

HR Challenges of Marijuana in the Workplace

White Paper



**Canadian Trucking Alliance
Alliance Canadienne du Camionnage**

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1.0 PROJECT OVERVIEW

The Canadian Trucking Alliance (CTA), in collaboration with Trucking HR Canada, have engaged with trucking employers across the country in a coordinated effort to identify and develop practical tools and policies to support the industry as it faces new challenges resulting from the proposed legislation on the legalization of marijuana. This effort also looks to address the existing challenges brought forth by regulations around medical marijuana.

It is clear that these changes will have a significant impact on the workplace, and on trucking employers. They include direct impacts on occupational requirements for safety-sensitive positions; human rights; the provision of workplace accommodations; and, public perception. Trucking employers are in need of guidance, clarity, and consistency on this matter.

2.0 CTA's Commitment to the Issue

At the Fall 2016 Board meeting, CTA passed the following board motions in relation to the legalization of recreational marijuana:

Motion 1 – Key Policy Principles Related to Marijuana

- CTA's key focus is on the impairment by marijuana in safety-sensitive positions, as opposed to broader social issues or issues relating to the production/sale of legalized marijuana.
- CTA supports a Criminal Code amendment that would treat driving under the influence of marijuana, including the establishment of a THC cut-off level and roadside testing protocols, similar to the way that alcohol is currently treated.
- CTA supports the introduction of mandatory drug or alcohol testing for truck drivers and other employees in safety-sensitive occupations, similar to which exists in the United States (if employers are expected to prohibit the use of marijuana in safety-sensitive positions, they need to be able to test for it).
- CTA supports a national approach, as opposed to a piecemeal province-by-province approach, to these issues.

Motion 2 – Roadside Enforcement of Commercial Truck Drivers and Sobriety Level

- The default position of CTA regarding this issue is until there is clear evidence and a complete understanding of what level of impairment is deemed to be considered "safe." CTA suggests zero tolerance regarding the presence of marijuana in a truck driver's system is presently the only safe choice. This could change over time, as measuring devices and testing methods become more accurate and more widespread, and the history of driving accidents from marijuana impairment or workplace incidents is understood.

Motion 3 – Safety Sensitive Positions

- Defining what constitutes a safety sensitive position in our industry, regarding marijuana use, is imperative.
- CTA will focus primarily on the truck driver as a safety sensitive position which can serve as a template for other occupations.

2.1 Defining Safety Sensitive Positions

According to the Canadian Human Rights Commission's Revised Policy on Alcohol and Drug Testing:

A safety-sensitive position is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. When determining whether a job is safety sensitive, one must consider the context of the industry, the particular workplace and an employee's direct involvement in a high-risk operation. Any definition must take into account the role of properly trained supervisors, and the checks and balances present in the workplace.
(p.3)¹

In the case of the trucking industry, the commercial vehicle operator (truck driver) occupation is considered a safety sensitive position. Employers should examine other positions within their organizations to identify other safety sensitive positions and identify these positions in relevant policies.

2.2 CTA Action to Date

On November, 2016, CTA President – David Bradley, (on behalf of a broad coalition of national trade association established by CTA) directed a letter to four federal ministers who each have a role in the issue of the legalization of marijuana, the head of the national task force on marijuana legalization and the MP responsible for guiding the issue. The key thrust of this letter addressed the coalition's concerns with the impact that legalization of marijuana use could have on road safety and the motoring public. In particular, the following issues/concerns were tabled:

1. Protect the safety of our workplaces which is the employer's legal obligation
2. Protect the safety of the public with whom many employers share their workplace or with whom we come into contact
3. Protect our ability to continue to conduct trade with the United States (U.S.) which will continue to treat marijuana as an illegal substance and which, for example, requires mandatory alcohol and drug testing for transportation providers (truck, bus, and rail operators)
4. Ensure our workplaces are not subject to any human rights and other legal challenges arising from the legalization of marijuana

2.2.1 Employer Survey

In January, 2017 CTA released an online survey to gather employer feedback on marijuana in the workplace in light of the impending legalization of recreational marijuana. As a primary research gathering tool, the survey provided the research team with valuable information regarding how employers are currently managing medical marijuana in their workplaces; what policies and procedures exist in regards to the use of both medical and recreational marijuana in the workplace; and issues and concerns that employers have regarding the pending legalization of recreational marijuana. The survey results provided initial insights into potential recommendations and how the CTA and Trucking HR Canada can meet employer needs now and in the future.

In total, 33 employers responded. Of the respondents:

Company Type:

- For-Hire – 88%
- Private Fleet – 6%
- Fleet Services – 6%

Company Size:

- Average number of employees – 428
- Average number of Owner Operators – 270

Operations:

- Cross-Border – 88%
- Cross-Province – 82%

Safety-Sensitive Occupations

- Company defined Safety-Sensitive Occupations – 50%
- Occupations:
 - All driving positions (including all equipment)
 - Mechanics/Technicians
 - Dispatchers
 - Freight handlers
 - Supervisors
 - Workers in same area as forklift operations
 - Safety manager

Existing Policies and Procedures:

- Existing prescription drug policies – 76%
 - Outline regulations regarding medical marijuana – 9%
- Existing alcohol and drug Policy – 91%
 - Outline regulations regarding recreational marijuana – 29%

Level of Tolerance for Medical Marijuana in the Workplace

- No Tolerance – 47%
- Somewhat Tolerant – 9%
- Neutral – 38%
- Somewhat Tolerant – 3%
- Very Tolerant – 3%

General Findings:

- 59% of employers have discussed the HR implications of impending legalization of marijuana
- Many employers have not had to deal with medical marijuana in the workplace (yet).
- Employers indicate that they want as much information as possible

2.2.2 Employer Round-Table

On February 22, the CTA hosted an employer round-table to discuss the HR challenges associated with marijuana in the workplace. Representatives from CTA and Trucking HR Canada, as well as Employment Lawyer – Shelley Brown, were present to facilitate the session and field questions and concerns.

The session allowed for a review of the work to date, and a good flowing discussion on the issue. There were lots of questions directed toward Shelley Brown (as our legal expert), leading us to believe there is a need from employers for legal direction. Additionally, the questions and discussion with the group also indicate that there is a lot of misinformation and inconsistency in advice being given to employers through various workshops and information sessions currently aimed towards the trucking industry. The key takeaway from this round-table was the need for the development and delivery of consistent, credible and correct information for employers moving forward. In order to be proactive and responsive to HR and legal issues surrounding the legalization of recreational marijuana, employers need to be armed with the right information. CTA is well positioned, as a national industry body to provide this leadership.

In particular, employers raised questions on the following topics/areas of concern:

- Employers are focused on the notion of a ‘prescription’ rather than the condition that the ‘prescription’ is treating. Even if medical marijuana is not prescribed in the same way as a traditional medication, the issue is the condition (or disability) that is being treated which then requires accommodation on the part of the employer.
- Employers are concerned about drug testing and how to include testing regulations within their drug and alcohol policies for pre-employment. This is an issue closely tied with human rights.
- Employers questioned whether they would be responsible for paying for rehabilitation programs for employees addicted to marijuana (i.e. a disability).
- Employers questioned the notion of safety-sensitive positions; namely, what should be defined as such. Shelley Brown indicated that safety-sensitive positions should be clearly outlined in a policy and preferably, rationale should be included. Employers asked for guidelines surrounding defining safety-sensitive positions in their workplaces.
- Employers noted that the impending legalization of marijuana could have a negative impact on the recruitment of the next generation of their workforces.

Employers also noted the resources they would find helpful in preparing for the legalization of recreational marijuana, including:

- Checklists for policies and procedures relating to medical and recreational marijuana in the workplace
- Tests for impairment in the workplace
- Field sobriety testing training and available funding to address the costs
- Annual meetings or a community of practice to discuss updates and concerns

3.0 The Issue - Pending Legalization of Recreational Marijuana

The proposed legislation on the legalization of marijuana, while different from medical marijuana, is expected to bring its own set of issues. These include: random testing; background and pre-screening checks for recruitment purposes; and, the need to ensure that trucking employers have appropriate drug and alcohol policies in place – policies that clearly articulate parameters around the use of any mood-altering drugs and potential impairment. It is clear in all HR legal circles that medical marijuana should be treated the same as any other prescription medication. Also, the distinction between medical marijuana and recreational marijuana does not appear to be clear for many, including employers. The introduction of new legislation has the potential to compound this confusion.

Whether for medical or recreational purposes, policies need to be clear on employers' expectations with regards to workplace impairment, particularly in safety-sensitive occupations.

3.1 Medical Marijuana vs. Recreational Marijuana – what's the difference?

The difference between medical marijuana and recreational marijuana are quite significant and employers must recognize these differences to fully understand their responsibilities.

Medical marijuana is treated in the same manner as other prescription drugs² and is subject to human rights legislation. In being covered under human rights legislation, employers are faced with the duty of accommodation – even for cases of marijuana addiction which in some cases is considered a disability under current legislation. Employers are required to accommodate medical marijuana users to the extent that the accommodation does not cause undue hardship (financial or otherwise) to the employer.

In contrast, recreational marijuana is not a prescription drug and therefore is not subject to human rights legislation. Although the legalization of marijuana for recreational use (as opposed to medical use) will undoubtedly have an impact in the workplace, the obligations of employers will vary. For example, in situations where dependency or addiction to marijuana exists or can be established, identical obligations exist as in medical marijuana.

3.2 What does Legalization Mean for the Trucking Industry?

Of key concern in the trucking industry is the impact that the legalization of marijuana will have on road safety. This concern is shared by many Canadians. In November 2016, the Canadian Automobile Association (CAA) released the results of a survey that they conducted regarding the effects of legalization on road safety. Results indicate that 63% of Canadians worry that roads will be more dangerous when marijuana is legalized. However, 26% of Canadians surveyed between the aged of 18 and 34 think that a driver under the influence of marijuana is either the same or better than a sober one.³

As an industry, there are various concerns for employers regarding the legalization of marijuana:

- Documented research lists the impairment of several brain functions, such as coordination, judgement of distances, reaction time and the ability to pay attention as key side effects of marijuana use.

- The above listed side effects associated with marijuana use will mean that employers will have to consider policies regarding being under the influence of marijuana while at work (e.g. zero-tolerance policies) to ensure workplace safety, particularly for safety-sensitive positions.
- Driving under the influence of marijuana is a major concern:
 - Marijuana is second to alcohol as a substance most frequently found among drivers involved in crashes, drivers charged with impaired driving and drivers who have been seriously injured.
- In contrast to alcohol, there is currently no legislated cut-off level for driving while under the influence of marijuana.
- In contrast to roadside alcohol testing, there is currently no technology available to assess the THC levels of drivers suspected of impairment by marijuana.
- Under current Human Rights legislation, employers are required to accommodate workers who use medical marijuana.
- Employers will be required to apply workplace measures to enable mitigation of risk to employees and the public in relation to marijuana use. Examples may include, but are not limited to, national cut-off levels for THC levels, comprehensive workplace drug testing and the review of the duty to accommodate employees who are using medical marijuana.
- Unlike consistently produced prescription drugs, the potency of one gram of marijuana can differ significantly depending on where, how, and how long it grew. This inconsistency in potency directly impacts the effects of the drug on the user and the ability of the individual to safely perform job duties.

4.0 TASK FORCE ON CANNABIS LEGALIZATION AND REGULATION

On November 30, 2016, the Task Force on Cannabis Legalization and Regulation released The Final Report of the Task Force on Cannabis Legalization and Regulation. This report addressed various areas of concern including: minimizing harms of use; establishing a safe and responsible supply chain; medical access; and implementation. The section of particular interest for the trucking industry is Chapter 4: Enforcing Public Safety and Protection, with a focus on “Impaired Driving:”

It is clear that cannabis impairs psychomotor skills and judgment. While there is a link between cannabis use and decreased driving performance and increased crash risk, several considerations were noted:

- Cannabis-impaired driving is more complex to study than alcohol-impaired driving;
- While scientists agree that THC impairs driving performance, the level of THC in bodily fluids cannot be used to reliably indicate the degree of impairment or crash risk;
- Whereas evidence was gathered over many years to arrive at an established metric for alcohol intoxication—Blood Alcohol Concentration (BAC)—these types of data do not exist for cannabis;

- In contrast to alcohol, THC can remain in the brain and body of chronic, heavy users of cannabis for prolonged periods of time (sometimes several days or weeks), far beyond the period of acute impairment, potentially contributing to a level of chronic impairment;
- Some heavy, regular users of cannabis, including those who use cannabis for medical purposes, may not show any obvious signs of impairment even with significant THC concentrations in their blood. Conversely, infrequent users with the same or lower THC concentrations may demonstrate more significant impairment;
- There is a significant combination effect when cannabis is consumed with alcohol, leading to a greater level of intoxication and motor control problems than when either substance is consumed alone;
- Roadside testing tools to measure THC presence in a driver's system are in development. Oral fluid screening devices are the most advanced today (and have the added advantage of signalling recent use);
- Other challenges exist, including the need to account for the rapid and sharp decline of THC levels in the blood in the hours following consumption through smoking (with edibles the decline is more gradual).

As a result of the research conducted, the Task Force reiterated that impaired driving is a serious issue that requires immediate attention to protect public safety. In regards to combating impaired driving under the influence of marijuana, the Task Force set forth the following key actions by the federal government:

- 1.** Invest immediately and work with the provinces and territories to develop a national, comprehensive public education strategy to send a clear message to Canadians that cannabis causes impairment and the best way to avoid driving impaired is to not consume. The strategy should also inform Canadians of:
 - the dangers of cannabis-impaired driving, with special emphasis on youth; and
 - the applicable laws and the ability of law enforcement to detect cannabis use
- 2.** Invest in research to better link THC levels with impairment and crash risk to support the development of a per se limit
- 3.** Determine whether to establish a per se limit as part of a comprehensive approach to cannabis-impaired driving, acting on findings of the DDC
- 4.** Re-examine per se limits should a reliable correlation between THC levels and impairment be established
- 5.** Support the development of an appropriate roadside drug screening device for detecting THC levels and invest in these tools
- 6.** Invest in law enforcement capacity, including Drug Recognition Expert (DRE)* and Standardized Field Sobriety Test (SFST)** training and staffing

7. Invest in baseline data collection and ongoing surveillance and evaluation in collaboration with provinces and territories⁴

*A Drug Recognition Expert (DRE) is a law enforcement officer trained to identify people whose driving is impaired by drugs other than, or in addition to, alcohol. DREs often testify in court, where the term “expert” has important legal implications. Some jurisdictions do not allow the term Drug Recognition Expert.

** The Standardized Field Sobriety Test (SFST) is a battery of 3 tests performed during a traffic stop in order to determine if a driver is impaired. The 3 tests that make up the SFST are the horizontal gaze nystagmus (HGN), the walk-and-turn, and the one-leg stand tests.

5.0 Key Industry Considerations

The increased risks of employees being under the influence of marijuana in the workplace require that the following should be in place prior to or at the same time as legislation is introduced to legalize marijuana:

- Identification of a national cut-off level similar to the “over .08” offence for alcohol with a practical, least invasive and legally acceptable roadside and workplace testing protocol for marijuana.

- The state of Colorado enforces a cut off level of 3 nanograms of THC per 100 ml of blood. While this does not necessarily establish actual impairment, it is the measurement that is applied regardless.

- Workplace alcohol and drug testing regulations, to require/permit employers to test employees on a pre-employment, post-incident, reasonable cause and random basis, as well as testing as part of a monitoring program for employees returning to work after treatment or in a post violation situation.

- It should be noted that pre-employment testing may prove to be problematic as there are privacy and potential human rights issues relating to refusal to hire individuals protected human rights grounds. That being said, an employer is entitled to insist that an employee self-identify; the employer has the right to fire that employee for failure to self-identify if they find out that this was not done (even for non safety-sensitive positions).

- Clear and balanced rules setting out an employer’s duty to accommodate employees who are under the influence of alcohol or drugs while at work and who suffer from substance abuse dependency.

5.1 Medical Usage of Marijuana

The Access to Cannabis for Medical Purposes Regulations (ACMPR) was enacted by Health Canada on August 24, 2016. The ACMPR “allow for reasonable access to cannabis for medical purposes for Canadians who have been authorized to use cannabis for medical purposes by their health care practitioner.” The ACMPR replaced the outgoing Marijuana for Medical Purposes Regulations (MMPR).

According to Health Canada, “under the ACMPR, Canadians who have been authorized by their health care

practitioner to access cannabis for medical purposes will continue to have the option of purchasing safe, quality-controlled cannabis from one of the producers licensed by health Canada. Canadians will also be able to produce a limited amount of cannabis for their own medical purposes, or designate someone to produce it for them.”⁵

5.1.1 Key Employee Responsibilities (Medical Marijuana)

- Employees should notify employer if they are using medical marijuana or prescription drugs that can cause impairment if they are in a safety-sensitive position
- Employees not in safety-sensitive positions do not have to report use of medical marijuana if it doesn't require accommodations
- Employees have the right to be accommodated, as long as it doesn't cause undue hardship on the employer's part.
 - Accommodations may include alternative forms of work, leaves of absence, modifications to work schedules, etc.

5.1.2 Key Employer Responsibilities (Medical Marijuana)

- Employers can request to view the employee's medical marijuana license (issued by the government) or letter of authorization from a medical professional.
- Employers must accommodate workers in safety-sensitive positions that use medical marijuana, as long as it doesn't cause undue hardship on the employer's part. The employer also has a responsibility to weigh in the health and safety risks involved. To this effect, accommodations may include but are not limited to: employee being assigned to a non-safety sensitive position; changes to the employee's work schedule; temporary leave of absence, etc.
- Undue hardship, while subjective, usually includes the following criteria:
 - Cost of accommodation
 - Funding availability to help the employer with the cost of accommodation
 - Health and safety
- Employers have to consult affected employees prior to establishing the proper adjustments, i.e. can't simply dismiss the employee's request to be accommodated for medical marijuana
- Employers may have to cover the cost of medical marijuana and vaporizer in cases where it is prescribed due to a workplace injury.
- Employers can place limits and expectations on employees as it relates to medical marijuana which may include:
 - Not attending work impaired
 - Not using medical marijuana at, or immediately prior to entering, the workplace
 - Not sharing the medical marijuana prescription with other employees
 - Not tolerating unexcused incidents of absence or lateness.⁶

6.0 OPTIONS FOR EMPLOYERS MOVING FORWARD

The following options for employers have been extracted from “Weed in the Workplace: An Employer’s Road Map by Employment Lawyer, Shelley Brown, LL.M.

ANTICIPATION

Employers need to review their workplaces and identify situations or areas where impairment would be either problematic or dangerous. The legal regime currently provides protections to employees even in workplaces that are highly safety sensitive. This includes industries involving transportation or employing heavy machinery, hazardous materials or chemicals.

There are cases which support the proposition that in the workplace, random drug or alcohol testing is not allowed in non-hazardous environments even where actual impairment exists. Termination for cause in these instances appears to require progressive discipline first. In hazardous environments, unless an employer can establish that the job site is safety sensitive and there is at least a general issue of drug use and impairment at work, the imposition of random testing and summary termination is problematic. Tests which provide evidence of drug usage, but don’t establish actual impairment, often don’t support termination for cause. Employers need to be aware of these issues and undertake appropriate reviews.

PREPARATION

In view of the limitations on employers, even where safety is an issue, policies and procedures must be created or enhanced to deal with dope-induced impairment. Behaviours that will not be tolerated need to be listed. Clear disciplinary procedures need to be identified. By doing so, in the absence of situations where cause might exist, an employer may take preventative and remedial action, such as suspension or progressive discipline. Even in safety sensitive workplaces, employers should begin the work to create or strengthen infrastructures that will respond to these concerns.

Most decisions have been in the unionized environment. They indicate that the more forgiving and supportive a drug policy is, the more likely it is that discipline and intrusive testing will be accepted. For instance, zero tolerance policies have been dealt with more harshly by arbitrators than those which offer other options before discipline is imposed.

EDUCATION

All staff must be kept advised of the development or modification of any policy and they should be aware of its contents. This can be done by means of general meeting or information bulletins on internal websites. Employers must keep on top of the inevitable legal changes that will occur as the legal landscape evolves. The failure to do so will be costly, particularly if a policy or procedure is inadequate or wrong. Huge penalties or damage awards could prove catastrophic, not to mention the negative impact on a company’s reputation. Where fair and clearly worded policies exist, the courts and tribunals tend to be more disposed to render favourable decisions.

The road ahead will be bumpy. If companies carefully develop a road map, there will be fewer blind alleys and detours on the journey for employers and human resource professionals to negotiate.

7.0 RECOMMENDATIONS

To successfully prepare for the impending legalization of marijuana, the following recommendations for action have been identified:

Employers

1. Identify safety-sensitive positions in their workplaces
2. Update (or develop) their “drug and substance abuse policies:”
 - It is important for employers to address the tolerance for, and consequences of, recreational marijuana use in the workplace
3. Update (or develop) their “prescription drug policies” to reflect medical marijuana as a prescription drug:
 - It is important for employers to include disclosure measures for medical marijuana within the prescription drug policy
4. Update (develop) policies to reflect accommodation plans
 - Many HR professionals recommend involving the health and safety committee in the development of accommodation plans for prescription drugs (including medical marijuana).
5. Delegate a staff person(s) who will be responsible and accountable for the policies pertaining to medical and recreational marijuana use in the workplace.
6. Provide appropriate training to staff on handling issues that may arise from the policy.

Trucking HR Canada

** Trucking HR Canada will develop the following at the request and for the Canadian Trucking Alliance.*

1. Provide support to employers by creating the following resources:
 - White Paper on the HR Challenges of Marijuana in the Workplace (said document)
 - Resource Suite for employers which may include the following resources based on employer feedback:
 - Checklist for developing or revising key HR policies, including: Drug and Alcohol Policies, Prescription Drug Policies, Accommodations Policies
 - Sample templates for policies/procedures (with full disclaimers that individual policies will be required, templates are not legally binding, best practice for all organizations to seek legal expertise when developing policies.
 - Resource list of potential sources of information (in the form of policies/procedures/Acts – such as the CHRC: Impaired at Work guidelines)
 - Suite of resources will be developed by THRC and Shelley Brown during the month of April.

CTA

- 1.** Continue lobbying the government officials regarding key industry concerns regarding the legalization of marijuana with particular emphasis on:
 - The importance of establishing effective roadside testing methods to detect THC levels
 - Negotiating employer rights to drug and alcohol testing for employees after hiring
 - Negotiating the employer duty to accommodate for drivers – a highly safety-sensitive position

- 2.** Provide ongoing support and resources for employers (through the Provincial Associations) in developing policies related to medical and recreational marijuana use in the workplace

- 3.** As an industry, create and control messaging around the issue of marijuana in the workplace. Emphasis should be placed on the proactive nature of the industry in dealing with this issue, while at the same time not creating a false notion that the use of marijuana is a paramount issue or challenge within the industry. At all times, the CTA must remain cognizant of how industry approaches the issue to manage public image, perception and opinion.

References

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