate need to take impairment causing medications.

Decide if you want to impose 'dry periods' for the use of cannabis for employees in safety-sensitive positions. While this is a common rule in the aviation industry for pilots or in the trucking industry for drivers, it may be a bit trickier for other safety-sensitive positions as there exists some disagreement on how long impairment lasts as a result of cannabis use. Lastly, determine if your testing parameters and processes are comprehensive enough for what you need in respect of the use of any drug, including cannabis, by employees in safety-sensitive positions. Include drug and alcohol cut-off levels in your policy, so that employees know the testing standards which will be used by the company in the event of drug and alcohol testing.

- **the disability and accommodation policies**

Consider addressing how medical cannabis will be treated in the accommodation process, thereby distinguishing it from recreational cannabis use.

5. Train your supervisors and managers

One of the main challenges of recreational cannabis is the lack of clarity on a test which measures impairment accurately, like there exists with alcohol.

Therefore, it will be crucial for employers to train their supervisors and managers on the recognition of non-testing indicia of impairment, including criteria like smell, lack of clarity of thought, confusion, unsteadiness, etc. If there is one area where courts and tribunals will give deference to managers, it is on such evaluations, which are necessary and, in safety-sensitive workplaces, critical to ensure the health and safety of employees.

Employees must report to work ready and able to work and perform the duties of their position. Just like it is not permissible to show up to work drunk or intoxicated by alcohol, it is also not permitted to show up to work high or under the influence of drugs, whether legal or illegal.

6. Train your employees

There may be employees who view October 17, 2018 as the day when they can smoke and otherwise use cannabis anywhere and anytime without criminal or other penalty.

Employers should disabuse their employees of such beliefs, particularly their employees in safety-sensitive positions. They should also review new drug and alcohol policies with the employees.

7. Be much more vigilant in the accommodations process

The use of cannabis, both recreationally and medically, may well lead to a blurring of the lines between the two uses.

If cannabis is being prescribed by a physician, you are entitled to request further information from the employee and/or the physician to understand whether such prescription will cause impairment, how it must be taken, and if there are alternatives that will not cause impairment or will minimize impairment. It will be critical for employers to ask the right questions if employees say they are using cannabis for medical purposes. For example:

- Self-prescribed cannabis is not medical cannabis. It is recreational cannabis not permitted in the workplace. Only a medical note from a physician justifies medical cannabis.
- Question and follow up with the employee's physician on whether cannabis is the only treatment or whether there is another type of treatment which will not impact the employee, including the use of non-hallucinogenic forms of cannabis or simply other non-cannabis drugs.

8. Restrict use of cannabis for employees who travel

While recreational cannabis use will be legal in Canada, it remains illegal in other countries, including the United States.

If employers have executives or other key employees (e.g., technicians, salespersons) who travel to the United States or other countries for work, they should consider including rules that such employees cannot at any time consume cannabis. Immigration officers have a wide latitude in respect of questions they can ask travellers and travellers have a legal obligation to respond truthfully.

It is likely that at least for some time in the future following October 17, 2018, U.S. immigration officials may ask about a traveller's use of cannabis and they have the discretion to refuse entry to individuals who have used or, even worse, are travelling with recreational cannabis.

Further information

For further information on cannabis legalization in Canada, and its implications for the workplace, please refer to the Employment & Labour group's webinars, which can be accessed through [this page](#).