

Builders abuzz about cannabis legalization

Drug testing on the radar as employers revisit workplace health and safety duties

Friday, October 27, 2017

By Michelle Ervin

Ontario's residential construction industry is anxiously awaiting tools from the province to help it uphold its workplace health and safety obligations when recreational cannabis becomes legal next year. Further details are expected soon, with information trickling out as the province races to set regulations ahead of the federally imposed deadline of July 1, 2018.

Amid the uncertainty, the **Residential Construction Council of Ontario (RESCON)** recently co-hosted an event called the Cannabis in Construction Symposium with the Ontario General Contractors Association. The event brought together more than 100 senior executives and health and safety representatives from builders and sub-trades to hear from legal and medical professionals.

“We don't really have any of the regulations that we need right now to ensure health and safety, to outline clear rights and responsibilities of employers and workers, other than we know you can't be impaired on a job site,” said Andrew Pariser, vice president at RESCON. “That hasn't changed, and that's good news.”

In Ontario's plans for regulating recreational cannabis, released last month, the Ministry of the Attorney General spelled out that the substance's use will be prohibited in workplaces as well as in public places and vehicles, among other restrictions.

“The Ministry of Labour has not introduced any new employer health and safety requirements, or requirements for other workplace parties, related to impairment and cannabis legislation,” said Emilie Smith, spokesperson for the Ministry of the Attorney General, via email. “The province will be developing resources to guide employers, labour groups and others as they manage workplace safety issues related to impairment at work through education and awareness initiatives, which will be available in advance of legalization.”

Although the legalization of recreational cannabis may not technically alter the employment and labour law landscape, it is expected to amplify employers' existing health and safety obligations.

Cultural acceptance clouds impairment issues

The experience in other jurisdictions that have changed their laws to permit recreational cannabis suggests that legalization may culturally normalize the drug. In Colorado, the drug's use — and related incidents — increased post-legalization, which has Dr. Melissa Snider-Adler, chief

medical review officer at DriverCheck, a company that provides workplace drug and alcohol testing, bracing for a similar surge when Canada follows suit.

“There will be more people using marijuana, people do have a feeling that it is not a big deal, [that] it doesn’t cause any problems, and we will see a spike in accidents and morbidity and mortality due to impairment,” she predicted, “which I fear may impact safety-sensitive jobs and work-related accidents that may occur.”

Dr. Snider-Adler, who spoke at the symposium, underscored that, despite misconceptions to the contrary, cannabis has impairing effects — on cognitive abilities, focus, memory and reaction time. And, unlike with heavy alcohol use, which typically comes with clear signs of impairment, including slurred speech and stumbling gait, with cannabis use, the signs of impairment, which can include pungent odour and red eyes, can be subtle.

As it stands, medical authorizations for cannabis have soared in Canada, from slightly less than 500 15 years ago to 200,000 today, since its therapeutic use was legalized in 2001. In the absence of guidelines for medical authorization, some physicians provide it more freely than others, observed Dr. Snider-Adler.

She recommended that employers who become aware of employees with medical authorization consult with their authorizing physician as well as an independent professional with the expertise to evaluate the impact of their specific cannabis use on their ability to safely carry out their specific job. She said the challenge in establishing standards for workplaces is that impairment is influenced by a number of variables, including the potency and quantity of cannabis a person uses, when and how often.

While there is currently no way to test for cannabis impairment, there is a way to test (oral swab) for recent use, within a window of several hours. DriverCheck statistics show that random drug testing by employers, which is more prevalent in the U.S., decreases the incidence of positive test results over time.

Courts rule on random drug testing

Recent high-profile cases have put drug testing on the radar of the residential construction industry.

“The one that we are paying particular attention to is the TTC [Toronto Transit Commission], which has obviously gotten a lot of media attention, and they are doing some random testing there,” said Pariser.

The TTC decided to make random drug and alcohol testing part of its fitness-for-duty policy in the interest of safety, which the Amalgamated Transit Workers Union, Local 113, challenged, claiming it violated human rights. The matter, which is subject to ongoing arbitration, gets at the crux of the challenge employers face.

Employers have a duty to both provide a safe workplace and accommodate people with disabilities, said Diane Laranja, associate at Filion Wakely Thorup Angeletti LLP. Addiction is classified as a disability under human rights law, and employees may use cannabis for medicinal and disability-related purposes, so employers have to exercise some caution in addressing drug and alcohol use in the workplace.

The failure of employers to meet either obligation can come with consequences, Laranja confirmed. Convictions for offences under the Occupational Health & Safety Act carry hefty fines for corporations and possible imprisonment for individuals, and damages for human rights violations can be “substantial,” she said.

A few years ago, the Supreme Court issued an important ruling in a case out of New Brunswick, known as Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Limited. In the Irving case, the court found that testing must be a proportionate response in light of both legitimate safety concerns and privacy interest, said Laranja. It’s not enough for employees to occupy safety-sensitive positions; there must be known issues with substance use in the workplace to justify the practice.

Definitions for safety-sensitive positions and provisions for drug testing should be detailed in the workplace fitness-for-duty policy, she said.

“Employers must be consulting with medical consultants when they’re drafting their policies to ensure that things like appropriate cut-off levels and appropriate testing methods are being used so that they’re accurate and they’re reliable, and that’s certainly something we’re seeing in current cases,” said Laranja.

Fitness-for-duty policies require update

Some post-incident drug and alcohol testing occurs in the Alberta oil sands, but, for now, the practice remains virtually unheard of in the Ontario construction industry.

“Our desire isn’t to test everyone on site, our desire is just to keep people safe,” said Pariser, “so I think it’s still too early to tell what direction we’re going to go.”

As employers in the residential construction industry await further details of Ontario’s plans to regulate recreational cannabis, there are steps employers can take now.

For example, policies that prohibit “illicit substances” will require an update to capture cannabis after it becomes legal July, 1, 2018, as Laranja pointed out. More generally, the employment and labour lawyer added, these policies should establish rules and consequences, as well as identify resources available to employees suffering from addiction.

With the province due to introduce legislation governing the use of recreational cannabis later this fall, RESCON is planning to host another symposium this spring to discuss best practices for the residential construction industry.