

# Accommodating Medical Marijuana in the Workplace

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## BACKGROUND ON MEDICAL MARIJUANA

### How did possession of Marijuana become legal for medical use?

On July 31, 2000, the Ontario Court of Appeal ruled that a total prohibition on marijuana possession was unconstitutional.<sup>1</sup>

In that case, the accused suffered from epilepsy and experienced frequent and severe seizures. While his attempts to control those seizures with conventional medication were only moderately successful, the accused found that he could substantially reduce the incidence of seizures by smoking marijuana. However because he could not locate a lawful source of the drug, he grew his own.

The accused was charged with cultivating and possessing marijuana. Given its purported therapeutic effects, he argued that now-repealed federal legislation that placed a total prohibition on marijuana possession violated his Charter of Rights and Freedom's right to "liberty and security of the person".

The Ontario Court of Appeal agreed, and in a landmark ruling struck down the offending legislation. In doing so, it called on the federal government to enact laws that permitted individuals to possess and use marijuana for medicinal purposes.

In response, Parliament introduced the Marijuana Medical Access Regulations ("MMAR")<sup>2</sup> in 2001. The MMAR was the governing framework for medicinal marijuana until it was replaced by the Marijuana for Medical Purposes Regulations ("MFMPR")<sup>3</sup> on April 1, 2014.

### Marijuana Cultivation

One of the major differences between the MMAR and the MFMPR regulatory regimes is with respect to the production of marijuana.

Under the old MMAR regime, a centralized federal regulator issued "licenses to produce" that allowed patients to grow plants at home. However under the MFMPR regime, patients must obtain a prescription from a medical doctor and then purchase marijuana from a licensed producer. The MFMPR expressly prohibits growing marijuana in one's own home.

<sup>1</sup> *R v Parker* (2000), 49 OR (3d) 481.

<sup>2</sup> SOR/2001-227, ["MMAR"].

<sup>3</sup> SOR/2013-119, ["MFMPR"].

The MFMPR was recently challenged on the grounds that the prohibition against growing marijuana for personal use would impose financial hardship to such a degree that patients would be required to choose between their prescribed marijuana dosage or other life necessities.

On March 21, 2014, the Federal Court granted the applicants an interim injunction exempting them from the MFMPR's provision that repealed personal production licenses. Unless the injunction is appealed, the exemption will remain in place until the issue is decided at trial.<sup>4</sup>

### Authorization to possess

Another significant change between the two regimes has to do with how authorization for accessing medical marijuana is obtained.

The MMAR contained a list of conditions and symptoms that would qualify a person for medical marijuana. For example, the MMAR considered the following to be "Category 1" symptoms that presumed entitlement to medical marijuana:

Symptom	Associated Medical Conditions
Severe nausea	Cancer, AIDS/HIV infection
Cachexia, anorexia, weight loss	Cancer, AIDS/HIV infection
Persistent muscle spasms	Multiple sclerosis
Seizures	Cancer, AIDS/HIV infection, multiple sclerosis
Severe pain	Cancer, AIDS/HIV infection, spinal cord injury or disease, severe form of arthritis

Under this regime, the patient's doctor submitted a form describing the patient's medical condition and forwarded it to the federal government for ministerial approval. This would result in a license to possess, and if also requested, a license to produce certain amounts of marijuana. The MFMPR limits the federal government's role to licensing large-scale marijuana producers. Individual doctors are now responsible for determining whether medical marijuana is the appropriate treatment to prescribe. As there is disagreement among doctors about the medical efficacy of marijuana, observers are expecting this change to lead to widely divergent criteria for issuing a prescription.<sup>5</sup>

### Medical Efficacy of Medical Marijuana

Despite the above-noted ruling from the Ontario Court of Appeal, the medical efficacy of marijuana remains controversial. In a recent interview, the President of the Canadian Medical Association reiterated that the "[CMA's] stand has always been that there is insufficient scientific evidence to support the use of marijuana for clinical purposes."

In 1999, an extensive analysis was released from an eleven-member expert panel at the Institute of Medicine, which was ordered and financed by the White House Office of National Drug Control Policy. The study confirmed the effectiveness of marijuana in treating nausea, pain and weight loss associated with AIDS, but found that the benefits for glaucoma patients were limited and of short duration. The study also failed to find evidence that marijuana had an effect on symptoms of Parkinson's disease or Huntington's disease, although it did appear to alleviate muscle spasms associated with MS.<sup>6</sup>

Since then, studies have been released which found marijuana to be effective in treating non-cancer pain, such as neuropathic pain, fibromyalgia, rheumatoid arthritis and mixed chronic pain.<sup>7</sup>

### WHAT DOES THIS MEAN FOR EMPLOYERS?

#### The Issue

Given that individual doctors, rather than a centralized regulator, will now issue prescriptions under the new MFMPR regime, there is a strong likelihood that medical marijuana will become far more prevalent than in the past. Combined with the fact that many provincial workers' compensation regimes will reimburse expenses related to medical marijuana,<sup>8</sup> employers must prepare for the reality of marijuana in the workplace.

Central to this issue are two competing duties: namely, the duty to accommodate under human rights and workers' compensation legislation, and the duty to take every precaution reasonable in the circumstances for the protection of a worker under occupational health and safety legislation.

#### Duty to Accommodate

The duty to accommodate under human rights legislation exists to relieve the adverse impact from when a workplace rule (e.g. no drugs at work) conflicts with a prohibited ground of discrimination (e.g. disability due to epilepsy).

<sup>4</sup> *Neil Allard et al v. Her Majesty the Queen in Right of Canada*, 2014 FC 280 (unreported, retrieved from: [http://www.mmarcoalitionagainstrepeal.com/pdf/ORDER%20T-2030-13\\_20140321\\_OR\\_E\\_O\\_VAN\\_20140321110555\\_MNS\\_2014\\_FC\\_280.pdf](http://www.mmarcoalitionagainstrepeal.com/pdf/ORDER%20T-2030-13_20140321_OR_E_O_VAN_20140321110555_MNS_2014_FC_280.pdf)).

<sup>5</sup> Brian Owens, "Be wary of 'prescribing' medical marijuana, CMA warns", online: (2014) Can Med Assoc J <[http://www.cmaj.ca/site/earlyreleases/28march14\\_be-wary-of-prescribing-medical-marijuana-CMA-warns.xhtml](http://www.cmaj.ca/site/earlyreleases/28march14_be-wary-of-prescribing-medical-marijuana-CMA-warns.xhtml)>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Mary E. Lynch and Fiona Campbell, "Cannabinoids for treatment of chronic non-cancer pain: a systematic review of randomized trials", online: (2011) Br J Clin Pharmacol <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3243008/>>.

<sup>8</sup> Ontario's Workplace Safety and Insurance Appeals Tribunal has reimbursed expenses relating to medical marijuana since approximately 2008. There are limits, however; in one case the Tribunal ruled that a worker cannot be granted \$300,000 to purchase a house because his apartment was unsuitable for growing marijuana (see 2012 ONWSIAT 908).

To this end, adjudicators will ask whether discrimination based on a prohibited ground has occurred, and if so, whether the discrimination was justified. Generally speaking, discrimination will only be justified if providing accommodation would result in undue hardship.

In the case of medical marijuana – or any other prescription drug for that matter – employers must remember that the treatment for a disability cannot be divorced from the disability itself. This means that accommodating the disability extends to making allowances for the prescribed course of treatment.<sup>9</sup> In the case of marijuana, common effects include increased appetite, impaired motor skills, reduced short-term memory and difficulty with concentration. In some users, marijuana can also cause acute anxiety or panic attacks.

The issue of medical marijuana was dealt with tangentially in the British Columbia case of *Wilson v. Transparent Glazing Systems Ltd.*<sup>10</sup> The complainant, Mr. Wilson, had a license to consume medical marijuana for relief of chronic back pain and migraine headaches. He alleged that the termination of his employment with the respondent contractor was due to his disability.

The respondent claimed that Mr. Wilson frequently argued with the site foreman, was aggressive toward coworkers and generally acted in an unprofessional manner. A fax from a Project Superintendent to the President and owner of the contractor ultimately led to Mr. Wilson's dismissal. The fax outlined the concerns with Mr. Wilson's unprofessional behavior, and in doing so made brief reference to medication that the Superintendent believed was impairing Mr. Wilson's duties.

The Tribunal held that mere mention of impairment by medication in the fax was enough to impugn the reasons for Mr. Wilson's termination. In considering the impact of the medication when making a determination about Mr. Wilson's continued employment, the Tribunal ruled that the employer fell under a duty to inquire about whether there was a relationship between job performance and either the disability or the medication he was taking to treat the disability. By failing to do so, the employer was found to have engaged in discriminatory conduct.

Similarly, employers must recall that a *perceived* disability is as much a ground of discrimination as the actual disability itself. This means that employers should be cautioned from making stereotypical assumptions about the abilities of an employee who has been prescribed medical marijuana. While some assumptions may be valid where safety is a concern (such as driving), it may be improper to, for example, diminish an employee's duties based solely on assumed impairment.

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That being said, a prescription for medical marijuana is not a license for undue impairment at work. If an employee cannot perform his or her functions in a safe and acceptable manner while using marijuana (or any prescription medication for that matter), then further discussion must be had on whether that person should be returning to work at all.

#### **Occupational Health and Safety**

Cast against an employer's duty to accommodate the use of medical marijuana, is the obligation to take every precaution reasonable in the

circumstances for the protection of a worker. Generally speaking, this duty requires employers to identify potential workplace hazards and to take proactive steps to minimize a worker's exposure to these hazards.

What hazards might be posed by an employee who uses medical marijuana at work? Depending on the workplace, an employee's impairment may pose a risk to coworkers as well as to the employee him/herself. In safety-sensitive workplaces, these risks may justify a significant repackaging of the employee's duties, or even refusing to return him or her to work at all.

Accordingly, employers faced with a request to consume and/or be under the influence of marijuana on company time should obtain medical documentation that speaks directly to the employee's ability to safely and effectively do his or her job. If those medical documents disclose a meaningful impairment to any abilities that are central to an employee performing his or her job in a safe and effective fashion, then the request for accommodation should be denied. In safety-sensitive workplaces, what constitutes “meaningful” impairment will have a naturally lower threshold.

<sup>9</sup> Note that adjudicators have held that “medication” does not necessarily need to be prescribed for the duty to accommodate to apply: see *Coca-Cola Bottling Company Brampton v. CAW Local 973*, 2009 CanLII 70988 (ON LA) (Chauvin).

<sup>10</sup> 2008 BCHRT 50.

Aside from impairment, employers must also consider the hazards posed by passive inhalation. In *Ivancicevic v. Ontario (AGCO)*,<sup>11</sup> the Ontario Human Rights Tribunal considered extensive evidence on passive marijuana inhalation in a case involving a claimed right to smoke medical marijuana in the open-patio tobacco smoking areas of licensed establishments. In dismissing the complaint, the Tribunal accepted that passive inhalation could result in “some level” of impairment, positive drug test results, and health complications associated with toxicity.

A number of occupational health and safety considerations can be drawn from the Tribunal’s decision in *Ivancicevic*.

The first is that, even though the *Smoke-Free Ontario Act*’s<sup>12</sup> restrictions on smoking in the workplace are limited to tobacco, in light of the hazards identified in *Ivancecevic*, reasonable accommodation may not extend to providing an area where an employee using medical marijuana can smoke.

For similar reasons, an employer may have grounds to insist that medical marijuana be consumed privately, away from anyone who could inhale it passively. This could mean that smoking in a workplace or building’s designated tobacco smoking areas might be validly prohibited as well.

In light of the complications associated with passive inhalation, an employer may be tempted to ask an employee to ingest the marijuana instead of smoking it. This, however, could be improper for a number of reasons, including increased cost to the employee and possible fundamental differences in the medical efficacy between smoking and ingestion.

### **BEST PRACTICES**

In many respects, the principles surrounding the use of medical marijuana in the workplace are no different from any other prescription medication. That is, while an employee cannot be unduly impaired at work, any impairment that does result from the medication must still permit the employee to carry out his or her duties in a safe and acceptable fashion. Employers faced with a request to consume and/or be under the influence of marijuana on company time should obtain medical documentation that speaks directly to the employee’s ability to safely and effectively do his or her job.

To ensure a safe and productive workplace, employers should enact a drug policy that speaks to the use of any prescription medication (including marijuana) on company time. This policy should:

- Define terms such as “impairment”, “intoxication”, and “under the influence” precisely enough in order to capture medical marijuana
- Set acceptable boundaries on the use of prescription medication, including the protocol for employees reporting on the use of (and/or being under the influence of) such medication during working hours
- Communicate the disciplinary consequences of policy breaches, including the sharing and/or selling of any prescription medication in the workplace

Employers should consult and cooperate with their Joint Health and Safety Committees in the drafting and implementation of such a policy.

Finally, employers should remember that if a request to use and/or be under the influence of medical marijuana is denied, this does not preclude the obligation to consider other forms of accommodation. For example, other accommodation might include providing a leave of absence while the employee undergoes treatment and/or rehabilitation, or providing a modified work schedule that allows sufficient time between the employee’s scheduled marijuana dosages and his or her working hours. 🍁



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<sup>11</sup> 2011 HRTO 1714.

<sup>12</sup> S.O. 1994, c. 10.