



CANNABIS IS LEGAL—NOW WHAT?

One of the most difficult areas for employers is managing and ensuring the safety of employees while, at the same time, respecting their rights to privacy and limits on drug testing. Employers, including all of those in the trucking and logging industries, now face an even more complicated legal situation following the legalization of cannabis last October. One of the most important tools for any employer in these industries is to have up-to-date workplace policies that can adequately deal with this new legal reality.

Each province and territory has enacted (or will enact) legislation providing for a variety of models for retail and distribution, and specific rules regarding public consumption. While specifics may vary, the impact on employers in every jurisdiction has some commonalities. Generally speaking, under most Occupational Health and Safety legislation, it is the employer that has the legal obligation to take all reasonable steps to ensure the safety of their employees; that is, employers have all of the responsibility, accountability and liability for workplace safety. It is, therefore, incumbent on employers to become aware of and understand the impact of legalized marijuana consumption on workplace safety. While all employers should have updated policies establishing expectations for fitness for work, employers in British Columbia will also have to consider and navigate how permissible public consumption might impact off-site smoking at the workplace.

Many employers have updated impairment or fitness for work policies, as well as zero-tolerance policies in place, and have developed accompanying communications plans to ensure employees are aware of the expectations placed upon them regarding the consumption of impairing substances. Employers should update their existing policies regarding fitness for work by amending them, or by introducing new policies to reflect

the company's policy regarding cannabis use whenever possible.

Policies outlining expectations around cannabis consumption and fitness for work, especially in safety-sensitive industries, are critical to ensuring worker safety and mitigating employer liability for workplace injuries. Allowing an impaired employee on a worksite puts the employee and other workers at risk of personal injury or harm, and exposes the employer to potential liability.

Moreover, while employer policies prohibiting the consumption of impairing substances such as alcohol and cannabis are justified, employers have a duty to accommodate disabilities under human rights legislation. This means, in certain circumstances, that the employer will need to consider whether an employee is an addict or has a prescription for medicinal cannabis, and the employer's policies will need to reflect and accommodate such employees. Employers should be sure to educate all of their employees on the new policies, and train supervisors and frontline personnel to watch for signs of impairment in their coworkers.

In addition to drafting or updating impairment policies, employers should consider implementing an accommodation policy that also reflects updated language recognizing the legalization of cannabis. If an employee has a medical condition for which a doctor has prescribed medical marijuana, an employer will have a duty to try to accommodate that employee. However, employers can ask the employee to provide additional information, such as whether the employee's condition is temporary or permanent, or whether there are any associated limitations or restrictions on their ability to perform their job. The employer's duty to accommodate includes a duty to inquire. Therefore, in order to accommodate such an employee, an employer may be required to grant a leave of absence while the employee is undergoing treatment. Alternatively, the employer may be required to find a different job for the employee in cases where that is possible. However, if the consumption of medicinal marijuana is likely to cause impairment to the extent that the employee cannot perform any job, then the
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employer must take appropriate steps to ensure the safety of that employee and the other members of the workforce.

Addictions or disabilities must generally be accommodated where safety is not an issue, and employers can often do this by entering into agreements with the employees that provide that the employee cannot return to work unless he or she is going through treatment. Accordingly, employers and employees should be made aware that, if an employee has been prescribed cannabis or any other medication that would cause impairment, a positive obligation exists to inform the employer given that it could impact their ability to safely perform their job function.

Employers should also consider the fact that, even though an addiction or dependency is considered a disability an employer may be required to accommodate, it does not excuse an employee who is not being forthcoming with his/her employer. If an employee suffering from a substance dependency issue causes an incident or injures someone, the employer is still able to discipline the employee in accordance with its


established policies. It is important to ensure that any disciplinary action is taken not because of the employee's substance dependency, but rather because of the employee's behaviour that led to the incident (as would be the case if any other employee caused a similar incident). Given the complexity of this area, an accommodation policy is just as important as an impairment policy.

Legal cannabis is here, but it is not too late to update your impairment or accommodation policies if you have not yet done so. Consider whether your policies appropriately define what "impairment" means. In safety-sensitive positions, an expressly worded policy that stipulates that employees can't use drugs or alcohol at work, or be under the influence of a drug or alcohol at work, will typically be considered acceptable. Such policies must respect an employee's rights regarding confidential information, but must also include specific requirements that employees must inform their supervisor (or the appropriate health and safety officer) if they are taking any prescription medication (including but not limited to medicinal

marijuana), and whether there are limitations and restrictions on their ability to perform their job.

If you have questions about how cannabis legalization may impact you or your organization, you should consult with appropriate legal advisors who can provide assistance in navigating this new legal development.▲

Charles Bois has a diverse practice that focuses on the oil and gas, energy, mining and natural resources, Aboriginal, environmental, commercial, and construction and infrastructure sectors. In addition to his legal experience, Charles has over 20 years of business experience in the natural gas industry, including senior management and consulting roles.



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