
Up in Smoke: Drug Use in the Workplace

Sundeeep Gokhale and Ashley Brown
Languages Canada
Tuesday, February 20, 2018



 Follow @sherrardkuzz

250 Yonge Street Suite 3300
Toronto, Ontario M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 Hour 416.420.0738
www.sherrardkuzz.com

Agenda

- Facts about Marijuana
- Duty to Accommodate
- Drug and Alcohol Testing
- How to Prepare for the Legalization of Marijuana
- Questions

Marijuana Legislation

■ Recreational marijuana

- July 1, 2018- Federal Government expected to remove marijuana consumption and incidental possession from the *Criminal Code*

■ Medical marijuana users

- 2013 – Under 40,000
- 2016 – Approx. 100,000
- 2024 – Projected 450,000



Understanding Marijuana

■ College's Preliminary Guidance

□ Advise not to drive for:

- 4 hours after inhalation

- 6 hours after oral ingestion

- 8 hours if the patient experiences euphoria

■ Health Canada

□ Driving and alertness may be unsafe for up to 24 hours after single consumption

Weed at Work

- Employer's concerns:
 - Productivity/performance
 - Impact on co-workers
 - Health and safety
 - Co-worker relations
 - Brand/reputational damage
 - Client/customer interactions
 - Public image (uniform, vehicles)

Weed at Work

■ Recreational use

- Do not need to accommodate

- Not permitted in the workplace – like alcohol

■ Medical use ***OR*** Addiction

- Standard accommodation analysis applies

- When is accommodation triggered?

- Employee reports MM use or addiction

- Employer becomes aware indirectly

Medical Marijuana at Work

- Manage like any other illness that requires accommodation
 - Request medical documentation
 - Is there a disability?
 - Alternative treatment options?
 - Dosage and frequency of use?
 - Expected timeframe usage required?
 - Usage necessary *at work*?
 - Consider independent medical assessment

Medical Marijuana at Work

- Accommodation ≠ allowing employee to carry out duties while impaired
- *OHSA*
 - Obligation to take every precaution reasonable in circumstances to protect health and safety of workers
 - Identify hazards if employee working under influence of MM
 - Employee duty to report hazards

Duty to Accommodate

- Duty to accommodate to point of *undue hardship* where prescribed for medical reasons
- Smoking MM at work may not be a reasonable accommodation in safety-sensitive work environments...
but in other work environments it may be...

Culpable vs. Non-Culpable Conduct

- Employer response depends on whether conduct is culpable or non-culpable
 - Non-Culpable
 - Causal connection between conduct and disability
 - Accommodation
 - Culpable
 - Misconduct related to recreational drug or alcohol use
 - Discipline

Case Study

- *Cambridge Memorial Hospital v ONA (2017)*
 - Grievor engaged in pattern of theft of narcotics and diverted drugs away from patients
 - Union grieved discharge and claimed the Hospital failed to accommodate her addiction
 - Discharge upheld – addiction is not a defence to where there is no nexus between the addiction and the misconduct

Accommodation for Addictions

- Duty to accommodate to point of *undue hardship* where causal connection between misconduct and addiction
- Common accommodation for addiction:
 - Absence/leave to obtain required treatment
 - Temporary reassignment to non-safety sensitive position where employee is subject to regular supervision
 - Modified work schedule

Where's the Limit?

- What an employer need not do:
 - Create a job consisting of duties that were previously non-existent and not required by employer
 - Ask other employees to:
 - Assume unacceptable health and safety risks
 - Tolerate excessive hardship as a result of changed duties
 - Accept an employee's failure to participate in their own accommodation or improve their own abilities, where possible

Accommodating MM

- Designated area
 - Avoid second hand smoke
 - Tobacco laws do not extend to MM
- During scheduled breaks or meal periods
- Restrict smoking while:
 - in uniform
 - in public view
 - around/in company vehicles

Accommodating MM

- Discuss alternate *methods of use* and timing
 - Smoking *at work* may not be the *only* option
 - Alternatives to smoking MM
 - Ingest in food/tea
 - “Juice” it
 - Vaporize
- Employee push back?
 - Ask for medical supporting delivery route

Drug & Alcohol Testing

- May initially seem like an attractive way to manage drug and alcohol use in the workplace
- Competing Considerations:
 - Employer has an obligation to protect safety of employees, clients/customers and public
 - Policies requiring testing:
 - May breach *Human Rights Code* (discrimination)
 - May violate collective agreement rights (privacy)

Is Consent Required?

- Employee consent required
- Form of consent
 - Collective agreement
 - Employment contract
 - Workplace policy
- Consent does *not* eliminate liability (e.g. human rights complaint, grievance, *etc.*)

Pre-Employment/Access Testing

- Generally not be permissible, even for safety sensitive workplace/positions
 - Results only indicate past use
 - Cannot predict future job performance
 - Privacy interest outweighs utility of testing



Random Testing

- Only permitted in very rare circumstances where
 - Dangerous / safety sensitive workplace
 - Evidence of an existing substance use problem in the workplace
- Even then, questionable whether random *drug* testing is permissible given scientific limitations

Safety Sensitive Workplaces/Positions

- What does ‘safety sensitive’ mean?
 - Generally, risk or harm to self or others (or other serious consequences) if impaired
 - Hazardous environment
 - Remote location
 - Limited direct supervision
- Position can be safety sensitive even if the workplace, as a whole, is not

Post-Incident / Reasonable Cause Testing

- Testing is generally permitted as part of a larger investigation into a significant workplace accident or “near miss”
- Or where actions or appearance suggest impairment (e.g. stumbling, slurred speech, smell of alcohol)
- Must be a reasonable basis to conclude impairment
Actions or appearance suggest impairment
- Generally only permitted in safety sensitive workplaces

Return to Work Testing

- Typically permitted for safety sensitive position
- May be permitted for non-safety sensitive position
- Rehabilitative testing requires balance between:
 - Privacy/human rights
 - Safety



How to Prepare for the Legalization of Marijuana

**SAFETY
DOESN'T
HAPPEN BY
ACCIDENT.**

Drug and Alcohol Policy

■ Drug and alcohol policy should

□ Address impairment from:

■ illegal drugs;

■ legal drugs and alcohol

■ prescription medications
(such as MM)

□ Prohibit employee in safety-sensitive position
from working while impaired



Drug and Alcohol Policy

- ❑ Require disclosure of prescription drugs that may impair ability to perform work safely
- ❑ Set out process for obtaining additional medical information to facilitate accommodation if needed

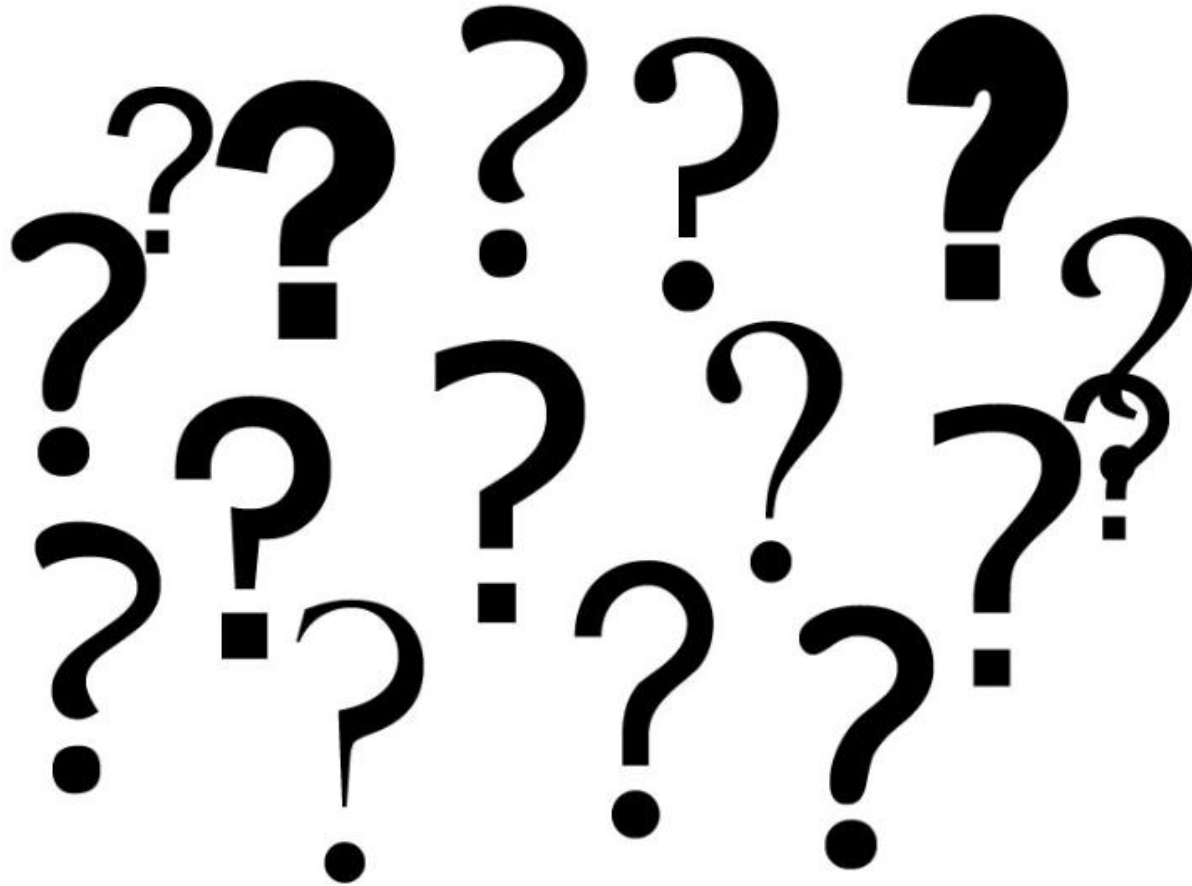
Drug and Alcohol Policy

- If testing contemplated, set out applicable procedures and circumstances for testing
 - Provide justification for performing testing
 - Include measures for protecting employee privacy
 - If positive result provide procedure for objective, individual assessment not assumptions or automatic discipline/termination

Drug and Alcohol Policy

- Incorporate process for accommodation:
 - Provide ability to self-report drug or alcohol dependency without fear of disciplinary consequences
 - Consider including a mandatory duty to report a dependency and related use
 - Communicate expectations to employees
- Enforce policy consistently

Questions?





250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7

416.603.0700 Phone

416.420.0738 24 Hour

416.603.6035 Fax

www.sherrardkuzz.com



LEXPERT RANKED



-
- *The information contained in this presentation/article is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This presentation/article is current as of **January 26, 2018** and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the presentation/article is prepared, but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP (or other counsel).*