

A pot primer for plan sponsors

From workplace usage to benefits coverage, the coming legalization of recreational marijuana has opened up a slew of questions for employers

By Ryan Murphy

When it instituted random drug testing last year, the Toronto Transit Commission was eager to ensure its employees knew what it expected of them.

To get the message out, the transit authority mailed a handbook last year to the home of every employee and published it online so all workers would be fully aware of the testing process, which involves screening 20 per cent of the TTC workforce each year. The move to introduce random testing followed a rise in positive tests for drugs and alcohol by employees suspected of impairment.

While the TTC's situation is somewhat unique, it's not alone in thinking about its policies and practices around drugs. With the legalization of recreational marijuana coming fast, employers across the country have been busy reviewing and modifying their policies on the issue.

"I liken it to alcohol," says TTC spokesperson Brad Ross.

"Most should know you don't come to work drunk or you don't go out at lunch and get drunk and come back to work. It's the same principle with marijuana or any other drug."

The issue of marijuana in the workplace isn't as simple as that, of course. As Canada heads towards legalizing recreational marijuana this summer, employers face a number of questions: What are the implications for workplace substance use policies and what are the possible impacts on safety? Does legalization of recreational marijuana affect benefits plans and coverage of the medical version of the drug?

For employers that have yet to address the issue, education and training about the effects of impairment are a good place to start, says Loretta

Bouwmeester, a Calgary-based partner in the employment, labour, occupational health and safety and workers' compensation practices at Mathews Dinsdale & Clark LLP.

As legalization nears, Bouwmeester expects to see a large amount of information about the benefits of marijuana. "There already is a large body of, frankly, marketing materials about the medicinal and even recreational uses of marijuana," she says.

"What there isn't is a very good understanding of what the negative effects are and how it can compromise safety at a work site. So really, training and education will be really key because most employers do have solid drug and alcohol or fitness-for-duty programs already in place, and this should be treated just like any other potential impairing . . . medication or drug."

Key actions to prepare for legalization include updating policies related to fitness for work and expectations around being under the influence of a substance, says Dr. Melissa Snider-Adler, an Oshawa, Ont.-based addiction physician and chief medical review officer of DriverCheck Inc., a medical testing and assessment company.

Those are key issues, she says, "because often, policies may say alcohol, prescription medication and illicit substances. And with legalized cannabis, it's not going to fall into any of those categories. So they have to make sure that the policy is up to date so that it includes cannabis."

As Snider-Adler points out, some aspects of the issue are relatively straightforward. "Just like with alcohol, the expectation is that you are not going to bring your alcohol to work and you're not going to drink right before work. Obviously, people do, but that would not be something that would be socially acceptable, to be going at lunch and drinking so much that you can't work afterwards or drive. The expectation is that you don't come to work under the influence of alcohol. And with legalized cannabis, it's going to be the same thing. Just because it's legal does not mean that people are able to bring it to work, to use at work, to use before work, because of the impairing issues with it."

More than anything, employers need to be proactive about governance issues as they prepare for legalization, says Gregory Clooney, a senior legal consultant at Morneau Shepell Ltd.

"I would suggest that all employers need to review their policies and procedures. Whether or not that requires amendment or clarification will rely on the individual situation, but they do need to take a look at it," he says, noting reviews will go beyond drug and alcohol or substance abuse policies to include other issues that may emerge.

"You may also have an accommodation or an equity policy. You want to take that into consideration as well. You might actually have a marijuana accommodation policy, so you want to make sure that differentiates between medical marijuana and recreational cannabis," says Clooney, adding that companies with provisions like a scent-free policy will need to consider those issues as well.

A range of HR challenges

Among the concerns from a human resources perspective is, of course, safety. While employers will need to take legalization into account when it comes to disciplining employees, Clooney believes a zero-tolerance policy is too harsh, due to the limits of testing for marijuana impairment. He notes much of the testing in the United States relies on oral swabs that detect tetrahydrocannabinol (THC) in the system but don't determine impairment.

"And that's OK for the U.S., because they have different rules and regulations, and it's OK in Canada, to a certain extent. But employers need to be aware that that swab only says there's THC in the system; it doesn't say that that individual is impaired. The analogy I would draw for that, for testing, is relying on that is the same as penalizing on a Monday for having a few beers on Friday night."

A key issue, of course, relates to when employers can undertake drug testing in the first place. While the landscape is more restrictive in Canada than in the United States, there are scenarios in which employers here can test for drugs, says Shane Todd, a partner at Fasken Martineau DuMoulin LLP.

They include situations involving reasonable cause to suspect impairment and a return-to-work scenario in which an employee who had admitted to having a drug problem has come back from rehabilitation. Employers can also conduct post-incident testing.

"Those are generally the types of testing that are permissible," says Todd.

"Outside of safety-sensitive testing, it's much harder to justify any of those [types of] testing. That doesn't mean that it doesn't happen, but it's much harder to justify if you get in front of a court or a human rights tribunal," says Todd.

Another challenge for employers is the possibility of new users who aren't sure of how the drug will affect them, says Bouwmeester, who notes marijuana's potency has changed significantly over time and that black-market access to the drug will still be a concern after legalization.

"If you're getting it from an illegal source or

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non-sanctioned source, you don't know what the potency is or what else is in it. And that's where you get into some potentially serious consequences with fentanyl and other things," she says.

"There is a difference, too, in how it's ingested and the concentration with effects. So you do need to have [employees] understand the actual effects of different modalities of use."

The tricky issue of medical marijuana coverage

With increased demand to cover medical marijuana amid new court and human rights decisions on the issue, employers should ensure they have knowledgeable people advising them, says Snider-Adler.

"Because what we're seeing, and probably due to the fact that it's going to be legalized, is a tremendous growth in the number of authorizations for cannabis for medical purposes," she says.

"And to be honest, that's probably more of a problem for employers than actual legalization of cannabis is or will be."

On the legal side of the issue, employers do have some guidance from a recent court ruling in Nova Scotia, *Canadian Elevator Industry Welfare Trust Fund v. Skinner*. In April, the Nova Scotia Court of Appeal overturned a decision by a human rights board of inquiry that found Gordon Skinner's drug plan had discriminated against him when it denied him coverage for medical marijuana. The plan didn't cover drugs, such as medical marijuana, not approved by Health Canada.

In overturning the board of inquiry's decision, the appeal court noted Skinner had access to all medications available to any other eligible plan member. "Refusing Mr. Skinner a drug not approved

by Health Canada does not differentiate him from others disabled by chronic pain,” wrote Justice Peter Bryson on behalf of the panel of judges.

“No beneficiary received medical marijuana. No beneficiary received drugs not approved by Health Canada. The plan’s exclusion of such drugs was not ‘based on’ Mr. Skinner’s disability.”

“I think that it presents a starting point for whether an employer has a choice to cover or not,” says Ross Gascho, a partner at Fasken Martineau, of the decision. The key takeaway, according to Gascho, is that employers are still able to determine the boundaries of their benefits plans.

That doesn’t mean plan sponsors won’t face pressure to cover the drug. Snider-Adler notes the number of people with an authorization for cannabis for medical purposes triples every year and suspects it’s now close to 300,000. “Then they go to their employer and say, ‘I’m able to use cannabis because I have my authorization here,’” says Snider-Adler, who questions the validity of some of the authorizations.

“That, to me, is a much bigger issue than the legalization,” says Snider-Adler.

What to cover and when?

A key question, of course, relates to whether and when medical marijuana is effective as a treatment. While there are many opinions on the issue, a guideline published in the February 2018 edition of the medical journal *Canadian Family Physician* suggested only three conditions have sufficient evidence to warrant a prescription for medical marijuana: chronic pain, nausea and vomiting and spasticity.

The authors noted, however, that medical practitioners could consider prescribing it for the following conditions if reasonable trials of standard therapies have failed: refractory neuropathic pain, refractory pain in palliative care, nausea and vomiting from chemotherapy and spasticity in multiple sclerosis and spinal cord injury. Nevertheless, they also found some gaps in the quality of evidence, versus the estimated benefit, when using medical marijuana in some of those situations. For example, they found it to be very low for chronic pain and change in spasticity but moderate when it came to control of nausea and vomiting when compared to a placebo.

A key issue, when it comes to questions of effectiveness, is the extent of clinical trials performed so far. “I think the best general statement I have is that there’s very good preliminary evidence in many different areas to suggest that cannabis or cannabinoids might be beneficial to peoples’ health and well-being. But in terms of the gold-standard clinical trials, in almost all instances, those have yet to take place, and the reason for that is quite obvious: it’s

illegal. It’s not as if the evidence isn’t there because we looked for it and we couldn’t find it. We haven’t had the chance yet to look for it,” says Michael John Milloy, a research scientist at the British Columbia Centre on Substance Use and an assistant professor at the University of British Columbia’s faculty of medicine.

“In terms of cancer, in terms of pain, there’s very good evidence from these sorts of non-clinical trial sources to suggest that there might be benefits to cannabis, enough at least to justify us doing clinical trials in these areas.”

Also playing a role in the changing landscape for benefits plans are recent moves by some insurance companies to cover the drug. “There are some people that are going to prefer an authorization versus purchasing illegally, because then it would be covered by their insurance company. I suspect the pressure on other insurance companies will also come to cover it,” says Snider-Adler, who notes she tries to make it clear to employers that while a physician may have authorized something, that doesn’t mean employees need to use medical marijuana in a workplace setting.

“It also does not necessarily mean that the person fits the criteria for a disability under human rights, because we have so many people being authorized cannabis for medical purposes that sometimes, they don’t really have a medical diagnosis that necessitates the authorization . . . nor would that medical diagnosis be a disability. So it’s sort of like their choice of treatment, right? It is important for employers to really look into it a little bit or have a third party look into it,” she says.



SOME KEY DIFFERENCES BETWEEN MEDICAL, RECREATIONAL MARIJUANA

When it comes to minimizing the risks of cannabis use in the workplace, Sandra Ventin, an associate vice-president at Accompass Inc., notes many medical marijuana products are cannabidiol-based and, as a result, don’t come with the same degree of psychoactive effect. “So one could argue they’re taking medical cannabis – hopefully under the care of a physician, hopefully highly regulated and monitored – but they’re not walking around being high. They’re being treated for their disease state,” she says.

Ventin adds that with medical marijuana often coming in the form of tinctures or creams, users typically don’t need to smoke or vape it. “So if employers put restrictions around what they are willing to accommodate and [it] requires further discussion and consideration, it might not be as disruptive to the rest of the workplace,” she says.

CANNABIS USE IN CANADA

Health Canada's 2017 cannabis survey shed some light on Canadians' habits around marijuana.

While the survey found 22 per cent of respondents reported having used it in the previous 12 months, it emphasized that the number doesn't provide an estimate of the prevalence of cannabis use in the general population. It also found:

21%
of respondents who had used cannabis in the previous 12 months reported doing so to get high before or at work

28%
of respondents who had used cannabis reported doing so to get high before or at work on a weekly or daily basis

77%
of all survey respondents felt cannabis could be habit forming

72%
of cannabis users said the drug had no effect on their work or studies

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Controls on claims

Canadian employers should take comfort in the mechanisms Canadian insurers have in place to guard against fraudulent claims, according to Sandra Ventin, an associate vice-president at Accompass Inc. in Toronto.

“I think the protection on the fraud side, with a major insurer in Canada, there's already safeguards in place,” says Ventin.

“What we have to make sure that there is thoughtfulness around is what are the covered conditions and how is the rigour of the prior-authorization process taking this concept and making sure it's part of their policy and their claim process. And then we all feel better that this is not going to be an area of fraud or abuse or concern,” says Ventin.

According to Cristina dos Santos, director of extended health care for group benefits at Sun Life Financial Inc., the insurer's controls to combat fraud and misuse include yearly maximum coverage limits, covering specified conditions only, a prior approval process and requiring plan members to obtain the drug from a licensed producer.

Sun Life provides optional coverage for plan sponsors under extended health-care plans, with yearly maximums ranging from \$1,500 to \$6,000 per covered member per benefit year.

“The coverage criteria that we have are really for five specific conditions and symptoms. It's cancer with severe refractory pain or with nausea and vomiting from cancer treatments, multiple sclerosis with spasticity or neuropathic pain, rheumatoid arthritis for pain that does not respond to standard therapy, HIV/AIDS with neuropathic pain or anorexia and for palliative care,” says dos Santos.

Veterans Affairs Canada provides another example of cost controls and some of the potential challenges associated with them. As part of a new reimbursement policy for medical marijuana introduced in 2017, the organization enacted a limit of three grams per day of dried marijuana or its equivalent. It also introduced a maximum reimbursement rate of \$8.50 per gram.

The move followed a report by the federal auditor general that noted that between April

and September 2016, Veterans Affairs spent about \$31 million on cannabis, which was \$10 million more than all of 2015. Recent media reports have, however, raised concerns about the department's policy changes, with some veterans saying the coverage limits don't meet their needs, particularly when it comes to relief from the symptoms of post-traumatic stress disorder. According to the *Globe and Mail*, some New Brunswick veterans are preparing to take the federal government to court over the issue.

Refining the benefits plan

Among the companies that have experience with the coverage issue is Shoppers Drug Mart Inc. and Loblaw Companies Ltd., which opted in March 2017 to cover medical marijuana under their benefits plan for certain conditions, such as nausea and vomiting related to chemotherapy.

Jonathan Tafler, senior director of product and operations for employer health solutions at Shoppers Drug Mart, says his company only needed to make slight tweaks to its human resources policies to account for issues related to marijuana.

“All we did was we more explicitly called out cannabis in our policies. That's essentially all we did. Now we have very robust policies, obviously, given the size of our organization and the number of safety-sensitive positions and so forth. . . . I don't want people to get a false sense of security, because we already had very robust policies in place,” he says, referring to the company's code of conduct and policies on substance abuse.

Beyond that, Tafler says the changes were very minor, including a tweak to the company's smoking policy to accommodate smoking in a designated area for medical purposes. “We had to think about that. But [it was] very minor,” he says.

When it comes to benefits, the main challenges have related to denials of coverage, he notes. “So in those situations, you deny the claimant based on the criteria set, and we do have an appeals process as well. So I think that would be the only areas we've had to deal with outside of the policy. There's been nothing in the workplace, no concerns from that.”

Benefits creep, or the prospect of the list of covered conditions expanding over time, is something plan sponsors will need to consider, according to Ventin. She points to the fact that, even among insurers that offer medical marijuana coverage — Sun Life and Green Shield Canada — the list of eligible conditions differs.

“And if we then take that argument out around the rest of the insurer community, there will be differences and, over time, probably the list of conditions will be expanded upon. We did see that with the biologics when they first entered the market. If we use an example like Remicade, when it first came on the market, it was eligible for about two to three classifications or conditions, and now it's nine, by and large, for most insurers,” she says.

Sun Life expects the list of covered conditions to expand over time, says dos Santos.

“Sun Life's opinion at this point is that really, this is our list of eligible conditions and related symptoms, [which] we're expecting will continue to evolve as we conduct regular review to determine if there is new clinical evidence to support the therapeutic use of medical cannabis for other conditions,” she says.

As for the cost concerns around coverage, Ventin notes there are mitigating factors.

“Of course, budget comes into it and people don't want to see a run on or spike in utilization, but remember there might be other offset costs and other pain medications that get reduced if medical cannabis is used as a substitute treatment therapy,” she says.

In its case, Shoppers Drug Mart has sought to limit its exposure through a \$1,500 coverage limit per year. While Tafler says he can't share claims data, he notes that the use of the medical marijuana benefit has been significantly lower than anticipated.

“And the reasons for that, we feel, are largely to do with communication and uptake of a new benefits program,” says Tafler.

“We've talked to insurers who say it can take up to five years for a new benefit to reach its full utilization. . . . It's a known thing in the industry that communicating changes in benefits, whether positive or negative, is difficult. It's really difficult to get employees' attention around those things.”

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