



## **Cannabis in the Workplace: What Employers Need to Know**

By Ronald S. Minken and Zoe Roberts

[rminken@minken.com](mailto:rminken@minken.com); [zroberts@minken.com](mailto:zroberts@minken.com)

905 477-7011

### **Quick Facts**

- **Recreational cannabis is now legal in Canada**
- For individuals under 19 years of age in Ontario, it is still illegal to possess, buy, use, grow or make cannabis products
- For individuals 19 years of age or older in Ontario, possession is limited to up to 30 grams of dried cannabis in public at any time, and 4 plants per residence
  - This applies to recreational cannabis - conditions may differ for employees with medical cannabis licenses
- The distribution and sale of cannabis is strictly regulated, both under the federal and provincial legislation
  - Cannabis will be sold online starting October 17, 2018, through the Ontario Cannabis Store
    - This is currently the only legal option to purchase recreational cannabis
  - Cannabis will be sold in person starting April 1, 2019, pursuant to Bill 36, by stores licensed by the Alcohol and Gaming Commission of Ontario
- Not all forms of cannabis are legal as of October 17, 2018
  - Only cannabis sold, produced or distributed by persons permitted to do so under the federal and provincial legislation is legal
  - Cannabis edible products and concentrates will not be legal for sale until approximately one year after the Federal *Cannabis Act* has come into force
- Not all cannabis causes impairment
  - Cannabis products containing tetrahydrocannabinol (THC), the primary psychoactive compound in cannabis, generally cause impairment
  - Cannabis products containing a high concentration of cannabidiol (CBD) and low concentration of THC have very different effects, are often used for medical treatment, and generally do not cause impairment or 'highs'
  - Functional impairment is still difficult to test, as a positive THC test does not necessarily indicate current impairment



- THC can remain in the body for days or weeks, but a state of impairment generally lasts between 2-24 hours
- The new federal and provincial laws do not affect medical use of cannabis, which was already legal
- The use and consumption of recreational cannabis in Ontario is limited to certain locations:
  - private residences, certain outdoor public spaces (sidewalks and parks), designated guest rooms in hotels, certain residential vehicles and boats, and certain controlled areas in retirement homes and hospices
- Individuals will NOT be allowed to smoke cannabis in:
  - enclosed workplaces within the meaning of the *Smoke Free Ontario Act, 2017*
  - schools or places where children gather (including child care centers)
  - most parts of hospitals, hospices, and care homes
- Driving while under the influence of cannabis remains illegal. Police officers will be authorized to use oral fluid screening devices as roadside tests. There will be zero tolerance for commercial drivers - meaning they cannot have any cannabis in their system while working
  - What does this mean for workplace testing of commercial drivers?
    - Likely Employers will be able to make an argument that this is a safety-sensitive workplace and random drug testing is appropriate to ensure drivers are free from impairment

## **Applicable Jurisdiction and Legislation**

The Federal Government is responsible for:

- Controlling production of cannabis
- Setting standards for:
  - The types of products available for sale
  - Packaging and labelling of cannabis
  - Standardized serving sizes and potency
  - Prohibition on the use of certain ingredients

**The applicable legislation is the Federal *Cannabis Act*, Bill C-45**

- Received royal assent on June 21, 2018
- Came into force on October 17, 2018
- Legalizes certain activities regarding possession, cultivation and consumption of **recreational** cannabis

The Provincial Governments are responsible for:



- Controlling distribution of cannabis
- Enacting laws about:
  - Pricing of cannabis
  - The legal age for consumption
  - Where cannabis can be purchased (for example, online or in retail stores; by government-owned establishments or private retailers)
  - Where cannabis can be smoked (for example, only in private residences, or in areas where smoking tobacco is permitted)
  - How much cannabis individuals can possess

**The applicable legislation is the Ontario *Cannabis Act, 2017* and Bill 36 (*Cannabis Statutes Law Amendments Act, 2018*)**

- Bill 36 was passed on October 17, 2018, and:
  - permits smoking cannabis wherever smoking tobacco and using e-cigarettes is permitted, including in certain outdoor, public areas; some controlled areas of long-term care homes and hospices; and designated guest rooms in hotels, motels and inns
  - Consuming cannabis in non-exempted enclosed workplaces remains prohibited, as well as in circumstances where an individual has care and control over a vehicle or boat

Municipalities can also put in place by-laws restricting where cannabis can be sold or whether cannabis can be smoked in public.

Employers with workplaces or offices in multiple provinces will need to be aware of different provincial legislation and regulations governing distribution, possession and use of cannabis.

## **Q & A for Employers**

**Is recreational cannabis use in the workplace illegal? Can an employee smoke a joint on their lunch break?**

- Consuming **recreational** cannabis in the workplace is still illegal
  - A workplace is defined as any land, premises, location or thing at, upon, in or near which a worker works
- Smoking or vaping is prohibited in an enclosed workplace under the *Smoke-Free Ontario Act, 2017*
- An employee can consume edible cannabis for a medical purpose related to a disability in an enclosed workplace, as long as it does not interfere with workplace health and safety or performing essential job duties



- Smoking and vaping in non-enclosed workplaces or outdoor areas near a workplace will be governed by provincial law and by municipality bylaws and, on private property, will be controlled by the entity with legal control over the property
  - In Ontario, smoking cannabis is permitted wherever smoking cigarettes is permitted, subject to local municipal bylaws
  - If Employers want to limit employees' ability to smoke cannabis on their private property outside of an enclosed workplace, a clear policy will need to be put in place
  - Employers will need to keep in mind Human Right discrimination issues regarding accessibility of spaces in which to consume medical cannabis
- It is reasonable for Employers to require employees to be free from impairment while at work
- Employers may be able to discipline or drug test an employee whom the Employer reasonably suspects is impaired based on a visual assessment
- An employee who leaves the workplace to smoke in a permissible public place while on a break is not doing anything *illegal*, however, the employee may be in violation of a workplace policy if they return to work after consuming even minor amounts of cannabis
  - The approach to discipline for employees will likely depend on the Employer's policy
  - Discipline for impairment at work could include, for example, sending an employee home (in a cab), with pay and a written warning in the first instance of suspected impairment at work
- Impairment training for supervisors and managers may be helpful in establishing reasonable grounds to suspect impairment, which will assist with disciplinary decisions such as when drug testing can be implemented
- Keep in mind - reasonable accommodation in the workplace is only necessary for **medical** cannabis, not recreational cannabis

**What kind of policy should Employers put in place regarding cannabis use? How should these policies differ between workplaces?**

- Employers are free to determine impairment and fitness for duty policies for their individual workplaces
- Employers should build on existing policies:
  - does the workplace have a drug and alcohol policy already? Is there a policy for disability-related accommodation, or regarding medical cannabis?
  - Recreational cannabis can be treated in a similar manner to alcohol; medicinal cannabis should be treated like other prescription drugs
- Policies should set clear expectations, and provide a basis for discipline



- For example: will the Employer require employees in safety-sensitive positions to disclose use of cannabis products? Will only those employees requiring accommodation be required to disclose use of medicinal cannabis?
- Occupational health and safety legislation still requires Employers to ensure a workplace that is safe for employees, contractors and visitors
- Employers are required to provide information, instruction and supervision to workers to protect their health and safety.
  - This could include providing training to employees on the dangers of using equipment or machinery while impaired, or training for supervisors on how to recognize the signs of workplace impairment
- Impairment and inappropriate conduct can still be grounds for discipline up to and including termination for cause
- Policies regarding drug use and drug testing in the workplace that have been effective so far (not struck down by courts) are fitness-for-duty policies addressing **impairment** rather than **use** of cannabis
- Employers should consider adding to policies disclosure obligations for employees who require any cannabis-related accommodation
- Employers can put general disclosure obligations in contracts or workplace policies, however there may be Human Rights or privacy concerns depending on the scope of requested disclosure
- Employers should have employees acknowledge any new policies or amendments to existing policies in writing
- It is in Employers' best interest to have Substance Abuse, Medical Marijuana, Disability and Accommodation, and other relevant workplace policies reviewed and revised by an Employment lawyer

### **Can employers randomly test employees for drug use?**

- Employers are not automatically justified in implementing random drug testing
- Generally the threshold for random drug testing in a workplace is high - courts will consider the balance between legitimate safety concerns and privacy interests of individuals, and the policy imposed by an Employer must be a proportionate response to legitimate safety concerns
- For generalized random drug testing of employees, the Employer will likely have to prove there is a widespread problem with drugs in the workplace, and the workplace has inherent, specific safety risks
  - Generally evidence of an enhanced safety risk in an already dangerous or safety-sensitive workplace is required to justify random testing
  - For example: workplaces where employees operate heavy machinery, such as oil rigs; public transportation systems where public safety is reliant on employees being free from impairment



- Generalized random testing must be a proportional response to evidence of a problem with substance abuse in the workplace **generally**, and not just with a few individual employees
- Random drug testing may be permitted following an accident or impairment related incident and/or where there are reasonable grounds to believe an employee is impaired while on the job

**After October 17th, 2018, can Employers ask employees about their cannabis use?**

- There is no legal obligation on employees to disclose recreational use of controlled substances to an Employer
- Employees are required pursuant to the *Occupational Health and Safety Act* to report hazards and disclose situations where impairment may result in danger to the employee's safety or the safety of others
- In situations where an employee has dependency or addiction issues, the Employer may request disclosure in order to facilitate accommodation – the employee may be required to make full disclosure in order to fall under the Employer's duty to accommodate
- It may be an invasion of privacy to compel employees to answer questions about their cannabis use, unless Employers have a clear justification - for example, if employees are employed in a safety-sensitive position
- Employers should still consider putting disclosure obligations for employees who use cannabis in employment contracts or workplace policies, however there may be Human Rights or privacy concerns depending on the scope of requested disclosure

**Can Employers refuse to hire someone who admits to cannabis use or who tests positive for THC?**

- Employers cannot discriminate on the basis of disability, which can include addiction to cannabis or a condition where an employee is prescribed and requires medical cannabis
- The Employer's duty to accommodate up to the point of undue hardship still applies
- The Employer's duty to accommodate exists for safety-sensitive positions, BUT accommodation of employee by allowing them to be impaired in safety-sensitive position might be 'undue hardship' for the Employer

**Can Employers terminate employees who use cannabis at work or who come to work impaired? What do Employers do if employees come to work impaired?**

- This will depend in part on the Employer's policy regarding progressive discipline for instances of impairment in the workplace
- Is it illegal to smoke cannabis in an enclosed workplace
- It is not illegal to smoke cannabis during the workday in places where smoking is permitted pursuant to Bill 36



- An Employer can reasonably expect employees to be fit for duty and free from impairment while on duty
  - Impairment while on duty may be a breach of contract and/or of workplace policy
- Employers may be able to discipline or drug test an employee whom the Employer reasonably suspects is impaired based on a visual assessment
- Discipline for an employee found to be impaired while on duty should be analogous to treatment of an employee who is found to be under the influence of other controlled substances while on duty
- Progressive discipline may include, for example:
  - Sending an employee home (in a cab) on a one-day, or short-term, paid suspension
  - Written warnings
  - Warnings of further discipline up to and including termination for cause, being violation of a workplace policy
- Employers should keep in mind accommodation obligations for employees who use cannabis for a medical purpose related to a disability, and employees who have or are perceived to have an addiction to cannabis
  - Termination of these employees for use of cannabis in the workplace may raise Human Rights concerns
- However, there is no absolute right to use medical cannabis in the workplace and reasonable accommodation may limit employees in safety-sensitive positions from smoking cannabis due to impairment concerns

**How should workplaces deal with medical cannabis? What is reasonable accommodation for medical cannabis users?**

- There is no absolute right to use medical cannabis in the workplace - accommodation is a two-way street involving the Employer and the employee
- An employee is not required to disclose cannabis use, however employees are required to report any contravention of the *Occupational Health and Safety Act* or any hazards of which they are aware to the Employer or to a supervisor
  - Impairment in the workplace that may endanger an employee's safety or the safety of others is a hazard and likely in contravention of the *Occupational Health and Safety Act*
  - An employee who requires medical cannabis should consult with their doctor about the potential effects of the prescribed cannabis with regards to hazards in the workplace
- Under the Ontario *Human Rights Code*, Employers cannot discriminate (in hiring, discipline, termination, etc.) against employees with a disability
- Individuals who use cannabis for a medical purpose related to a disability, and individuals who have or are perceived to have an addiction to cannabis, are protected



from discrimination under the *Code* and have the right to disability-related accommodation

- Employers should first consider whether accommodation is required:
  - The Employer can only request medical documentation once accommodation is sought by employee
  - However, Employers can encourage employees to ask for disability-related accommodation
  - Employers are entitled to request medical information from an employee who has disclosed a need for accommodation
- The duty to accommodate up to the point of undue hardship still applies to employees who consume medical cannabis
  - This duty requires a balancing of general safety interests with the Employer's obligations to the employee
- If the employee cannot perform essential duties of the job after accommodation has been tried and exhausted, the duty to accommodate ends
- If the Employer is arguing that an employee cannot be reasonably accommodated because they cannot perform essential duties of the job to an appropriate standard, the Employer must be able to show that:
  - The standard is rationally connected to the performance of the job in question;
  - The standard has been adopted in an honest and good faith belief that it is necessary; and
  - The standard must be reasonably necessary to accomplish the work-related purpose (i.e. keeping at-risk employees safe)
- Accommodation of employee by allowing them to be impaired in safety-sensitive position might be 'undue hardship'
- Employers must be conscious of accommodation when it comes to terminations related to impairment in the workplace
  - Is the employee's impairment somehow connected to a disability? Has the employee been prescribed medical cannabis? If so:
    - The Employer may open themselves up to allegation of discrimination under the *Human Rights Code*
    - The best practice is to have all employees sign a clear policy - either zero tolerance or a requirement for addiction and/or disability disclosure
    - If the employee has signed off on a reasonable policy, the Employer may be able to successfully argue that termination of employment was as a result of the employee's violation of a workplace policy and therefore was not discriminatory

For further information please contact Ron Minken at (905) 477-7011, or [rminken@minken.com](mailto:rminken@minken.com). The content of this booklet is intended to provide a general guide to the subject matter and should not be considered legal advice. Specialist advice should always be sought about your specific circumstances.