

Workplace Law Bulletin

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Medical Marijuana in the Workplace: Employer Rights “Up in Smoke”?

By Lorenzo Lisi

Employers in Canada understand that they must maintain a safe work environment for their employees. They also understand that when it comes to accommodating employees with disabilities, they must do so to the point of undue hardship. This obligation does not change if the disability involves the use of medical marijuana.

Given this fact, the approach to the use of medical marijuana in the workplace really shouldn't be any different. The accommodation process must be undertaken as if it were any other accommodation issue. But the stigma and the “politics” of marijuana can make this process confusing from an employer's perspective. So here is a quick overview.

Current Regulatory Status

Marijuana is not an approved drug or medicine in Canada and its possession is prohibited by the *Controlled Drugs and Substances Act*. However, the *Marihuana for Medical Purposes Regulations* (“MMPR”) permit the use of marijuana for medical purposes. What this means is that the use of marijuana, where not medically supported, is still not permitted.

Marijuana on the job

The case law is and will continue to evolve, confirming that marijuana in the workplace can lead to contentious issues. These issues could involve elements of discipline and accommodation, particularly if the circumstance of “addiction” collides with misconduct on the job.

An example of this is the case of *Ontario Nurses' Association and London Health Science Centre (Grievance of BS)*. Here, the arbitrator had to address the interplay between accommodation and addiction (which is a disability). The employee in this case, a nurse, was found to have stolen narcotics for her own personal use, falsified records and attended work while impaired. She was terminated for her conduct. But the evidence led at the hearing confirmed that she suffered from a substance addiction. The analysis centered around whether or not her conduct was “causally connected” to her addiction, that is, did her disability lead to her conduct. Ultimately, the arbitrator found that it did. The result was that the employer was obligated to accommodate the disability without undue hardship.

Compare this to the case of *French v. Selkin Logging* (2015, British Columbia Human Rights Tribunal), where the employee claimed that Selkin Logging discriminated against him on the ground of physical disability by preventing him from taking time off to attend medical appointments and terminating his employment when it should have accommodated his marijuana use on the job. The tribunal accepted that the employee was disabled (which triggered the obligation to accommodate), but found that because his marijuana use was not authorized by a doctor and the employee had not informed the employer, the employer's zero tolerance policy was not unreasonable. In other words, the employee was under an obligation to ensure that the employer knew that marijuana use was medically supported. Since it was not, he couldn't claim using marijuana at work constituted a proper accommodation.

And finally, in *Calgary (City) v. Canadian Union of Public Employees (CUPE 37)* (2015, Alberta Grievance Arbitration Award), a City employee, who was prescribed marijuana for medical purposes, was removed from his position and placed in a non-safety sensitive position. Subsequently, the union filed a grievance demanding that the employee be returned to his previous position. The arbitration board found that the City had failed to prove that the employee had substance abuse issues or that he had been impaired while on duty. As a result, the employee was reinstated, but at its heart was the failure of the employer to make a proper assessment of the employee, his duties and the impact of the employee's marijuana use.

Given this state of evolution in the law, how do employers move forward? Here are some tips to assist.

Exhale – You Have Probably Dealt with This in Some Form Already

The specific issue may be new and each case may have unique elements, but the same fundamental principles apply to medical marijuana as to other issues of disability, discipline and accommodation.

Consider updating your policies on drug/alcohol use in the workplace – marijuana is still currently illegal. Even if it becomes legalized in the near future, its use while at work will be treated just like any other drug or alcohol substance.

Should an employee approach your organization about using medical marijuana, treat his or her disclosure confidentially, but ask the following questions:

1. Do they have proof of their prescription (i.e., purchase history from a licensed provider)?
2. When will they need to take the product?
3. How much of the product will they need to take?
4. Will they be taking it at work?
5. Where will they take it?
6. How will they take it?
7. How long do they anticipate needing to take it?

Remember, employers have rights too. Without getting into the specific diagnosis, obtain information and discuss the employee's needs. Tailor the accommodation to your workplace and the employee.

Consider Specific Accommodations

1. Are authorized users entitled to smoke in the workplace? If so, should a designated smoking area be provided? Could the employee ingest marijuana in another form, rather than smoking it, such as eating it or vaporizing it?
2. If an employee's use of medical marijuana at work poses any health and safety risks, consider other accommodations such as leaves of absence or modified duties

Employees have a responsibility to discuss their needs with the employer. Employees are part of the accommodation process! They also have a duty to participate. Asking them the right questions will help determine how your organization can address their use of medical marijuana without causing undue hardship on the organization as a whole.

The **Labour & Employment** and **Occupational Health & Safety** Groups at Aird & Berlis LLP can advise on developing medical marijuana policies or specific case accommodations. For more information, please contact **Lorenzo Lisi**.

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