



Changes in the Workplace: Marijuana, PTSD, and the New Employment Standards Act

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Overview

PART 1: Impact of marijuana legalization on the workplace

PART 2: On-call amendments to the *Employment Standards Act (ESA)*

PART 3: PTSD & First Responders

PART 4: Personal Emergency Leave Days: amendments to the *Employment Standards Act (ESA)*

PART 1: Impact of Marijuana Legalization in the Workplace

Relevant Legislation

Controlled Drugs and Substances Act

Access to Cannabis for Medical Purposes Regulations
(under the CDSA)

Cannabis Act (Bill C-45)

Basic Considerations for Employers:

Accommodation

- Employers can expect an increase in accommodation requests relating to medical marijuana usage
- Legalization of recreational marijuana could contribute to an increase in employee workplace impairment

Basic Considerations for Employers:

Health and Safety Issues

- Impairment is still impairment, whether or not it arises from the use of prescribed marijuana
- Obligations under the *Occupational Health and Safety Act*
 - Duty to protect workers

Basic Accommodation Principles

Human rights legislation exists in all Canadian jurisdictions

Employers have an obligation to accommodate employees to point of “undue hardship”

Employees have obligation to accept “reasonable accommodation”

Do I need to Accommodate?

- No obligation to accommodate for recreational use
 - No obligation to tolerate related impairment
- Must accommodate for medicinal use
 - Employer must consider *Human Rights Code* and *Occupational Health and Safety Act*

How Do I Accommodate?

- Ensure that the use of marijuana is medically necessary
- Identify your bona fide occupational requirements
 - Consider safety-sensitive positions
- Review and amend, as necessary, drug prescription policies
- If Applicable, review drug testing policies

Medical Marijuana - *Considerations*

- Important for employers to be aware that “zero tolerance” policies are still subject to the duty to accommodate in appropriate circumstances
- They must be applied with regard to individual circumstances and the nature of the workplace
- Employers cannot exclusively rely on a zero tolerance policy; however, the policy is an important consideration when factors such as health and safety are at play

Requests for Medical Information

Employers can require medical information to demonstrate:

- Disability exists
- Cannabis is effective for symptoms
- Others forms of medication are not appropriate
- Proof of fitness to work
- Strain of cannabis authorized and used; usage rates and times
- If necessary, independent medical examination

Requests for Medical Information

Questions to Ask

- Does employee require medical marijuana?
- Is employee limited in manner in which medical marijuana is ingested?
- Can employee safely perform duties?
- What impact does employee's marijuana use have on ability to perform job duties, both physically and cognitively?
- Please provide any other information regarding impact of employee's medical marijuana use on ability to perform duties safely and competently.

Key Takeaways

- ➡ Request medical information
- ➡ Don't assume that employee using marijuana is impaired
- ➡ Honour all accommodation rights and fulfill all accommodation obligations
- ➡ Consider health and safety issues

PART 2: On-Call Amendments to the *Employment Standards Act*

Minimum On-Call Pay – *In Force January 1 2019*

- **Minimum pay for being on call**
- **21.4** (1) If an employee who is on call to work **is not required to work or is required to work but works less than three hours**, despite being available to work longer, **the employer shall pay** the employee **wages for three hours, equal to the greater of** the following:
 - 1. **The sum of,**
 - i. the **amount the employee earned for the time worked**, and
 - ii. **wages equal to** the employee's **regular rate for the remainder of the time.**
 - 2. **Wages equal to** the employee's **regular rate for three hours of work.**
- **Exception**
- (2) Subsection (1) does not apply if,
 - (a) the employer required the employee to be on call for the purposes of ensuring the continued delivery of essential public services, regardless of who delivers those services; and
 - (b) the employee who was on call was not required to work.

Minimum On-Call Pay – *Who does it apply to?*

- Rule applies where:
 - employee is on call to work, and either:
 - ✓ the employee is not required to work, or
 - ✓ the employee works less than 3 hours (but is available)
- Exception where employee on call to ensure continued delivery of essential public services and not required to work

Minimum On-Call Pay – *How is it calculated?*

- Payment is “wages for three hours”, which is greater of:
 - regular rate for three hours of work or
 - the sum of:



- Capped at one payment per 24-hour period

Minimum On-Call Pay – *Example #1*

- Sam makes an hourly wage of \$23/hour. While on-call he:
 - does not get called into work
- What is the minimum on-call pay that he is entitled to?
 - \$23/hour x 3 hours = **\$69**

Minimum On-Call Pay – *Example #2*

- Sam makes an hourly wage of \$23/hour. While on-call he gets called into work for $\frac{1}{2}$ hour
 - where an individual that is called in receives overtime pay = $1.5 \times$ hourly wage
- Half-hour called in + regular rate for remainder of time
 - $(1.5 \times \$23/\text{hour} \times 0.5 \text{ hour}) + (\$23/\text{hour} \times 2.5 \text{ hours})$
 - $= \$17.25 + \57.5
 - **$= \$74.75$ which is greater than 3 hours of work at regular rate (\$69)**

Minimum On-Call Pay – *Transition Date for CAs*

January 1, 2019 Transition Date for Collective Agreements



If provision in effect on January 1, 2019, it prevails until the earlier of:

The expiry of the collective agreement or

January 1, 2020

PART 3: PTSD & First Responders

Post Traumatic Stress Disorder

- Persistent mental and emotional stress which is the result of a psychological shock.
- Can result from direct or indirect trauma
- Common causes:
 - Exposure to sudden or unexpected death of others
 - Witnessing or participating in rescues to prevent death or injury
 - Highly emotional events
 - Extreme fatigue, weather exposure or hunger
 - Extended exposure to danger or emotional/physical strain
 - Exposure to environmental hazards

Who are First Responders?

First Responders are:

- Full-time, part-time and volunteer firefighters.
- Fire investigators
- Police officers
- Members of an emergency response team
- Paramedics, emergency medical attendants, and ambulance service managers
- Workers in a correctional institution
- Workers in a place of secure custody or place of secure temporary detention
- Workers involved in dispatch

Supporting Ontario's First Responders Act

If a First Responder is diagnosed with PTSD by a psychologist or psychiatrist it is **presumed** that PTSD is work-related

Rebuttable Presumption

Section 14(6): the posttraumatic stress disorder is presumed to have arisen out of and in the course of the worker's employment, unless the contrary is shown.



Action Plan

- Know your workplace
- Know your resources
- Create a policy
- Educate your management and employees

PART 4: Personal Emergency Leave Days: Changes to The *Employment Standards Act*

Personal Emergency Leave

- 10 days (2 paid, then 8 unpaid)
 - Qualifying period for paid days: 1 week of employment
- Applies to all workplaces
 - 50 employee threshold is removed
- Employers will no longer be able to require a medical note as reasonable evidence

Personal Emergency Leave

- What does it apply to:

Personal illness

**Death or illness
of a family
member**

**Urgent matter
with respect to a
family member**

**NOT an urgent
matter regarding
the employee**

Personal Emergency Leave

- Practical considerations:



Does your workplace have a greater right or benefit?



If not, can you offset current contractual entitlements that have the same purpose as PEL? (e.g. bereavement leave)



How does PEL interact with your Short-Term Disability (STD) plan?

“Greater Right Or Benefit”

United Steel Workers, Local 2010 and Bristol Machine Works (4 April 2018, Mitchnick)

- Union grieved that the Employer violated section 5(2) of the ESA when it refused to pay PEL to a number of employees
- Collective agreement provided for an “Insurance Welfare Program”
- Arbitrator Mitchnick found that comparison requires looking at “the totality of the benefit in question as it exists under the collective agreement versus the totality of the benefit as provided by the Act”
- Grievance dismissed
- **But** upheld to extent that related to *probationary employees* who did not receive benefit of plan under the CA until 60 days of service

“Greater Right Or Benefit”

Carillion Services Inc. c Labourers’ International Union of North America, Local 183,

- Three paid floater days in collective agreement are not considered greater right or benefit than two paid emergency leave days

Cargill Value Added Meats

- “If the benefit or benefits in the collective agreement do not directly relate to the [emergency leave] day employment standard benefit, the employee is entitled to both the collective agreement benefit and the [emergency leave] day employment standard”; “the employer had no right “to unilaterally change the meaning or intent of a collective agreement provision ... to transform a paid holiday into an emergency leave””

PEL - Takeaways

- Need to provide minimum standard no matter what
- If providing greater right or benefit, define what the days are for
- Every PEL case will be analyzed on its own – there is no magic formula
- Cannot require a medical note for the PEL days

Will the *ESA* be Amended Yet Again?



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Questions & Answers



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