



*This document is intended to provide a brief explanation to employers and employees of their rights and obligations under the Act with regard to **the consumption of adult-use cannabis and/or medically prescribed cannabis both inside and outside of the workplace.***

Legalization of Cannabis

What is the impact inside and outside of the workplace?

Introduction:

Cannabis became legal in Canada effective October 17, 2018. Many employers and employees have questions and concerns regarding the impact that the legalization of cannabis will have on the workplace, and on employers' and employees' rights and obligations under the New Brunswick *Human Rights Act (Act)*. What employers and employees need to understand is that their rights and obligations under the *Act* will remain the same pre and post-legalization. Therefore, the legalization of cannabis does not effectively change the duty to accommodate.

This document is intended to provide a brief explanation to employers and employees of their rights and obligations under the *Act* regarding the consumption of adult-use cannabis both inside and outside of the workplace, and the consumption of medically prescribed cannabis both inside and outside of the workplace. This document is not to be considered legal advice from the Commission as in all human rights cases, the individual facts of the matter are important when determining whether or not a duty to accommodate exists, to what extent accommodation is required, and whether discrimination has occurred.

One of the recurring themes about no drug or alcohol policies and mandatory, random drug and alcohol testing is whether the workplace is dangerous, whether the employment position is “safety sensitive”, and whether there is a problem with drug and alcohol consumption within the workplace. Human rights tribunals and the courts have defined safety sensitive positions as being ones in which an employee's drug or alcohol impairment could lead to direct and significant risk or injury to the employee, others, or the environment. A safety sensitive position is determined by examining the context of the industry, the particular workplace, the

Note: the duty does change slightly with regard to professions that have limitations on individuals who are convicted of a *Criminal Code* offense as it will no longer be a *Criminal Code* offense to be in possession of a certain quantity of cannabis. Therefore, employers of these types of professionals (police officers, security personnel, etc.) will have the duty to accommodate their employees to the point of undue hardship with regard to their adult use of cannabis both inside and outside of the workplace.

employee's direct involvement with high-risk operations, the role of trained supervisors, and the existence of checks and balances in the workplace. Positions that have been found by arbitrators, tribunals, and the courts to be safety sensitive include, but are not limited to: bus driver; tug boat captain; a machine operator at a waste transfer station; maintenance worker in a pulp and paper mill; machine operator at an oil refinery; a power engineer at a paper mill; and a labourer assisting gas technicians with the installation of gas lines.

Further, there appears to be a different line of decisions regarding no drug or alcohol policies and mandatory, random drug and alcohol testing when a workplace is unionized as compared to a non-unionized workplace, but the tests used are similar in that it must be a dangerous workplace and there must be a general problem with drug or alcohol consumption in that workplace.

In early Fall 2018, the Commission will be issuing an updated guideline on drug and alcohol testing in the workplace. This updated guideline will address, in more depth, the duty to accommodate employees with addictions, the consumption of medical cannabis in and out of the workplace, the drug and alcohol testing in the workplace, and the differences between unionized and non-unionized workplaces.

Inside of the Workplace

Medically Prescribed Cannabis

Tetrahydrocannabinol (THC) is one of at least 113 cannabinoids identified in cannabis. THC is the principal psychoactive (intoxicating) constituent of cannabis. **Just like any other intoxicating substance, employees in safety sensitive positions have an obligation to inform their employer that they are using a medication that may intoxicate the employee or impair their cognitive functioning.** However, the employee does not have to disclose that it is cannabis as an employer has a duty to accommodate the employee to the point of undue hardship regardless of the type of intoxicating/impairing medication.

Cannabidiol (CBD) is another cannabinoid. Unlike THC, CBD does not produce a high or intoxication. An employee who is utilizing medically prescribed cannabis that does not contain THC, but does contain CBD, does not have an obligation to disclose his/her use to his/her employer as long as it does not intoxicate or impair the employee. This non-reporting requirement would be similar to an employee who is utilizing anti-inflammatory medication such as naproxen, etc.

Addictions

Addiction is both a mental and physical disability under the *Act*.

The *Act* requires employers to accommodate employees to the point of undue hardship if an employee has an addiction to cannabis and the employer is made aware of this addiction or suspects a cannabis addiction.

Employers who have safety sensitive or dangerous workplaces are able to implement no drug and alcohol in the workplace policies that require an employee to self-report the consumption of

drugs or alcohol as long as the policy is not punitive with regard to the employee self-reporting (no termination, no adverse impact, etc.) and the employer provides accommodation to the employee which may include time off to attend treatment facilities, etc.

If an employer has the appropriate policy that provides for accommodation once an employee self-reports the addiction, the employer is permitted to have a clause within that policy that sets out the consequences of not self-reporting and then testing positive for alcohol or drug consumption post a workplace incident or accident. However, it should be noted that employers should not have absolutes in the policy as the duty to accommodate requires that individual assessment take place and part of this assessment includes: whether or not the employee's addiction caused the employee not to follow the policy; whether or not the employer was able to accommodate the employee by not terminating their employment; the nature of the workplace, etc. This assessment is dependent upon the particular facts of the situation.

Employers who do not have safety sensitive or dangerous workplaces should be cautious about implementing no drug or alcohol workplace policies, particularly zero tolerance policies that result in the termination of the employee. Such policies could be considered discriminatory if the employer is unable to establish a *bona fide* requirement for having such a policy or if it is unable to establish that it attempted to accommodate the employee to the point of undue hardship. Further, these types of employers (non dangerous or non safety sensitive workplaces) are not permitted to institute mandatory or random drug and alcohol testing in the workplace.

Adult Use

Just like the consumption of alcohol or other mind-altering/intoxicating substances, the *Act* does not require an employer to accommodate an employee who consumes adult-use cannabis in the workplace. If an employee does not raise an addiction to cannabis as a reason for the employee consuming cannabis while at work, and if the cannabis is not medically prescribed, the duty to accommodate is not triggered and normal workplace policies would apply.

Outside of the Workplace

Medically Prescribed Cannabis

Employees who consume medically prescribed cannabis outside of the workplace and who attend work not under the influence of the medically prescribed cannabis (effects have worn off prior to the commencement of working hours) do not have an obligation to disclose the consumption of the medically prescribed cannabis to their employers. However, as cannabis may be detected in the blood for several days, an employee may test positive for having consumed cannabis even though they are no longer experiencing the intoxicating side-effects of cannabis. Therefore, if the employee is in a safety sensitive position and if that employee's employer has a no drug or alcohol in the workplace policy in place that requires disclosure, the employee may want to inform the employer that they consume a medication outside of the workplace and therefore may test positive despite not being impaired by the medication during working hours.

Addictions

An employee who has an addiction to drugs or alcohol and is consuming cannabis not during working hours (after working hours and does not attend work impaired by cannabis), has no obligation to disclose such addiction to his/her employer. **If the employee informs the employer of the addiction or the employer suspects the employee has an addiction, the employer has a duty to accommodate the employee to the point of undue hardship.** This accommodation would include not terminating the employee's employment as the employee is not attending work impaired. However, due to the duration of action of some drugs, including cannabis, an employee may test positive for consuming such drugs even though they are no longer experiencing the intoxicating side-effects of the drugs. Therefore, if the employee is in a safety sensitive position and if that employee's employer has a no drug or alcohol in the workplace policy in place that requires self-reporting, the employee may want to inform the employer that they consume drugs and/or alcohol outside of the workplace and therefore may test positive despite not being intoxicated by the drug or alcohol during working hours. This will ensure that the employee abides by the employer's policy. As noted previously, such a policy is considered *bona fide* ("in good faith") in dangerous workplaces as long as it does not have punitive repercussions once an employee self-reports.

Adult Use

Employees who consume drugs, including cannabis, outside of working hours and who attend work not under the influence of such drugs and alcohol do not have an obligation to disclose such use to their employer.

However, due to the duration of action of some drugs, including cannabis, an employee may test positive for consuming such drugs even though they are no longer experiencing the intoxicating side-effects of the drugs. Therefore, if the employee is in a safety sensitive position and if that employee's employer has a no drug or alcohol in the workplace policy in place that requires self-reporting, the employee may want to inform the employer that they consume drugs and/or alcohol outside of the workplace and therefore may test positive after a workplace incident despite not being intoxicated by the drug or alcohol during working hours. This will ensure that the employee abides by the employer's policy. As noted previously, such a policy (no drug or alcohol in the workplace policy) is considered *bona fide* in dangerous workplaces as long as it does not have punitive repercussions once an employee self-reports.

Note: Case law in this area is developing due to the fact that technology cannot effectively and accurately measure the current state of impairment from the consumption of cannabis. In one recent case, an Arbitrator found in favour of a potential employer of a dangerous workplace who denied employment to a potential employee since that employee candidate disclosed the consumption of medical cannabis and technology was not advanced enough to measure the current state of impairment to ensure safety in a dangerous workplace.

For further information about the Act or this document, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at <http://www.gnb.ca/hrc-cdp> or email us at hrc.cdp@gnb.ca

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