# What The Report of the Federal Task Force On Cannabis Legalization and Regulation Means for Employers

**February 01, 2017**

On December 13, 2016, the federal government's Task Force on Cannabis Legalization and Regulation released its highly anticipated report entitled *A Framework for the Legalization and Regulation of Cannabis* (the "Framework Report"). While the marijuana (cannabis) legalization debate has been at the forefront of Canadian politics since the 2015 election, the impact of legalization and regulation for Canadian employers and workplaces across the country remains hazy.[1]

The Framework Report highlights a range of recommendations in several key areas including:

- Minimizing harms of use;
- Establishing a safe and responsible supply chain;
- Enforcing public safety and protection; and
- Ensuring medical access.

Within each of the above areas, the Framework Report provides approximately eighty recommendations, some of which touch on minimum age limits, labelling requirements, sales density and storefront restrictions, criminal offences for export, and maintaining a separate medical access framework. The sheer array of recommendations means that passing and implementing the required legislation, regulations and other related measures may take until 2018 or 2019.

## Recreational Use

So what does this mean for employers? Given the extended timeline to implement legislation, a starting point is to realize that changes will not happen overnight. Employers should also be aware that, akin to alcohol usage, legalization of marijuana for recreational purposes will not give employees the right to freely use cannabis in the workplace. Employers would still be entitled to discipline employees whose recreational use of marijuana has an adverse impact on their job performance. Similarly, restrictions on the smoking of tobacco in the workplace would apply equally to the smoking of marijuana.

Employers will have to review and amend existing workplace policies and procedures to reflect the new legal reality once legislation comes into force. This legal change may also require a social shift away from traditional views on the use of marijuana for recreational purposes. One key change will include removing any express policy references to marijuana usage as an illegal "off-duty" activity when it is being used legally. While such activity will no longer be illegal, employers can still create parameters around recreational use of marijuana and how it relates to work being done.

Another key change will include reviewing and potentially revising drug testing policies, where applicable. Tests can generally be divided into three categories: pre-employment, post-incident and reasonable cause testing. The Supreme Court of Canada's 2013 decision in *Irving Pulp & Paper* is still a leading authority on balancing an employer's safety interests alongside an employee's privacy rights in this field. The Supreme Court in *Irving* upheld an arbitrator's decision to allow a grievance challenging a mandatory random alcohol testing program, unilaterally implemented by the employer at a paper mill. A general test emerged from the decision: random testing will be narrowly defined to circumstances where there is evidence of (i) a dangerous workplace and (ii) enhanced safety risks (e.g., a general problem with substance abuse).
While *Irving* provides a useful framework for employers, the decision does not set out parameters for what constitutes a "problem" in the workplace. In the years since *Irving*, judges and arbitrators have attempted to apply the *Irving* principles to other scenarios, including pre-employment testing. The result is a range of decisions that are divided on whether drug and alcohol testing policies are enforceable and what evidence employers need to justify such policies.

Amidst this unsettled area of law, the Ontario Human Rights Commission's updated *Policy on Drug and Alcohol Testing (2016)* offers some helpful guidance on how to design testing policies and programs to respect human rights, while also ensuring workplace safety. While these documents are not binding in Ontario or other jurisdictions, they are persuasive before provincial human rights adjudicators and tribunals.

## Medical Use and Disability

Employers must also be mindful that despite the prohibition on marijuana for recreational use, it is currently legal for a licensed physician to prescribe the use of marijuana to treat an illness or medical condition. Employee usage should be treated in accordance with existing policies and procedures on the use of other prescription medications in the workplace. Employees will still need to produce adequate documentation from a licensed physician to support their medicinal marijuana use.

Under federal and provincial human rights legislation, employers generally have a duty to accommodate employees with disabilities to the point of undue hardship. While this assessment will always be fact specific, employees with physical or mental disabilities, including addiction, will likely fall under this category. The range of accommodation efforts will depend on a number of factors including the financial ability to accommodate, the type of work performed and the impact of cannabis use on the employee's essential duties.

Employee accommodation in these circumstances must be balanced against the broader duty under federal and provincial occupational health and safety legislation to

provide for a safe workplace. For example, section 25 of the Ontario *Occupational Health and Safety Act* requires that employers take "every precaution reasonable in the circumstances for the protection of a worker." Safety-sensitive positions, such as those involving the operation of heavy machinery, may include essential duties or requirements that create safety concerns when a proposed accommodation plan includes cannabis use.

In these limited circumstances, employers may be required to authorize a leave of absence while an employee undergoes marijuana treatment or reassign an employee to alternative duties in a non-safety sensitive position. Such employees would likely require reinstatement once they have recovered from their illness or medical condition. Long-term disability may also be required, if provided by the employer, in the event the employee cannot return to work safely.

# Planning and Next Steps

Until the federal government implements legislation to legalize marijuana and regulate its production and use, the current criminal restrictions remain in place. However, an ounce of preparation goes a long way in addressing workplace disruptions before they arise. Employers would be well advised in the meantime to review and prepare to amend existing policies and procedures.

[1] The Framework Report indicates that the word "marijuana" is a common term used most often in reference to the dried flowers and leaves of the cannabis plant. While it is a slang term that is not scientifically related to the *cannabis sativa* plant, it is purposely adopted in this article in lieu of the more scientific term "cannabis".

By

Adam Pennell

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**Calgary**

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

**Ottawa**

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

**Vancouver**

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

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F 604.687.1415

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Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749



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