

## **Marijuana is Legal. Now what?**

The legalisation of marijuana in Canada has major implications for the workplace. Employers are justifiably concerned about the potential effect on safety if employees come to work impaired by marijuana. This was a concern for employers even before legalisation. It is an even bigger concern now because legalisation may lead employees to discount the dangers of impairment and to feel more entitled to use marijuana before reporting to work.

Employers are responsible under the law to provide a safe work environment for their employees. This means that employers must take steps to ensure that employees do not work while impaired by drugs or alcohol. Employees must be informed that drug and alcohol impairment at work will not be tolerated. Ideally supervisors should receive professional training on how to recognize impairment. Some employers have a policy of sending employees home if they report to work smelling of alcohol or marijuana. Labour arbitrators have upheld such policies as a reasonable safety measure given the difficulty of determining actual impairment.

Where there is reason to believe that an employee is not fit for duty, the employee should not be permitted to work. In such situations, a manager should ensure that the employee leaves the workplace and has a safe method of transportation. The employee should not be allowed to drive himself or herself home. In the case of unionized employees, the union steward should be informed of the situation. The employer may treat such an incident as either grounds for discipline or as a non-disciplinary suspension. The latter option is preferable in circumstances where there is a reasonable doubt about the employee's condition.

Employers considering a drug and alcohol policy that includes testing should seek legal advice in order to ensure that the policy can withstand judicial scrutiny. Drug and alcohol policies must strike a balance between the employer's need to maintain safety in the workplace and the employee's right to privacy under the *Charter of Rights and Freedoms*. Post-incident testing is generally acceptable whereas random testing is generally not acceptable.

Employers should be aware that they have an obligation under the *Human Rights Code* to accommodate addicted employees to the point of undue hardship. This is because addiction is considered a disability. The most common form of accommodation for addiction consists of time off to seek treatment and reinstatement with conditions such as a commitment to abstinence or consent to random testing. Employees are more likely to disclose addiction issues if they believe that they will meet with a compassionate response from their employer.

Finally, employees who are prescribed medical marijuana, as treatment for a disability, are also entitled to accommodation. This does not mean that the employer must tolerate impairment at work, but the employer cannot simply refuse to employ someone because they are a medical marijuana user. Individual assessment is the key to effective accommodation. The employer must consider the risks associated with the employee's position and investigate whether the amount and type of marijuana prescribed would

exacerbate those risks. While there are very few cases that deal with this issue so far, it is to be expected that the case law and scientific literature will grow over time resulting in more guidance for employers.