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# Quick Legal Updates

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## Is Your Workplace Ready for Legalized Marijuana

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# Is Your Workplace Ready for Legalized Marijuana?

With the legalization of marijuana fast approaching, it is more important than ever for employers to understand the legal implications of marijuana use surrounding the workplace. Employers will need to be prepared to balance their duty to maintain safe working environments with the duty to accommodate individuals treating medical disabilities through the use of medical marijuana.

## Duty to Create Safe Work Environment

Both provincial and federal occupational health and safety legislation impose a duty on employers to maintain a safe workplace – to prevent, where possible, accidents and injury in the workplace. Employers are well versed in the constantly increasing workplace safety standards and the corresponding severe fines and even imprisonment for breaches.

Now employers will be faced with finding solutions to the mass introduction of an impairing substance that could have serious consequences on the safety of a workplace. Making things worse, courts have for the most part found drug testing for marijuana to be unlawful. So just how does an employer balance safety and accommodation?

## Accommodating Marijuana Use

In the context of marijuana use, the duty to accommodate arises in two ways. First, the duty to accommodate drug dependency. Second, the duty to accommodate marijuana in the workplace when it is authorized by a medical practitioner for health treatment purposes, in the same way an employer would a prescription medication used to treat a disability. There is no legal duty to accommodate recreational use of marijuana that falls short of disabling drug dependence.

Employees are also responsible for certain aspects of the accommodation process. They must possess a valid medical marijuana license, be under direction from their physician to use marijuana for medical purposes and must comply with company policies regarding the disclosure and use of marijuana.

The *Airport Terminal Services* decision discussed below, provides employers with guidance on accommodating medical marijuana use.

## Discipline for Marijuana Use

The law on when the use of marijuana justifies discipline or termination remains unclear. However, the following decisions shed some light on the issue.

In ***FirstBus Canada Ltd. v.. A.T.U. Local 279*, [2007] CLAD No 166**, the Grievor was a bus driver who had received complaints that he was smoking marijuana on the job. The following day, the Grievor was told he would be required to take a urine drug test. He admitted to the drug use but refused to take the test stating that he was not going to pay for something he may have done months before. He was suspended for two weeks. At arbitration, it was found that a positive blood test would not have proven he was impaired on the job. Therefore, the discipline for failing to take a drug test, in a circumstance when the test would have been useless, was unreasonable and discipline was found not to be warranted.

In ***French v. Selkin Logging,* 2015 BCHRT 101**, the Complainant was employed in a safety-sensitive position operating heavy equipment in the logging industry. The employer had a zero tolerance policy for alcohol or drugs on the work site. The Complainant was a cancer survivor who self-medicated with

marijuana by smoking 6-8 joints per day but did not have medical authorization. After the employee was involved in a motor vehicle accident, the employer found marijuana in the company vehicle. The Complainant admitted that he had smoked on the job to treat his pain. When reminded of the company's zero tolerance policy, the employee stated that he would continue to use marijuana at work for pain management. When told that this would not be permitted, the Complainant quit and filed a human rights complaint.

The Tribunal found that the employer had a duty under occupational health and safety legislation to ensure that employees not operate heavy machinery while impaired by alcohol or drugs. This duty imposed an obligation on employees in safety sensitive positions to disclose their use of marijuana. In this case, the Complainant did not have legal or medical authorization to use marijuana and it would therefore constitute undue hardship for the employer to accommodate illegal drug use in the workplace. The Tribunal noted that a strict application of the employer's zero tolerance rule, without consideration of accommodation, may be *prima facie* discriminatory. However, the policy was found to be justifiable as the employer's safety obligations were a *bona fide* occupational requirement. Therefore the high risk nature of the job allowed for a higher safety standard than otherwise required by occupational health and safety regulations.

In ***University of Windsor and CUPE Local 1001***, two janitorial staff were terminated following an investigation into allegations that they had smoked marijuana during their shift. The Grievors were sitting in one of their cars while on break during a shift at the University. They were approached by campus police and the officer noticed a strong smell of freshly-smoked marijuana. The officer asked the Grievors if they had smoked marijuana, and if they had any marijuana on them. They initially denied, but once informed that the Police would have to be involved, they relented that they had smoked marijuana but denied that they smoked on campus.

The employer investigated and determined that the Grievors were not being honest, and in fact that they had been smoking marijuana on campus during their shift. The University decided to terminate the employees for just cause, relying on their possession and consumption of an illegal substance on campus, the safety sensitive nature of their position, their access to locked areas of the campus, their proximity to students, the fact that they were not honest about their conduct, and ultimately the employer's loss of trust in the Grievors. The last factor was crucial given that the janitorial staff work largely unsupervised.

Despite each Grievor having seventeen years' of service with the employer, with no notable disciplinary history, the Arbitrator ultimately agreed with the employer that the Grievors' lack of candour and their attempts to mislead the employer destroyed the trust necessary for them to continue working in an unsupervised position and their terminations were upheld.

The most recent decision on point was released on March 5, 2018. In ***Airport Terminal Services Canadian Company v. Unifor, Local 2002*, 2018 CanLII 34078**, the Grievor worked in a safety sensitive position as a ramp agent at an airport when he was involved in an accident. The Grievor suffered from a lower lumbar related workplace injury caused by excessive twisting and turning, as well as from a sports-related knee injury. He was prescribed medicinal marijuana for three years and his prescription at the time was for five grams per day. So, when he underwent a drug test following the accident, he tested positive for marijuana and was subsequently terminated.

The Arbitrator found that based on established jurisprudence the drug test which indicated that there were THC antibodies in the Grievor's urine did not support a finding that the Grievor was impaired on the day of the incident.

After also finding that the company failed to conduct a proper review of the medical information relating to the Grievor's medicinal marijuana use, the Arbitrator went on to explain why the company's drug policy was offside. The following excerpt is useful to employers as a guideline with regards to their duty to accommodate and what may be required in workplace drug and alcohol policies moving forward:

> 52. The ATS Drug and Alcohol Policy does not contemplate the Employer's duty to accommodate a mental or physical health disability which would include the obligation to accommodate an employee who is authorized to use medicinal marijuana to treat a mental or physical health disability. The duty to accommodate, which includes the obligation to accommodate an employee authorized to use medicinal marijuana, would not necessarily oblige ATS to employ the Grievor on the air-side of their operations. A number of relevant factors and competing obligations, such as the Grievor's restrictions and limitations (if any), the daily and scheduled consumption of marijuana, the strain or strength of the marijuana, the safety sensitive nature of the workplace, as well as the Employer's obligation to maintain a safe workplace for all employees, would all play an important role in determining what, if any, accommodations could be made. The CHRA duty to accommodate does require the Employer to undergo an accommodations analysis which would include both the procedural and substantive duties. ATS management, including Mr. Rockbrune, were advised of the Grievor's medical authorization for marijuana on the day of the incident or very shortly thereafter. The Grievor also advised the MRO at the time of the MRO's review of his positive drug test. Once informed of this, ATS had both a procedural and substantive duty to attempt to accommodate the Grievor. The ATS Drug and Alcohol Policy contemplates the accommodation of an employee suffering from an addiction but does not, in its application, contemplate the Employer's duty to accommodate an individual who suffers from a physical ailment which requires the individual to take pain medication, which includes an authorization to take medicinal marijuana. For this reason, I find that the ATS Drug and Alcohol Policy does not comply with the CHRA.

The arbitrator also found that the policy prohibited the use of "unlawful" drugs, including for recreational use. However, the Arbitrator held that although marijuana is currently an illegal drug, the Grievor was consuming marijuana lawfully pursuant to a medicinal authorization. By using marijuana pursuant to a medical authorization and for medicinal purposes, the Grievor did not use an unlawful drug at or in connection to the workplace and was therefore not in violation of the drug policy.

The Arbitrator ordered the Grievor be reinstated but left the conditions of reinstatement to the parties, such conditions potentially including an analysis of the Grievor's restrictions and limitation and any objective medical evidence substantiating the restrictions and limitations, any workplace accommodations, issuing surrounding the dosage, strain/strength of any medicinally authorized marijuana, the schedule of consumption of any medicinally authorized marijuana, and back pay, if any.

**Take Away for Employers**

The most important take away is that termination for being impaired at work is not automatic, and each case has to be assessed on its own circumstances.

Employers will still have the duty to accommodate medically authorized marijuana use to the point of undue hardship. In fact, medical marijuana has been a reality in Canadian workplaces for some time now, and it has been dealt with like any other medication. Certain criteria need to be in place for an employee to be able to use marijuana as a medicine and still attend for work; such as a proper

prescription, and safeguards for any potential workplace hazards. The same holds true with regard to prescribed opioid painkillers, for example. Even though they are not being taken for recreational use, an employee impaired by prescription medication may not be allowed to work, and if they recklessly attend for work in a safety sensitive position, discipline could result in the right circumstances.

A challenge for employers will be how to ensure employees are fit to safely carry out their duties and not still impaired from off-duty or on-duty marijuana use, given that random drug testing is rarely lawful and, in any event, positive drug tests have consistently been given no weight by courts and tribunals. Perhaps technological advances will produce a drug test that is capable of measuring current levels of impairment.

From what we hear from clients, there is a sense from employees that they will be untouchable once recreational marijuana is legal. We disagree. With regards to recreational marijuana use, employers should treat and regulate its use in the workplace in a similar manner as alcohol. Alcohol is legal, but any employee who gets drunk at work is subject to being disciplined or terminated. The same outcome will always be possible for any employee who is impaired at work by any other drug, even if legal.

Employers can and should, even after legalization, implement workplace policies tailored to their specific workplace prohibiting employees from being or becoming impaired at work, particularly in safety sensitive positions. This is especially so given a recent Supreme Court of Canada decision, ***Stewart v. Elk Valley Coal Corporation*, 2017 SCC 30**, suggesting that termination for drug use may not be considered discriminatory when the reason for termination is breach of policy and not the employee's addiction. Employers may also be within their rights to revise scent policies to include the smell of marijuana smoke, given the strong and distinct smell which may affect other employees with scent allergies in the workplace.