

LABOUR RELATIONS 2017

PAPER 1.4

Legalization of Marijuana—What Will It Mean for BC Employers?

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LEGALIZATION OF MARIJUANA—WHAT WILL IT MEAN FOR BC EMPLOYERS?

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I. Introduction

The possession, consumption and sale of marijuana for recreational use will soon be legalized in Canada. Just when that will occur, and where and how and by whom marijuana will be able to be legally purchased in British Columbia, remains up in the air.

While the federal government had announced July 1, 2018, as the “legalization date”, there is a growing chorus of stakeholders, including provincial governments, police, health care professionals, health and safety advocates, and even marijuana producers, who are asserting that this is too soon, and that the necessary infrastructure and training to deal with the new “legalized” reality cannot possibly be in place by this time.

Arguably, it matters little for most British Columbians whether or when “legalization occurs”, as marijuana is currently widely available to anyone who wants it, at any time, and on an almost wholly unregulated basis. Indeed, if anything, the legalization of marijuana may introduce into the situation greater constraints on purchase, possession and use of marijuana than currently exist in British Columbia.

That being said, there can be no doubt that the legalization of marijuana, when it occurs, will raise some new issues for employers in British Columbia. Currently, because of marijuana’s officially “illegal” status, there is no serious dispute that employers can prohibit employees from using or possessing marijuana in the workplace or during the work day, other than in the situation of medicinal marijuana where some additional review and consideration must be given.

With the legalization of marijuana for recreational use, there will likely be an increase in the number of employees seeking to use marijuana at work and/or during the work day. Employers will have to consider whether and to what extent they must or should permit such use, and in what circumstances. Employers will also will have to rethink their drug and alcohol policies so as to ensure that they are not treating marijuana as an “illicit” drug akin to cocaine, but rather are treating it as a legal, but potentially unsafe and addictive substance, akin to alcohol.

This paper will address a few of the primary issues that employers will need to consider in dealing with marijuana use once it has been legalized.

II. Workplace Issues Related to Employee Marijuana Use

There can be no serious dispute that marijuana causes impairment in cognitive and motor functioning. Its use in close time proximity to work is incompatible with work in either a safety-sensitive environment or an environment in which an employee must exercise high-level thinking.

There is some debate about how long the impairing effects of marijuana last. The most recent scientific studies have found that acute subjective feelings of intoxication (i.e. when acute impairment could be expected) generally last from two to four hours after a single use, but can last up to eight hours, and that carryover effects (i.e. lingering impairments in cognitive and psychomotor functioning) can last 24 hours or even longer after a single use. And, with chronic use, impairment is chronic, with neural and intellectual deficits that do not recover even after months of cessation of use.

These impairing effects are magnified when marijuana is combined with other legal and illegal substances, including in particular, alcohol, opiates and cocaine.

In addition, regular or chronic marijuana use can lead to dependency and/or addiction to cannabis. Marijuana is also known as a gateway drug, which can lead to use of, and resulting dependency or addiction on, other “harder” drugs, such as cocaine and methamphetamine. Dependency and addiction in turn lead to poor work performance and productivity, absenteeism, workplace impairment, can cause or exacerbate other mental and physical health issues, and in some cases, can lead to workplace misconduct including dishonest conduct and/or safety risks.

Thus, on the most basic level, to the extent that legalization of marijuana results in an increase in marijuana consumption by employees who are already marijuana users, or an increase in the number of employees who use marijuana on a regular basis, it is not good news for BC employers. It could lead to increased costs with respect to absenteeism, lower productivity, workplace impairment, medical benefits usage, safety concerns and potential misconduct.

On the other hand, legalization will hopefully bring with it both greater regulation of marijuana use, and information about the effects of such use. This will allow employers to more directly confront the implications of marijuana use in their workplace and among their employees, so as to deal with potential issues proactively and in the best interests of their workforce and their businesses.

III. How Do We Characterize Marijuana Once It Is Legal?

Among recreational marijuana users, there is a fairly pervasive view that once marijuana is legalized, all persons will now have a “right” to use marijuana when and where they wish.

However, the reality is that legalization will not change the fact that marijuana is a mood-altering drug, which creates cognitive deficits both with acute and occasional use, as well as with chronic use. These cognitive deficits create serious safety risks in safety-sensitive workplaces, and create potential productivity, performance and attendance problems for all workplaces.

Marijuana use can also lead to the development of dependency or addiction, with resulting serious detrimental effects on the user’s ability to function in daily life and in the workplace.

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As such, once legalized, marijuana will be akin to alcohol in terms of its effects on the user.

In addition to its cognitive and addictive effects on the user, most marijuana consumption is through the smoking of marijuana. Aside from itself being harmful to the user (the most recent evidence is that inhalation of marijuana smoke may be more damaging to the user than cigarette smoking), this creates “second-hand smoke” which is potentially harmful to others in the vicinity, in addition to being an irritant, odorous, and possibly impairing.

Both alcohol consumption and cigarette smoking are legal activities. That does not mean that they can be engaged in at any time or in any place, or specifically that they can be engaged in a manner that impacts on the workplace.

As a result, the most appropriate way to characterize marijuana once it is legal may be to equate it to consuming alcohol by smoking a cigarette. It encompasses the negative aspects of both of those behaviours in terms of their potential effects in and on the workplace.

Employers are not required to countenance the use of alcohol by employees during the work day or in a quantity or at a time where it renders the employee unfit for work or less able to perform to a reasonable standard. Nor are they required to countenance cigarette smoking in the workplace or at times which would interfere with the employee’s performance of their work.

Nor are employers required to countenance recreational marijuana use in the workplace or at times when it could interfere with the employees’ ability to safely or effectively perform their jobs.

That said, marijuana is different in a couple of important respects from alcohol, which are very relevant when considering how to regulate or treat marijuana use by employees, and its potential impact in the workplace.

The first is that the method of action of alcohol in the body, and excretion from the body, is very well known. Thus, while there are variations among individuals, the impact of certain levels of alcohol consumption, and the period of time during which it can be expected that alcohol will continue to have detrimental effects on cognition or performance, are fairly predictable. This is not true of marijuana, which is stored in the fatty tissues of the body (and thus in the brain) and is released over time in a non-linear pattern. The result is that it is much less clear what type of effects will be produced by certain levels of marijuana consumption, and the time frame over which it can be expected that these effects will dissipate.

The second point is that, unlike alcohol, which is often consumed not for its mood-altering effects per se (i.e. for the purpose of getting drunk or even “tipsy”), but rather for its taste or as a meal enhancement, marijuana (and other illicit drugs) are generally consumed for their mood-altering properties. Marijuana users will generally consume a sufficient amount of the drug so that they feel “high”.

As such, unlike alcohol consumption, which some employers may view as being permissible or appropriate in small quantities at some workplace functions or work-sponsored events as an enhancement part of a social activity or meal, it is questionable whether marijuana use on such occasions can or should ever be permitted by a reasonable employer.

IV. Medicinal Marijuana

Cannabis does have some medicinal properties, and can be of benefit to persons suffering from certain conditions in terms of alleviating those conditions. However, the number of conditions for which there is demonstrated benefit from cannabis is very small, and the conditions in question – end-stage cancer, multiple sclerosis, and serious epilepsy – are those in which it is unlikely (albeit not impossible) that the individual is still in the workplace.

For the remainder of conditions for which cannabis is often “prescribed”¹, there is little evidence of any actual medical benefit, or that the benefit exceeds that of other pharmaceutical medications for which there is well-established and scientific information about efficacy, side effects, and dosage.

As a result, employers are currently and will continue to be entitled to question whether it is medically necessary or appropriate for employees to be utilizing medicinal marijuana where such use can have a potential effect in the workplace.

Specifically, it is currently unlikely that use of medicinal marijuana could ever be compatible with working in a safety-sensitive workplace. This is especially so given that ongoing regular use is likely to result in chronic impairment, which can persist for days or even weeks after the use has been discontinued.

Moreover, even for occasional medicinal use for therapeutic reasons, there is very little, if any, guidance in the medical literature or in the “prescriptions” being given for medicinal marijuana as to what dosage and timing is appropriate for therapeutic use and/or what the side effects of such use will be.

Generally speaking, when marijuana is “prescribed” for therapeutic use, it is on an “as and when needed” basis, to be determined by the user, and with the direction that the user should consume as much as needed to alleviate the symptoms in question. Individual users are thus expected to “self-titrate”. While there are sometimes guidelines suggesting that the person should not consume more than a certain amount (say 5 grams) over a week or in excess of a certain amount in a day, this does not provide any guidance, or any comfort for employers, as to what amounts are appropriate at any given time or that the user will not be impaired following any given use.

Thus, employers in safety-sensitive workplace can and should be rightly concerned about medicinal marijuana use. Drug and alcohol policies should make clear that any employee in a safety sensitive workplace who wishes to use medicinal marijuana should raise this with their employer in advance of such use. The Employer then can and should seek information from the “prescribing” physician about (a) the existence of an underlying condition justifying the need for drug; (b) information about whether other established pharmaceutical treatments have been tried and the reasons they are not being continued; (c) the expected dosage and timing of the medicinal marijuana use and (d) the effects on the employees’ ability to function in a safety-sensitive environment.

If, as is sometimes the case, the employee and/or the “prescribing” physician is not willing to provide this information, the matter may need to be referred to an independent physician for an IME or other independent opinion. Employers cannot and should not permit employees to engage

1 I use the term “prescribed” but in fact these are not prescriptions in the normal sense in which the term is used in relation to prescription drugs because they do not conform with the standards for pharmaceutical prescriptions, and do not contain or reflect any of the research results, or scrutiny which would be given to a pharmaceutical drug before it is authorized for prescription by a physician or dispensation by a pharmacist. .

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in safety-sensitive work unless and until information has been provided that clearly establishes that the employee can safely perform the work.

It should be reiterated that it will likely be a rare circumstance in which an employee using medicinal marijuana on any type of regular basis will be able to continue working in a safety-sensitive position. It is possible that this may change over time as the type of cannabis-related medicinal products available for use expands to include those which have less or no impairing effects.

In a non-safety-sensitive workplace, these concerns do not loom as large. In these cases, absent a suggestion that the employee should be allowed to consume marijuana during working hours, there may be little reason for an employer to know or to be concerned about occasional medicinal marijuana use which occurs outside of working hours and outside of a window of at least eight hours prior to commencing work.

Medicinal marijuana should in such situations be treated the same as other forms of medication -- if it appears that the employee's work performance is being affected, the employer is entitled to inquire as to the reasons why, and to seek information about whether there are other medicinal solutions which may have a lesser effect.

An employer is also entitled (and indeed is generally required) to inquire into whether an employee demonstrating performance or attendance problems, and for whom there is a suggestion of substance or other mental health problem) may have a dependency or other mental health issues which are being exacerbated by cannabis use, and to require the employee to take steps to overcome these problems as a condition of ongoing employment. Those steps will in some case include refraining from any cannabis use, including on a medicinal basis.

Over time, we will likely see the development of more information about the connection between medicinal marijuana use and the development of dependency and/or exacerbation of other mental health problems. This will provide more guidance both for health care professionals and for employers in addressing these issues.

V. Testing

The legalization of marijuana should not have any significant legal impact on the ability of employers in safety sensitive workplaces to test for marijuana as a potentially impairing substance, at currently accepted workplace testing levels.

As discussed above, the decriminalization of marijuana does not alter its character as a cognitively impairing substance, nor does it alter the periods of time in which it is likely that an employee may be impaired to at least some degree from the consumption of marijuana.

For casual recreational users, this period is up to 8 hours for acute effects, and up to 48 hours for carry-over effects. This is approximately the same time frame for which a casual user might test positive on a standard workplace urine drug test, and is much longer than the time frame for a positive test under an oral fluid test.

For chronic users, the period of impairment lasts much longer, as the impairing ingredients are stored in the fatty tissues of the body and build up over time, and are released over time. Thus, chronic users may test positive on a workplace urine drug test for up to two weeks over past use. This period again corresponds with the period of time in which they likely remain impaired by chronic or carryover effects.

Thus, just as alcohol is generally tested for in workplace testing programs, there will be no legitimate reasons to eliminate cannabis from the substances tested for in such programs, or to change the levels at which a test result will be deemed “positive” under such programs. If anything, it is likely that as the scientific knowledge base about the impairing effects of cannabis use, and the duration of those effects, expands, there will be even greater concern about the safety and health implications of cannabis use.

VI. “Smoking” in the Workplace

Last, we come to the issue of marijuana consumption in the workplace. This should be prohibited by all employers as a matter of policy, just as the consumption of alcohol at the workplace would and should normally be prohibited.

Further, it is likely (and certainly to be hoped) that smoking of marijuana will be caught by the restrictions that currently exist on smoking in the workplace. That is, that this is prohibited by regulation, including smoking within a certain distance of doorways and air vents. All of the same issues with respect to negative effects on the health of the user and negative effects for others in the vicinity exist with respect to marijuana smoking as exist for cigarette smoking, and there would appear to be no valid policy reason for distinguishing between the two.

Assuming such regulations apply to marijuana smoking, this will go some distance to avoiding disputes over whether employees can or should be able to consume marijuana at the workplace.

While there may occasionally be disputes over whether an employer must allow consumption of some form of medicinal marijuana in the workplace (similar to allow consumption of another form of required medication at the workplace or during working hours), it is unlikely that employers will be required to permit employees to consume marijuana by smoking it in the workplace.

There may be circumstance in which an employer is required to permit some other form of consumption, such as pills or possibly edibles, at the workplace. However, this should occur only where the need for consumption at that particular time is established by medical evidence, and where it is clear that the consumption will not impact the employee’s ability to perform his or her work, or to get home safely from the workplace.

VII. Conclusion

In summary, while it is likely that the legalization of marijuana will result in many employees believing that they have the “right” to consume marijuana for recreational (or “therapeutic”) reasons at any time or in any place, employers should not yield to this view.

Cannabis remains a cognitively-impairing substance which can lead to significant health and safety problems for the user and for co-workers and members of the public, and which is wholly incompatible with safety-sensitive environments. The fact that it is no longer criminalized does not alter its fundamental character in this regard.

There will be no circumstances in which employers are required to permit employees to use marijuana for recreational purposes during or in the several hours prior to the workday, and very few, if any, circumstances in which employers will be required to allow medicinal use at the workplace or in close temporal proximity to the work day.

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It is to be hoped that the legalization of marijuana will bring with it greater knowledge and awareness of the detrimental effects of marijuana use and its negative impacts on users, their families, employers and co-workers, and society at large, as well as regulation of this use in public, in motor vehicles and in workplaces. This will be of great assistance to employers in providing training and education to their employees and to developing appropriate workplace policies based on evidence rather than speculation.

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