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Legalization of Cannabis: A Guide for Employers

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With the legalization of recreational cannabis as of October 17, 2018, Canadian employers must be prepared to understand their rights and responsibilities vis-à-vis their employees.

Substance and Drug Use Policy

Employers are encouraged to adopt or amend their substance and drug use policies to conform to cannabis legalization.

First, employers' drug policies should clearly stipulate that they apply to cannabis use, notwithstanding its legalization.

Second, regardless of the particular rules employers wish to adopt, it is advisable to institute policies that are clear with regard to the behaviours that are forbidden and the consequences of violating the policies. These policies should also be applied in a consistent and uniform manner to every employee (subject, of course, to any duty to accommodate, as discussed below).

The implementation of cannabis use policies should be accompanied by training on the various issues surrounding cannabis and the workplace, particularly for managers who will have to apply these policies.

When Is Testing for Cannabis Use Permitted?

Subjecting an employee to a drug test is considered to be a violation of the employee's right to privacy. Testing employees for drug use is allowed only in specific circumstances. Therefore, unilateral random testing is justified only in safety-sensitive industries and workplaces or where there is evidence of a generalized problem with substance abuse, and only for employees who occupy safety-sensitive positions.

Beyond that, an employer may impose drug testing only in a safety-sensitive workplace and for an individual employee who occupies a safety-sensitive position in the following situations:

- There is reasonable cause to believe that the employee is impaired while on duty.
- The employee has been directly involved in a workplace accident or significant incident.
- The employee is returning to work after treatment for substance abuse.

Current drug testing is unable to accurately determine the extent of cannabis impairment. Although testing for cannabis use can detect the presence of THC in the blood, such tests do not necessarily show that an employee is or was impaired by using cannabis. Moreover, because THC can be detected in the blood several days after consumption, these tests cannot accurately determine the temporal aspect of impairment. We strongly recommend that employers seek legal advice before testing their employees for cannabis use.

Employers' Duty to Accommodate

Employers are required by law to accommodate an employee's disabilities up to the point of undue hardship. While employers are permitted to prohibit employees' recreational use of cannabis in the workplace, employers are required to accommodate employees who

use prescribed medical cannabis and employees who suffer from an addiction to cannabis where such disabilities do not affect their ability to perform their duties and do not affect workplace safety.

An employer's policy could provide that employees who need to use cannabis for medical purposes are required to inform their employer. The policy could also stipulate that employees with an addiction to cannabis are encouraged to inform their employer in a confidential manner, so both parties can work together to find a solution to accommodate the employee.

Employers are advised to seek legal advice regarding the appropriate measures to be adopted in respect of employees who use cannabis for medical purposes or who suffer from an addiction to cannabis.

Québec: Bill 157 to Restrict Cannabis Use in the Workplace

Québec's Bill 157, which enacted, among others, the *Cannabis Regulation Act (Act)*, provides regulations regarding the use and possession of cannabis in the workplace. Under the Act, employers have the option of regulating or entirely forbidding any form of cannabis use in the workplace by their personnel, regardless of the nature of the business they operate. The Act also prohibits the smoking of cannabis in any enclosed workplace. The Act more specifically prohibits anyone who takes care of or otherwise provides care to a minor, a senior or any person in a vulnerable situation from using cannabis during working hours. The exact scope of this prohibition is nebulous, but it may well apply to employees of schools, hospitals and pharmacies so as to prohibit them from using cannabis during their work shift, which would likely include coffee and/or lunch breaks.

The Act also modifies the *Act Respecting Occupational Health and Safety (AOHS)* to restrict employees to whom the AOHS applies from performing work when their condition, by reason of impairment by cannabis, represents a risk to their health, safety or physical well-being or to the health, safety or well-being of other people in or near the workplace. In addition, the AOHS creates a corresponding obligation for employers to ensure that their employees do not perform their work when their condition represents such a risk to health, safety and physical well-being. It is noteworthy that on a construction site, being impaired by cannabis is deemed to represent a risk to health, safety and physical well-being.

Ontario: Bill 36 and the *Occupational Health and Safety Act*

In Ontario, Bill 36 was passed on October 17, 2018, which amended the *Ontario Cannabis Act, 2017*, to become the *Cannabis Control Act, 2017*. Bill 36 provides that smoking or consuming cannabis is prohibited in enclosed workplaces.

The *Occupational Health and Safety Act (Ontario)* requires employers to ensure the safety and protection of their employees in the workplace. This means that the legalization of cannabis does not affect an employer's right to require employees to be free from impairment in the workplace.

It should be noted that the other provinces and territories of Canada can adopt their own rules regarding the use of cannabis in the workplace, and they may differ from the rules adopted in Québec and Ontario.

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