Cssea NEWS

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In this Edition:

CANNIBIS UPDATE: WHAT'S NEW, WHAT'S STAYED THE SAME, AND CHALLENGES RELATED TO ASSESSING IMPAIRMENT

By Margery Pazdor, Advocate

What's new since October 17, 2018?

Since recreational use of cannabis became legal in Canada on October 17, 2018, a patchwork of retail approaches have unrolled across the country. In British Columbia, only one retail store was licensed at the time of legalization, with 35 stores open across the province as of June 2019. In contrast, Alberta had licensed more than 70 cannabis retailers within weeks of legalization, and in Ontario it is still only possible to purchase cannabis legally using an online store.

More Canadians, especially more middle-aged men, may be using cannabis since it became legal to do so. Early results from Health Canada's "National Cannabis Survey indicate that 19% of Canadians over the age of 15 had used cannabis in the past three months, compared to 15% in the last survey of 2018. The survey indicates that the increase is specific to middle-aged men, and not to women or other age groups.

What's stayed the same?

While the retail landscape and demographics of cannabis use continue to evolve, not much has changed in the regulatory or legal landscape for employers. Employees are still not allowed to come to work impaired, and employers still have the right to manage the workplace through employment policies such as substance use and abuse policies.

STAY IN TOUCH

We welcome all suggestions and comments. Feel free to send your feedback to Doris Sun, Director of Communications, at: dsun@cssea.bc.ca.

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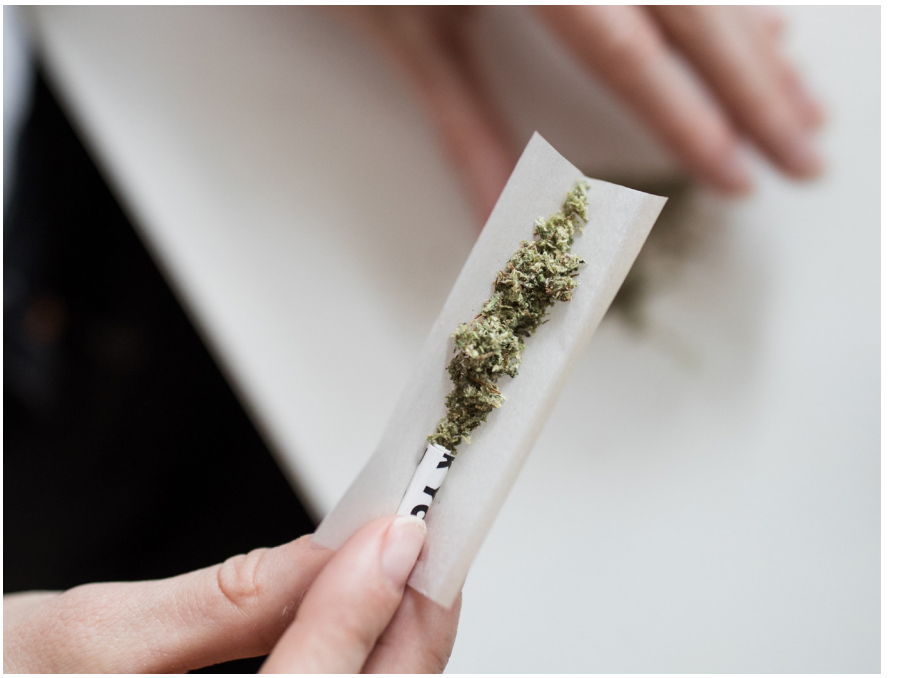
Community Social Services Employers' Association of BC

One challenge employers face is identifying and measuring impairment. Drug testing is permissible in some circumstances, but it is considered by courts and arbitrators to be a serious violation of privacy, and policies must be carefully drafted and applied in order to be compliant with the law. Even if drug testing is permitted, cannabis poses unique challenges because there is currently no conclusive test that proves impairment or non-impairment. Furthermore, testing is costly and time consuming.

Given the challenges associated with drug testing, it is often better for employers to rely on other means of assessing impairment, such as observations of "functional impairment." Functional impairment could be caused by any number of impairing substances or conditions, and could include signs such as decreased motor control, impaired judgment, decision making, focus, or other signs.

Safety first: What happens when you can't measure impairment in a safety-sensitive position?

The challenges associated with not being able to measure impairment are even more acute when dealing with an employer's duty to accommodate. A recent Newfoundland court decision, ***International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association***, 2019 NLSC 48, or "***Lower Churchill***," highlights these challenges, particularly for employers filling "safety-sensitive" positions.



Unlike recreational use of cannabis, medical use of cannabis has been legal in Canada since 2000. As a result, employees may seek accommodation for their use of cannabis, just as they would for any other medical issue. Request for accommodation may take many forms, including being permitted to consume cannabis while at work or before coming to work. The duty to accommodate also extends to applicants to a job, and not just current employees. In any accommodation situation, employers must base their decision on medical evidence.

In ***Lower Churchill***, an arbitrator found that an employer could reasonably deny someone employment in a safety-sensitive position based on medical evidence that there was a risk that they might be impaired from use of cannabis for medical purposes. The claimant in ***Lower Churchill***, Mr. T, was a construction worker with 30 years of experience who had chronic pain due to Crohn's disease and osteoarthritis. After exhausting other pain-management options, Mr. T was referred by his family doctor to the provincial Cannibinoid Medical Clinic and prescribed cannabis under the supervision of one of the clinic's doctors. Mr. T consumed approximately 1.5 grams of cannabis each evening after work through vaporization.

At the time that he initially began using medical cannabis, Mr. T worked on a large hydro-electric construction project in a safety-sensitive position. He reported his cannabis use to his supervisor, who never reported it further up the supervisory chain, and who permitted Mr. T to continue working. At the arbitration hearing, Mr. T's then-supervisor expressed the opinion that the claimant was "always safe" while performing his duties. Mr. T worked for several months while consuming medical cannabis, without incident. He was eventually laid off, and applied for new positions within the same project. After successfully bidding on a position, Mr. T was asked to submit to a drug test as part of standard hiring procedure, at which point he disclosed his medical cannabis use. After lengthy back and forth between the employer, the union and Mr. T, the employer refused to employ Mr. T on any future project, citing safety concerns. The union grieved.

Mr. T provided medical evidence from his family doctor, as well as from the doctor prescribing cannabis. Both doctors held the opinion that Mr. T's use of cannabis in the evening after work would not impair him to do his job duties the next day. The employer, meanwhile, consulted with an occupational health consultant. The consultant advised that there was a possibility that an employee would continue to be impaired within a 24 hour period after consumption. The employer stated that it could not accommodate Mr. T as it would constitute undue hardship to employ him in a safety-sensitive position when the risk of impairment could not be alleviated by a reliable measure of impairment. In the employer's view, given their expert's opinion that a risk of impairment existed, it was up to the union and Mr. T to prove that he was not, in fact, impaired.

At the arbitration hearing, many expert witnesses were called in addition to the three doctors initially consulted. The employer's expert witness testified that the timeframe for impairment varied according to a number of different factors, but could increase from long-term use. The expert cited a 2013 Health Canada recommendation that patients taking cannabis should not work in safety-sensitive jobs until 24 hours following cannabis use.

The arbitrator found this evidence persuasive, and upheld the employer's decision not to hire Mr. T, saying it would impose undue hardship to do so. The arbitrator accepted that there was evidence of ***potential*** impairment, or ***risk*** of impairment, and that in the context of a safety-sensitive position, the risk imposed undue hardship on the employer. In January 2019, the Newfoundland Superior Court upheld the arbitrator's decision.

Key takeaways: safety sensitive and medical evidence
There were a number of key factual elements that led to the arbitrator's decision in this case. Most importantly was the designation of Mr. T's employment as "safety-sensitive." The determination of whether or not a job, or industry, is "safety-sensitive" depends on the context of the specific work environment. Generally, a position is considered "safety-sensitive" if an employee's incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others, or the environment.
A second key factual element was the employer's reliance on medical opinion in making its decision regarding accommodation. It is unlikely the employer would have been successful if they had not consulted with an occupational health expert. As the science around impairment and testing for impairment continues to evolve, employers will need to stay up-to-date and consult with experts as needed when assessing accommodation requests.

ASK AN HRLR CONSULTANT: VANESSA WONG

We were advised that our funding will be reduced for a program. What are our obligations?

The employer should first determine if ***Article 13.1 – Definition of a Layoff*** is triggered. A regular employee is laid off when their:

1. Hours of work is reduced by greater than 4 hours per week;
2. Hours of work is reduced to less than 20 hours per week such that she is no longer eligible for health and welfare benefits; or
3. Employment status changes from regular full-time to part-time or regular part-time to full-time.

Once the employer has determined Article 13.1 is triggered, they should contact the union to determine whether notice under section 54 of the ***Labour Relations Code*** is required. Section 54 requires an employer to give at least 60 days' notice in advance of a change affecting the terms, working conditions, or security of a significant number of employees. The employer cannot provide less than this statutory requirement. If the parties agree that a significant number of employees will be affected, section 54 notice must be issued.

At the section 54 meeting, the parties are to meet in good faith and engage in meaningful discussions to endeavour to develop an adjustment plan that will either eliminate the need for a layoff situation or minimize the effect of the layoff situation. Ultimately, the employer makes the final decision regarding whether the adjustment plan is doable. If the employer decides there will be a layoff situation, the employer and the union should discuss whether a pre-layoff canvass of employees is necessary. The parties can mutually agree to waive the pre-layoff canvass. If the pre-layoff canvass is not waived, the employer is required to conduct a pre-layoff canvas as outlined in ***Article 13.2 – Pre-Layoff Canvass***. The pre-layoff canvass should be in writing.

If an employee, with the agreement of the union, accepts one of the options in the pre-layoff canvass then there is no layoff process for that specific employee. If an employee does not accept one of the options, the employer issues a layoff letter to that employee. The employee is entitled to notice (either working notice or pay in lieu of notice) in accordance with ***Article 13.6 – Advance Notice***, which is dependent on the employee's length of employment with the organization. The layoff letter should outline bumping options for each employee. Bumping is by seniority and not by employment status (i.e., part-time or full-time).

Please see the CSSEA website for template letters for section 54 notice, pre-layoff canvass, and layoff and bumping. To access the page, log in at www.cssea.bc.ca, go to Resources/Members Home and click on HRLR/HRLR – Templates and Forms and look for Layoff or Other HRLR.

REGISTER NOW FOR OUR 2019 AGM AND CONFERENCE

Registration for *Imagining the Next 25* is now in full swing. We are offering a wonderful lineup of speakers and sessions that will inform attendees on the various ways they can position themselves for success in the next 25 years. Spaces for workshops are limited so register now to secure your seat. Also, don't forget that early bird rates expire August 30!

Full details on sessions, speakers and registration can be found at: https://conference.cssea.bc.ca

GET TO KNOW OUR CONFERENCE SPEAKER: CHARMAINE HAMMOND

We are excited to have Charmaine Hammond as one of our conference presenters at this year's AGM and Conference. Charmaine possesses an impressive resume, having earned a Master's Degree in Conflict Management & Analysis, authored 5 bestselling books and earned a designation as a CSP™ Certified Speaking Professional.

As an expert in Workplace Communication and Collaboration and Conflict Resolution, Charmaine has been featured in various publications and shows, including a recent podcast, *The Employer Blueprint*. In her episode, Charmaine talks about problems with trust, and friendships ending from a new manager trying to manage people who were once coworkers. To get a glimpse into Charmaine's philosophy and expertise, listen to the Podcast here: http://employerblueprintpodcast.com/invest-in-your-leadership-skills-with-charmaine-hammond?tdest_id=559603

Catch Charmaine at *Imagining the Next 25*, where she will share her strategies on how to manage conflict and turn workplace breakdowns into breakthroughs. Charmaine will be presenting on October 8, from 1-4pm.