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Cannabis legalization: a reference guide for employers

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The use of cannabis for recreational purposes will be legal in Canada as of October 17, 2018. Employers will have to manage cannabis consumption in the workplace to ensure that employees do their work safely while respecting applicable laws.

Summary of the law in Quebec

Considering the various applicable laws and regulations concerning cannabis in Quebec, Quebec employers need to be aware of these main legal restrictions:

- Adults may possess up to 30 grams of dried cannabis in a public place, and up to 150 grams in private premises;
- Minors may not possess or consume cannabis;
- The sale, production and trafficking of dried cannabis by individuals remains illegal;
- Smoking or vaping cannabis is prohibited in places where smoking tobacco is already prohibited, including enclosed workplaces and any other enclosed space that admits the public;
- In certain cities and municipalities, consuming cannabis in all public places is prohibited;
- Working while impaired by alcohol or drugs, including cannabis and similar substances, is also prohibited;
- It is an offense under the Criminal Code to have a concentration equal to two nanograms (ng) or more per millilitre (ml) of blood within two hours after ceasing to operate a motor vehicule; and
- Once effective tools are available to detect the presence of cannabis in saliva, it will be prohibited in Quebec for any person to drive or to have control of a road vehicle if there is a detectable presence of cannabis or other drug in the person's saliva.

What are the responsibilities of employers and employees?

In Quebec, an employer's right to limit or ban any form of cannabis use by members of its personnel at the workplace is recognized, even if the workplace is not enclosed.

Quebec legislation now requires employers to ensure that a worker does not perform work when his or her condition represents a risk to his or her health, safety or physical well-being, and also to other persons at or near the work place. Employees have a similar obligation.

In order to address these responsibilities, employers should list the applicable rules in the workplace to prevent and limit potential problems stemming from cannabis legalization. Employers should adopt or update a policy that is clear and adapted to the realities of the workplace.

What changes should be made to your drug and alcohol policy?

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Ensure that the policy specifically covers legal cannabis: erase all explicit references to cannabis consumption as an illicit activity;
As much as possible, align cannabis restrictions with those for alcohol, specifically in terms of possession, consumption, trafficking, distribution and to the concept of impairment;
Define the workplace (consider parking lots, patios, etc.) and set out the rules for consumption in open spaces;
Define impairment and establish tolerance thresholds for employee consumption with respect to the risks associated with their positions;
Reiterate that employees must show up for work unimpaired, while respecting the tolerance threshold established by the employer, and that they must remain unimpaired for their entire shift;
Include all forms of cannabis consumption (smoked, ingested, etc.) in the policy;
Specify that consumption is prohibited during work hours and in the workplace as well as before or after the shift when necessary; and
Set out rules for cannabis consumption during work-related activities (breaks, meal times, social activities, off-site Christmas parties, meetings with clients, etc.).

Can employers have employees take drug tests?

The courts have recognized that drug tests may be administered in the following circumstances:

If the employer has good reason to believe that an employee is impaired by the effects of alcohol or drugs while at work;
Following a serious incident;
Following a consumption-related absence;
As part of a last chance agreement;
With the employee's express, free and voluntary consent.

It is still very important for employers, and particularly managers, to observe and document objective signs of impairment, since a positive drug test does not necessarily prove a violation of the employer's policy or the employee's impairment.

What obligations exist for accommodating medical cannabis?

Despite a policy prohibiting the possession and consumption of cannabis in the workplace, an employee may request accommodation to use cannabis for therapeutic reasons.

As with any accommodation request related to a disability, the employer must understand the basis of the request and evaluate the request in order to determine if the policy constitutes undue hardship.

Employers should not hesitate to ask questions and demand a detailed medical certificate in order to fully understand the conditions of use prescribed by the doctor, particularly:

Length of treatment;
Dose;
Required frequency of consumption; and
Side effects.

How does one prepare for the legalization of cannabis?

The first step for employers is to evaluate their employees' positions as well as their needs and expectations in terms of preventing drug consumption.

Following this evaluation, employers will be able to adapt the terms of their policies on drugs and addictions.

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It is also important that the policy's provisions comply with laws and jurisprudence and that each infringement of an employee's fundamental rights (e.g., prohibiting consumption outside of the workplace) be justified by considerations that are specific and proportional to the employer's objectives based on employment requirements and the nature of work activities.

Supervisors and managers should also be trained to detect cannabis consumption and intoxication, as well as signs of such consumption, and to administer tests to prove intoxication. Implementing appropriate tools, such as a checklist, may facilitate the analysis and preparation of a properly documented file.

Proactive employers equipped with tools and procedures that suit this new reality will be able to effectively carry out their managerial responsibilities.

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