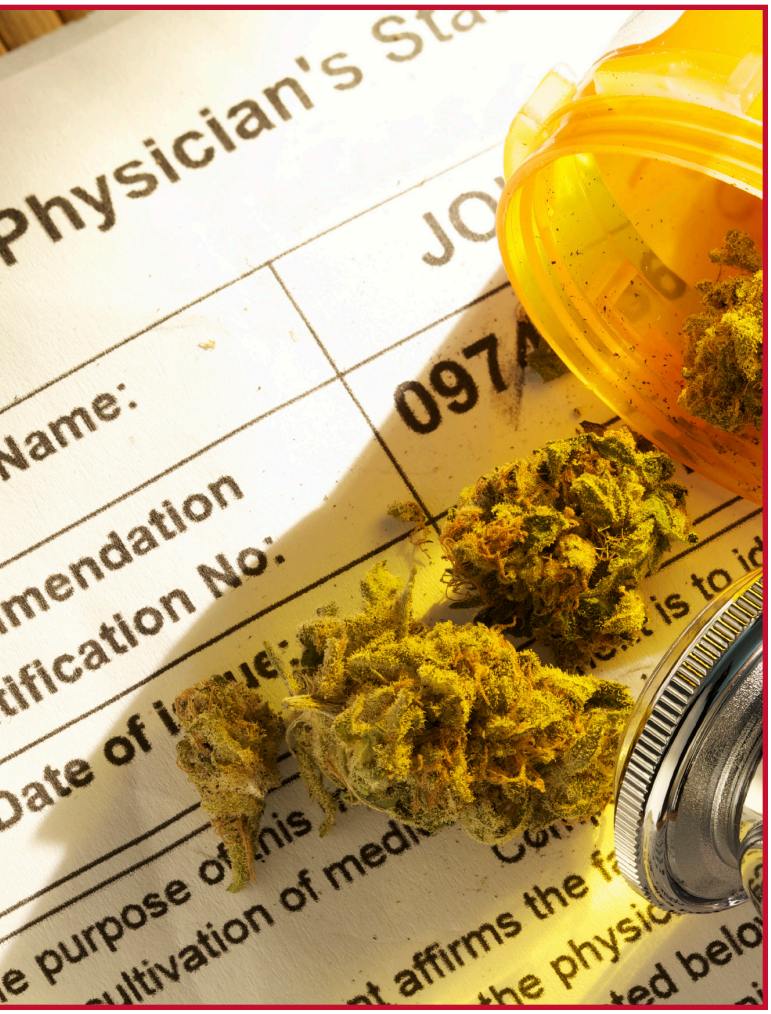
MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers



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.

Is a Drug-Free Workplace a Thing of the Past?

Medical Marijuana Creates a Buzz for Employers

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.

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Impairment on the job

Accommodation does not mean allowing an employee to carry out his or her duties while impaired. Under Ontario's *Occupational Health and Safety Act* ("OHSA") 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. 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 or her 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 (*e.g.*, where and when)
- Identify consequences in the event of a breach of the policy (*i.e.*, discipline)

To learn more and for assistance addressing drug and alcohol issues in your workplace, contact a member of Sherrard Kuzz LLP.

Injuries Related to Mental Stress in the Workplace – *Insurance Anyone?*

It is easy to think of workers' compensation as being limited to "accidents". That is the common vernacular most people relate to this system which provides benefits to employees injured on the job. However, for the past several years harassment, bullying and workplace stress have come to be recognized as legitimate occupational health and safety hazards, with an impact on the ability to work as real as a broken foot or slipped disc. The questions we are often asked by employers are: *What protection is in place for the employee who cannot work due to a mental disorder resulting from events in the workplace? Can that employee recover workers' compensation benefits, or must they sue their employer and/or co-worker? What is better for employers?*

To understand the issue, it is important to go back in time over a century to the beginning of Canadian law regarding workers' compensation.

The purpose of workers' compensation

Workers' compensation is a compulsory, no-fault insurance mechanism administered by the state. Often referred to as an "historic trade-off", the basic framework of a workers' compensation program is that a worker loses the right to sue his or her employer for damages resulting from a workplace injury, and in exchange receives benefits from a system that does not consider the fault of the employer or its ability to pay. While an employer is required to contribute premiums to the mandatory insurance scheme, it gains insulation from potentially crippling liability.

What protection is in place for the employee who cannot work due to a mental disorder resulting from events in the workplace? Can that employee recover workers' compensation benefits, or must they sue their employer and/or co-worker? What is better for employers?

An employee's right to sue – what's the fuss?

The workers' compensation regime should occupy the space related to workplace injury resulting in disability. It should not be open to an employee whose claim fits under the workers' compensation scheme to instead choose to sue his or her employer for damages, or launch a grievance, simply because the employee has been denied entitlement under the scheme or prefers a wider range of remedies.

This was aptly illustrated by the British Columbia Court of Appeal in the 2012 decision *Downs Construction Limited v. British Columbia (Worker's Compensation Appeal Tribunal)*. A female employee alleged she had suffered stress-related injuries as a result of the conduct of a male co-worker. The employee's claim for compensation was denied on the basis the event giving rise to the

injury was not *unexpected* (a legal requirement at the time of the events). She sued her co-worker and employer. The employer asserted a court action was barred as a result of the historical trade-off.

The Workers' Compensation Appeals Tribunal found that the factual circumstances were connected to the workplace; however, since the employee was not successful in obtaining benefits under the insurance scheme there was no bar to her right to sue. On judicial review it was reinforced that the employee was able to sue her co-worker or employer because she hadn't qualified for workers' compensation benefits.

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The British Columbia Court of Appeal disagreed with the lower courts, reinforcing the concept that a worker gives up the right to sue the employer for injuries sustained in the workplace in exchange for the no-fault compensation system. According to the Court of Appeal, the determination whether an injury arises in the context of employment is distinct from whether an employee's claim is denied due to a failure to establish a required element for compensation (in this case, that the injury was not sudden and unexpected). In short, if an injury could be compensable under a workers' compensation scheme but fails to make out the requisite requirements, the employee is not entitled to sue separately in court or bring a grievance against his or her employer.

Ongoing developments

The events underlying the *Downs* case occurred prior to amendments to the British Columbia legislation. That act was amended in 2012 to loosen the requirements under which an employee can claim entitlement to benefits. A traumatic incident no longer needs to be unexpected and sudden. Rather the worker need only prove the mental disorder was a reaction to one or more traumatic events in the workplace, or was predominantly caused by a significant work-related stressor which may include bullying, harassment, or a combination thereof.

That said, there are many provincial regimes that still require a sudden and unexpected work-related trauma. In a recent Ontario decision the court held that the "sudden and unexpected" requirement violates the section 15 equality provision under the *Canadian Charter of Rights and Freedoms* because it creates a more difficult burden to claim benefits for mental illness as compared to physical disability. In this case, a long-standing employee (nurse) was subject to abuse by a co-worker, including yelling and bullying in front of colleagues and patients. The employee sought medical and psychiatric treatment and was diagnosed with a mental illness as a result of the workplace incidents. Her claim for compensation was denied on the basis the illness was not the result of an acute reaction to a sudden and unexpected traumatic event. The Workplace Safety and Insurance Board held that the requirement of suddenness and unexpectedness could not be justified. Although this decision (which may still be judicially reviewed) is not binding on other tribunals, it will be interesting to follow its impact on the cases that follow.

While recent trends suggest a growing number of employees seeking workers' compensation benefits for injury arising out of workplace harassment and bullying, this is not necessarily a bad thing for employers.

Is this good for employers?

While recent trends suggest a growing number of employees seeking workers' compensation benefits for injury arising out of workplace harassment and bullying, this is not necessarily a bad thing for employers. Yes, there may be legitimate concerns regarding the impact of claims on premiums required to sustain workers' compensation systems across the country. However, for the overwhelming number of employers, the cost of premiums is likely to be far less than that of protracted and unpredictable litigation and grievance arbitration. For these reasons, it is not difficult to see how employers can benefit from the reinforced application of the "historic trade-off". *Insurance anyone?*

To learn more contact a member of the Sherrard Kuzz LLP team.

DID YOU KNOW?

Contrary to what many employers believe, under the Ontario *Employment Standards Act* most salaried employees are entitled to overtime if they work more than 44 hours per week. To understand how overtime rules impact your organization and for strategies to reduce your liability, contact any member of the Sherrard Kuzz LLP team.

MANAGEMENT COUNSEL

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

Managing the Difficult Employee

Employers often speak of spending 80% of their time managing 20% of their workforce. Common themes include *employees consistently late to work, "sick"-related absences on Fridays and Mondays* or simple *poor performance*. It may be easy to identify who the offending employees are. It can be more difficult to determine how to change their behaviour. To help your organization more effectively manage these "difficult employees", this *HR*eview will address:

Performance and Productivity

- The importance of recognizing the cause of performance and productivity issues.
- How to effectively implement a performance improvement system.
- Tips and traps to using discipline in managing performance.

Attendance Management Techniques

- Creative approaches for changing behaviour and re-engaging the chronically late or "no show" employee.
- How to request the right type of medical information.
- Deciding when to discipline for attendance issues.

When All Else Fails: Terminating the Difficult Employee

- When do performance issues amount to cause for termination?
- When can an employee be terminated for attendance issues?
- Top tips for minimizing liability and managing the fall-out.

DATE: **Tuesday September 16, 2014; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Mississauga Convention Centre**, 75 Derry Road West, Mississauga, L5W 1G3

COST: Complimentary

RSVP: **By Friday September 5, 2014 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPAO CHRP designated members should inquire at www.hrpa.ca for certification eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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