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LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI





HAC Convention 2018

Dude, Where's My Helicopter?

And Other Queries Following the *Cannabis Act*

Context / Background

Creating a Drug and Alcohol Policy

Human Rights Considerations

Further Resources

Questions?





Context



Why Discuss this Now?

Safety Sensitive Workplace
+
Recent Incidents
+
Legalization of Recreational Cannabis
=
Increased Use and Increased Risk



- Adults are now able to purchase, possess, consume, grow and share cannabis
- Dried, fresh, oil, seeds, plants
- Edibles and other products within one year
- Possession, production, distribution and sale outside of legal system still illegal
- No changes to medical marijuana framework – will be reviewed within next five years
- New offences regarding driving while having a “blood drug concentration” (BDC)



- **No proposed changes to CARs**
- TSB has suggested substance abuse program, including testing
 - Carson Air crash
 - *“...the Board recommends that the Department of Transport, in collaboration with the Canadian aviation industry and employee representatives, develop and implement requirements for a **comprehensive substance abuse program, including drug and alcohol testing**, to reduce the risk of impairment of persons while engaged in safety-sensitive functions.”*



- October 9th letter - Transport Canada relying on current CARs prohibitions
- No person shall act as a crew member of an aircraft
 - (a) within 8 hours of consuming an alcoholic beverage;
 - (b) while under the influence of alcohol; or
 - (c) while using any drug that impairs the person's faculties to the extent that the safety of the aircraft or of persons on board the aircraft is endangered in any way
- *“Currently, the use of cannabis is a disqualifying factor for obtaining a medical certificate to fly or control aircraft.”*





Creating a Drug and Alcohol Policy

Why Implement a Drug and Alcohol Testing Policy?

- Safety sensitive workplace?
- Workplace culture of substance abuse?
- Past instances of employee impairment at work?
- Accidents in the workplace?
- Clear expectations and obligations?
- Client-mandated policy?



- Evaluate workplace
 - Identify safety-sensitive positions
 - Historical incidents?
 - Drug and alcohol use problems?
- Review and update current policy to reflect illegal and legal drugs
- If no policy, take steps to put one in place
- Consider what types of testing to implement
- If unionized, consider risk of challenge
- Make employees aware of expectations, consequences, and support available



- Policy statement
 - Commitment to ensuring health and safety
 - Commitment to human rights
- Duties of company, management, employees
- Application of policy
 - Employees, contractors, anyone performing work
- Definitions
 - Capture legal drugs (cannabis) as well as illegal drugs
- Safety-Sensitive Positions
 - Where impairment could result in significant safety risk and where there is limited or no supervision



- Provide employees with clear understanding of what behaviour will not be tolerated
 - Clear consequences on non-compliance
- Zero tolerance on impairment or possession in workplace
 - What about with medical authorization?
- Time restrictions on consumption
 - 8 hour “bottle to throttle”
 - “Toke to yoke”?
 - Total ban?
- Structure to encourage reporting



- There is no general law permitting workplace testing
 - Mandatory testing may be possible for safety-sensitive jobs, such as pilots
- A “balancing of interests” approach is used
 - An employer’s right to a safe workplace
 - An employee’s right to privacy
- Generally testing only permitted for safety-sensitive positions
- Highest threshold is for random workplace testing



Guiding Principles on Testing

- No employee is to be subject to random alcohol or drug testing unless part of rehabilitation or there is evidence of drug/alcohol use
 - Testing may be a legitimate part of employment contract for employees with a drug/alcohol problem
- Employer may require testing where reasonable cause
- Testing generally permitted in post-incident/accident situations where human factors contribute



Types of Testing

- Pre-Access/Conditional Offer
 - Make negative test a condition of employment
- Reasonable cause
 - Where reasonable grounds to suspect impairment
- Post-Incident
 - Following a work-related accident or incident
- Return to Duty/Follow-up
 - Following a policy violation or treatment program
- Random
 - Where there is a “general problem”



- Supervisors/management:
 - Contents of policy
 - Detecting impairment
 - Accommodation
 - Testing
 - Return to work
- Employees:
 - Contents of policy
 - Expectations
 - Duty to report
 - Risks of impairment



What to do if you Suspect an Employee is Unfit?

- Immediately:
 - Remove them safely from duty until medically cleared
 - Investigate
 - Request written confirmation from their physician, e.g., updated Functional Abilities Form (employer to cover cost)
 - If necessary, order and pay for a full medical evaluation



- Personal health information
 - Information about drug or alcohol-related disability
 - Testing information
 - Other medical information
- Should be kept in secure location
- Separate from employee's personnel file
- Subject to privacy laws relating to personal health information





Human Rights Considerations

- Human rights legislation plays a significant role
 - Does an employee have a disability?
 - Does the duty to accommodate arise?



When is there a Duty to Inquire?

- Whenever an employer suspects that an employee may have a disability, or that their conduct (or misconduct) is caused by a disability
- Train staff to identify the indicia of disability relating drug and/or alcohol use:
 - Behaviour changes
 - Frequent lateness
 - Physical symptoms (e.g., glassy eyes, slurring speech, smell of alcohol/cannabis, etc.)



- Significant component of drug and alcohol policy
- Commit to follow *Canadian Human Rights Act*
- Require employees to request accommodation
 - Need to disclose restrictions/limitations
 - Employees must cooperate
- Duty to accommodate
 - Disability relating to drug and/or alcohol use
 - Disability requiring impairing drug(s) for treatment
- No duty to accommodate recreational use of cannabis or any other drugs



Accommodation

- Duty to accommodate persists to undue hardship
- Entitled to ask for confirmation of risk of impairment
- No obligation to accommodate use of cannabis:
 - Without authorization;
 - Where employee is self-medicating; or
 - Where not aware of need for medical cannabis
- Duty to inquire into whether accommodation is required
 - Work with employees to provide reasonable accommodation



Stewart v. Elk Valley Coal Corp.

- 2017 decision of the Supreme Court of Canada
- Employee in safety-sensitive position tested positive for cocaine
- Terminated in accordance with employer's policy
- Alleged he was addicted to cocaine
- Termination upheld
 - Court found he was terminated, not because of his addiction, but because he breached the employer's drug and alcohol policy, which required him to have disclosed his addiction **before** an incident



Additional Resources



FLYING HIGH: The Aviation Industry and Cannabis

Download here:

<http://myeh.ca/flying-high>



Echo Hotel Aviation Law Briefing

Register here for your weekly scan of the
aviation industry

<http://aviation.ehlaw.ca/>



Questions?





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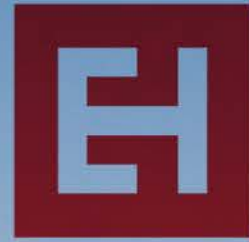
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