

EMERGING TRENDS IN MUNICIPAL LAW



MEDICAL/LEGAL CANNABIS
Don't let your workplace go "up in smoke"



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Medical Marijuana / Cannabis

- i. Duty to accommodate
- ii. Recent case law
- iii. Practical considerations

Upcoming Legalization / Recreational Use

- i. What does this mean for Municipal Employers?

Overview



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Duty to Accommodate


- Mental and physical disabilities are prohibited grounds of discrimination under the *Alberta Human Rights Act*
- Human rights protection will extend to the treatment indicated and prescribed for a disability, which includes medical cannabis
- While addiction is also protected, recreational use is not



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Duty to Accommodate



- In the context of a request to accommodate medical cannabis, this will involve:
 - Disclosing medical restrictions and treatment regimen if it is relevant to current job duties or otherwise has a workplace impact;
 - Providing medical information supporting and outlining the treatment regimen, including support for workplace use, if required; and
 - Negotiating terms of use in the workplace to minimize workplace impact

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Duty to Accommodate

- The duty to accommodate requires employers to accommodate an employee's disability **to the point of undue hardship**
- Examples of hardship include financial cost, effect on employee morale, and safety risks
- A failure to accommodate is grounds for a human rights complaint

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Duty to Accommodate

The duty to accommodate does not require the employer to permit:

- an employee to work while impaired to a degree that the workplace is impacted, and/or
- the employee's culpable misconduct

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Duty to Accommodate

Recent case law examples:

- *French v. Selkin Logging*
- *Re Calgary (City) and CUPE, Local 37 (Hanmore)*
- *IBEW Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP*
- *Stewart v. Elk Valley Coal Corp. (SCC, June 2017)*
- *Suncor v. Unifor (ABCA, September 2017)*




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Workplace Testing – Current State of the Law

Pre-employment and Random Testing	Post-Incident Testing	Reasonable Cause Testing
<ul style="list-style-type: none"> • Current case law is conflicting, evolving, and uncertain • Likely at a minimum, the employer must establish: very safety-sensitive position; proof of the existence of drug and alcohol issues in the workplace; and that the testing program is likely to significantly mitigate the risk 	<ul style="list-style-type: none"> • Automatic drug and alcohol testing post-incident without any line of inquiry or reasonable cause analysis has generally been held to be inappropriate and unenforceable • While the threshold may be low, there must at least be some analysis of the incident and the potential for it to be related to drugs or alcohol before post-incident testing will typically be justified and valid 	<ul style="list-style-type: none"> • Where an employer has reasonable grounds to believe the employee is impaired by alcohol or drugs, drug and alcohol testing is typically upheld • However, even reasonable cause testing, as with the other forms of testing, should be encapsulated in a comprehensive drug and alcohol policy

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Practical Considerations: Testing

- A discriminatory policy is grounds for a human rights complaint
- Any testing an employer undertakes should be addressed by a policy which identifies and addresses recreational drug and alcohol use, prescription drug use and misuse, and addictions
- Risks of an improper policy and/or testing conducted improperly include human rights complaints, wrongful dismissal litigation and punitive damages

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Practical considerations: Medical Cannabis

- Medical cannabis is no different than any other prescribed medication
- The duty to accommodate analysis will apply to the employee's medical condition and extend to the treatment prescribed
- Employers will not be required to simply accept workplace impairment, where position is safety sensitive
- A properly drafted policy which applies to the use of prescribed medication in the workplace or otherwise having a workplace impact, will be critical



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Practical Considerations: Legalized Recreational Use

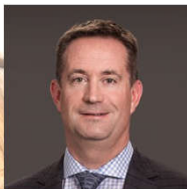
- Do not panic!
- Recreational use related to the workplace will in most respects be treated the same as alcohol
- Significant wild-card/unknown is lack of credible impairment tests
- In anticipation, review your existing drug and alcohol policy and determine any necessary revisions to ensure your existing rules on alcohol can be easily expanded to and applied to recreational cannabis



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Presented by:



Colin Fetter
Partner, Edmonton Office
cfetter@brownleelaw.com
Direct: 780-497-4867



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