Non-medical Marijuana Use at Work

published 11/07/2017

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With the proposed Cannabis Act looking to legalize recreational marijuana in Canada in July of 2018, employers are wondering how the new legislation will affect their workplaces and how they can prepare for the potential multitude of issues that may in turn emerge as a result of this new legislation.

Once passed, the Cannabis Act will permit Canadians who are 18 years or older to: a) possess up to thirty (30) grams of cannabis; b) share up to thirty (30) grams of cannabis with other adults; c) purchase dried or fresh cannabis from a provincially licensed retailer; d) grow up to four (4) cannabis plants; and e) make cannabis-infused food and drinks.

Although the provisions of the Cannabis Act may be altered prior to July 2018, it is clear that employees across all types of industries will have access to marijuana, bringing with it concerns of how employers can appropriately address any potential risks and/or discipline should employees attend the workplace while under the influence of the drug.

Employers can be assured that once recreational use of marijuana is legalized, non-medical use of marijuana can be treated similarly to most employers' current drug and alcohol policies (see our article, "Medical Marijuana Use in the Workplace" for more information). Employers will still be able to prohibit the use of marijuana during work hours, and to further prohibit attendance at work while impaired or under the influence of recreational marijuana. Any violation of the employer's workplace policies in this regard could result in discipline, up to and including termination.

Policies

The case law continues to evolve in regard to marijuana use in the workplace, and will continue to evolve with the Cannabis Act coming into force in 2018. This will no doubt lead to

further contentious issues between employers and employees, including elements of discipline, accommodation, and various other workplace policies.

Employers are encouraged to place a high priority on making changes to workplace policies which set out procedures for dealing with marijuana use in the workplace prior to any problem arising. The updated drug and alcohol policies should make specific mention of how non-medical marijuana use will be addressed in the workplace, and should include the following aspects:

a. duty to disclose any use of marijuana in the workplace;
b. consequences of noncompliance, including appropriate progressive disciplinary procedures;
c. modifications to human rights and accommodation policies to specifically deal with issues relating to marijuana dependency;
d. establishing a framework for testing for impairment, including triggering circumstances and testing methods; and
e. proper training of management and supervisory staff on the application of all policies relating to medical and non-medical use of marijuana in the workplace.

Educating employees and management on the policy changes and how they are to be administered is also key. Further, to avoid restricting employment opportunities in a manner that contravenes The Code[1], employers need to ensure that any employment standards, policies or rules:

a. are rationally connected to the performance of the job;
b. are adopted in an honest and good faith belief that they are necessary to the fulfillment of a legitimate work-related purpose; and
c. are reasonably necessary to accomplish the legitimate work-related purpose[2].

Drug Testing

Currently, testing for marijuana use is difficult as there is no medical test that accurately or reliably indicates the level of a person's impairment due to marijuana use. Unlike alcohol, marijuana can be detected in the bloodstream days after ingestion, and levels of THC (the active ingredient in marijuana) do not necessarily correspond with levels of impairment. Further, the Supreme Court of Canada has stated that employers are required to balance their interest in drug testing to ensure a safe work environment with employee privacy interests.

Courts have held that completely random drug testing of an employee is not permitted, however, if an employer has reasonable cause to believe an employee is under the influence of marijuana, the employer can insist on that employee submitting to a drug test. As indicated earlier, it is in an employer's best interest to have strong drug and alcohol policies in place prior to the Cannabis Act coming into force that include reasonable cause expectations and the resulting procedures.

For example, whether a reasonable cause drug test is in order is entirely fact specific. The employer must show evidence of a reasonable belief that the employee had used marijuana. Such evidence would include physical evidence of the employee (bloodshot eyes, slowed reaction time) as well as situational evidence (smell of marijuana smoke, discarded marijuana paraphernalia near the incident scene). Outlining the expectations of reasonable belief to employees prior to the enactment of the Cannabis Act strengthens an employer's position if and when the time came to consider whether circumstances warrant requiring a drug test and/or implementing a form of discipline as a result of suspected impairment.

Canadian case law also recognizes that an employee's refusal or failure to undergo an alcohol or drug test in the circumstances described above may properly be viewed as a serious violation of an employer's drug and alcohol policy, and may itself be grounds for serious discipline.

Notwithstanding these restrictions, the Supreme Court confirmed there are instances where random testing policies may be allowed, such as in workplaces that are safety sensitive and where there is a demonstrated problem of ongoing drug use in the workplace. Post-incident testing is also typically permitted in cases where a workplace incident or a "near-miss" has occurred and evidence to suggest that impairment may have been a factor exists. In these instances, the infringement on the employee's privacy rights is outweighed by the "gain" an employer may receive with respect to safety.

Similar to alcohol, testing for marijuana use may also be justified as part of a rehabilitation or return to work program of an employee who works in a safety sensitive position and has shown a pattern of behaviour where use of marijuana is central to the problem.

In several cases, dismissal or discipline based solely on the testimony of witnesses present at the time, or the mere observing of marijuana use without corroborating physical evidence, has not been found to be compelling enough to satisfy arbitrators that the employer has established its case. The Supreme Court of Canada has stated that there is only one civil standard and in all cases, the evidence must be carefully scrutinized and must be sufficiently "clear, convincing and cogent" to establish the balance of probabilities test.

Be forewarned, however, that a refusal of a drug test or testing positive for marijuana use does not necessarily justify automatic termination of employment. The appropriate disciplinary action in these types of cases must be determined on a case by case basis, having regard to the relevant facts, as well as being cognisant of any just cause provisions of any applicable collective agreement or employment agreement between the parties.

Employers with strong workplace policies and procedures, which take into account Human Rights legislation, the current Access to Cannabis for Medical Purposes Regulations[3] and the proposed Cannabis Act, will be well-positioned to educate employees of their workplace responsibilities and expectations prior to the proposed Cannabis Act coming into force, and in

turn, heading off potential issues which may have otherwise occurred.

[1] The Human Rights Code (Manitoba), C.C.S.M. c. H175
[2] British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3
[3] Access to Cannabis for Medical Purposes Regulations, SOR/2016-230

Click here to read more: **Medical Marijuana Use in the Workplace**
