



What's New in HR Law

Cannabis in the Ontario Workplace – An Update

August 17, 2018

BOTTOM LINE

The federal *Cannabis Act*, which received Royal Assent on June 21, 2018, makes recreational cannabis legal in Canada as of October 17, 2018. To prepare for this new reality, Ontario employers should take the time now to review, update and/or create new policies so all employees are clear about what is and isn't allowed when it comes to cannabis use in your workplace.

An employer is obligated to provide a healthy and safe workplace to all workers

Not surprisingly, many employers fear the cognitive and psychomotor effects cannabis use will present in the workplace. The effects of cannabis use are problematic given an employer is obligated to take every precaution reasonable in the circumstances to protect the health and safety of a worker.

Although there are no statutory provisions in Ontario's *Occupational Health and Safety Act* ("OHS") that specifically address substance use in the workplace, it is arguably incumbent on an employer to implement an appropriate policy to deal with cannabis (and other substance use) as part of its due diligence requirements.

An employer should therefore take every reasonable precaution to minimize the risks caused by workers who are impaired or potentially impaired at work by cannabis. Workers should also be adequately informed, instructed, and supervised on this policy.

Accommodating for medically-authorized cannabis use and addiction

Because of employers' occupational health and safety obligations, many are inclined to enforce a "zero-tolerance" policy for cannabis use.

However, employers must also consider the possibility that an employee's use of cannabis may be a protected human right, one that may trigger a duty to accommodate pursuant to the *Ontario Human Rights Code* (the "Code").

For almost two decades now, physicians have been permitted to authorize patients to use cannabis for a variety of therapeutic or medicinal purposes. Further, an addiction to cannabis is recognized as a protected disability under the *Code*.

While an employer may be required to accommodate an employee's cannabis use in either of these situations, the employer is not obligated to incur undue hardship in the process. Undue hardship includes imposing undue health and safety risks.

To assess the potential health and safety risks that cannabis use may present in a particular workplace, an employer is entitled to (and should) know what effect the employee's disability or authorized cannabis use may have on his or her ability to work safely and effectively. This includes information regarding the dosage and tetrahydrocannabinol ("THC") concentration level, as well as the timing and method of consumption.

Ontario legislation restricts cannabis use in the workplace

Even after recreational cannabis is legalized on October 17, 2018, an individual cannot consume recreational cannabis in the workplace.

The *Ontario Cannabis Act, 2017*, which is currently paused for further review, would prohibit individuals from consuming recreational cannabis in a workplace, within the meaning of *OHSA* as well as in other specified locations, such as a public place. The *OHSA's* definition of a "workplace" includes "any land, premises, location, or thing at, upon, in or near which a worker works."

As well, the *Smoke-Free Ontario Act, 2017*, which is also paused for further review, would prohibit individuals from smoking or holding lighted medical cannabis in a number of places, including in an "enclosed workplace" or "enclosed public place."

The *Smoke-Free Ontario Act, 2017* will also require an employer to:

- ensure compliance with the restrictions on smoking or holding lighted medical cannabis in enclosed spaces;
- provide notice to employees of the restrictions;
- post signs throughout the workplace;
- ensure that there are no ashtrays or similar equipment in the enclosed workplace or area (other than a vehicle in which the manufacturer has installed the ashtray); and

- ensure that employees or persons who do not comply with these requirements are removed from the space.

Corporations who do not adhere to these obligations may be fined up to \$100,000 for a first offence and up to \$300,000 for subsequent offences. Individuals may be fined up to \$1,000 for the first offence and up to \$5,000 for subsequent offences.

Until the new acts come into force, the existing *Smoke-Free Ontario Act* and *Electronic Cigarettes Act 2015* remain in effect for provincially-regulated workplaces. Federally-regulated workplaces are subject to the *Non-Smokers Health Act*.

Check the Box

There can be no doubt that the legalization of recreational cannabis will bring a slew of challenges for employers. To prepare for these challenges, employers are urged to review, revise or create new written drug use policies.

The objective of a drug (and alcohol policy) should be to educate your workers, including your supervisors and managers, and to clearly outline how the use of cannabis will be addressed and dealt with.

For example, the policy should:

- Identify the objective of the policy and acknowledge the obligations of both employer and employee under the applicable human rights legislation.
- Outline your clear expectations regarding fitness for duty, workplace use, possession, and sale of impairing substances. This includes what a worker is expected to do (e.g. report cannabis use to a supervisor immediately) and what a worker is prohibited from doing (e.g. attending work while impaired).
- Inform your employees of any investigations or justifiable drug testing that may occur and in what circumstances.
- Provide information on the support resources, such as access to an employee assistance program, and accommodation that are available to employees with a disability. This should include the contact information of your designated representative who will handle requests or needs for accommodation.
- Advise employees of the disciplinary consequences for violating the policy and workplace rules regarding substance use in the workplace

Need more information?

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