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Is a drug-free workplace a thing of the past?

Medical marijuana creates a buzz for employers

BY LISA BOLTON

MARIJUANA USE for recreational purposes is currently illegal in Canada. However, for the more than 40,000 Canadians who legally use the drug for medical purposes, obtaining it has recently become a lot easier. Effective April 1, 2014, medical marijuana users no longer require a license from Health Canada and can secure the drug from an authorized distributor with only a doctor's prescription. According to Health Canada, this change is likely to increase the number of medical marijuana users across the country to more than 450,000 in the next 10 years. For employers, this creates many new and challenging issues as marijuana use creeps further and further into the workplace.

Accommodating the user

When marijuana is used to treat a disabling medical condition such as epilepsy, chronic pain, or post-traumatic stress disorder, an employer has a duty under human rights legislation to accommodate the employee unless the accommodation would result in undue hardship for the employer. This means an employer must permit an employee to use marijuana during working hours if it is medically necessary to do so. However, an employer does not have to permit an employee to smoke marijuana while on the job or expose other workers to second-hand smoke. An employer may implement workplace rules regarding the use of medical marijuana so long as appropriate accommodation is provided to the employee. This may include requiring the employee to smoke in a designated area during scheduled breaks or meal periods, and restricting the employee from smoking while in uniform, in public view, in company vehicles, or in the vicinity of other workers or customers who may come into contact with the smoke.

Are there alternatives?

If there is a disability that requires the use of medical marijuana, an employer should not assume smoking the drug is the only option. To ensure both the employee and workplace are respected and served appropriately, an employer should explore suitable alternatives to smoking — such as ingesting marijuana in food. A modified work schedule or leave of absence during the period of treatment — depending on the frequency of administration, dosage and anticipated degree of impairment — may also be appropriate.

Impairment on the job

Accommodation does not mean allowing an employee to carry out his duties while impaired. Under Ontario's Occupational Health and Safety Act (OHSA), for example, an employer has an obligation to take every precaution reasonable in the circumstances to protect the health and safety of workers. This includes identifying hazards which may result from an employee working while under the influence of medical marijuana. The bottom line: an employer must carry out its health and safety due diligence at the same time it accommodates an employee requiring the use of medical marijuana in the workplace. In the case of a safety-sensitive position, this may mean considering whether the employee can be reassigned to a non-safety-sensitive position.

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No duty to disclose pot smoking

The obligation to accommodate is easy to identify if the employee discloses medical marijuana has been prescribed for a disabling medical condition. But what if the employee stays silent? There is no legal requirement for an employee to disclose the use of medical marijuana. However, an employee has a duty under the OHSA to report hazards in the workplace. As such, supervisors and managers should be alert to signs of possible impairment so steps can be taken to accommodate, if appropriate.

How employers can navigate this new territory

To help manage risk resulting from the anticipated increase in employee use of medical marijuana, employers should ensure their drug and alcohol policy is broad enough to address impairment not only from the use of illegal drugs, but also prescription medication such as marijuana. While there are many nuances to be addressed and tailored to the specific workplace, at a minimum the policy should:

- Prohibit an employee in a safety-sensitive position from working while impaired
- Require an employee to disclose information about any prescription drug that may impair his ability to perform work safely
- Set out a process for obtaining additional medical information to facilitate accommodation
- Ensure the employee (and union if applicable) participates in the accommodation process
- Identify restrictions on the use of medical marijuana in the workplace (such as where and when)
- Identify consequences in the event of a breach of the policy (such as discipline).

About the Author

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