

Workplace Safety After Cannabis Legalization: Duties and Liabilities

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General Safety Duty: s. 25(2)(h) of OHSA

An employer shall . . . take every precaution reasonable in the circumstances for the protection of a worker

Fines for Contravention of OHSA:

Up to \$1.5 million per charge

“Christmas Eve Fatalities” (Metron Construction)

- “Toxicological analysis determined that three of the four deceased, including the site supervisor Fazilov, had marijuana in their systems at a level consistent with having recently ingested the drug.”
- Metron Construction, Joel Swartz (Director), Swing N Scaff all fined (total of \$1.24 million). Vadim Kazenelson (Project Manager) jailed for 3 ½ years

Only Mining Safety Regulations Expressly Deal with Drug Impairment

Mines and Mining Plants regulation under OHSA:

15. (1) No person under the influence of, or carrying, intoxicating liquor, shall enter or knowingly be permitted to enter a mine or mining plant.

(2) Subject to subsection (3), no person under the influence of, or carrying, a drug or narcotic substance shall enter or knowingly be permitted to enter a mine or mining plant.

(3) A person required to use a prescription drug and able to perform his or her work may enter a mine or mining plant upon establishing medical proof thereof.

Basics:

- Impairment is a safety issue, at least for employees in safety-sensitive positions
- Employers may (and must) ensure that employees do not work while impaired where safety hazard
- Employers may (and must) remove impaired employees in safety-sensitive roles
- Employers need not permit use of cannabis at work or on employer premises, except medical cannabis to the extent required by the duty to accommodate under the *Human Rights Code*

Undue hardship and cannabis – Case study: Tizzard (NL Arbitration, 2018)

- Tizzard had medical authorization for cannabis he ingested every evening
- He disclosed his use to a prospective employer, but said he did not feel impairment during the daytime working hours
- Failed pre-employment drug screening and employer refused to hire him
- Jobs applied for were on a major construction project
- Union grieved, claiming employer failed to accommodate his disability
- Arbitrator decided that accommodating the cannabis use would amount to undue hardship because (1) there is no test to adequately and accurately test for cannabis impairment and (2) the work was safety-sensitive

Undue hardship and cannabis – Case study: Aitchison v. L & L Painting and Decorating Ltd. (HRTO, 2018)

- Employee fired for smoking cannabis at work – on swing stage at 37th floor
- Employee filed HRTO application, argued that employer's zero-tolerance policy was discriminatory
- HRTO disagreed, held that employer's zero-tolerance policy was rationally connected to a legitimate health and safety concern in the workplace. Further, the policy was adopted with an honest and good faith belief that it was reasonably necessary to protect the health and safety of workers and the public.

Possession of “small amount” of marijuana was just cause to fire employee who had “not carefully checked his pockets” (Terra Nova Employers’ Organization, NLCA, 2018)

- Unionized millwright caught with a small amount of marijuana in his jeans pocket during screening prior to boarding a helicopter that would transport him and other employees to an offshore platform
- Fired for cause
- Arbitrator upheld firing for just cause

Bartender, fired for smoking marijuana at work, loses human rights complaint (Burton v. Tugboat Annie's Pub and others, BCHRT, 2016)

- Employer policy prohibited consumption of drugs while on shift
- Bartender caught smoking marijuana – claimed chronic pain condition
- Human rights complaint dismissed

“Zero tolerance” policy on drugs in workplace upheld by human rights tribunal where employee did not have “marijuana card” (French v. Selkin Logging, BCHRT, 2015)

- Human Rights Tribunal: “Safety is the purpose of the zero tolerance policy, and this is clearly rationally connected to the performance of the job, namely operating heaving equipment in the logging industry.”
- The Tribunal noted that strict application of a zero-tolerance rule, without consideration of accommodation of the employee’s disability (addiction), may offend the *Human Rights Code* where the employee has a “marijuana card” and is legitimately using marijuana for medical purposes

The Employee's Duty to Disclose

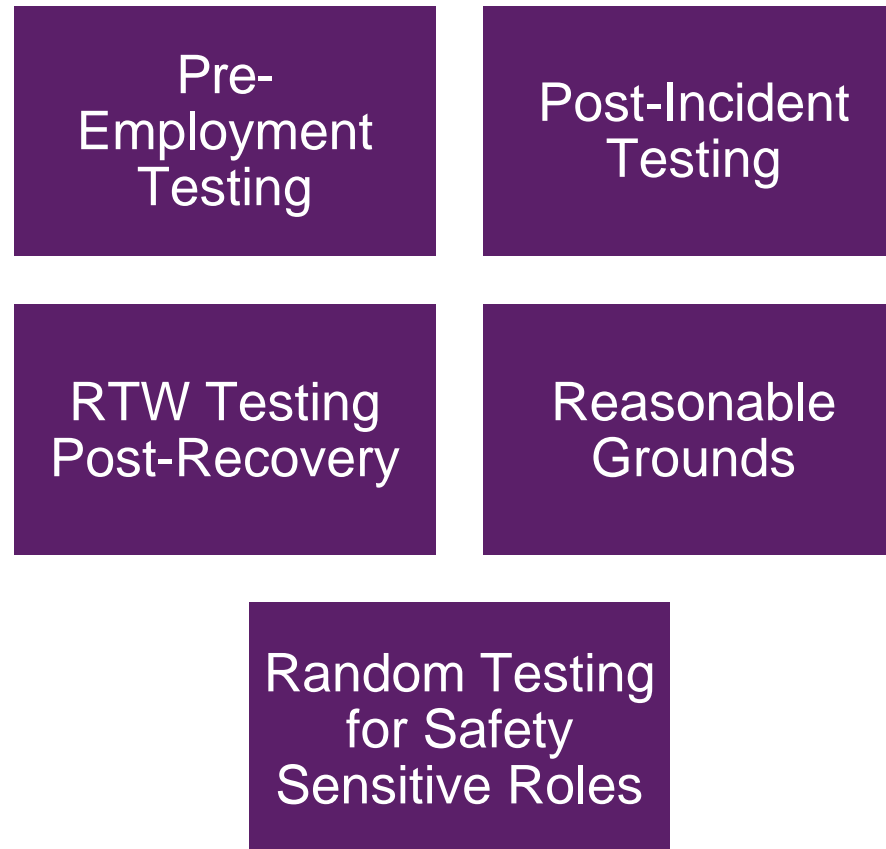
- All policies should distinguish between medicinal cannabis and recreational cannabis
- Include a positive obligation on employees to disclose to the employer their use of cannabis at work or in a way that could result in them being impaired at work
- Include a positive obligation on employees to disclose to the employer that they suffer from a drug addiction
- State that a failure to disclose such use or addiction could result in the termination of their employment for cause

The Duty to Disclose

Stewart v Elk Valley Coal Corp (2017 SCC)

- Company implemented policy requiring disclosure prior to incident
- Employee signed off on policy but did not disclose
- Employee was fired following accident
- Alberta Human Rights Tribunal determines that termination was result of policy breach, not his addiction
- Decision upheld on Judicial Review by SCC

Legal Framework for Drug Testing



Legal Framework for Drug Testing

- *CEP v Irving Pulp & Paper Ltd.* (2013 SCC)
- Unilaterally imposed universal random testing policies are unreasonable unless there has been a workplace problem with substance abuse and the employer has exhausted alternative means of dealing with the abuse.

Note: different analysis in non-union workplaces

Testing Impairment

- Police approaches for testing impaired driving:
 - Standard Field Sobriety Test
 - Drug Recognition Expert
 - Saliva or Blood Tests

Testing Impairment

Physical

- Odor
- Glassy or red eyes
- Unsteady gait
- Slurred speech
- Poor coordination

Psychosocial

- Mood fluctuations
- Inappropriate verbal or emotional response
- Memory lapses
- Irritability

Performance

- Absenteeism
- Excessive errors
- Significant deterioration in performance

Thank you

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