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Drug and Alcohol Testing in the Workplace: Addressing Employers' Concerns

These materials were prepared by Melanie Vipond of Gall Legge Grant Zwack LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, October 2019.

DRUG AND ALCOHOL TESTING IN THE WORKPLACE: ADDRESSING EMPLOYERS' CONCERNS

I. Introduction

Employers are legitimately concerned with the use of drugs and alcohol by employees in safety sensitive workplaces. The reasons are threefold: (i) the prevalence of drug and alcohol use, particularly given the legalization of cannabis; (ii) the growing body of research demonstrating the serious effects that such use has on an individual's ability to safely perform his/her job; and (iii) the legal, moral and ethical obligations on employers to provide a safe work environment. It is irrelevant whether the drugs are legal, illegal or prescriptions – employers must treat all impairing substances that pose a safety risk in the same manner.

Employers must balance these concerns with employees' privacy rights. Certainly in safety sensitive workplaces, having a drug and alcohol testing policy makes sense. That is the best way to provide clear guidance to the workforce on the employer's expectations and policies regarding the use of drugs and alcohol, the types of testing, the method of testing and the consequences of testing positive. It also makes sense for employers to educate their workforce on their testing policies, as well as the effects of using drugs and alcohol (which are often not clearly understood by employees).

This paper will explore five questions regularly asked by employers concerning the use of impairing substances in the workplace.

II. Questions

A. Should employers care if employees in safety-sensitive positions use drugs (including cannabis and prescriptions) on their own time?

Employers have legal, moral and ethical obligations to ensure a safe workplace. Employees are entitled to expect that employers will do everything in their capacity to ensure that they return home safely from work each day.

Therefore, employers must do everything they reasonably can to identify and address safety concerns, including the use of impairing substances in such a way as to pose a safety risk.

This includes the use of impairing substances, both on and off work. While it may seem that what employees do at a party Sunday night is outside of the employer's purview, these off-duty actions can nonetheless affect employees' abilities to safely conduct themselves when they return to work on Monday morning.

There are three types of impairment: acute, carry-over, and long term. Most people are only aware of or familiar with acute impairment from drug or alcohol use – that is, the physical and psychological effects which take place shortly after a substance is consumed and which typically last for several hours. However, there are also carry-over/hangover effects, which last beyond the impairment stage. In fact, some substances (e.g. cocaine and amphetamines) can cause greater impairment during the carry-over/hangover phase than during the acute phase. Long term/chronic effects describe the ongoing impairment which can occur in individuals who regularly use an impairing substance, which can last even after the substance is no longer in the individual's bloodstream. Beyond these three types of impairment, the use of drugs or alcohol can sometimes cause people to attend work in an unfit condition, such as where the use of drugs or alcohol impairs their ability to sleep and they are insufficiently alert to perform safety sensitive tasks.

In 2018, the Canadian Centre for Occupational Health and Safety ("**CCOHS**") released a comprehensive paper, with the assistance of the Canadian Human Rights Commission, which provides specific information relating specifically to cannabis use.[1] The paper distinguishes between the two components of cannabis—Delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD)—noting that THC is the component responsible for the high-inducing or psychoactive effects, while CBD provides the therapeutic effect.[2] It also notes the differences in impairment based on the method of consumption, explaining that the effects are delayed if cannabis is ingested rather than smoked, as the chemicals must first pass through the digestive system if ingested before any acute impairment occurs.[3] Lastly, the paper explains the long-lasting impairing effects of cannabis and the "large body of evidence to support the persistence of neurocognitive impairment lasting from hours to weeks" after use[4].

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1 https://www.ccohs.ca/products/publications/cannabis/; https://www.ccohs.ca/products/publications/Cannabis_pub_19.pdf

2 https://www.ccohs.ca/products/publications/Cannabis_pub_19.pdf, p. 4.

3 https://www.ccohs.ca/products/publications/Cannabis_pub_19.pdf,, p. 4; See also information regarding specific effects and duration of impairment at p. 5.

4 https://www.ccohs.ca/products/publications/Cannabis_pub_19.pdf, p. 6

In addition to their moral and ethical obligations, employers have legal obligations to provide a safe work environment. Specifically, section 115 of the *Workers' Compensation Act* ("***WCA***") states that "every employer must (a) ensure the health and safety of (i) all workers working for that employer, and (ii) any other workers present at a workplace at which that employer's work is being carried out." Among other obligations, under s. 115(2)(a) of the *WCA*, an employer must "remedy any workplace conditions that are hazardous to the health or safety of the employer's workers."

Section 4.20 of the BC *Occupational Health and Safety Regulation* ("***OHS Regulation***") outlines obligations for employers (and others) regarding impairment by alcohol, drug or other substance, as follows:

(1) A person must not enter or remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.

(2) The employer must not knowingly permit a person to remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.

(3) A person must not remain at a workplace if the person's behaviour is affected by alcohol, a drug or other substance so as to create an undue risk to workers, except where such a workplace has as one of its purposes the treatment or confinement of such persons.[5]

WorkSafeBC's website emphasizes the need for employers (and workers) to consider the potentially impairing effects of drugs:

> Note: In the application of sections 4.19 and 4.20, workers and employers need to consider the effects of prescription and non-prescription drugs, and fatigue, as potential sources of impairment. There is a need for disclosure of potential impairment from any source, and for adequate supervision of work to ensure reported or observed impairment is effectively managed.[6]

In BC, employers can face sanctions under both occupational health and safety legislation and the *Criminal Code* if they fail to comply with their obligations to maintain workplace safety.

For example, employers are captured under s. 217.1 of the *Criminal Code,* which provides that "Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."[7] The term "Everyone" includes "organizations", and "organizations" includes among other things, a "company, firm, partnership, trade union, or municipality," per s. 2 of the *Criminal Code*. Failure to comply with this duty may amount to criminal negligence under s. 219 of the *Criminal Code*. If this failure

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5 http://www.bclaws.ca/civix/document/id/complete/statreg/296_97_02#section4.20

6 https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation/part-04-general-conditions#SectionNumber:4.20

7 *Criminal Code,* R.S.C. 1985, c. C-46 ("*Criminal Code*"), section 217.1.

results in death, it may amount to an offence under s. 220, and if it results in bodily harm, an offence under s. 221.[8]

Under s. 196 of the *WCA*, WorkSafeBC can impose steep administrative penalties on employers, other than those who establish that they exercised due diligence, if employers:

(a) Fail to take sufficient precautions to prevent work-related injury or illness

(b) Do not comply with the *OHS Regulation*, Part 3 of the *WCA*, or an applicable order, or

(c) Have an unsafe workplace or working conditions.[9]

WorkSafeBC's Guidelines note that employers must fulfill their obligations under the *WCA* and *OHS Regulation,* and that "[w]here those obligations have not been fulfilled, WorkSafeBC prevention officers may issue orders and, where appropriate, recommend administrative penalties or prosecutions."[10]

It has become apparent in recent years that WorkSafeBC is regularly, and arguably increasingly, exercising its enforcement authority to impose administrative penalties and recommend prosecutions.[11] While employers should always be vigilant in maintaining workplace safety regardless of sanctions, it is important to remain aware of this reality regarding potential penalties and prosecutions.

In short, it is important for employers to identify and, wherever possible, reduce the risks caused by the use of drugs and alcohol by employees, including where those risks are caused by usage away from the workplace. This is not only a moral obligation that employers owe to their employees and the public at large, but a legal obligation imposed on employees through workers health and safety legislation and the *Criminal Code*.

B. What should employers do if they have concerns with an employee's use of impairing substances?

If an employer has concerns with an employee's use of an impairing substance (which could include prescription drugs) and the safety risks posed by such use, the employer should:

(1) If the employee is in a safety sensitive work environment, immediately remove the employee from the safety-sensitive environment.

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8 See also *Criminal Code* section 22.1, which outlines the circumstances in which an organization is liable for negligence, and s. 22.2, which outlines organizations' liability for offences other than those involving negligence.

9 See https://www.worksafebc.com/en/health-safety/create-manage/incident-investigations/penalties and *WCA* section 196 at http://www.bclaws.ca/civix/document/id/complete/statreg/96492_03#section196.

10 WorkSafeBC Guideline G-D3-124, Responsibilities of the persons/parties in a workplace, at https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-guidelines/guidelines-for-workers-compensation-act

11 See for e.g. WorkSafeBC, Statistics 2018, pp. 77-78, retrieved from: https://www.worksafebc.com/en/resources/about-us/annual-report-statistics/2018-stats?lang=en and WorkSafeBC, Statistics 2015, p. 101, retrieved from https://www.worksafebc.com/en/resources/about-us/annual-report-statistics/2015-stats?lang=en.

(2) Meet with the employee (and a Union representative, if applicable) to discuss the employer's concerns.

    (a) If the employee admits to using an impairing substance, find out the key details of when, how, and why they consume cannabis, as well as how much, and how often. This will often require obtaining information from medical specialists and possibly an independent medical assessment. An employer should consider whether placing the employee on disability leave would be appropriate.

(3) Consider whether the employer has a duty to accommodate the employee's substance use to the point of undue hardship.

(4) Keep the employee out of his or her safety-sensitive position until the employer is confident that the employee can safely perform the job. The employer should consider whether the employee can be put into a non-safety sensitive position in the interim.

C. What should employers do if they discover that an employee in a safety-sensitive position is using cannabis for medical reasons?

Even if an employee is using cannabis for medical reasons, the employer still has an obligation to ensure the safety of its workplace, which will require the employer to remove the employee from his or safety sensitive job until more information is known.

After the employer becomes aware of the use of cannabis, and removes the employee from any safety sensitive work (if applicable), the employer should meet with the employee to discuss his or her cannabis use.

The employer should also request that the employee provide medical information from the employee's treating physician. The treating physician should be asked to provide details regarding the employee's use of cannabis, including why the employee uses cannabis, the dosage, the timing, the method and whether/what other safer alternatives have been attempted or could be attempted by the employee.

The treating physician should also be made aware of the safety sensitive nature of the employee's position, including the specific safety sensitive job duties and the potential consequences of failing those duties. Sometimes physicians who prescribe cannabis for medical reasons are unaware of an employee's job duties, and upon learning that an employee is in a safety sensitive job, will advise that they would not have prescribed cannabis, or a particular form of cannabis, had the physician known about the safety sensitive nature of an employee's work. In these circumstances, physicians will often explore and offer an alternative means of treatment that does not create a safety risk.

As discussed above, employers should also be aware that different methods of cannabis consumption are indeed safer and less impairing than others, and should discuss the use of those alternatives with employees and their physicians, in the event that no non-impairing treatments are available.

For example, the use of CBD oil is generally seen to be a safer option than smoking cannabis, as CBD oil lacks the psychoactive ingredient, THC. However, employers still need to be aware that these alternatives may still pose safety risks. For example, depending on where employees are

obtaining their CBD oil, the product may (and likely does) contain small amounts of THC, and could thus still be impairing (and could result in a positive drug test).

The Occupational and Environmental Medical Association of Canada ("**OEMAC**"), which is the "largest national association of physicians with an interest in occupational and environmental medicine"[12] released a position statement in September 24, 2018, noting specifically "with respect to workers in safety-sensitive settings," the need to draw attention to the following evidence-based statements:

1. Irrespective of the source of procurement, the use of cannabis can lead to impairment, which may adversely impact the performance of individuals at work.
2. It is recognized that the timing and duration of cannabis impairment is variable and that more research is needed in this regard. To provide practical guidance, until definitive evidence is available, it is not advisable to operate motor vehicles or equipment, or engage in other safety-sensitive tasks for 24 hours following cannabis consumption, or for longer if impairment persists.
3. In light of the legislative change, it is recommended that employers update relevant workplace drug and alcohol policies to address the use of cannabis and the mitigation of occupational risk.
4. Education and training on the risks of cannabis use as well as the recognition of impairment, and the treatment options available to employees with substance use issues, for both employers and employees, is advisable.
5. More research is needed to adequately study cannabis-related impairment, including methods for the detection of impairment as well as the further implications of the legalization of cannabis on the individual, the workplace, and on human resources policies and practices.[13] [Emphasis added.]

Lastly, an employer is not automatically obligated to accommodate an employee who uses cannabis for medical reasons. That is because there may not be any *prima facie* discrimination, even if the employer refuses to allow the employee to continue to work in his or her safety sensitive position. For example, if the employee is reasonably able to use a safe alternative (as opposed to cannabis) to treat his or her disability, then there is a good argument that any disadvantage resulting from prohibiting the employee from using cannabis while working in a safety sensitive position is not based on the employee's medical condition, which can be treated without using an impairing substance, but rather their voluntary choice to use cannabis. This is no different than the treatment of other protected grounds – such as religion or family status – where, if the employee has a meaningful choice or reasonable ability to avoid the conflict between the religious/family status need and the workplace obligation, then there won't be *prima facie* discrimination sufficient to impose a duty to accommodate on the employer.

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12 https://oemac.org/wp-content/uploads/2018/09/Position-Statement-on-the-Implications-of-cannabis-use.pdf, p. 1

13 https://oemac.org/wp-content/uploads/2018/09/Position-Statement-on-the-Implications-of-cannabis-use.pdf, p. 2

If it is unclear whether an employee has a genuine medical need to use cannabis, often employers consider obtaining an independent medical examination ("**IME**"). An IME can determine the underlying cause of the employee's medical issues, whether some type of medication is necessary, and whether there are non-impairing alternatives. An IME provides an objective, evidence-based alternative to a worker's self-reports or vague physicians' notes regarding an alleged need to use cannabis to treat a particular condition.

Interestingly, a recent WCAT Decision from August 6, 2019 (A1901310) highlights the concerns with concluding that cannabis (in this case, CBD oil) is medically necessary. In that case, WCAT accepted the appeal of a shuttle driver, who had argued that the use of CBD oil was medically necessary to treat his compensable chronic pain condition, despite the safety risks raised by a Workers' Compensation Board ("**WCB**" or "**Board**") Medical Advisor and a Review Division Medical Advisor, about the use of CBD oil.

The Board Medical Advisor, Dr. van der Meer, was of the unequivocal opinion that there was inadequate medical evidence to support the use of medical cannabis, including CBD oil:

> [25] In his August 31, 2018 opinion Dr. van der Meer advised that at this time the medical evidence to support the use of medical cannabis is inadequate and the safety concerns related to these unregulated products are considerable. She noted that there are various varieties of medical cannabis plants and that the active ingredients in each variety, and within the same variety, differs significantly, even among licensed producers. More than 400 active chemicals have been identified in medical cannabis, and the composition of the chemicals is not standardized. There are no medical standard safeguards in place as in the case for pharmaceutical medications and there are no set dosing guidelines and precautions. As such, Dr. van der Meer explained, medical cannabis is not considered a prescribable substance by the medical community. For this reason the College of Family Physicians of Canada has recommended that the term "declaration" rather than "prescription" be used by health professionals to indicate solely that the patient meets Health Canada criteria allowing access to cannabis for medical use. The College explains that, unlike a prescription, a declaration does not give dosages or directions, and does not imply that the physician recommends or advises the patient to smoke or ingest cannabis.
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> [26] Dr. van der Meer also referred to a June 2015 article in the Journal of the American Medical Association which notes that even though oral consumption of cannabis lacks the harmful by-products of smoking, difficult dose titration can result in overdosing or underdosing, highlighting the importance of accurate product labeling. Unregulated edible cannabis products that were tested failed to meet basic label accuracy standards for pharmaceuticals. Greater than 50% of the products evaluated had significantly less cannabinoid content than labeled, and other products contained significantly more delta-9-tetrahydrocannabinol (THC) or other cannabinoids than labeled, placing patients at risk of experiencing adverse effects. Since medical cannabis is recommended for specific health conditions, the authors stated that regulation and quality assurance are needed.

> [27] Based on the information from the College and the JAMA article, Dr. van der Meer was of the opinion that use of CBD oil is not medically supported.[14]

The Review Division Medical Advisor, too, was of the view that the Board should not support coverage for cannabinoids including CBD oil for this worker, focusing on the fact that "the worker's use of CBD oil during the day and vaping THC at night was contrary to the College of Physicians and Surgeons of British Columbia's (CPSBC) Practice Standard and the OEMAC's Position Statement that an individual should not drive for 24 hours following cannabis consumption."[15]

Somewhat surprisingly, and glossing over the safety issues with this shuttle driver consuming cannabis, WCAT decided to permit CBD oil as a medical necessary treatment for this worker. WCAT did so by emphasizing the fact that the medical literature considered by the Board Medical Advisor and a Review Division Medical Advisor did "not appear to refer to cannabis products provided by licensed medical cannabis suppliers in Canada," but rather products marketed by unregulated vendors in the United States, and thus "placed limited weight" on the these advisors' opinions with respect to this Worker's CBD oil use.[16] WCAT also highlighted the fact that this worker was not asking the Board to pay for his recreational THC, only the CBD oil.[17]

Likely in an effort to address the potential implications of this decision for occupational health and safety generally, WCAT stated that this decision was "not a general endorsement of the provision of cannabis generally or CBD oil specifically by the Board," and noted that the panel's conclusion was "unique to the circumstances of this case".[18] Similarly, WCAT further recommended that ongoing monitoring of the Worker's use of CBD oil by the Board may be appropriate, stating "it may be appropriate for the Board to consider monitoring the worker's ongoing CBD oil use with [the worker's physician] or any other treating physician."[19]

However, it is ultimately up to employers themselves to decide what is safe in their workplace and to do what they can to address it, subject to any legal obligations of the employer under an employee's contract, a collective agreement, or human rights codes.

D. Can and should an employer terminate an employee who has a substance problem after testing positive following an incident or near-miss at work?

The answer to this question depends on the circumstances in each particular situation. Contrary to a common assumption, an employer can terminate an employee in a safety-sensitive position even if the employee has a substance dependency or use problem.

One key consideration is whether that employee had a reasonable choice or meaningful ability to comply with the employer's drug and alcohol policy. If an employee, despite having a

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14 A1901310, paras. 25-27.

15 A1901310, para. 38.

16 A1901310, para. 82.

17 A1901310, para. 40.

18 A1901310, para. 85.

19 A1901310, para. 85.

substance problem, had a meaningful choice in complying with the employer's policy, but they simply choose not to, their employment can be terminated.

The Supreme Court of Canada's recent decision in ***Stewart v. Elk Valley Coal Corp., 2017 SCC 30*** **("*Stewart*")** is instructive in this regard.

In *Stewart*, the Supreme Court of Canada agreed with the Tribunal's conclusion that Mr. Stewart had the capacity to comply with the company's drug policy, as demonstrated by the fact that he "had the capacity to come forward and disclose his drug use" and "did make rational choices in terms of his drug use."[20]

In addition, the majority's decision in *Stewart* contains three important statements that employers should be aware of, as follows:

1. The mere fact that an employee has an addiction does not establish *prima facie* discrimination, even in the context of a rule imposing discipline for drug/alcohol use. Instead, the employee's addiction/disability must render the employee unable to comply with the policy in order for a case of *prima facie* discrimination to be established. Thus, it should no longer be open to employees to argue that they experienced discrimination simply because they had an addition and were terminated due to a breach of a drug policy alone.
2. The most crucial consideration in this context will be the facts of each specific case. Once a tribunal or arbitrator makes a decision about whether or not an employee can comply with a workplace rule, courts should defer to those findings. Thus, expert evidence on this point is of significance.
3. Adjudicators should consider the motives and reasons of the employer (i.e. when the employer acts reasonably and in good faith in enacting or enforcing rules, this will support upholding an alcohol and drug testing decision). In *Stewart*, the majority held that "The most important piece of evidence on whether Mr. Stewart's addiction was a factor in Elk Valley's reasons for the termination of his employment is the termination letter"[21] which showed no explicit or implicit indication that Mr. Stewart had been terminated for his addition, but rather for his breach of the workplace safety policy, with which he was able to comply.

As can be seen, it is critical to get the appropriate medical advice to determine whether the employee was reasonably able to comply with the employer's drug and alcohol policy. While there aren't "addiction specialists" *per say* in Canada, there are psychiatrists with occupational health & safety expertise that can appropriately answer the question. There are also experts in the United States that some employers often use in such cases.

As for whether an employer should terminate the employee's job, employers must remember that safety in the workplace is of paramount importance. Moreover, if employees are put on notice that they can breach the employers with minimal consequences, then they are more likely to do so in the future. Therefore, if there is evidence that an employee in a safety

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20 See *Stewart*, paras. 34, 35, 38, 39, and 42.

21 *Stewart*, para. 29.

sensitive workplace had a meaningful choice/reasonable ability to comply with the employer's drug and alcohol policy, but chose not to, then the employer should strongly consider terminating the employee. This will have the added value of generally deterring the workforce from engaging in similar behavior in the future.

E. Should an employer of a safety-sensitive worksite have a drug and alcohol policy?

While employers do not need to have a drug and alcohol policy in order to have the ability to test or discipline their employees, having a policy is recommended, particularly in safety-sensitive work environments.

Having a policy makes the rules and expectations of the employer clearer for everyone. If employees (and contractors) understand the expectations of the workplace, then they can conduct themselves accordingly, even in those situations where they might otherwise be unaware that their conduct was creating a safety risk (e.g. due to carry-over effects from drug or alcohol use the night before).

However, while it is important to be clear with employees on what the expectations are, and what the consequences could be for failing to comply with the expectations and rules, employers should be careful to not put too much detail in their policies.

It is impossible to capture every circumstance in which a drug or alcohol test might be required. Implementing a drug and alcohol policy that is overly detailed on procedural steps could end up stifling an employer's ability to effectively determine when tests may be required and may actually lend itself to more complaints by employees that specific criteria or procedures in the policy have not been fulfilled in carrying out these tests and investigations.

In the same vein, employers should not make too many distinctions in their policy between illegal substances and legal substances, such as alcohol or prescribed medications. Ultimately, whether or not a substance is legal does not change the impairing effects of the drug on an employee, and therefore does not determine whether the employer needs to take action to prohibit its use to ensure a safe workplace.

Further, employers should be careful that the wording in their policy is not so stringent as to only capture recent drug and alcohol use by employees, rather than also capturing hangover or other lingering effects, since these longer term effects can still be impairing, as explained above. Employers should avoid drafting policies that solely prohibit employees from being "under the influence"..." That language may require the employer to prove the employee was under the influence, suffering from the acute impacts of drug or alcohol use, which may be very difficult. I recommend also prohibiting employees from using at a time or in a manner which creates a risk of impairment in the workplace.

III. Conclusion

While it may often seem easier to turn a blind eye to the potential use of drugs and alcohol by employees, employers in safety sensitive workplaces need to take this concern seriously and are strongly recommended to both implement a policy and educate their workforce on the effects of drugs and alcohol.