

Legalization of Marijuana and Maintaining a Healthy Workplace



Marijuana and its impact on the workplace

Overholt Law Firm Seminar
Terminal City Club, Vancouver BC
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What is Marijuana?

- Marijuana is derived from the cannabis plant
- Used for both medicinal and social purposes
- Contains hundreds of chemical substances, the most well studied of which is tetrahydrocannabinol (“THC”). This is the substance responsible for the “high” cannabis users identify.

What is Marijuana?

- A variety of products can be derived from the cannabis plant, including:
 - Dried, herbal material (“marijuana”);
 - Oil (e.g. “hash oil”);
 - Concentrates;
 - Foods and beverages containing extracts of cannabis

Legislative Background

- In 2015 the Government of Canada committed to introducing legislation to legalize, regulate, and restrict access to cannabis
- A Task Force on Cannabis Legalization and Regulation was created in 2016 to engage in cross-country consultations and prepare a report with recommendations for any proposed legislation

The Current Framework

- Why legalize cannabis?
 - Youth continue to use cannabis at rates among the highest in the world
 - Thousands of Canadians end up with criminal records for non-violent drug offences each year
 - Organized crime reaps billions of dollars in profits from its sale
 - Changing societal attitudes towards simple marijuana possession

The *Cannabis Act*

- On April 13, 2017, Bill C-45 – *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* was introduced and read in the House of Commons
- Also known as the *Cannabis Act*

The *Cannabis Act*

- The *Cannabis Act* aims to provide legal access to cannabis and to control and regulate its production, distribution and sale.
- Numerous stated objectives, including preventing young persons from accessing marijuana, protecting public health and safety, and deterring criminal activity

The *Cannabis Act*

- If the Bill becomes law, adults 18 years and older would be able to legally:
 - **possess** up to 30 grams of legal dried cannabis or equivalent in non-dried form
 - **share** up to 30 grams of legal cannabis with other adults
 - **purchase** dried or fresh cannabis and cannabis oil from a licensed retailer
 - **grow** up to 4 cannabis plants, up to a maximum height of 100cm, per residence for personal use from licensed seed or seedlings
 - **make** cannabis products, such as food and drinks, at home provided that organic solvents are not used

The *Cannabis Act*

- However, provinces and territories will still have the authority to set additional requirements, such as:
 - Higher minimum age limits;
 - More restrictive limits on possession and personal cultivation;
 - Rules for cannabis-based businesses;
 - Restrictions on where cannabis can be consumed

The *Cannabis Act*

- Initially, adults will be able to legally purchase fresh and dried cannabis, cannabis oil, and seeds or plants for personal cultivation
- Other forms of cannabis, such as “edibles”, will be dealt with once necessary federal regulations are implemented

The *Cannabis Act*

- Until the *Act* becomes law, it remains illegal to possess, sell, produce, import or export cannabis unless it is authorized under the *Controlled Drugs and Substances Act* and its regulations, such as the *Access to Cannabis for Medical Purposes Regulations*.
- If the Bill is approved it will become law no later than July 2018.

What does this mean for the Canadian workplace?

- Increase in recreational use
- Increase in medical use and need for employers to accommodate
 - The current program for medical access to cannabis is expected to continue under the proposed *Act*
- Possible changes to workers compensation laws
- Need for updated workplace policies to ensure safe workplaces

Medicinal Marijuana

- Currently governed by the *Access to Cannabis for Medical Purposes Regulations, SOR/2016-230*
- Where the *Regulations* are more restrictive than what is set out in the *Cannabis Act*, the *Regulations* will be amended to align with what is set out in the proposed *Act*

Medicinal Marijuana

- Example: There is a limit on storage of cannabis under the *Regulations*. There is no limit on storage under the *Cannabis Act*. The *Regulations* will be amended to remove that limitation on storage
- However, where the *Regulations* are *less* restrictive, they will remain unchanged

Employer Concerns

- In August 2016, Enform Canada (the Safety Association for Canada's Upstream Oil and Gas Industry) wrote to the Task Force that marijuana use and its after effects were "incompatible with working in a safety-sensitive work environment"
- Made numerous recommendations, including an express prohibition on the use of marijuana in safety-sensitive workplaces

Employer Concerns

- Other recommendations:
 - Prohibition on using marijuana for a pre-determined time before attending work at a safety sensitive worksite
 - Prohibiting possessing/sale/storage of marijuana at a safety sensitive worksite
- These recommendations were not included in Bill C-45

Employer Concerns

- The Task Force has recommended that the Government consult and work with employers and labour representatives to implement workplace impairment policies
- As it stands it is up to the employer to be proactive when it comes to marijuana regulation at the workplace



Disability Management



Addiction and the Duty to Accommodate

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Introduction

- *BC Human Rights Code* = protects against discrimination in employment on various grounds
- Drug and alcohol addiction are recognized as disabilities under the *Code*
- The duty to accommodate continues to develop – for example, accommodations for medical marijuana use - making continuing education important

The Duty to Accommodate

- What is the duty to accommodate to in the context of a physical/mental disability expressed as a drug or alcohol dependency or addiction?

Addiction Issues in Canada

"70% of drug or
alcohol abusers are
employed"

- Statistics Canada,
2007



Addiction Issues in Canada

- **Problematic substance use:**
 - Alcohol and other drug use which is causing problems for an individual and could either be dependent or recreational
- **Addiction:**
 - a disorder where the drug is the dominant influence on the individual's behavior and the person is physically and/or psychologically dependent on the substance for normal functioning

Addiction Issues in Canada

- The Substance Use Spectrum:
 - Recreational Use
 - Frequent Use
 - Problematic Use
- Inappropriate to attend at work impaired (safety sensitive?)

Warning Signs

1. Frequent tardiness or unexplained absences
2. Frequent small accidents
3. Lack of concern for personal appearance and hygiene
4. Decreased job performance
5. Negative attitude or uncooperative conduct
6. Physical signs (bloodshot eyes, weight loss)
7. Uncharacteristic behaviour

Addiction in the Workplace



Implement Policies

- Implement policy that outlines acceptable behaviour in the workplace
- Implement a Substance Abuse Policy with resources, program and contact information
- Invest in an EAP?

Elements of a Good Policy

1. Purpose and objective of policy/program
2. Definition of substance use/abuse
3. Who is covered by the policy/program
4. Prohibited conduct in the workplace
5. Employee and manager education/training
6. How breaches will be dealt with (for example, impairment at work)
7. How accommodation plans will be developed
8. If applicable, under what circumstances drug or alcohol testing will be conducted
9. Investigation of breaches, and possible disciplinary action

A Duty to Inquire



A Duty to Inquire

- Be respectful, compassionate and non-judgmental
- Ensure the conversation is confidential.
- Identify concerns about an employee's performance, or behaviour
- Explain the duty to accommodate all disabilities, refer them to any policies
- Only ask questions relevant to their possible need for accommodation (have they been assessed by a medical professional?)
- Let them know about any workplace support

Discipline v. Accommodation

Right to remove the employee if:

- Workplace accident where impairment suspected
- Behaviour puts their own safety or the safety of others at risk
- Serious impact on workplace where impairment at work suspected (reasonable grounds)

Duty to Accommodate

- Medical information request
- Employers need to know:
 - whether the employee has a disability, and if so,
 - what accommodations the employee needs

Duty to Accommodate

- Can the employee perform the essential duties of their position?
- Do they need to be moved to a different position? (non-safety sensitive)
- Do they need to be off work pending treatment?

Obligations – Both Parties

- Must be individualized –
assessed on a case-by-case
basis (accommodation plan)

Accommodation Plan

- Identify specific accommodation measures/solution agreed to
- Identify what changes in the employee's behaviour or performance will be understood as "significant" and therefore requiring updated medical information
- Be flexible - Allow for whatever treatment the employee may require, whether urgent or ongoing
- Consideration the employee may have another physical or mental disability that requires accommodation

Obligations – Employees

- What if an employee is not willing to participate in the process, take responsibility for their own workplace behaviour, or rejects a reasonable accommodation solution? (*Brooks v. Martin Brower*)

Obligations – Employees

A substance dependent employee
has a duty to facilitate
accommodation through
rehabilitation.

Obligations – Employees

- Supreme Court of Canada decision of *Stewart v. Elk Valley Coal Corp.*



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Workers' Compensation and Employer Liability

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Introduction

- Effects of marijuana on workers
- Occupational Health & Safety
- Workplace policies
- Recreational use
- Medical use

Health Effects of Marijuana

- Short term effects on the brain:
 - Confusion
 - Fatigue
 - Impaired ability to remember, concentrate, and/or pay attention
 - Anxiety, fear or panic
 - Reduced ability to react quickly



Health Effects of Marijuana

- Short term effects on the body:
 - Decreased blood pressure
 - Increased heart rate
- THC can impair the following:
 - Coordination
 - Reaction time
 - Ability to pay attention
 - Decision-making abilities
 - Ability to judge distances

The *Workers Compensation Act*

- 115** (1) 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, and
 - (b) comply with this Part, the regulations and any applicable orders.

The Occupational Health and Safety Regulation

Impairment by alcohol, drug or other substance

4.20 (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.

The *Criminal Code*

Section 217.1 – Duty of persons directing work

Everyone 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

Have I scared you yet?

- The Task Force recommended that the Federal Government work with provinces, territories, employers and labour representatives to facilitate the development of workplace impairment policies
- Meanwhile, the Saskatchewan Workers Compensation Board told employers in March 2017 that they should have workplace policies in place *before* cannabis is legalized

Workplace Policies

- Existing policies should be amended to reflect cannabis legalization
- This also includes any reference to marijuana as an “illegal off-duty activity”
- Consider the need for a framework surrounding marijuana use at and before work



Workplace Policies

- What should the policy include?
 - What kind of workplace do you have?
 - What does “impairment” and “under the influence” even mean?
 - How is your policy going to be enforced?
 - Once you have drafted the policy or edited an existing policy, how will your employees know about it?

Recreational Use

- Cannabis intoxication should be managed in a similar way to alcohol intoxication
- Duty to keep a safe workplace may require restrictions or prohibitions on recreational cannabis intoxication and usage while at work
- Policies must still be unambiguous with clear penalties for violation

Medicinal Use

- Anticipate a drop in medical marijuana prescriptions
- An employer may still require medical proof if an employee wants to use medical marijuana at the workplace, or come to work under the influence of marijuana

WCAT-2012-02598 (Re)

- In 2012 the Workers Compensation Appeals Tribunal ruled that a sheet metal worker's claim for medical marijuana was not covered under workers' compensation
- Reasoning: workers' compensation covers any medical or other treatment that it considers "reasonably necessary" to provide relief from or alleviate the effects of a compensable injury

Medicinal Use

- Communicate what uses of medical marijuana will be acceptable in the workplace, and how employees should report their use of medical marijuana
- Address the consequences for breaching these rules

Best Practices

- Understand that the landscape is changing
- Become familiar with cannabis jargon and understand what is being legalized
- Be proactive
- Remember that employers AND employees have obligations to maintain a safe and healthy workplace



Legalization of Marijuana and Maintaining a Healthy Workplace



Drug Testing, Privacy & Medical Records

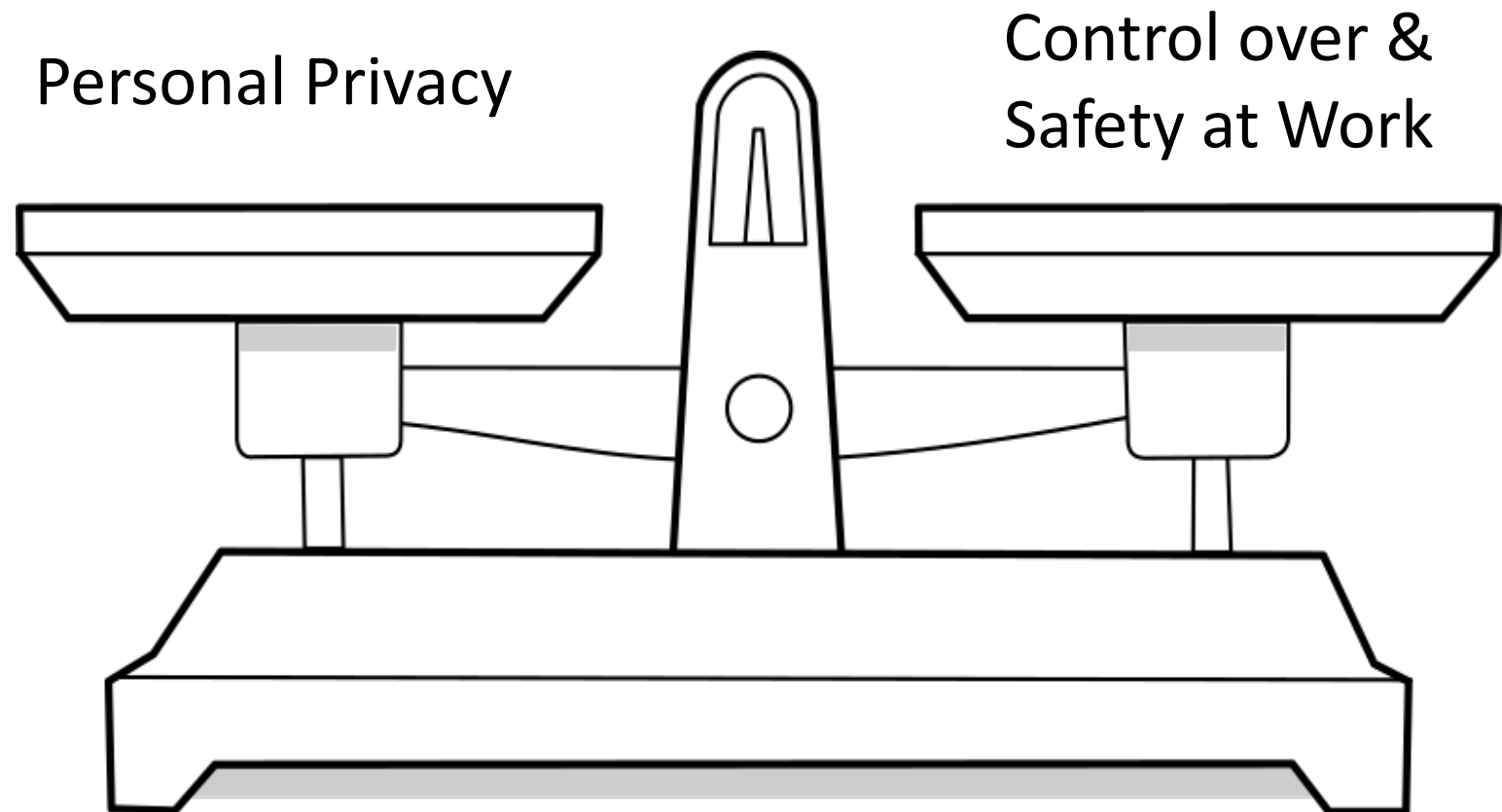
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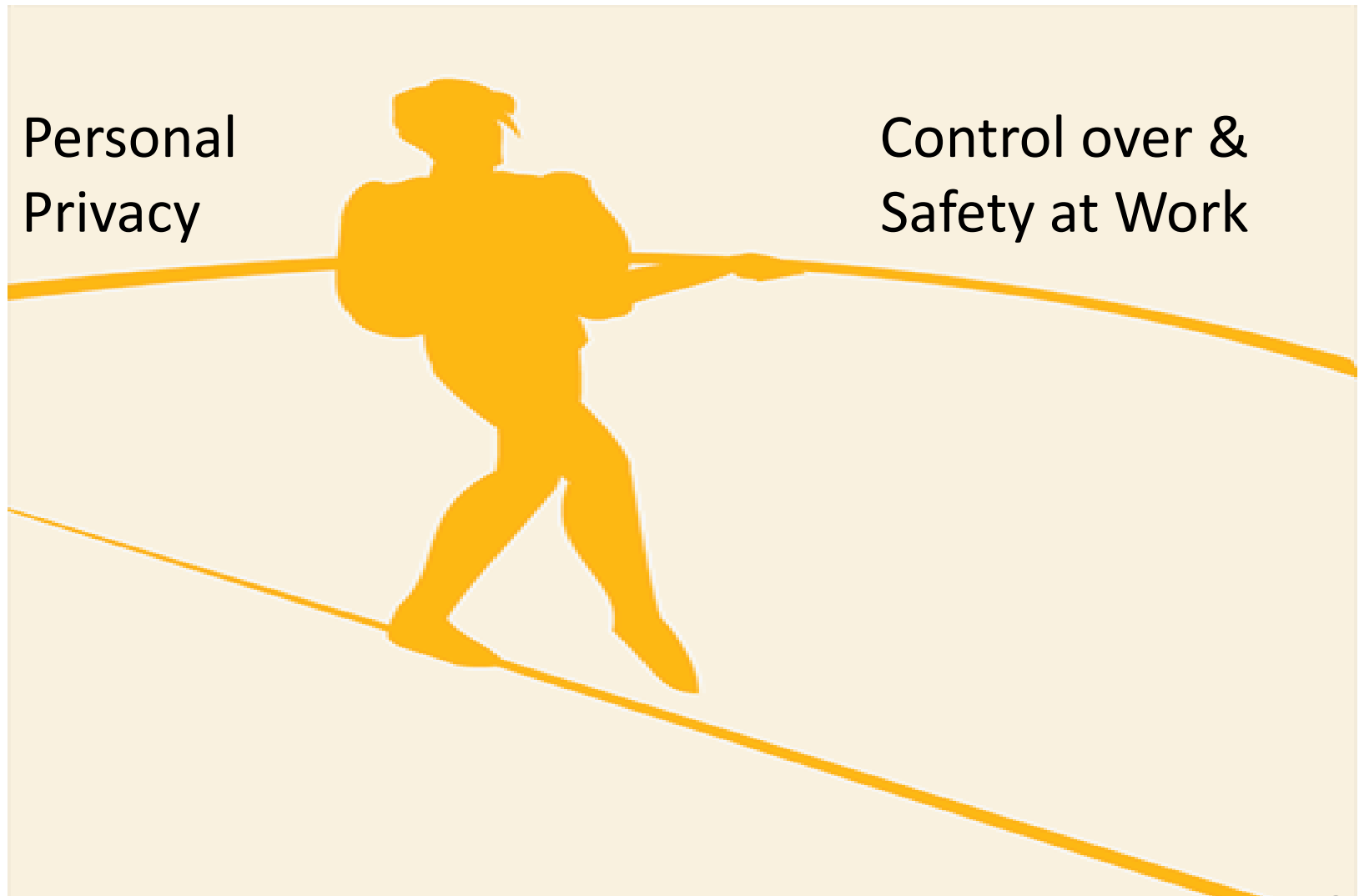
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Privacy at Work: A Legal Perspective



Privacy at Work: A Manager's Perspective



Privacy at Work

- Right to operate your business as you see fit (lawfully)
 - In unionized settings: “management rights clause”
- Generally:
 - Make rules, expectations, restrictions, and obligations clear
 - When introducing a substantial new change, provide adequate notice

Drug & Alcohol Testing

- Considering implementing a Drug and/or Alcohol Testing Program?
 - Considerations:
 - Privacy obligations around personal information
 - Goals of the program?
 - Safety sensitive workplace?
 - General evidence of substance abuse in your workplace?
 - Type of testing to implement?

Drug & Alcohol Testing

- Seven Types:
 1. Pre-employment testing*
 2. Pre-access testing*
 3. Random testing*
 4. Reasonable cause testing
 5. Non-random post-incident testing
 6. Follow-up testing
 7. Fitness for duty testing

Controversial Testing

- Pre-Access
- Pre-Employment
- Random
- Common Factor = no need for employee being tested to have any history of abuse/use or show present impairment

Pre-Employment Testing

- “Pre-employment” drug and alcohol testing takes place before an individual is hired into a position (job applicants)
- “Pre-access” testing takes place before an individual, such as a contractor, is allowed to start work on a particular job site

Pre-Employment Testing

- Generally, pre-employment drug and alcohol testing is not allowed and can lead to human rights claims if an applicant is denied employment because of their results
- However, in certain circumstances, it may be permitted to test an applicant after they've received a conditional offer of employment for a *safety-sensitive position*

Random Testing

- Random in terms of frequency, portion of the workforce, location, etc.
- Only appropriate where:
 1. Dangerous workplace
 2. Safety sensitive employee role
 3. Evidence of a general substance abuse issue at the worksite is available

Less Controversial Testing

- Reasonable cause
- Non-random post-incident
- Follow-up
- Fitness for Duty
- Common Factor = employee appears to have used, or employer knows employee has before

Testing methods

- Urine sample
- Blood test
- Breathalyzer
- Saliva swab

Legalization of Marijuana



Legalization of Marijuana

- What's really changing?
- What's still the same?

Legalization of Marijuana

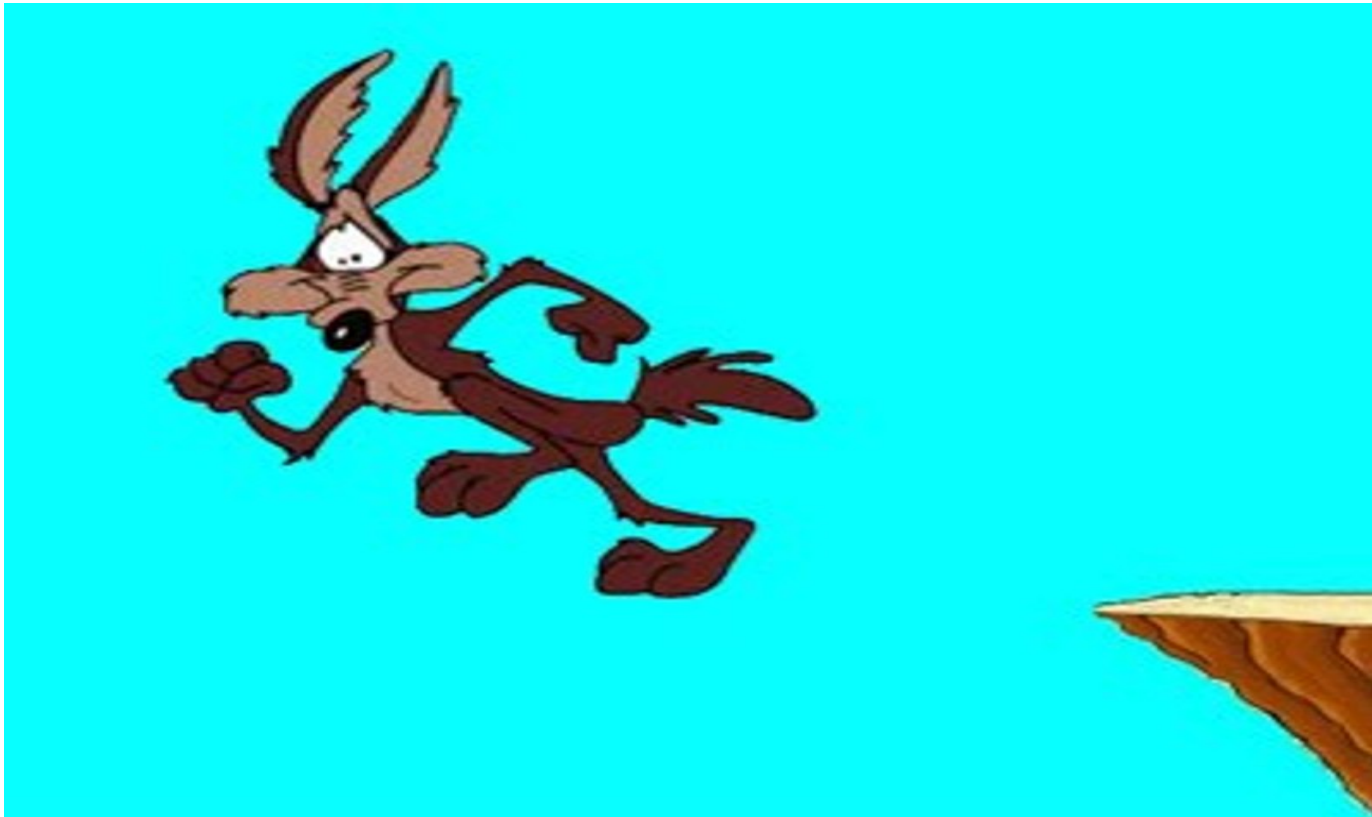
- **Remember:** Alcohol is a legal drug. You cannot come to work drunk. Similarly, you cannot come to work stoned.



Legalization of Marijuana

- Recreational marijuana use vs. recreational alcohol use
- Both could present addictions issues
- Difference:
 - Medical marijuana
 - No recognized medical treatment with alcohol

Drug Testing



Drug Testing

- Issues:
 - Reliability? Accuracy?
 - What constitutes “impairment”?
 - Present Impairment vs. Past Impairment?

Drug Testing

- Unless the person is visibly stoned, the jury is out on:
 - what amount of marijuana is necessary to cause “impairment”
 - a reliable test to determine *present drug impairment*
- Developments in medical science and technology in the near future will provide solutions

Medical Records

- Privacy Legislation
 - Federal vs. Provincial
 - Public vs. Private
- All deal with what information constitutes “personal information”

Medical Records

- Personal health information is certainly employee personal information, and presumptively **sensitive** and **private**
- Restrictions on its **collection, use, and disclosure**
- Data retention and/or storage requirements apply

Summary & Best Practices

- Avoid drug and alcohol testing at the pre-employment stage
- Consider whether testing is necessary for the position
- Don't immediately revoke the offer of employment if the test comes back positive

Best Practices

- Remember that the less personal information you obtain, the less you need to safeguard
- Drug testing at present is less reliable than alcohol testing so be cautious with decisions made on drug tests
- Legalization of marijuana does not create a tidal wave – manage similarly as to how alcohol use at the workplace is managed.



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Medical Insurance

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Introduction

- Benefit plans which include counseling and addiction treatment
- Legal obligations during medical leaves and after termination of employment
- Human rights considerations
- Common law requirements

Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund

- The Nova Scotia Human Rights Commission recently determined that an employee's prescribed medical marijuana must be covered by his employee insurance plan
- The employee was a former elevator mechanic who had been unable to work since an August 2010 accident

Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund

“Employee benefit plans are not required to cover the sun, moon, and the stars. However, where an employee with a disability requests coverage that is consistent with the purpose of a plan and comparable to coverage provided to other beneficiaries, more is required from a plan administrator than simply an assertion that its hands are tied by its policy and forms”

Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund

“In the absence of evidence that extending coverage would unreasonably alter the plan premiums or risk its financial sustainability, non-coverage of a medically-necessary drug may amount to discrimination”

Benjamin Perryman, Board of Inquiry Chair

Termination during medical leave

- An employee can be dismissed from their position while they are on medical or disability leave
- The employee **cannot** be dismissed *because* of the leave or the underlying reason for their leave (i.e. their medical disability)

Disability Benefits

- An employee who is wrongfully dismissed while working and an employee who is dismissed while receiving disability benefits are both entitled to damages consisting of the salary the employee would have earned had the employee worked during the notice period

Disability Benefits

- Notwithstanding the issues that arise under human rights and workers' compensation legislation if an employee is disabled at the time of dismissal, is the employee entitled to disability benefits as a remedy?
 - I.e.) Is the employee entitled to receive disability benefits AND damages in lieu of reasonable notice?

History - Two Disability Benefits Cases

McKay v. Camco Inc (1986) Ont. C.A.

- Employee given 8 weeks' notice of termination
- During notice period, employee sustained eye injury
- Lower Court = the employee received short-term disability benefits from the employer's disability plan for 6 months
- This discharged any obligation to compensate the employee for loss of income for inadequate notice
 - I.e. Receipt of disability benefits set off employee's entitlement to damages for wrongful dismissal for insufficient notice of termination

Disability Benefits Cases

McKay v. Camco Inc (1986) Ont. C.A.

- Court of Appeal = overturned lower Court
- Receipt of disability benefits cannot satisfy the employer's obligation to pay damages in lieu of reasonable notice
- Court awarded the employee full damages for the employer's failure to provide reasonable notice, in addition to the disability benefits already received

Disability Benefits Cases

McKay v. Camco Inc (1986) Ont. C.A.

- Court of Appeal = overturned lower Court
- Disability benefits cannot satisfy the employer's obligation to pay damages in lieu of reasonable notice
- Court awarded the employee full damages for the employer's failure to provide reasonable notice, in addition to the disability benefits already received

Disability Benefits Cases

Prince v. T. Eaton Co. (1992) B.C. C.A.

- Employee disabled 4.5 months before the end of his notice period
- Employer argued this disability precluded his receiving disability benefits in addition to his payments for reasonable notice
- To award both would be to permit the employee double recovery for a single loss
- Court accepted this argument = deduction made for disability benefits from reasonable notice payments

Supreme Court of Canada Case

Sylvester v. British Columbia (1997)

- SCC helped clarify some of the disability benefits “double recovery” issues

FACTS:

- Employee was terminated because of a reorganization during a period when he was receiving short-term disability benefits
- The disability plan was established solely by the employer and the employee did not make any contributions to the plan

Sylvester v. British Columbia

- The employer offered the employee 12.5 months salary as severance, less any benefits received under the disability plan during this period
- The employee sued for wrongful dismissal and claimed 24 months' notice

ISSUE:

- Should the disability payments received by the employee during the notice period be deducted from damages awarded for wrongful dismissal?

Sylvester v. British Columbia

CONCLUSION:

- Depends on the terms of the employment contract and the intention of the parties because disability benefits are contractual
- In this case, the terms of the contract demonstrated that the parties did not intend that the employee receive both amounts
- Therefore, the disability benefits should be deducted

Sylvester v. British Columbia

REASONS:

1. The terms of the STIP showed an intention that the benefits were intended to be a substitute to the employee's regular salary
 - o The STIP was designed to continue an employee's earnings for up to seven months for an employee unable to work in the event of illness or injury

Sylvester v. British Columbia

REASONS:

- Clear in the STIIP brochure that the disability benefits would be reduced by other income received, including wage continuation plan benefits, pension benefits, workers' compensation benefits and salary from other employment

Sylvester v. British Columbia

REASONS:

2. The simultaneous payment of disability benefits and damages for wrongful dismissal was inconsistent with the terms of the employment contract
 - Damages for wrongful dismissal are based on the premise that the employee would have worked during the notice period
 - Disability payments were payable to the employee only because he could not work

Sylvester v. British Columbia

REASONS:

- This suggests that the parties did not intend the employee to receive both damages and disability benefits
- Both contractual provisions could not operate simultaneously when each was based on a contrary assumption about the ability of the employee to work

Sylvester v. British Columbia

OTHER CONCLUSIONS:

- Parties to an employment contract can agree that the employee is to receive both disability benefits and damages for wrongful dismissal
- There may also be cases in which this intention can be inferred
- For example – when the disability benefits are akin to benefits from a private insurance plan for which the employee has paid/provided consideration for
 - Here, Sylvester had not contributed to obtain the benefit by paying for it directly or indirectly

Disability Issues

General Summary:

- Cases are divided as to whether disability benefits will be deducted from the pay to which the employee would otherwise be entitled
- Disability benefits may impose a separate contractual obligation on an employer, in addition to that of providing reasonable notice of termination
- A dismissed employee may be entitled to damages for the loss of both reasonable notice and disability benefits if the employer dismisses the employee without notice or cause

Double Recovery Issues

General Summary, cont'd:

- Whether disability benefits received by a disabled employee are deductible from an award of damages for wrongful dismissal depends on:
 1. The terms of the employment contract;
and
 2. The intention of the parties

QUESTIONS?

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