



# MARIJUANA — *and the* — WORKPLACE

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## cover feature



### EMPLOYMENT LAWYERS SAY IT'S HIGH TIME TO UPDATE YOUR WORKPLACE ALCOHOL AND DRUG POLICIES

By Heather Hudson

**O**n Oct. 17, 2018, Canada will officially enter uncharted territory as the only first-world nation to fully legalize the use of recreational marijuana. As the country navigates the new legislation, employers will be expected to have policies and procedures that guide their staff. Are you ready?

We spoke to two leading employment lawyers about how this new legislation will affect the workplace. Their answers may surprise you.

“The fact that marijuana is legal in Canada doesn’t mean that obligations in the workplace are different. Alcohol is something we can’t consume and then participate in work. And if you put recreational marijuana in same category, the same principles apply,” said James D. Heeney, partner at Robinson Heeney LLP.

“You can’t show up [to work] intoxicated from alcohol at lunch and you won’t be able to show up that way from smoking marijuana.”

Does this mean employers can lump marijuana into their existing policies about substance use and consider the issue covered? Not exactly. Heeney says this is high time to think carefully about your approach and update HR policies to be clear about the recreational use of drugs in the workplace.

It’s also a good time to address your organization’s approach to medicinal marijuana. Something David A. Whitten, partner at Whitten & Lublin, says should already be covered. “Everybody’s excited about the marijuana legalization, but the real watershed moment happened two or so years ago when it became recognized as medicinal treatment and has needed to be accommodated in the workplace if prescribed by a doctor ever since.

“Employers should already have turned their minds to this.”

With the expert advice of Heeney and Whitten, we’re walking you through what to consider to ensure you’re up on your obligations and have a clear strategy for handling marijuana-related issues in your workplace.

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## HAVE A PRECISE POLICY

As Heeney noted, many workplaces can limit marijuana consumption in the workplace the same way they do alcohol. “We’ve been telling clients that if they have a drug and alcohol policy in their workplace, it’s probably something that, with minor modifications to specifically reference recreational marijuana, can be compliant once the new legislation is in place.

“Overall, it’s important to be clear: just because it’s legal doesn’t mean it’s appropriate to be high at work.”

He recommends creating a fulsome policy that considers the ricochet effects of recreational marijuana use on the workplace. While your policy may stipulate that employees are not permitted to be intoxicated at work, it’s possible for someone to have a drink at lunch and not appear to be affected. The same may hold true for an employee who consumes a small amount of marijuana via odourless vaping. Heeney advises setting clear expectations about what employees need to do to “be a participant in the workplace,” which may include a zero-tolerance approach to alcohol or drug consumption of any kind during the workday.

Whitten advises writing in the consequences of breaching the policy. “Be clear: if you come to work stoned, you’re subject to discipline. You can progressively discipline and ultimately terminate unless they show up with a doctor’s note. Right off the bat, you can dispense with some of the disruption that could come with someone smoking a Marley-sized cannon in front of the office.”

And what about work functions outside the office? Many businesses entertain clients at lunch or after hours, and alcohol may be a part of these social events. Heeney says policies will need to be modified to address whether marijuana will be in the same category as alcohol.

Finding boundaries may be complicated, as employees who drink alcohol with clients may also want to consume marijuana. “We don’t know for sure because there is no case law on it, but I believe it will be okay [to put limits on marijuana]. I compare it to having a policy saying that you cannot order ‘shots of alcohol’ at a [work] event, but you can order wine.”

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— DAVID A. WHITTEN

## OFFER TRAINING AND HAVE CONVERSATIONS ABOUT THE AMENDED POLICY

Even if you’re just updating an existing policy to include recreational marijuana to the rules around alcohol, it’s important to communicate the changes so there is no confusion about what is acceptable in your workplace.

“The only way people will be held accountable for breaching a workplace policy is if it’s clear. Just changing a policy and putting it on your intranet site is not a good approach because you can’t be sure everyone has read and understood it,” said Heeney.

“The easiest way to do ‘make sure’ is to have a training seminar or a meeting with all employees and walk through a bunch of examples. Is the consumption of marijuana acceptable at work events? What if a client proposes it? What if a client is consuming it? How are we going to manage this as a business? Walk them through the process so they understand where the line is and there’s no lack of clarity.”

## WHAT ABOUT PRESCRIPTIONS?

Medicinal marijuana is a more complex issue in the workplace. If an employee has a prescription for the use of medical marijuana during working hours, the company needs to be advised and assess what they can and can’t do to accommodate it.

“Legislation says that you have to accommodate medical conditions in the workplace to the point of undue hardship. And there’s no hard and fast rule – it differs from each workplace and situation,” said Whitten.

“One thing that has emerged is that if somebody is in a safety-sensitive position and the marijuana impairs their ability to do their job, such as operate heavy equipment, you’re entitled to decline accommodation.”

Heeney points to a recent case that went to the Human Rights Tribunal involving a window washer with a prescription for medicinal marijuana whose job it was to clean high-rise buildings. It was decided that the employer did not have a duty to accommodate his need to consume marijuana on the job because it would interfere with his ability to safely carry out his duties. This case helps establish a precedent that allows companies to avoid accommodating employees whose work requires them to do physical work that could jeopardize their safety if not carried out properly, including driving a vehicle.

Whitten says an employer is not obligated to create another job for an employee who cannot do their original job under the influence of medicinal marijuana. “The Tribunal has found that it is beyond undue hardship to create a new position. However, if you have another role you can put them in without firing someone else or you can unbundle some of their duties to accommodate their restrictions, you should explore further.”

This becomes trickier when an employee’s responsibilities don’t include driving or operating heavy machinery. “This is the part that the law is going to struggle with. I foresee people getting prescriptions and the employer not knowing how to manage them,” said Heeney.

He recommends working through an accommodations process on a case-by-case basis with each individual, advising HR professionals to gather information about the prescription and find out

Employers need to determine the expectation when employees meet with clients who may consume marijuana



more about the work the employee does. You may then request additional medical information, such as a functional abilities form from their doctor.

Heeney and Whitten agree that it is critical to avoid saying yes or no to accommodations right off the bat. “If you’re concerned about their ability to carry out their job while taking medicinal marijuana, you might create a job description for the role and ask them to take it to their doctor to determine whether they can perform all their duties,” said Whitten.

If you ultimately determine that the employee can’t be accommodated, and the case goes to the Human Rights Tribunal, you will need to prove you went through a process of evaluating options before denying accommodation.

“You have the right to ask for more information from their doctor and you can request an independent medical exam from a third party. But you want to avoid saying that this is our approach every time we have a request for accommodation. Evaluate the facts of each case and make a measured decision,” said Heeney.

Whitten agrees. “Don’t try to make a one-size-fits-all medicinal marijuana policy or you’ll find yourself at the Human Rights Tribunal.”

Once it’s been established that an office employee can be accommodated, Whitten says it’s within the rights of an employer to impose restrictions on how and where they can consume medicinal marijuana. “You can say that, ‘If you have to ingest it, you can’t do it in front of [the] building, you must do it out of view of colleagues.’”

However, he cautions employers to avoid bias when it comes to medicinal marijuana. “There’s the Cheech and Chong stereotype that somebody is going to want to sit around eating Doritos and that’s not true. Depending on [the] strength of it and whether it’s got more CBD versus THC – often CBD is what’s used to treat anxiety – it’s not a high they get off of it, it’s more of a mellow feeling. They can still work with numbers and computers.

“A person can be productive, concentrate and may even be able to deal with customers. You can’t assume they’re going to be totally incapacitated.”

It’s also important to remember that medicinal marijuana comes in many forms, including edibles. “One of the tools in an HR professional’s toolbox when somebody has a medical note is to inquire if they can get the same effect by eating it as by smoking it,” said Whitten. “When people see [smoke] and smell it on them, that can have a disruptive effect for other workers because they may have these stereotypes in mind. It’s not out of bounds to ask whether the employee can vaporize or eat it so that it’s minimally intrusive in the workplace.”

### GET LEGAL ADVICE

When you’re not sure about the law, Heeney suggests getting legal advice as you put together your policy and the first few times accommodation requests for medicinal marijuana comes up. “You don’t have to write a whole new policy [to include new legislation]. Tweak what you have and consider getting it reviewed by an employment lawyer. If the Human Rights Tribunal feels those policies are not reasonable, they can rule that there is a breach even if it seems unwarranted.”

Remember that window cleaner case? Eager employment lawyers awaited the decision from the Human Rights Tribunal, hoping that it would provide more clear direction about the law and medicinal marijuana. Unfortunately, it wasn’t as helpful as they were hoping.

“It’s easy to justify a refusal to accommodate a prescription for workers who drive or use heavy equipment. It’s the office jobs that are more complex and there’s no across-the-board standard set at this point.”

All the more reason to shine up your policies and make sure your employees understand them. ■