

# MERCER'S RESPONSE: LEGALIZATION OF MARIJUANA

The constantly changing healthcare landscape continues to be impacted by new and complex legislation. On April 13, 2017, Bill C--45 was tabled signalling potentially huge implications for employers and their workforce in three key areas;

- Occupational Health and Safety,
- Accommodation of Disability, and
- Benefit Plan Coverage.

The federal government's legislation to legalize the sale and possession of marijuana is expected to be implemented by July 1, 2018, but the precise timing is still uncertain. In addition, the government has tabled legislation to reform the impaired driving provisions of the Criminal Code. Though the effects of marijuana legalization may not be felt for another 15 months, it's critical that employers prepare for the impacts on the workplace now.

## BILL C-45 – CANNABIS ACT

Bill C-45, "An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts", establishes the framework for regulation of the production, distribution, sale and possession of cannabis in Canada. The federal government will regulate the licensing and oversight of marijuana producers, with grandfathering of currently licensed producers under the medical marijuana licensing regime. The provinces will regulate marijuana distribution and sales subject to minimum federal standards (including a minimum age of 18 to buy marijuana).

Many of the details of the legalization framework remain to be fleshed out in the regulations to the legislation and provincial legislation with respect to sales and distribution. Notably, the legislation does not address taxation of cannabis and the government has announced that details in this regard will be released in coming months.

## BILL C-46 – AN ACT TO AMEND THE CRIMINAL CODE

Bill C-46, "An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts", reforms the impaired driving provisions of the Criminal Code, with respect to impairment by drugs, including cannabis, and alcohol.

The legislation increases penalties, tightens screening provisions and eliminates/ restricts certain impaired driving legal defences. Specifically with respect to drug impairment, the legislation provides for:

- Roadside screening: authorizing the demand for an oral fluid sample, drug evaluation by an "evaluating officer", or production of a blood sample.
- Drug-impaired driving offences: creating new criminal offences for having specified levels of a drug in the blood within two hours of driving. The levels would be set by regulation, and for THC (the main psychoactive compound in cannabis), the government has announced its intention to legislate impairment levels starting at 2 nanograms per ml of blood.

## COMMENTARY

Notwithstanding the removal of criminal prohibitions, it is important to note that marijuana (in its natural forms as either fresh, dried marijuana or marijuana oil) has not undergone the regulatory approvals for sale in Canada as a pharmaceutical, nor as a Natural and Non-prescription Health Product. Several prescription-requiring synthetic or derivative products<sup>1</sup>, however, have received regulatory approvals from Health Canada to date and more products are in development.

Most health plans limit eligible drug expenses to products granted a Drug Identification Number<sup>2</sup> by Health Canada, and as such medical marijuana is not an eligible expense; however, health care spending accounts often have more liberal eligibility rules and allow reimbursement under the Canada Revenue Agency's list of eligible expenses for purposes of the Medical Expense Tax Credit, which currently includes medical marijuana.

Access to medical marijuana is currently governed by the Access to Cannabis for Medical Purposes Regulations (ACMPR). An individual must obtain medical documentation from a physician or nurse practitioner, outlining the quantity (grams per day) and duration of therapy; however, unlike a prescription for a pharmaceutical, the medical document does not require specification of the potency, product/ strain, mode or frequency of therapy, all of which are patient determined. The Canadian Medical Association has raised concerns with respect the lack of clinical evidence to demonstrate medical benefits and support physician prescribing decisions.

In submissions to the Task Force on Cannabis Legalization and Regulation, the Canadian Medical Association advocated for a single system for medical and non-medical usage, except as required for special cases (such as under-age children). Under the new legislation, physicians will no longer be the gatekeepers; however, physicians will still have a role to play with respect to documenting disability and private/ public payer<sup>3</sup> reimbursement "prescription" requirements, where applicable.

Producers who wish to sell marijuana as a Natural Health Product will be required to make application to Health Canada for licensing and provide proof of safety and efficacy as to any health claims.

## CONSIDERATIONS FOR EMPLOYERS

Marijuana usage, both medical and recreational, may rise as a result of legalization. Employers are advised to consider the following implications for the workplace.

## OCCUPATIONAL HEALTH & SAFETY

Employers are encouraged to review their occupational health and safety policies with respect to marijuana usage, including:

- Clarification of drug, alcohol, and substance use policies with respect to impairment, detection and tolerance levels<sup>4</sup>;
- A clear and documented understanding of work requirements, roles and tasks that have safety implications, including cognitive and attention requirements; and
- Procedures to clearly evaluate performance deficits relative to role expectations regardless of the cause of impairment.

Until more consistent methods of impairment assessment are available and agreement is reached on testing standards, a zero-tolerance approach to marijuana use in safety sensitive occupations remains the most prudent practice. When it comes to employer testing protocols, the balance between workplace safety and employee privacy considerations continue to be reviewed by the courts. The recent dismissal of a union's injunction request against random testing (see *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078) is illustrative of the factors courts will consider. The impaired-driving offence thresholds are expected to influence future evidentiary submissions by employers in support of workplace impairment thresholds.

Finally, consideration should also be given to workplace policies around the safe use of medicinal marijuana including acceptable ingestion methods, impact of second hand smoke, storage and security requirements for consumables.

### **Accommodation of Disability**

Employers are required to accommodate disability in the workplace, including therapy, up to the point of undue hardship. Employers are encouraged to review their policies with respect to accommodation of disability. Standardization of accommodation policies and practices is recommended to ensure consistency and fairness, regardless of the cause of impairment or the nature of the treatment. Employers may also wish to ensure that employees are following recommended treatment that is supported by governing bodies like the Canadian Medical Association, and determine in advance how to address variances from treatment guidelines.

### **Benefit Plan Coverage**

Medical marijuana is expected to remain an ineligible expense for health plans that strictly limit eligible drugs to those with a Health Canada issued Drug Identification Number or drugs which legally require a prescription. Plan sponsors who do not have such plan restrictions or who have made ex-contractual claims exceptions are encouraged to review their plan rules and claims practices with respect to the eligibility of medical marijuana.

Plan sponsors who allow coverage of Over-the-Counter/ Natural Health Products (including plan sponsors with Quebec employees who are required

to cover certain Natural Health Products pursuant to the Régie de L'Assurance Maladie du Québec "RAMQ" formulary) may also wish to review their plan rules and plan language in light of the potential for future Health Canada licensing of medical marijuana products.

Plan sponsors may also wish to review their disability plan language with respect to the eligibility of medical expenses, including medical marijuana, for reimbursement as a Rehabilitation Program expense. A recent Mercer survey of large disability insurance providers confirmed relative consistency in provider claims practices: that providers limit expenses to those which are time-limited in nature and specifically focussed on return-to-work. As such, it has been reported that maintenance therapies, including medical marijuana, are not covered in practise. However, few providers have developed plan language clearly defining eligibility for Rehabilitation Program expenses, which may give rise to challenges.

For employers considering adding coverage for medical marijuana, it should be noted that there is not much evidence in supporting the relative costs/benefits of medical marijuana use. For some employers, the balancing of interests may weigh in favour of coverage for medical marijuana; for others, it may not. A careful analysis is required.

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