

When Human Rights and Safety Laws Collide

When does an employer's right to know, and their legal obligation to take every precaution reasonable to protect the worker, overshadow a worker's rights to privacy, confidentiality? Or does it?

Recent medical developments are potentially putting workers and employers at risk...and sorting through the complications will require a great deal of time and effort.

The legalization of medical marijuana, and the sharp increase in prescriptions over the past few years, will have a profound effect on workplace health and safety policies and procedures for all companies in the future.

According to many sources, **over 400,000 Canadians** will be taking medical marijuana within a decade. This issue will eventually affect almost every workplace in the country.



Prescribing for Medicinal Uses

Medical marijuana is currently being prescribed in Canada to treat the following:

- ❖ Acute and/or Chronic pain
- ❖ ALS
- ❖ Alzheimer's
- ❖ Anorexia Nervosa
- ❖ Anxiety
- ❖ Arthritis
- ❖ Asthma
- ❖ Chronic nausea and vomiting
- ❖ Crohn's Disease
- ❖ Depression
- ❖ Dystonia
- ❖ Epilepsy
- ❖ Fibromyalgia
- ❖ Glaucoma
- ❖ Huntington's Disease
- ❖ Hypertension
- ❖ Inflammatory Skin diseases
- ❖ Irritable Bowel Syndrome
- ❖ Liver diseases
- ❖ Migraine Headaches
- ❖ Multiple Sclerosis
- ❖ Musculoskeletal Disorders
- ❖ Osteoporosis
- ❖ Palliative care
- ❖ Pancreatic diseases
- ❖ Parkinson's Disease
- ❖ Post-Traumatic Stress Disorder
- ❖ Schizophrenia
- ❖ Sleep Disorders
- ❖ Tourette Syndrome
- ❖ Wasting syndromes related to AIDS and Cancer Treatments

This list is growing on a regular basis as more is learned of the beneficial effects of marijuana treatment on a variety of illnesses and symptoms.

This is NOT a New Situation

The drug in question may be different, but most of the concerns and risks we are discussing are actually old news.

*"An employer can insist that a worker not **smoke** medical marijuana at work."*

Financial Post

Many workers show up to their jobs every day, while taking prescription drugs that can affect their performance and mental acuity. The list of "psychoactive" (or "psychotropic") medicines is very long. Some of the most common are *Percocet, OxyContin, Dilaudid, Valium, Xanax, Ativan, Vicodin, Zolofl and Wellbutrin.*

One in 5 people in the United States (about 70 million) take psychoactive medicine. The percentage in Canada is slightly lower than that. The effects of various psychoactive medications on users differ, depending on the category and dosage.



The **Five Main Categories** of psychoactive drugs are:

- 1) Anxiolytics (anti-anxiety medication) and Sedatives
- 2) Hypnotics and Sleeping Pills
- 3) Antidepressants
- 4) Antipsychotics
- 5) Mood Stabilizers

Companies must include health and safety policies for the use of these types of drugs, in addition to effectively covering policies and procedures for using medical marijuana.

The arrival of medical marijuana is going to force organizations to review the use of ALL psychoactive medicines that can affect performance and judgement...and treat them all equally. In the modern context, medical marijuana is just as legitimate a treatment as any of the others listed above.

Human Rights & Workplace Safety Laws

The sanctity of doctor-patient confidentiality is a cornerstone in medical care. It is one of our basic rights that this information is protected and any disclosure about a person's medical condition must be done only with their consent.

Under the *Ontario Human Rights Code*, Section 5.1, we are also guaranteed the right to equal treatment without discrimination, with respect to employment, on the grounds of disability. Under the OHRC, the definition of "disability" extends to illness and other medical conditions.

Conversely, under the *Occupational Health & Safety Act* workers have a legal obligation to report all hazards they identify in the workplace. This would include reporting their own inability to perform their duties safely, due to mental and/or physical impairment from medication. In short, employees are expected to arrive to work fit for duty.

The OHRC also states that an employee has "*the onus to cooperate with the employer*" regarding their need for an accommodation, due to disability. This would include the worker's responsibility to declare their use of a psychoactive drug that potentially impairs their ability to perform their work safely.

A worker cannot be asked to divulge their medical condition, but it is prudent for them to report the use of any medication that might affect their judgement and performance...especially if they work in a safety-sensitive position.

Accommodating workers who have legal prescriptions to take marijuana or other psychoactive drugs, while still maintaining an employer's and supervisors due diligence to ensure the safety of all workers, is an issue that will require time, effort, trust and a thorough review of current workplace safety policies and procedures.

Your Business Type Will Drive Decisions

For relatively benign workspaces, such as an office atmosphere, solving this dilemma may require only a few new changes in policy and procedure - many of which will probably not affect daily operations noticeably.

Business within safety sensitive jobs, such as many in the Construction, Manufacturing, Industrial and Transportation sectors, must be prepared to devote serious time and effort toward refining policies, programs and procedures.



The specter of having equipment and machinery operators, or company drivers, performing their duties at less than optimal mental and physical capacity, is one that should be given great thought... for very good reasons.

A failure on an organization's part to identify these scenarios and deal with them promptly and correctly, not only puts worker's safety at risk, it also exposes the company to the possibility of expensive human rights tribunals and lawsuits from wronged parties, injured personnel or the relatives of a workplace fatality.

Points to Consider

- Employers have a legal obligation to allow workers to use medically prescribed marijuana (and other psychoactive drugs) on the job, if it is necessary for their treatment.
- Workers have a legal obligation to arrive for work fit for duty, and perform their duties safely



- Employers and supervisors have to do their due diligence in protecting all workers from injury. This applies not only to the person who takes medical marijuana, but to the co-workers, customers, etc., who may be impacted by the actions of an impaired worker.
- A worker has the onus to disclose their need for a medical accommodation to their employer
- Allowing marijuana to be smoked is not a legal requirement. Some places of business have provided a designated smoking area, while others may ask that employees take their medical marijuana in another form, if possible (for example, using a vapourizer, or ingesting it in their food or drink).

Questions to Ask

- If a person is unable to perform their "regular" job, due to impairment, what accommodations can/should the employer make with regard to a reassignment of duties and responsibilities?
- Will the accommodation cause the employer "undue hardship?"
- When recruiting for new hires, employers are severely restricted regarding a number of questions they cannot ask a potential worker - age, marital status, ethnic origin, sexual orientation, religion, etc. Given the implications to safety in the workplace, should an employer be allowed to ask about use of medications, like marijuana, which may cause impairment?
- Can/should an employer ask potential new hires for a drug test as a condition of employment? At what point in the recruiting and hiring process would this be appropriate?
- How long should an employer reasonably be expected to make accommodations?

These considerations are just the tip of the iceberg...and the solutions will vary from company to company, depending on the nature of their operation and the risk levels that exist in each place of business.

Impaired Versus Medicated



While it is true that medical labs have developed some strains of medical marijuana and synthetic marijuana that do not cause impairment, a key question that must be asked is "*how could you know, with certainty, that an employee is using one of those strains, rather than a variant that does cause impairment?*"

And, to complicate matters further, some people have started growing their own marijuana for medicinal purposes. If they were to simply put their own "home-grown" blend into a prescription container, it would likely be difficult to identify one type of marijuana from the other.

How Impaired is Too Impaired?

One of the more complex issues in this situation is determining the level of impairment caused by the use of medical marijuana and other psychotropic drugs.

Tests can detect the presence of marijuana, but so far nothing has been developed that can accurately measure the level of impairment of the subject.

Since residual amounts stay in the liver for quite some time, tests also fail to measure, with any degree of accuracy, how recently the person being tested used marijuana. Did they take it this morning before work, or last week while they were on holidays?

The equivalent of a breathalyzer, which can accurately send back a blood-alcohol reading (like .08%), and determine the degree of impairment, simply does not exist for marijuana...yet.

For that reason, and several others, random drug testing by employers in Canada is considered a violation of a person's rights under the human rights code. There is also no case law in Canada that holds that an employee can be terminated for refusing to take a drug test.

Canada is not alone in the regard - drug testing is not used to any significant degree in any country in the world, other than the United States.

Your "Zero Tolerance Policy" - Up in Smoke!

Many organizations with working environments that are hazardous and/or with security concerns have adopted a "zero tolerance" policy toward the use of illegal drugs.

The legalization of Medical Marijuana effectively shoots part of any zero tolerance policy, down in flames.

Simply put, employers cannot declare zero tolerance for a legally prescribed medication.



Shedding the Stigma

One factor that makes the use of medical marijuana so touchy is the stigma that the drug carries with it among so many people.

For any medical marijuana policy to be truly effective, those stigmas must be put to rest. The development and implementation of a working medical marijuana policy must be created within an atmosphere of cooperation, comfortable disclosure, and, above all - **trust**.

No one will openly declare himself or herself to be a medical marijuana user, if they know they are going to be judged negatively or subjected to ridicule by superiors and/or peers because of their treatment.

The same is true regarding the use of many other psychoactive drugs, which are often prescribed to treat illnesses that can carry stigmas of their own (like depression, bipolar disorder and other mental health problems).

What You Can Do Right Away

This is not an area you are likely capable of handling independently.

Since there are a myriad of laws involved, many of which seem to be in conflict, you would be wise to bring in expert help, to guide you through the pitfalls of each policy revision and action you may consider.

Company Health & Safety policies and programs need to be thoroughly reviewed and revised to include the use of all legal drugs that can cause impairment, in addition to the current protocols you have in place for handling the use of illegal drugs and alcohol abuse.

Supervisors and Managers must be on the lookout for signs of impairment, so the proper steps can be taken to identify any safety hazards and to accommodate the worker, if appropriate. If your supervisors and managers have not had any training in identifying impairment, you should provide some kind of guidance for them.

To help you out, some of the most common tell-tales are:

- Bloodshot eyes
- Increased heart rate
- Increased appetite
- Memory impairment
- Noticeable changes in speech
- Difficulty concentrating
- Slower reaction times
- Difficulty in problem-solving
- Paranoia
- Anxiety
- Unusual fear or panic reactions

What You SHOULDN'T Do May Be Even More Important

Oddly enough, the best preparation you might engage in, is putting together a list of "**Don't Dos**" to provide some guidance for your managers, supervisors, etc.

While each case of medicinal intoxication may be unique, the way they should be handled, at the onset, should be thoroughly considered and communicated to all those in a position of authority. At the very least, you should have a game plan prepared that your team knows they must follow the moment they suspect that a worker may be performing their duties while impaired in some way.



*"Employers are encouraged to work with the employee and their physician to see if the use of alternative forms of cannabis, other than smoking, would be appropriate."*ⁱⁱ

Canadian Centre for Occupational Health & Safety

Conclusion

In this new era of medically-approved impairment (for lack of a better phrase), the responsibilities of the employer, managers and supervisors become much more complex - balancing a person's rights to confidentiality and approved medical treatment, with their legal obligation to provide competent supervision and take every precaution reasonable to protect the safety of the worker.



Given the numbers already discussed, it is extremely unlikely that at least one of your workers is not taking some form of psychoactive drug, right now. The addition of marijuana to the list of accepted medical treatments, just adds one more item to the list you need to be prepared to deal with.

The best thing you can do is take a proactive approach and prepare for that time **now**.

If you wait until you're actually faced with the situation, you run the risk of having managers and supervisors making things up on the fly, which will almost inevitably lead to some very costly mistakes.

How successfully your organization will handle this very delicate issue is a matter of being well-prepared, well in advance.

Getting Started with Education

Need help getting started?

HASCO offers two online ***Marijuana in the Workplace*** courses, which are the most comprehensive training programs that Canadians can receive on the subject.

One course is for owners, managers, supervisors and HR departments, while the other is for workers.

Please click one of the links below, for more information on our online training courses.

[Managing Medical Marijuana in the Workplace \(for Supervisors\)](#)

[Cannabis Awareness for Employees](#)

The information presented in this article is not legal advice. This information is provided solely for the purposes of furnishing readers with an overview of this issue. Readers are cautioned not to make any decisions based on the information in this article alone. Legal advice should be sought out.

ⁱ Financial Post April 13, 2016 *What to Do if Your Employee Asks to Use Medicinal Marijuana at Work*

ⁱⁱ Canadian Centre for Occupational Health and Safety (CCOHS); http://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf