

Recreational Cannabis in the Workplace – Are you ready for legalization?

On October 17, 2018, recreational cannabis became legal in Canada. Employers updating their policies may be inclined to attempt to impose strict rules, out of an abundance of caution. The following case demonstrates that policies must be reasonable in order to withstand the scrutiny of the courts.

Teck Coal Ltd. and USW, Local 7884¹

Teck Coal Ltd. operates coal mines in British Columbia. The coal mining process involves many safety-sensitive jobs that include the operation of heavy machinery and large haul trucks in close proximity to one another.

The Employer unilaterally implemented a drug and alcohol policy that included the following statement:

“... the use of Alcohol and Illegal Drugs ... can have serious adverse effects on the safety of its employees and the work environment.”

The policy prohibited the use, possession and distribution of alcohol and illegal drugs while on duty at the mine site. The most controversial section of the policy was that employees would be subject to mandatory testing for the presence of alcohol and/or illegal drugs in two circumstances. The first involved where the Employer reasonably believed that an employee’s work performance may be affected by alcohol or an illegal drug. The second was post-incident. The mandatory testing involved urinalysis for both alcohol and illegal drugs.

Previous arbitration decisions have established that when a policy for random drug and alcohol testing in a union environment is unilaterally introduced, the policy must meet the following requirements²:

1. It must not be inconsistent with the collective agreement.

2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

The union argued that Teck Coal’s policy was not reasonable because it required the seizing and testing of employees’ bodily substances and the disclosure of personal, highly sensitive employee information. Their position was that this would violate the employees’ rights to privacy, bodily integrity, liberty and freedom of movement and was, therefore, not justified.

An expert testified that the limitations of urine testing, for example, for marijuana, are that it can only capture metabolites of the drug, not the psychoactive component of the drug. Presence of the cannabis metabolite may demonstrate prior use, but it does not establish impairment. He further commented that while “research ... shows the acute effects of some drugs [including cannabis] can negatively affect performance, such as the ability to operate equipment” there was “not enough research evidence” to support a conclusion that “those who test positive for drugs represent an increased risk for work injuries or accidents...”

Later in his report, he stated that:

“Urine tests are not accurate for detecting performance deficits. They can detect non-problematic users who are not under the influence of drugs and do not represent a measurable safety risk.”

¹ Teck Coal Ltd. and USW, Local 7884, Re 2018 CarswellBC 119, [2018] B.C.C.A.A.A. No. 6, 134 C.L.A.S. 126, 286 L.A.C. (4th) 1
² Lumber & Sawmill Workers’ Union, Local 2537 v. KVP Co., [1965] O.L.A.A. No. 2, 16 L.A.C. 73 (Ont. Arb.) (Robinson, C.C.J.)

The Arbitrator in this case admitted that: As is apparent from the many cases dealing with drug and alcohol testing of employees, those issues involve the interaction between employers' interest in making their workplaces safe and employees' interest in protecting their privacy and how to resolve disputes when those interests come into conflict. The Arbitrator included that "In Canada, random testing is an exceptional remedy because of its impact on privacy rights, and, accordingly, it is reserved for compelling circumstances. Such circumstances do not exist in this case...."³

Decision

"In summary, having considered all of the evidence and argument put before me, I have reached the conclusion that on balance, the Employer was not justified in implementing random drug and alcohol testing at its Fording River and Elkview operations in December, 2012 or any time up to the conclusion of the hearing. Such testing and its accompanying policies seriously intrude upon employee privacy rights and there is not a corresponding "general" problem in those workplaces with employees being under the influence of, or impaired by, drugs or alcohol sufficient enough to justify those serious intrusions into their rights. Consequently, the Employer's introduction of its new policies and random testing was not a reasonable exercise of its management rights in all the circumstances of this case."

So, what can Employers do?

It is clear from the above that random testing is not going to be an option unless "compelling circumstances" exist. While it may seem like a losing battle, Employers should remember that legalization of recreational cannabis does not mean employees can get high at work. Impaired is impaired and Employers can set rules.

Review and revise policies with the following in mind:

7. Use current medical marijuana and alcohol policies as a guide to develop policies that include recreational marijuana.

8. Each province will be enacting recreational cannabis legislation. Ensure you are familiar with the legislation that applies to your operations.
9. Even though recreational marijuana consumption is no longer criminal, inappropriate behaviour of employees in the workplace may be subject to discipline, including dismissal.⁴
10. Policy definitions of "drug" will need to be updated so that the status of marijuana is not illicit or illegal and medically-authorized and recreational use are distinguished.
11. Prohibition of recreational marijuana use can be made similar to alcohol including "zero tolerance" and include on-call employees.
12. Address work-related events such as business lunches and Christmas parties.
13. Update policies to prohibit use of recreational cannabis including possession and sale as well.
14. Include a requirement for employees to disclose alcohol or drug-related issues particularly in safety-sensitive environments.
15. Update scent policies to address marijuana odour as well as cigarettes and alcohol.
16. Impairment and testing policies for recreational marijuana, especially in safety sensitive positions, can be similar to alcohol.
17. Review policies frequently to keep up with science and criminal law standards.
18. Employees may view legalization of recreational marijuana as a license to consume it anywhere they choose. Train employees on your policies to clear up any confusion.
19. Train all managers and supervisors on the policies and advise them to be vigilant.
20. Monitor for compliance and authorize and empower managers and supervisors to discipline for breaches and be consistent.⁵

³ Ibid

⁴ <http://www.mondaq.com/canada/x/743596/Healthcare/Preparing+For+The+Legalization+Of+Recreational+Cannabis+In+Canada+What+employers+should+know?type=popular>

⁵ Workplace Policy Areas to Manage Marijuana Risk, McInnes Cooper