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Marijuana in the Workplace – Are you ready?

Recreational marijuana will be legal for adults in Canada effective October 17, 2018. Of course, there will be limitations on the use of marijuana and we will continue to keep you posted as these develop. For now, we have the *Cannabis Act, 2017*, which prohibits the sale or distribution of marijuana by individuals and limits the consumption of recreational marijuana in a public place or workplace. In addition, the *Smoke-Free Ontario Act, 2017*, which is currently under review by the Conservatives, is expected to limit medical marijuana consumption in public.

As such, employers need to create policies, or review existing policies, relating to drugs and alcohol in the workplace to ensure they prohibit consumption of these substances while at work, as well as the acts of attending at or performing work while intoxicated. These policies must also address the duty to accommodate employees that suffer from addictions under the *Human Rights Code*.

A recent Supreme Court of Canada decision suggests that, in some cases, employers can get creative in drafting drug and alcohol policies and may be able to terminate employees for breaching same even if they suffer an addiction. Specifically, in *Stewart v Elk Valley Coal Corp,* 2017 SCC 30, the employer operated a dangerous mine. To ensure safety, the employer implemented a policy requiring that employees disclose any addiction issues before an accident occurred. If they did, the employer would offer treatment. However, the employer would terminate their employment if they were involved in an accident, tested positive for drugs or alcohol, and failed to disclose their addiction, unless termination would be unjust in all of the circumstances.

The employee used cocaine on his days off and failed to disclose his drug use to his employer. He was involved in an accident and tested positive for cocaine. He then advised the employer that he thought he was addicted to cocaine. Nevertheless, the employer terminated his employment pursuant to its policy and the employee filed a complaint with the Alberta Human Rights Commission (the "Commission").

The Commission held that the employee's addiction was not a factor in the termination. Rather, the employee was terminated for failing to comply with the employer's policy, which required that he disclose his drug use prior to the accident. This decision was appealed by the employee to the Supreme Court of Canada and was ultimately upheld. This is not to suggest that a termination will be upheld in every such instance; rather, that analysis would need to be done on a case-by-case basis.

Similarly, in *Aitchison v L&L Painting,* 2018 HRTO 238, the employer worked in the construction industry and, like other employers in the same industry, had a zero tolerance policy for drug and alcohol use at work. The employee was terminated under the zero tolerance policy after he was caught using marijuana during his shift. However, he claimed that

he used marijuana to treat his chronic pain caused by a degenerative disc condition. The employee filed a complaint with the Human Rights Tribunal of Ontario (the "Tribunal"), which was dismissed.

The Tribunal recognized that the employee did not have an absolute right to smoke in the workplace, regardless of whether he was using marijuana for medicinal purposes. In addition, it noted that the employee did not claim that he was compelled to use marijuana at work, for example, due to an addiction.

The Tribunal also examined whether the employer's zero tolerance policy was compliant with the *Human Rights Code*. It noted that the purpose of the policy was to focus on the intoxicating effect of drugs and alcohol; it did not stigmatize marijuana use. In addition, and most importantly, the policy did not provide for the automatic termination of employment; it simply required that employees be removed from the work site if they used drugs or alcohol. As such, it left the door open for accommodating employees and was not discriminatory.

The employees in both of the cases set out above worked in safety sensitive positions. However, there are circumstances in which employers will be justified in disciplining or terminating employees for breaching drug and alcohol policies even though they do not hold safety sensitive positions and where they are using marijuana for recreational purposes.

For example, in a recent case handled by our very own Michael Wills, the employer terminated two long-term employees who were custodians for smoking marijuana after having punched in for the start of their shift. The union filed grievances on their behalf. There was no evidence that either employee suffered an addiction.

All of the parties accepted and acknowledged that employees should not be performing work under the influence of drugs or alcohol, including marijuana. However, the union argued that the employer did not have just cause for terminating the employees and they should be reinstated to employment. Mr. Wills successfully argued that the terminations of both employees ought to be upheld, and the grievances were dismissed. The arbitrator noted the employees were generally unsupervised and "displayed a willingness to lie…that was transparent and highly troubling."

If you would like us to draft or review a drug and alcohol policy or you are concerned that an employee is attending work intoxicated, please contact a member of our team.

Sexual Harassment and the #me-too Movement

In light of the 2016 amendments to the *Occupational Health and Safety Act ("OHSA")* and the rise of the #me-too movement, employers need to ensure they have up-to-date policies relating to harassment, including sexual harassment. These policies must provide a mechanism by which employees can bring forward complaints about harassment and they must establish a procedure for investigating any such complaints.

The Ministry of Labour has hired a number of Employment Standards Officers that will be auditing workplaces across Ontario. Employers that fail to develop policies and address complaints of sexual harassment may face orders from the Ministry of Labour, as well as grievances under a collective agreement, applications under the *Human Rights Code* or court actions.

As seen in *Bassis v Commissionaires Great Lakes*, 2017 HRTO 1667 ("*Bassis*"), an employer's response to a complaint of harassment may be determinative of the employer's ultimate liability. In *Bassis,* the applicant complained to his supervisor about a co-worker's sexual comments. The supervisor immediately took action. He told the co-worker that his comments were not appropriate and that he should apologize. The co-worker apologized and indicated he would not make such comments again.

The applicant filed an application claiming that the employer failed to properly address his complaint and requested damages. However, the Tribunal concluded that the employer's response to the applicant's complaint was reasonable and dismissed the application. The Tribunal applauded the prompt attention the supervisor gave to the issue at hand. In this respect, it should be noted that under the *Human Rights Code*, the employer is not vicariously responsible for sexual harassment committed by its employees – its obligation is to provide a harassment-free workplace, which means addressing claims of sexual harassment as they arise.

Therefore, it is particularly important that supervisors receive training about enforcing sexual harassment policies. The risks of not doing so are substantial, as we have seen the Tribunal regularly award damages in the range of $15,000 to $25,000 for sexual harassment cases. In one case, *AB v Joe Singer Shoes Ltd,* 2018 HRTO 107, the applicant was a vulnerable individual. She was an immigrant and a single mother, supporting a child with a disability. The employer subjected her to harassment, sexual assaults, and threats. She was awarded $200,000.00 in damages.

We are also seeing courts expanding on damages associated with sexual assault and battery. For instance, a recent decision of the Ontario Superior Court of Justice, *Merrifield v The Attorney General,* 2017 ONSC 1333, which is currently under appeal, recognized the tort of harassment. This raises the possibility of court actions alleging sexual harassment and claiming damages from employers under the *Human Rights Code,* as well as common law punitive or aggravated damages, moral damages, and damages under the tort of harassment.

To limit the possibility of orders from the Ministry of Labour and claims for substantial amounts of damages, you must ensure that your policies relating to sexual harassment are compliant with relevant statutes, your supervisors receive the training they need to effectively enforce those policies, and that proper investigations are conducted when issues arise. For assistance in any of these areas, please contact our offices.

Also of note is that given the recent changes to the *Workplace Safety and Insurance Act* effective January 1, 2018 relating to benefits for traumatic or chronic mental stress, workplace harassment can constitute a substantial work-related stressor arising out of and in the course of employment giving rise to benefits. Where such claims are made, WSIB claims managers are requesting copies of the employer's entire investigative file, which must be produced. This gives rise to a number of concerns. By utilizing the services of an external investigator, limits can be placed on what employers are required to produce. It is also important to recognize that where an employee is entitled benefits due to workplace harassment, he or she may be precluded from seeking damages relating to that harassment from an arbitrator, court, or tribunal.

Personal Emergency Leave Policies

The *Employment Standards Act, 2000* ("*ESA*") has been recently expanded to provide all employees with 10 personal emergency leave ("PEL") days, the first two of which are paid (there is an exception for those in the automotive industry). In addition, employers cannot require that employees provide notes from qualified health practitioners to substantiate any of their 10 PEL days.

PEL is a minimum standard under the *ESA.* As such, employers can provide additional rights or benefits to their employees under their collective agreement or policies. Where they do, the employment standard will not apply.

It is crucial that employers develop PEL policies that make it clear that they are providing a greater right or benefit in lieu of PEL. Otherwise, a decision-maker may conclude that they are not providing a greater right or benefit to their employees, which means that employees will be entitled to the 10 PEL days in addition to any other benefits provided by the employer.

There is some inconsistency in how adjudicators apply the "greater benefit" analysis. Two recent decisions provide us with some insight as to how a greater right or benefit analysis with respect to the new paid PEL days under the *ESA* should be conducted. In *United Steel Workers, Local 2020 v Bristol Machine Works Ltd,* [2018] OLAA No 88, Arbitrator Mitchnick assessed whether the employer's short term and long term disability benefits constituted a greater right or benefit than the two paid PEL days under the *ESA.* He felt it was appropriate to compare the totality of the benefits under the collective agreement to the benefits under the *ESA.*

Employees were entitled to 17 weeks of short-term disability benefits at 65% of employee earnings subject to a 7-day waiting period and unlimited long-term disability benefits at the same rate subject to an 18-month waiting period. Benefits were also subject to review by the insurer, which could require substantiation by a qualified medical practitioner. Arbitrator Mitchnick concluded that the employer's benefits were vastly superior to paid PEL and, as such, employees were not entitled to paid PEL days under the *ESA*.

However, the order was limited to the application of PEL used for disability benefits; he did not consider whether the ESA was displaced in other situations where PEL may be applicable (e.g., bereavement or general emergencies), leaving that for another day. Furthermore, probationary employees were not entitled to short-term or long-term disability benefits under the collective agreement. Therefore, Arbitrator Mitchnick concluded that probationary employees were entitled to paid PEL days under the *ESA*.

Similarly, in *Carillion Services Inc v LIUNA, Local 183,* 2018 CanLII 47110, Arbitrator Rogers looked at the totality of the collective agreement and compared it to the *ESA.* However, he also focused on the importance of comparing "apples to apples" when comparing benefits to determine whether the employer provides a greater right or benefit than the *ESA*.

The employees received three paid floating holidays that were subject to approval. Arbitrator Rogers concluded that the paid floating holidays were not equivalent or directly related to the paid PEL days. As such, the employees were entitled to two paid PEL days in addition to these three floating holidays, despite language in the collective agreement that suggested the benefits should overlap.

If you require any assistance in drafting policies relating to PEL days, or amending existing attendance policies, please contact our office.

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