

The Cannabis Countdown is Over

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On October 17, 2018, the *Cannabis Act* legalized recreational cannabis in Canada. Under the new regime, each province is responsible for regulating the sale and distribution of recreational cannabis within its jurisdiction. Employers should be aware of how legalization and provincial regulation affects their workplaces and prepare for potential issues that may result.



The provisions of the *Cannabis Act* permits Canadians who are 18 years of age 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 per household for personal use; and
- e) make cannabis-infused food and drinks.

It is expected that the legal sale of cannabis-infused food and drinks will not come into effect nationally until 2019, as regulations are still being developed.

Manitoba Legislation

Provincially, Manitoba has passed two pieces of legislation - *The Cannabis Harm Prevention Act* and *The Safe and Responsible Retailing of Cannabis Act* - which regulates the sale and distribution of cannabis within the province. The sale of cannabis in Manitoba is restricted to individuals who are 19 years of age or older.

The Cannabis Harm Prevention Act amends several Acts to address health and safety concerns that are expected to result from the legalization of cannabis consumption. It is also intended to close any legislative gaps that may arise now that cannabis is no longer an illegal drug. The Acts that have been amended include: *The Highway Traffic Act*; *The Non-Smokers Health Protection Act*; and *The Public Schools Act*.

The Safe and Responsible Retailing of Cannabis Act amends *The Liquor and Gaming Control*

Act to set out the requirements for licensing cannabis stores and cannabis distributors in Manitoba. It also amends *The Manitoba Liquor and Lotteries Corporation Act* to regulate how the Manitoba Liquor and Lotteries Corporation acquires cannabis for resale at licensed stores. Pursuant to these amendments, private companies are also able to apply for retail cannabis licenses. Initially, the Province has approved four private companies and consortiums to sell cannabis in Manitoba.

Medical Cannabis

An employee's legal ability to use cannabis for medical purposes was confirmed by the Supreme Court of Canada in 2015. As of August 24, 2016, the *Access to Cannabis for Medical Purposes Regulations* (the "Regulations") replaced the *Marihuana for Medical Purposes Regulations* and established the current legal framework under which patients can obtain authorization to possess cannabis for medical purposes. The Regulations outline, *inter alia*:

- a) who may possess cannabis;
- b) limits on the amount of cannabis that may be possessed;
- c) the medical documentation required to qualify for cannabis use under the Regulations; and
- d) the information that must be contained in a prescription for medical cannabis.

The legalization of recreational cannabis has few effects on the administration of medical cannabis. It is important to note that the use of medical cannabis does not give employees a right to be impaired at work, particularly where their impairment may endanger their own safety or the safety of their co-workers. Employees who seek accommodation from their employer for the use of medical cannabis while working are still required to obtain a prescription. This has not changed from what was required of employees who used medical cannabis prior to legalization of the recreational use of cannabis.

Further, employers and employees still have an obligation under occupational health and safety legislation to maintain a safe working environment for all individuals in their workplace. In particular, employees in "safety sensitive" positions are required to inform their employers if they intend to use medical cannabis while on the job. In such circumstances, accommodation may be required.

Accommodation

Due to the application of *The Human Rights Code* (the "Code"), employers must be cognizant that some cannabis users may be entitled to legal protections, while other cannabis users may not. Specifically, employees prescribed cannabis for medical purposes and employees suffering from addiction may be entitled to accommodation.

Employers are required to accommodate employees “to the point of undue hardship”; however, it is important to remember that accommodation of employees does not mean that employers are required to permit impairment in the workplace. Rather, employers must balance the right of the employee to equal treatment with the rights of the employer to employ the best employee for the job and maintain a productive workplace. Accommodation can take many forms, and should be done on a fact-specific basis.

Addiction

As noted, employers are prohibited from discriminating against employees suffering from addiction because addiction is classified as a disability under the Code. This has not changed with the legalization of recreational cannabis. Employers are expected to continue to treat cannabis addiction in the same fashion as any other drug or alcohol addiction. Certain accommodations may be required to ensure compliance with the Code, such as providing the addicted employee time off to attend rehabilitation or treatment programs.

Employers may see an increase in the number of employees who claim addiction to cannabis now that it has been legalized. This should not alter the employer’s response. Employers should still inquire about the addiction and determine the best course of action for both the addicted employee and the employer.

Testing

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

Although Courts have generally held that random drug testing of an employee is not permitted, there are some instances where employers may be justified in testing employees for cannabis impairment. These situations are very fact-specific, and employers should exercise caution when determining whether to drug test an employee.

Policy

Employers are encouraged to update their current Drug and Alcohol Policies now that the *Cannabis Act* and the various provincial Acts which regulate recreational cannabis have come into force. Any changes made to Drug and Alcohol Policies should reflect the new legal status of recreational cannabis. Perhaps more importantly, employers that do not have Drug and Alcohol Policies currently in place are strongly advised to have such Policies drafted and implemented as soon as possible.

The implementation of Drug and Alcohol Policies, as well as the revision of current Drug and Alcohol Policies, must be properly communicated to all employees to ensure compliance. It is further recommended that employers provide continued education for both management and employees on the responsibilities and expectations of cannabis use in the workplace. This will help to ensure all staff are fully educated on the permitted and prohibited uses of cannabis in the workplace and help prevent issues from arising before they reach disciplinary levels.

Help

There has been a considerable amount of hype (and some hysteria) surrounding this issue in the last year; however, although employers can expect to encounter some challenges as a result of greater cannabis consumption following legalization, implementation and reasonable application of appropriate Policies should enable employers to deal with those challenges without undue difficulty. As always, the Labour & Employment Practice Group at TDS would be pleased to provide any assistance you might require, including with preparation of an updated Drug & Alcohol Policy.

Co-author Colton Hnatiuk has accepted an in-house legal counsel position at People Corporation, effective February 28, 2022. Anyone wishing to contact Colton should contact Tanya Comeault at tcomeault@tdslaw.com or by phone at (204) 934-2376 and she will be delighted to assist you.

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