

## PUBLICATION

### With cannabis legalisation comes new employer | employee obligations

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The relationship between an employer and an employee is a contractual relationship. The terms of the contract may be written, verbal, or implied by the law to fill in any gaps that the parties did not consider when the contract was formed.

When hiring staff, many employers do not turn their minds to employees using cannabis, or experiencing the effects of using cannabis at work. With the recent legalization of cannabis in Canada this is now a very real and urgent issue.

The best option for employers is to implement policies relating to the use of drugs and alcohol, and incorporate the terms of those policies into their employment contracts. Putting the terms of the employer's drug and alcohol policies in writing will remove any questions about what the employer's expectations are and makes it clear to the employee what the consequences may be for failing to meet those expectations.

#### Employee obligations without a policy

Where there is no written drug or alcohol policy, employers are left with nothing but the contractual terms that a Court may imply into the existing contract. Courts in Canada have long recognized that there is generally a power imbalance between the employer and its employees, and so employment law has developed to protect the vulnerable party - the employee.

An implied term of every employment contract is that the employee will show up to work and be able to perform his/her work duties safely and competently. It is also an implied term that if an employee breaches that term, the employer may impose discipline.

#### Employer's ability to impose discipline *without* a policy

If an employee is unable to perform his/her work duties safely and competently as a result of cannabis usage, outside of a union setting, the main legal question will be whether an employee's conduct will justify dismissing the employee for *just cause*.

A *just cause* dismissal is the most severe discipline that an employer can impose. A proper just cause dismissal

ends the employment relationship without the employee being entitled to receive any advance notice or pay in lieu of notice, prevents the employee from being eligible to receive employment insurance payments, and often makes it more difficult for the employee to find new employment.

Because of these significant negative impacts to an employee, the Court will only consider a *just cause* dismissal to be an appropriate response by the employer if it is proportionate to the misconduct of the employee.

In the case of cannabis usage by an employee, whether a just cause dismissal is a proportionate response will depend on the entire context of the employment relationship. Important factors will include:

- When the cannabis consumption occurred (using cannabis at work is more culpable than using it outside of work hours but suffering residual effects);
- Whether the cannabis usage created a safety risk to other employees or the public;
- Whether the cannabis usage violated any laws (such as by operating a company vehicle while impaired);
- The nature of the employee's job duties.

Generally, in order to establish that an employee's cannabis use qualifies as a breach of the implied duty to perform his/her work duties safely and competently the employer will need to show that the cannabis usage:

1. Affected the employee's ability to perform his/her job functions;
2. Caused the employer to suffer some kind of prejudice as a result.

If the employer is not able to show these two things, then the employer will only be justified in imposing a lesser sanction. Over time, the employer may be able to establish a pattern of conduct that warrants a just cause dismissal if:

- The employer has imposed a lesser discipline;
- The employer has given the employee notice of Their expectations;
- Warned the employee that further breaches will lead to more serious discipline including dismissal for just cause;
- Given the employee opportunities to improve, but the employee nonetheless continues to use cannabis in a way that breaches their implied obligations.

#### Employer's ability to impose discipline *with* a policy

Having a drug policy simplifies the disciplinary process for two reasons:

1. It puts the employee on notice that the employer considers impairment due to cannabis to be incompatible with the employee's job duties;
2. Courts have held that the breach of a policy is in and of itself grounds for discipline.

A well drafted policy clarifies the obligations of the employee with respect to cannabis and other drugs, and further shows that these obligations are reasonably connected to the employee's job duties. If safety is a concern, it is important to specify in the policy that the employee is in a safety sensitive position.

However, having a policy does not give the employer unrestricted discretion to dismiss the employee for *just cause* for a single breach of the policy in all circumstances. The discipline imposed must still be proportional to the misconduct and dismissal for *just cause* will still require evidence that the employee was impaired at work and the employer experienced prejudice as a result. However, an employee's breach of a drug policy is a clear example of misconduct which makes it easier to justify discipline, particularly where the drug policy itself sets out the consequences of a breach.

## Drug testing in the workplace

Without a drug policy permitting testing, an employer has no right to demand that an employee take a drug test. Even where a drug policy exists, the Canadian Courts have severely restricted the circumstances in which testing can occur.

Essentially, testing must be conducted in a reasonable manner and will only be permitted if the employee occupies a safety-sensitive position and there is either:

1. Reasonable cause to believe that an employee may be impaired;
2. An incident that caused or had the potential to cause significant damage or injury, where impairment may have been a factor;
3. A return to work program after an employee has received treatment for a drug dependency.

Although testing remains important for drugs such as alcohol, it is currently unsettled as to how meaningful a positive test result for cannabis will be in an employment context. The main reason is that current testing methods for alcohol are able to determine impairment, but there is no equivalent test with respect to cannabis that can identify whether an employee is impaired. Based on current technology a positive test only indicates that the employee recently consumed cannabis. A related issue is that, unlike alcohol, there is no standard definition as to what qualifies as “impaired”.

Though an employer may be able to discipline an employee for breach of a policy against testing positive for cannabis, actual evidence of impairment is critical. Documenting evidence that an employee may have been impaired, such as bloodshot eyes, the smell of cannabis on the employee’s clothing or breath, and seemingly impaired motor skills, in many cases will be every bit as valuable to the employer’s case as a positive drug test.

## Human Rights

Employers have a positive obligation to accommodate a physical or mental disability of an employee to the point of “undue hardship”. As cannabis is now taken for a variety of medicinal purposes for treatment of physical and mental health issues, this can give rise to an employer’s obligation to accommodate an employee’s cannabis use.

As in all human rights scenarios, the employer will be required to provide reasonable accommodation. What qualifies as “reasonable accommodation” and “undue hardship” depends upon all the surrounding facts and circumstances.

For example, if an employer is able to show that using cannabis to treat an employee’s medical condition would in all circumstances pose a safety risk, then unless it is reasonable to move the employee to another position, accommodating that employee will likely constitute undue hardship.

## Discipline for off-duty conduct

Historically the Court took the view that what an employee did on his/her own time was of no concern to his/her employer. The explosion of social media in the last several years has had the effect of blurring the distinction between “work time” and “personal time”. Employees can often be identified as working for their employers and, for better or for worse, the personal actions of employees can impact their employer.

Viral videos of drunk employees have created public relations headaches for employers in the past, and it seems very likely the legalization of cannabis will create similar headaches in the future.

An employer will be able to impose discipline for off-duty conduct if the conduct:

- Interferes with the employer's reputation or product;
- Interferes with the employer's ability to conduct operations;
- Renders the employee unable to perform his/her job duties;
- Leads to other employees being reluctant, refusing, or being unable to continue working with the employee; or
- Is a serious *Criminal Code* offence that damages the general reputation of the employer and other employees.

Whether or not an employer can impose discipline for an employee's off-duty cannabis usage would depend on whether the employer could show the type of harm listed above. Again, context will be critical as to what, if any, discipline would be appropriate in the circumstances. If video surfaced online of staff at a fast-food restaurant smoking marijuana while off-duty, that would not have nearly the same impact on the employer's reputation and ability to conduct operations that could occur if the employees were in a safety-sensitive environment like pilots or school bus drivers.

The best way for employers to minimize risk and uncertainty about the off-duty conduct of their employees is to have appropriate policies in place.

Contact any of our [Employment Law lawyers](#) for assistance in creating or revising your policies.