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To What Extend Must Employers Accommodate Medical Marijuana in the Workplace?

To the same extent as always: To the point of undue hardship. Although the obligation to address medical marijuana use by employees has added to the scope of concerns faced by Canadian employers, employers' broad obligations have not changed. Employers have long had a duty to accommodate an employee's disability, including the need to use prescribed medications in or around the workplace. The following discussion is intended to help employers better understand how medical marijuana fits in to the broader duty to accommodate.

Is accommodation required?

An employer's first question in assessing the duty to accommodate medical marijuana use is whether the employee seeking or requiring accommodation is disabled. Any individual seeking medical marijuana must obtain a medical certificate from a prescribed medical practitioner, in accordance with the ***Access to Cannabis for Medical Purposes*** regulation (SOR/2016- 230) under the ***Controlled Drugs and Substances Act***. Employers should remain mindful, however, to limit requests for medical documentation to only what is needed to accomplish their accommodation needs. Moreover, employers cannot request medical information until accommodation is sought by the employee. Where in doubt, employers should ask an employee if accommodation is needed and proceed accordingly. Given all of the focus on recreational marijuana, employers should bear in mind that their duty to accommodate

extends only to medical marijuana. There is no obligation to accommodate recreational marijuana use, which should be treated in much the same way as any other non- prescription drug or alcohol.

Extent of the duty: Undue hardship

Once an employer confirms that accommodation is required, the inquiry turns to the extent of the duty to accommodate. Employers must accommodate an employee's disability, and corresponding need for medical marijuana, to the point of undue hardship. Undue hardship, in the medical marijuana context, often means balancing safety interests with obligations to the accommodated employee. Any safety standard (including any zero tolerance policy) must satisfy the following test:

1. The standard must be rationally connected to the performance of the job in question;

2. The standard must be adopted in an honest and good faith belief that it is necessary; and

3. The standard must be reasonably necessary to accomplish the work - related purpose (i.e. keeping at-risk employees safe).

In setting a safety standard, employers are required, therefore, to consider the severity of the safety risk, the probability of an accident, and the employees that are at risk from any medical marijuana use. These considerations arose in ***Calgary v. CUPE 37*** (2015 CanLii 61756) ("***Hanmore***"), where an employee known to be using medical marijuana caused a safety incident and injured himself. After the accident, the employer transferred the employee to a non-safety sensitive position, which the employee challenged. The arbitrator found that the employer's belief in the need for the transfer was not honest, since there was no evidence suggesting that the employee was dependent on marijuana. Instead, the employee was reinstated in his former position and agreed to lower his marijuana dosage.

Similarly, in ***French v. Selkin Logging*** (2015 BCHRT 101), a driver was involved in an accident and marijuana was found in his truck. The driver was a known marijuana user, but did not have a medical certificate. Nevertheless, when the employer demanded that he

return to work "drug- free", it was found to have terminated his employment. The tribunal deemed the termination inappropriate and, instead, required the employee to obtain a medical certificate before returning to work.

Overall, ***Hanmore*** and ***French*** show us that employers must be very careful in balancing safety needs with the accommodation needs of the employee in question. An abrupt reaction, such as moving the employee to a non-safety sensitive position or implementing a "zero tolerance" rule, may not be appropriate.

Despite these cases, however, employers should know that there is no absolute right to use medical marijuana in the workplace. In ***Aitchison v. L&L Painting*** (2018 HRTO 238), the Human Rights Tribunal of Ontario recently upheld a termination resulting from an employee found using medical marijuana while working as a high-rise painter. Although the employee had a medical certificate, he had not disclosed the certificate to his employer. Moreover, the employee's own doctor testified that he would have prescribed a lower dosage had he known about the employee's occupation.

What appears to distinguish ***Aitchison*** from ***Hanmore*** and ***French*** is the employee' s lack of good faith. The employer had a known zero tolerance policy, yet the employee did not seek accommodation.

As a result, employers should bear the following lessons in mind:

1. There is no absolute right to use medical marijuana in or around the workplace – accommodation remains a two-way street;

2. Employers should establish clear policies on both prescription drug use (including medical marijuana) and workplace accommodation; and

3. Employers wishing to limit the potential risks of medical marijuana should make their policies clear and known, including through workplace training where appropriate, thus putting the onus on employees to seek appropriate accommodation.

When it comes to accommodating a disability, including one which requires the use of medical marijuana, there will always be cases on

the margins. However, employers that understand their duty to accommodate and that take appropriate steps to identify and mitigate workplace risks before an incident arises will be able to substantially reduce the "grey area" associated not just with the emerging issue of marijuana in the workplace, but with their broader duty to accommodate as well.

by Kyle Lambert

For more information on this topic, please contact:

Ottawa	Kyle Lambert	613.691.6117	kyle.lambert@mcmillan.ca

a cautionary note