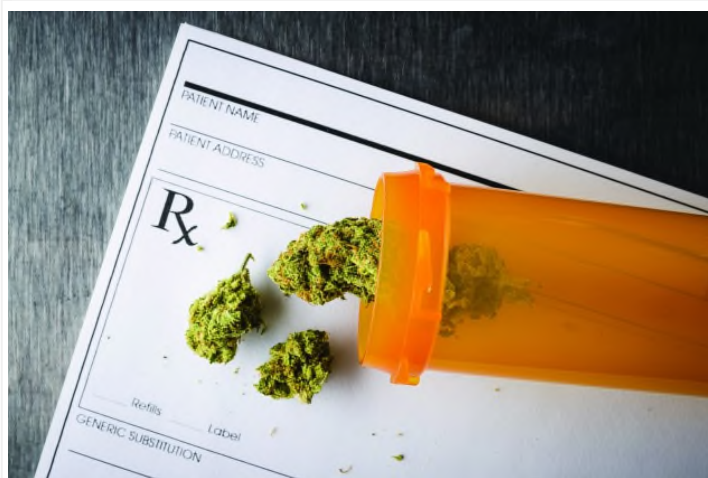


Weed and the workplace

Managing the legal and safety issues.

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by Andrew Ebejer



An employer accommodating medical marijuana use must carry out health and safety due diligence. PHOTO: FOTOLIA

During the 2015 federal election, Justin Trudeau promised marijuana would be legalized, but as we stand today, marijuana possession without a prescription is illegal.

Legal or not, the worry for employers remains the same: how to manage the use of marijuana in the workplace, particularly in manufacturing where employees operate heavy and automated

machinery, and impairment can have fatal consequences.

Relying on drug testing may seem appealing; however, testing is only permitted in limited circumstances and results are inconsistent. Other controls, such as policies and protocols, should be considered.

The primary purpose of testing is to indicate the presence and extent of an employee's impairment on the job. With rare exception, existing testing methods do not indicate current impairment. They do show a drug is present in the body, including what may be a trace amount from several days or weeks prior, that has no

impairing effect. Balanced against the potential privacy implications of compelling an employee to provide a personal sample (of blood, urine, saliva, breath) courts and arbitrators have taken a cautious approach to permitting workplace drug testing.

Consider these scenarios:

- Pre-employment and pre-access. In Ontario, courts and arbitrators have held that this type of testing is not permitted because it neither demonstrates impairment in the workplace (testing occurs before work), nor predicts future impairment.
- Random. Testing and privacy issues make random testing permissible only in very rare circumstances. In a unionized environment, an employer must demonstrate the workplace is dangerous and there's evidence of a drug problem. In a non-unionized workplace, Ontario courts have permitted random alcohol testing where: an employee works in a safety-sensitive position, and workplace supervision is non-existent or minimal.
- Post-incident and reasonable cause. If there is reasonable basis to suspect substance abuse may have been a factor in a workplace accident or "near miss", an employer may test the employees involved; and where actions suggest impairment (slurred speech and/or the smell of marijuana). Testing in both of these contexts is generally permissible provided the workplace has appropriate policies in place identifying the circumstances in which testing may occur.
- Return to work. Following treatment for drug dependency, such testing is typically part of a return to work program or a condition of a last chance agreement stipulating that a positive test will result in termination.

Safety precautions

When marijuana is used to treat a 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 and during working hours if it's medically necessary to do so, unless the accommodation would result in undue hardship for the employer.

However, an employer may still implement workplace rules regarding the use of medical marijuana. This may include exploring alternatives such as ingesting it or smoking in a designated area during scheduled breaks or meal periods; and restricting the employee from smoking while in uniform, in public view, in a company vehicle or in the vicinity of others who may come into contact with the smoke.

Under Ontario's Occupational Health and Safety Act (OHSA) an employer has an obligation to take every reasonable precaution to protect the health and safety of workers. This includes identifying hazards that may result from an employee working while under the influence of medical marijuana. A safety-sensitive position may mean re-assigning the employee to a non-safety-sensitive position.

A drug and alcohol policy must be broad enough to cover impairment from the use of illegal, prescription and legal recreational drugs. At minimum it should:

- Prohibit an employee in a safety-sensitive position from working while impaired.
- Require an employee to disclose information about any drug use that may impair his or her ability to perform work safely.
- Set out a process to obtain information regarding drug use in a way that respects privacy and encourages compliance.
- 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 marijuana in the workplace.
- Identify consequences in the event of a breach of the policy.

Having a policy puts employers in a better position to manage risks resulting from an anticipated increase in employee use of marijuana, whether it's for medical or recreational reasons.

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