



Best Practices in Accommodating Medical Marijuana

Jessica Thomson and Justin Barrie (student-at-law) – May 2017

Introduction

Canada is experiencing a rapid shift in the way it approaches marijuana following the Conservative government's enabling of regulated production and authorization¹ to possess medical marijuana. Continued changes are anticipated with the Liberal government vowing to legalize and regulate the drug by July 2018.² Employers must be aware of the issues around marijuana in the workplace in order to understand its potential impact and to adapt by creating workplace policies that are meaningful to employees and responsive to the law.

Marijuana can appear in the workplace when an employee is using it either for medical purposes or recreationally. Employers must accommodate properly authorized medical use to the point of undue hardship. Employers do not need to accommodate employees' recreational use of marijuana but they must be alive to the possibility that it is demonstrative of a dependency which is a recognized disability.

Employers have long had to consider issues which arise when employees provide prescriptions for medications which may cause impairment. Although authorized medical marijuana requires the same approach, employers face an added challenge in accommodating the well-documented impairing side effects of marijuana use. This has created uncertainty as to how to balance the needs of the workplace with the employee's need to use his or her prescribed marijuana. The focus of this paper is to provide a guideline for employers in such circumstances.

The "Duty to Accommodate"

The starting point is to review the duty to accommodate which is well established in law. The Supreme Court of Canada in *Meiorin*³ determined that an employer may discriminate against an employee on a prohibited ground (such as disability) only if that employer can establish that the discriminatory standard imposed is a *bona fide* (genuine and sincere) occupational requirement (a.k.a. a "BFOR"). The employee bears the initial onus of proving that a *prima facie* case of discrimination exists (i.e. the employee must show the facts are such that it seems at the first impression that there is discrimination).

If the employee establishes that discrimination exists, the burden shifts to the employer to justify their discriminatory conduct. This requires the employer to demonstrate that:

¹ For the purposes of this memo, the terms "authorization" and "prescription" are used interchangeably.

² <https://www.liberal.ca/realchange/marijuana/>

³ *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].



1. the discriminatory standard (i.e. the rule, policy, etc.) was adopted for a purpose “rationally connected” to the job (i.e. there’s some relationship);
2. the standard was adopted honestly and in good faith to fulfill the above legitimate work-related purpose; and
3. the standard is “reasonably necessary” to accomplish that purpose and it is impossible to accommodate the employee without imposing “undue hardship” on the employer (i.e. it not practical, realistic or financially sensible for the employer to accommodate).

Accommodating the Use of Marijuana

Employers have an obligation under human rights legislation to accommodate employees who suffer from any physical or mental disability. The obligation includes accommodating any side effects an employee may experience as a result of treatment or medication for their disability. Where medical marijuana is authorized for the treatment of a physical or mental disability, the employer is required to consider whether the individual can continue to work in their current job role, notwithstanding the side effects of the marijuana use, without the employer incurring undue hardship.

If the employee’s use of marijuana as a treatment makes them less safe or less effective in their job role, an employer *may* be entitled to remove the individual from that job until the period of medication is over as their impaired performance would otherwise create an undue hardship. Before coming to such a conclusion, the employer must consider whether the employee could be accommodated by being placed in a different role, or in the same role with modifications to duties in order to accommodate the use of the prescribed marijuana and its side effects.

Each case must be assessed individually. In assessing whether accommodation can be achieved without undue hardship, the employer should investigate whether the use of medical marijuana will *actually* impair the employee’s ability to perform their specific job duties. Reliance solely on the nature of the job itself, or on the basis of the purported effects of marijuana generally, without further analysis, will not justify a lack of accommodation. Even where an employee’s job is “safety-sensitive”, such as a heavy vehicle operator or a long-term healthcare facility worker, there is no default presumption of incompatibility with the use of medical marijuana: an analysis must be taken in all cases.

Although employers are only obligated to accommodate authorized medical marijuana use, attention must also be paid to any signs or patterns of an employee which hint at addiction or dependency issues. Addiction is a recognized physical disability requiring accommodation. If an employee self-reports or is found to be using marijuana off-duty, inquiries should be made to ensure that the employee does not have a dependency problem requiring accommodation, and that the off-duty usage is not resulting in on-duty impairment (intentionally or otherwise).



Even when receiving authorization for marijuana usage, employers should not preclude the possibility that the employee may have addiction issues. It is possible that the employee suffers from addiction to marijuana as well as from side effects which arise from medical marijuana treatment. If this is suspected further inquiries should be made.

Consider the following when determining whether the duty to accommodate arises:

- Is the employee using marijuana recreationally or pursuant to medical authorization?
 - **Recreationally:** no duty to accommodate to the point of undue hardship, but must consider if addicted
 - If addicted, the duty to accommodate arises
 - **Medically Authorized:** must accommodate to point of undue hardship, best practice to consider if addicted

If medical marijuana use is authorized: Assess the degree of impairment caused by marijuana use based on medical evidence; evaluate whether specific nature of job role and duties can allow for accommodation notwithstanding potential side effects (discussed later in this paper).

Best Practices: A Four Step Action Plan to Addressing Medical Marijuana

Step 1: Create an Expectation and Culture of Disclosure

Encourage employees to notify or disclose their use of any prescription or non-prescription drugs – including medically authorized marijuana – which *could* cause impairment. Policies and corporate culture should allow for disclosure without employees feeling that they may be reprimanded for their honesty.

Be responsive to any disclosure. If an authorization for medical marijuana is provided by an employee, review the authorization itself, and any additional information provided by the employee (if any), to assess what further information will be required to make a determination as to whether the employee can perform their job duties safely and productively notwithstanding the side effects of the marijuana use. Where employees report marijuana use recreationally or as self-medicating, take steps to investigate whether addiction is a potential issue. In either circumstance, let the employee know it is your duty as an employer to take the steps necessary to determine whether any prescription or non-prescription drug use is compatible with the safety and productivity requirements of the workplace.



The employer may also wish to remind the employee that they are required to actively participate in the accommodation process.

Step 2: Ask the Right Questions to Make an Informed Decision

Where the employee has not initially provided documentation sufficient enough to make a determination as to their fitness to work, provide the employee with a letter to take to their medical practitioner who authorized the use of medical marijuana. In the letter, clearly outline the nature of the specific job role(s) and regular duties of the employee, and inquire whether those duties may be performed safely and efficiently if the employee uses the medical marijuana in the quantity and at the times as prescribed. Do not request a *diagnosis* of the employee's medical condition, as that is prohibited; instead, ask which symptoms may cause a limitation to the employee's safety or productivity and how those symptoms may be alleviated.

If the employee returns the letter and the information is still insufficient, vague or unreliable, or if the employee cannot reach the authorizing medical practitioner, provide the employee with an amended letter (taking into account any new information) to take to their treating physician or family doctor. Again, ensure that the physician receiving the letter is provided details about the nature of the job duties and ask clearly whether the individual's use of medical marijuana as prescribed will impair his or her ability to perform those duties.

Take care in drafting questions to any medical personnel. Questions should be pertinent to establishing whether the job can be performed safely and effectively but should not ask for unrelated medical history or other information bearing no relationship to employment.

There is some debate as to whether the employer may ask whether an alternative course of treatment was offered or made available, instead of medical marijuana, which would be less impairing.⁴ Although such a line of questioning seems to bear a nexus to the employment relationship, and there is some arbitral support of an employer's ability to ask, other Supreme Court and Federal Court decisions emphasize that an individual's ability to choose their own course of treatment without undue interference is of fundamental importance. As such, employers should proceed with caution in asking about alternative treatment options.

The kinds of questions that can lawfully be put to an employee's medical practitioner or physician is a highly contextual and fact-driven exercise. Examples of questions that *may* be appropriate include:

- i. What is the employee's prescribed dosage, frequency of use, method of consumption, and advised time of consumption?

⁴ *United Steel Workers, Local 7656 v Mosaic Potash Colonsay ULC*, 2016 CanLII 18320 (SK LA) (Hood).



- ii. What are the anticipated effects of the usage as it is prescribed/authorized? For what duration will these effects last?
- iii. Will the use of medical marijuana in the prescribed/authorized manner adversely impact or otherwise impair the employee's ability to perform any of their duties safely and effectively?

Step 3: Assess the Reliability of the Medical Expert's Responses

Evaluate objectively and critically all documentation and responses the employee returns. It is the employer's right to make all inquiries needed to make a fair and proper determination as to whether the individual's medical marijuana use can be accommodated such that the employee can continue working without the employer incurring undue hardship. Remind the employee that he or she also has a duty to facilitate accommodation by providing the requested medical information.

Where an employee returns with insufficient, questionable, or unreliable information from a medical practitioner, family doctor, or otherwise, which prevents a reasonable and accurate assessment of the potential for workplace impairment occurring due to the authorized medical marijuana use, take additional steps, such as:

- i. Submit the information obtained to date to an independent expert for an opinion as to its reliability or accuracy; or
- ii. Require the employee to attend an Independent Medical Examination ("IME") for the purposes of attaining the full answers sought.

Once again, assess the information you receive from these lines of inquiry to determine whether there is sufficient information to make an informed decision. If further questions arise, follow up to seek clarification.

Step 4: Accommodation

Based on all of the information provided by the employee, medical practitioner(s), physician(s), and/or expert(s), consider all potential forms of accommodation that may be possible for the employee at the workplace short of that which results in undue hardship. Do not forget the "BFOR" analysis; any discrimination must be based on a reasonably required job requirement.

If an employee cannot be accommodated in their regular role due to the side effects of their medication (i.e. the authorized medical marijuana), consider whether the role could be modified to be suitable for the employee without incurring undue hardship. As well, consider if another similar role could be offered or made available to the employee until their need to use marijuana comes to an end and they can return



to their usual role. If no role can be provided to accommodate the employee's disability and medication use without incurring undue hardship, consider providing the employee with an unpaid leave of absence until they may return to work. It may be that the employment relationship become frustrated at some point but employees should proceed cautiously in taking this position.

Any actions taken with respect to accommodation should be supported by a thorough and fairly conducted investigation to assess what impact the employee's disability, and the effects of any medication required in treating it, will have on the performance of their required job duties.

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