



# Medical Marijuana in the Workplace

June 8, 2016

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# What we will cover

- Brief overview of medical marijuana laws
- Brief overview of the law of discrimination
- The duty to accommodate – what does it mean in practical terms?
  - Focus on accommodating medical marijuana under the *Ontario Human Rights Code* and *Occupational Health and Safety Act*
- Creating policies that address medical marijuana in the workplace

# Background on Medical Marijuana

- *Marihuana Medical Access Regulations*
  - Prior to 2014, obtain license from Health Canada
- *Marihuana for Medical Purposes Regulations*
  - Since 2014, doctors issue prescriptions
- Use of marijuana without valid prescription illegal under *Controlled Drugs and Substances Act*

# Fast Facts: Marijuana in the Workplace

- As of December 31, 2013:
  - Number of persons who held an Authorization to Possess Dried Marijuana in Canada: 37,884
- Number of Canadians authorized to use medical marijuana is expected to reach approximately 1% of Canadian population by 2024 – Health Canada
- 17.9 million workers in Canada with significant number in safety sensitive industries

# What Legislation Applies in Ontario?

- *Controlled Drugs and Substances Act*
- *Ontario Human Rights Code*
  - Protection extends to persons with disabilities; however does not permit impairment at work or endangerment to self or others
- *Occupational Health and Safety Act*
  - Employers must take every precaution reasonable in the circumstances for the protection of a worker
- NOT *Smoke-Free Ontario Act*
  - Prohibits smoking tobacco or holding lighted tobacco in an enclosed public space and enclosed workplaces
  - Still able to smoke in non-restricted areas

# Ontario Human Rights Code

- Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status and disability.

# Definition of “Disability”

- A person who has or has had, or is believed to have or have had:
- any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- a condition of mental impairment or a developmental disability,
- a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- a mental disorder, or
- an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*

# What is not a “Disability”?

- Broad definition of disability
- NOT every medical condition is a legal “disability”
- Finding commonplace, temporary illnesses as disabilities would have the effect of trivializing the Code’s protections
- Flu/strep throat *not a disability*
  - *Ouimette v Lily Cups Ltd.* (1990)
  - *Burgess v College of Massage Therapists* (2013)

# Every Employer's First Question:

- **Does the employee have a disability?**
- Request medical documentation
  - Reasonable in the circumstances
  - Respect confidentiality
  - Process to safely use, store or destroy

# Discrimination Exception

- It is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a ***bona fide occupational requirement***.
- For any practice to be considered a bona fide occupational requirement it must be established that ***accommodation*** of the needs of an individual or a class of individuals affected would impose ***undue hardship*** on the person who would have to accommodate those needs, considering health, safety and cost.

# What is a Bona Fide Occupational Requirement?

- Employer can justify discriminatory rules if they meet a three-part test:
  - 1) The employer has adopted the rule for a purpose that is rationally connected to the performance of the job;
  - 2) The employer adopted the particular rule in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
  - 3) The rule is reasonably necessary to accomplish that legitimate work-related purpose.

# Undue Hardship

- Subsection 17(2) prescribes three considerations:
  - 1) Cost;
  - 2) Outside sources of funding, if any; or
  - 3) Health and safety requirements.

# Health and Safety concerns

- Amount of undue hardship caused by safety risk is assessed by considering:
  - Severity of the consequences if the risk were to materialize
  - The probability of the risk materializing
  - The identity of the people who are exposed to the risk

## *French v. Selkin Logging (B.C.)*

- Employer was a logging contractor on First Nations Reserve with a zero tolerance drug and alcohol policy
- French struck moose while driving company car; marijuana found in car
- French was diagnosed with cancer and claimed he had a prescription to smoke medical marijuana
- French did not provide employer with medical documentation confirming his prescription to smoke medical marijuana
- Employer refused to accommodate French (safety-sensitive position) and dismissed him
- French brought discrimination claim
- Tribunal found no evidence that French had authorization to use marijuana for medical purposes and upheld the employer's zero tolerance drug and alcohol policy

# Every Employer's Second Question:

- **Does the employee have authorization to use medical marijuana?**
- Request medical documentation
  - Consistent with approach to other disabilities
  - Proportionality of what employer requests
  - Procedures to maintain confidentiality

## Every Employer's Third Question:

- **Is the employee in a safety-sensitive position/ Is sobriety/mental acuity a bona fide occupational requirement?**

# Accommodating Medical Marijuana

- Procedural
  - Actively seek information
  - Consider and explore options
- Substantive
  - Make modifications or provide accommodation to allow the employee to fully participate in the workplace (within and consistent with relevant restrictions)

# Duty to Accommodate

- Document, Document, Document
- Employer must:
  - Investigate accommodation options
  - Individually assess and manage each employee's unique circumstances
  - Have concrete evidence of undue hardship (not subjective impression)

# Employer Duties

- Accept request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- Obtain expert/specialist opinion or advice, where needed
- Take active role in canvassing accommodation options
- Keep records of accommodation request and actions taken to consider accommodation options
- Maintain confidentiality
- Limit requests for information
- Grant accommodation requests to the point of undue hardship
- Give substantive reasons supported by evidence if request is denied for the reason of undue hardship
- Bear the cost of any required medical documentation

# Employee Duties

- Advise employer of disability
- Make her needs known to the best of her ability
- Answer questions and provide information regarding restrictions and limitations
- Participate in discussions regarding possible accommodation
- Cooperate with any experts whose assistance may be required
- Meet agreed-upon performance and job standards once accommodation provided
- Work with employer on on-going basis to manage accommodation process
- Discuss disability (only) with individuals who need to know

## *Wilson v Transparent Glazing Systems Inc. (B.C.)*

- Wilson had licence to consume for relief of chronic back pain and migraine headaches
- Fax outlined concerns about Wilson's unprofessional behaviour (arguing with foreman and aggressive toward co-workers) and mentioned that supervisor believed medical marijuana was impairing his duties
- Dismissed and brought discrimination claim
- Tribunal found that employer did not meet the duty to accommodate by failing to inquire about the relationship between performance and medical marijuana

# Summary: Accommodating Medical Marijuana

- Does the worker have a disability?
- Does the worker have a valid prescription?
- Is employee in a safety-sensitive position (BFOR)?
- Can the employer accommodate the employee without undue hardship?
  - Fulfill procedural and substantive components of duty to accommodate, as required

# Occupational Health and Safety Act

# Obligations Under OHSA

- **Employers**
  - *Take every precaution reasonable in the circumstances to protect workers*
  - *Provide information, instruction and supervision to the workers*
- **Managers/Supervisors**
  - *Ensure a worker works safely*
  - *Advise a worker of existence of hazards*
  - *Take every precaution reasonable in the circumstances to protect workers*
- **Employees**
  - Work in compliance with the Act
  - Report any contravention of the Act
  - Can refuse unsafe work

# What is a Workplace?

- *OHSA - “workplace” means any land, premises, location or thing at, upon, in or near which a worker works*
- *Test: Is the worker being directed and paid to be there or to be near there? If the answer is “yes,” then it is a workplace under OHSA*

## ***Ivancicevic v Ontario (Customer Service and the Alcohol and Gaming Commission of Ontario)***

- Licences to Sell Liquor Regulation excludes individuals from possessing or using marijuana in licensed establishments
- Ivancicevic had Authorization to Possess (under old regime)
- He challenged legislation in order to smoke marijuana on uncovered patios that allow tobacco smoking
- Tribunal found through expert evidence that side stream marijuana smoke poses a risk to inhaling individuals on uncovered patios possibly leading to some level of impairment
- Valid basis to prohibit smoking marijuana at requested location

# Protecting Workers from Medical Marijuana

- Suggested control measures to reduce risk of passively inhaling marijuana smoke:
  - Have client/worker smoke outside workplace/ in designated area
  - Have client/worker stop smoking 60 minutes before work/visit
  - Use fans and open windows to dissipate smoke
  - Designate room in home care that is smoke-free
  - Rotate staff attending to client
  - Explore personal protective equipment options (respirators, air purifiers, etc.)

## *R v Smith (S.C.C.)*

- Individuals authorized to smoke medical marijuana can also use and possess derivatives (cannabis oil, fresh marijuana buds and leaves) in addition to dried marijuana.
- Licensed producers can produce these products (section 56 exemption)
- Discuss with client/doctor possibility of using marijuana derivatives instead of smoking marijuana

# Best Practices: Workers who are users

- Advise employer of required accommodation
- Provide relevant documentation
- Follow medical direction about potential impairment/avoid safety sensitive work
- Consume/smoke in appropriate location
- Avoid collateral/secondhand impact on coworkers/clients
- Flexibility on scheduling and duties

# Medical Marijuana in the Workplace Policy

# Basic Components:

- Define terms such as “impairment”, “intoxication”, and “under the influence” precisely enough in order to capture medical marijuana (and other prescription and non-prescription drugs)
- Set acceptable boundaries on use of prescription medication, including protocols for self-reporting
- Communicate willingness to accommodate
- Communicate the disciplinary consequences of policy breaches, including sharing or selling prescription medication

# Drug Testing: The Basics

- Drug testing is *prima facie* discriminatory
- Employer can justify discriminatory rules if they meet a three-part test:
  - 1) the employer has adopted the test for a purpose that is rationally connected to the performance of the job;
  - 2) The employer adopted the particular test in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
  - 3) The test is reasonably necessary to accomplish that legitimate work-related purpose.

# Drug Policy Limitations

- Limited to determining actual impairment of employee's ability to perform essential duties of job
- Testing that has no demonstrable relationship to job safety and performance has been found to violate Code
- “rational connection” required

## Before testing, ask:

1. Is there a rational connection between testing and job performance?
2. Is there an objective basis for believing the employee's behaviour (e.g. lateness, erratic behaviour) at work are related to impairment?
3. Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by the dependency will adversely affect the safety of co-workers or the public?

# Conducting Testing

- Conducted in a manner which protects the privacy and dignity of the employee being tested
- Third party: licensed physician, social worker, drug and alcohol abuse counsellor
- The result of the employee's test will be provided as soon as practicable to the employee
- Results disclosed only to persons who need to know

# What should employer do if it suspects employee is using marijuana in workplace?

- Determine whether use is medical and authorized
- Private meeting
- Approach concern as performance issue
- Raise possibility of providing accommodation, if needed
- Request medical documentation, when appropriate
- Explore accommodation options
- Document the meeting and investigation of options fully
- Set a time to meet again to review the employee's performance and accommodation measures

# What Should Employee Do If Unsafe Workplace due to Medical Marijuana?

- Discuss concern with supervisor
- Engage in discussion about options to reduce safety risk
- Refuse to perform work if working condition is unsafe and not rectified by employer
- Consult safety committee representatives as appropriate

# Take-Away Points

- Use and possession of marijuana is illegal without proper medical documentation
- If employee has a disability and proper medical documentation, medical marijuana is treated the same as any other prescription drug
- Impairment by medical marijuana (or any other prescription drug) is not protected or approved by the Human Rights Code or Occupational Health and Safety Act
- Employer must consider accommodation options and undue hardship (BFOR)
- Consider implementing a comprehensive drug policy that encompasses impairment by illegal and prescription drugs in the workplace, including medical marijuana
- Employer must protect other employees from risk of impairment due to colleague or clients use of medical marijuana
- Talk to your employer if you feel you are in an unsafe workplace due to a colleague or client's medical marijuana use



## QUESTIONS?

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