

CANNABIS IN THE WORKPLACE

27 June 2017

On April 13, Bill C-45 - An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, also known as the Cannabis Act - was introduced and read in the House of Commons. The Cannabis Act sets out, among other things, certain terms and conditions for legalizing and regulating the production and distribution of cannabis for medical and recreational use.

The adoption of the Cannabis Act could therefore result in the legalization of cannabis use under the terms set out in the Act, making the legal conditions of its use similar to that of other substances, such as alcohol. Like alcohol, cannabis is a substance that impairs the user's faculties. The legalization and regulation of its production, sale and use does not change the fact that this substance is a drug in the common sense, and we think that employers should continue to treat it as such.

Recreational use

Firstly, note that the foreseeable legalization of recreational cannabis use under the terms of the Cannabis Act does not modify the right that any employer has to prohibit its employees from using substances that can impair their functioning in the workplace, or to prohibit them from performing their work duties under the influence of those substances.

Indeed, cannabis use should be viewed in the same way as alcohol use in the workplace and be handled in a similar fashion. A vigilant employer should manage cannabis intoxication and an employee's presence at work under the influence of this substance when it is used solely for recreational purposes in the same way it manages alcohol intoxication.

Internal policies or regulations could be adopted or enforced to provide a specific framework for, or completely prohibit, the use of cannabis in the workplace and the

performance of work duties under the influence of cannabis when this use is solely for recreational purposes.

Violation of these policies, i.e., the use of cannabis in the workplace or an employee performing his or her work duties under the influence of cannabis, could be sanctioned by disciplinary measures. Once again, the employer could consider an approach similar to that taken for alcohol use.

However, note that unlike with alcohol use, there do not currently seem to be reliable technical means of detecting whether a person's faculties is impaired by cannabis use. Therefore, it will be up to the employer and its observations to determine whether an employee's judgment or other faculties seem to be impaired by cannabis use.

That being the case, there must be some nuance for medical, rather than recreational, cannabis use.

Medical use

Although Canadian legislation currently allows access to cannabis for medical use for certain individuals, it is possible that the adoption of the Cannabis Act will lead to an increase in cannabis use for medical purposes. Once again, medical use could result in two situations in the workplace: cannabis use at the workplace and the performance of work duties under the influence of cannabis.

It is possible that an employee will inform the employer that he or she must use cannabis in the workplace for medical reasons. If applicable, we consider it essential for the employee to first justify this need to the employer with medical proof for the existence of a relevant physical or psychological medical condition, given that one of the possible effects of cannabis use in the workplace is impairment of the user's faculties.

Only with medical proof confirming that the employee has a physical or psychological condition justifying medical cannabis use should the employer begin by asking questions. Does the employee's condition involve incapacitating, painful or disabling symptoms or problems? Could these symptoms be alleviated or treated with cannabis use? It has been found that some individuals with certain chronic illnesses or forms of cancer may benefit from the effects of cannabis.

In any case, the existence of a physical or psychological condition justifying the use of cannabis for medical purposes could be considered a disability within the meaning of the Charter of Human Rights and Freedoms.^[1]

As with any other ailment that can be associated with a disability, the employer may not discriminate on the sole basis of that disability and is obligated to accommodate the affected employee. This obligation, developed by the Supreme Court of Canada in a series of leading decisions, involves an independent review of each situation so that the employer can determine possible measures to accommodate the employee's disability without going beyond the threshold of undue hardship.

When it comes to cannabis use for medical purposes, the employer must fulfill its obligation to accommodate the employee just as for employees with other disabilities. Adjusting the employee's work station, modifying the employee's schedule or transferring the employee to a different department have been recognized as accommodation measures employers may implement.

One important characteristic of cannabis use is the resulting impairment of faculties, much like the impairment caused by other types of medications, such as opiates. We foresee this being a key factor in the employer's analysis of its duty to accommodate, given the employer's legal obligation to ensure the health and safety of its employees under the Act respecting occupational health and safety.^[2] This obligation will likely have a considerable effect on how this analysis is conducted and on the determination of the threshold of undue hardship. In addition, given their nature, some companies may be unable to accommodate an employee working with impaired faculties based on the employee's position or duties.

Lastly, it is possible for an employee to be dependent on cannabis, as with any other substance. Since substance dependency is also considered a disability under the Charter, the employer must conduct the same accommodation analysis in such a situation, up to the point of undue hardship. This analysis will be similar to that an employer must conduct in the case of alcohol intoxication or dependence on other drugs, and may include coming to a "last chance" agreement and being given the opportunity to undergo rehabilitation.

Finally, keep in mind that until the Cannabis Act is adopted and comes into effect, cannabis is a Schedule II drug under the Controlled Drugs and Substances Act^[3] and, therefore, its use remains illegal in Canada with the exception of medical use.

This is an important issue that will no doubt crop up again in the future.

[1] CQLR, c. C-12.

[2] CQLR, c. S-2.1.

[3] S.C. 1999, c. 19.

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