

Recreational Cannabis is Legal! Now What?

Six Things An Employer Should Know... (and a checklist)

1. Just because it's legal doesn't mean recreational cannabis is permissible in the workplace.

The *Cannabis Act* comes into force today - October 17, 2018. Each provincial jurisdiction has its own legislation governing where cannabis may be consumed.

In Ontario, recent proposed amendments to legislation would allow the smoking of cannabis in any non-enclosed area of a workplace (*i.e.*, where workers may currently smoke or vape tobacco). Smoking or vaping cannabis in an "enclosed workplace" would be prohibited.

As a result, if an employer wishes to fully prohibit the consumption of cannabis at the workplace, while working or when representing the employer (*e.g.*, when wearing a company uniform, *etc.*), as a best practice the employer should clearly communicate that requirement to employees in a workplace policy.

2. Edible cannabis products will not be legal as of October 17, 2018.

The smoking or vaping of recreational cannabis is now legal in some locations. However, this does not extend to edible cannabis products which are not expected to become legal in Ontario until October, 2019.

3. There is no need to create a new set of protocols specifically for cannabis use.

It may be necessary to amend your drug and alcohol policy to address the use of legal recreational drugs, such as cannabis. Beyond that, as a general rule if you suspect a worker is under the influence of cannabis you should address the worker the way you would any other worker you think may be under the influence (*e.g.*, by a narcotic, alcohol, *etc.*).

4. An employer may be required to accommodate the use of medical cannabis.

Where cannabis use is for medical purposes, a worker must be accommodated to the point of undue hardship to the employer. Generally, this means to the point where consumption and related impairment renders the worker unable to perform the essential duties of any available workplace position or puts health and safety at risk.

5. An employer can implement drug and alcohol testing for a safety-sensitive position as a component of a broader policy to address drug and alcohol use in the workplace.

Reasonable cause, post-incident and return to work testing have all been upheld as permissible. This includes testing for cannabis use.

6. An employer can implement a scent-free policy to prohibit against a worker coming to work smelling of cannabis (or tobacco).

Even where there is no concern about workplace impairment, a worker attending at work smelling of cannabis can be a distraction and uncomfortable for other workers, customers and clients. To address this, an employer can implement a policy to address scents in the workplace, including the odour of cannabis.

A Checklist...

Consider the following best practices:

POLICY DEVELOPMENT

1. Prepare a written Drug and Alcohol Policy.
2. The Drug and Alcohol Policy should:
 - a. Prohibit a worker from working under the influence of illegal drugs, legal drugs (*i.e.*, cannabis), alcohol and medication.
 - b. Address the use and possession of drugs and alcohol in the workplace.
 - c. Require the disclosure of medication that may impair a worker's ability to appropriately and safely perform work.
 - d. Confirm accommodation may be provided where a worker has a substance use dependency or is required to use or possess an intoxicant in the workplace for medical reasons.
 - e. Advise that it may be necessary to obtain additional medical information to facilitate accommodation.
 - f. If testing is contemplated for a safety sensitive position, set out when and how testing will occur (*e.g.*, reasonable cause, post-incident or return to work), and what measures will be taken to protect privacy.
 - g. Address discipline for a violation of the Drug and Alcohol Policy.

TESTING

3. If the Drug and Alcohol Policy contemplates testing, identify a testing provider and confirm:
 - a. The steps the provider would like followed to implement testing.
 - b. The substances to be tested.
 - c. What constitutes a "positive" test with respect each substance and how this will be determined (*i.e.*, that the thresholds are supported by medical evidence).
 - d. How test results will be provided to the employer and the estimated timelines.

IMPLEMENTATION

4. Train supervisors on the Drug and Alcohol Policy including the obligation to report suspected impairment and how to address the worker.
5. Consider providing supervisors additional training on recognizing signs of impairment (internally or through a third-party provider).
6. Inform workers about the Drug and Alcohol Policy including the obligation to report and to whom.
7. Have each worker sign an Acknowledgment and Consent to comply with the Drug and Alcohol Policy (and a Consent to testing, if applicable).

COMPLIANCE

8. Ensure each new worker is trained on the Drug and Alcohol Policy and signs the Acknowledgment and Consent.
9. If a worker requests accommodation under the Drug and Alcohol Policy, determine whether accommodation is for a substance use dependency (which would not require continued use of the drug and/or alcohol) or a disability for which the drug is being used medically (e.g., medical cannabis). Engage in the appropriate accommodation process based on the underlying medical information.
10. Before imposing discipline for a violation of the Drug and Alcohol Policy, ensure any human rights and/or accommodation issue has been considered.
11. Revise the Drug and Alcohol Policy as necessary based on legislative changes, case law developments and the needs of the workplace.

For assistance preparing and implementing a drug and alcohol policy and protocols in your workplace, contact the employment and labour law experts at Sherrard Kuzz LLP.

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