
Reefer Madness – A Look at What’s Ahead for Employers

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Agenda

- Cannabis – What You Might Not Know
- Legal Overview
- Purpose and Scope of Drug and Alcohol Policy
- Key Elements of a Drug and Alcohol Policy
- Detecting Use
- Responding to Use
- Decisions of Interest
- Questions

Cannabis: What You Might Not Know



What is Cannabis?

- Anything derived from cannabis plant
- Over 100+ different cannabinoids
 - Delta-9-tetrahydrocannabinol = **THC**
 - Cannabidiol = **CBD**
- Cannabinoids influence human endocannabinoid system
 - Impacts include appetite, mood, memory, pain sensation, etc.

THC (delta-9-tetrahydrocannabinol)

- Main (but not only) psychoactive component
- Impairing effects vary depending on concentration, potency, tolerance, etc.
- Methods of use: inhalation, oral, topical
- Available in multiple forms: leaves, oils, hash, tinctures, other concentrates

CBD (Cannabidiol)

- Associated with therapeutic effects
- Not itself psychoactive
- But, low THC can be present in CBD
 - *less* impairing but not be *non*-impairing
- Available in an oil form
- May still test positive for THC

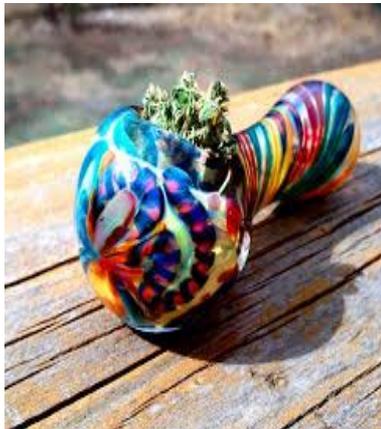
Joint



vs



Blunt



DABS



shatter

honeycomb

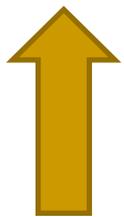


crumble

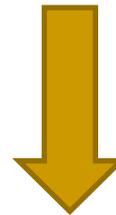
Concentrates are illegal

Changes in Cannabis Potency Profile

- 2 significant trends since 1960s-1970s
 - Increase in THC concentration
 - 1-5% average to 15-25% average
 - Corresponding decrease in CBD concentration



Psychoactive
Component



Decreased therapeutic
effect

2017 Cannabis Usage Statistics

23%

Workers that use
cannabis

39% ↑

Have operated vehicle
under the influence of
cannabis
(within 2 hrs)

39% ↑

Passenger in vehicle with
driver under influence of
cannabis (within 2 hrs)

21.5%

Workers that used
cannabis to get “high”
before or at work

7.7%

Workers that use
cannabis to get “high”
before or at work
(weekly or daily)

Impairing Effects



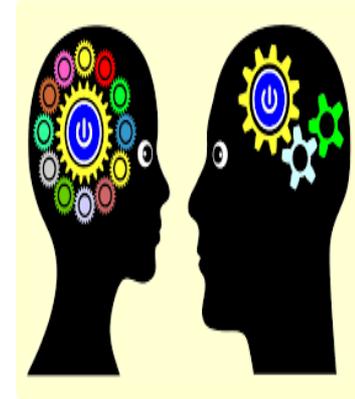
Euphoria and
relaxation



Time
distortion



Difficulty
with
divided
attention



Cognitive
impairments
memory &
learning

Types of Impairment: Acute

- Perceptual changes, time distortion
- Euphoria-“high”, relaxed-“numb”
- Cognitive changes-memory and learning
- Attention
- Reaction time

Types of Impairment: Residual

- Fatigue
- Comprehension issues
- Unclear mind
- Attention
- Reaction time

Types of Impairment: Withdrawal

- Anger, irritability
- Insomnia, nightmares
- Anxiety
- Anorexia
- General malaise

Cannabis Study with Aircraft Pilots

- Nine active pilots trained on a flight simulator
- Smoked one joint of marijuana (3.65% TCH)
- Tested before, and 0.25, 4, 8, 24, 48 hrs after
- Significant impairment seen up to 24 hours
- 7/9 showed impairment at 24 hours, but only one had awareness of the drug's effects

Health Canada says...

Using cannabis or cannabis products can impair your concentration, ability to think and make decisions, reaction time and coordination. This can affect motor skills, including ability to drive. It can increase anxiety and cause panic attacks, paranoia and hallucinations.

These effects can last 24 hours (or more).

Legal Overview of Cannabis



Legal History of Cannabis

- 1999 - Permitted for medicinal use
- 2014 - Changes to medical cannabis regime
- October 17, 2018 – Recreational use legal



Legalization – Who and What?

- ***Subject to provincial restrictions***, adults 18 and over (19 in Ontario) may:
 - ❑ Possess/share up to 30 grams of dried cannabis
 - ❑ Purchase dried cannabis or oil from a provincially-licensed retailer
 - ❑ Grow up to 4 cannabis plants per residence
 - ❑ Make cannabis products at home (but cannot use organic solvents to create concentrated products)
 - ❑ Purchase commercially produced edibles (only after Oct 17, 2019)

Legal Prohibitions – Where?

- Governed by provincial law
 - variations in laws regarding age, possession limit, growing rules, consumption location
 - E.g. Ontario – *Smoke-Free Ontario Act, 2017*
 - No smoking or holding lighted tobacco or cannabis in enclosed workplace or enclosed public place
 - Includes vaping and vapour products

Legal Prohibitions – Where?

- The Ontario *Municipal Act* also allows regional and local municipalities to prohibit or regulate smoking in public places or workplaces
 - *e.g. Peel Region Smoking By-Law*
 - No smoking tobacco or cannabis within 9m of municipal buildings, parks, playgrounds, or sports/activity areas



Legal Prohibitions - Driving

■ *Highway Traffic Act*

□ No person shall consume cannabis in any manner in a vehicle or a boat

■ While driving or

■ While a passenger in a vehicle, motorized show vehicle or boat

□ Regardless of whether the vehicle is in motion



Prohibitions – Personal Drivers

Penalties for drug-impaired driving		
New Summary conviction offence		
<ul style="list-style-type: none"> 2 nanograms (ng) but less than 5 ng of THC per millilitre (ml) of blood 	Maximum \$ 1,000 fine	
New Hybrid offences		
<ul style="list-style-type: none"> 5 ng or more of THC per ml of blood Any detectable level of LSD, psilocybin, psilocin, ketamine, PCP, cocaine, methamphetamine, 6-mam 5 mg/L of GHB 	First offence	Mandatory minimum \$1,000 fine
	Second offence	Mandatory minimum of 30 days imprisonment
	Third and subsequent offences	Mandatory minimum 120 days imprisonment
<ul style="list-style-type: none"> 50 milligrams (mg) of alcohol per 100 ml blood + 2.5 ng or more of THC per ml of blood 	First offence	Mandatory minimum \$1,000 fine
	Second offence	Mandatory minimum of 30 days imprisonment
	Third offence	Mandatory minimum 120 days imprisonment
Drug-impaired driving that does not cause bodily harm or death – Maximum penalties		
Summary conviction	18 months imprisonment	
Indictment	5 years imprisonment	
Drug-impaired driving causing bodily harm – Maximum penalty		
Indictment	10 years imprisonment	
Drug-impaired driving causing death – Maximum penalty		
Life imprisonment		
Testing		
Police can demand that a driver comply with either a standardized field sobriety test or provide an oral fluid sample if they reasonably suspect a drug is in the driver's body. If they have reasonable grounds to believe that an offence has been committed, they can demand a blood sample or a drug recognition evaluation.		

Prohibitions – Commercial Drivers

- Applies to A-F class, CVOR and road builders
 - As of July 1, 2018 – “zero” tolerance rules for drugs and alcohol
 - 3-day suspension + escalating admin penalties (\$\$) and potential for charges
 - If impaired or test refused
 - 90-day suspension, 7-day impound + escalating admin penalties and fees, treatment, ignition lock
 - Partial exemption for medical cannabis users
 - Criminal charges for drug/alcohol impaired driving

Employer Legal Obligations

■ Health and Safety

□ *Occupational Health and Safety Act*

- Employer has duty to create and maintain a safe workplace for all employees

- Working under the influence of alcohol or drugs can affect safety

- Employer can implement policies/procedures restricting alcohol/drug use on company property and by employees during work

Employer Legal Obligations

■ Human Rights

- Duty to accommodate **disability**

- Triggered in two different contexts

 - Drug/alcohol addiction (disability/perceived disability)

 - Drug use as treatment for disability

- Employer policies/procedures restricting use must be subject to duty to accommodate

Assessing Accommodation Requests

- Need for accommodation must be for disability
 - Common medical uses for Cannabis
 - Manage chronic pain
 - Prevent nausea/vomiting (chemotherapy)
 - Reduce spasticity/seizures (MS, epilepsy)
 - Manage insomnia
 - Treat anxiety, PTSD
- Dosing is individualized but typically < 3g/day

Typical Prescription

Rx **Dr. Iris Greenwald**
OATC Brampton
14 Nelson Street, Units A & B, Brampton ON, L6X
Phone: (905) 450-6679 Fax: (905) 450-7741

For: **Daffy Duck**
DOB: Mar 24, 1967
CARD NA : 0000000000

Intended **Pharmacy of Choice**
For: Phone: (000) 000-0000 Fax: (905) 000-0000

ibuprofen
S: 400 mg po tid prn
M: 30 tablets

Repeats: 0

Rx has been created by a unique
authorization process

M.D.(69100)

Created 17-Jun-2018 12:19 Script ID: 0003801352

Cannabis Authorization

Patient's Given Name and Surname:

Patient's Date of Birth (DD/MM/YYYY):

Daily quantity of dried marihuana to be used by the patient:
grams/day

The period of use is day(s) or week(s) or
month(s).

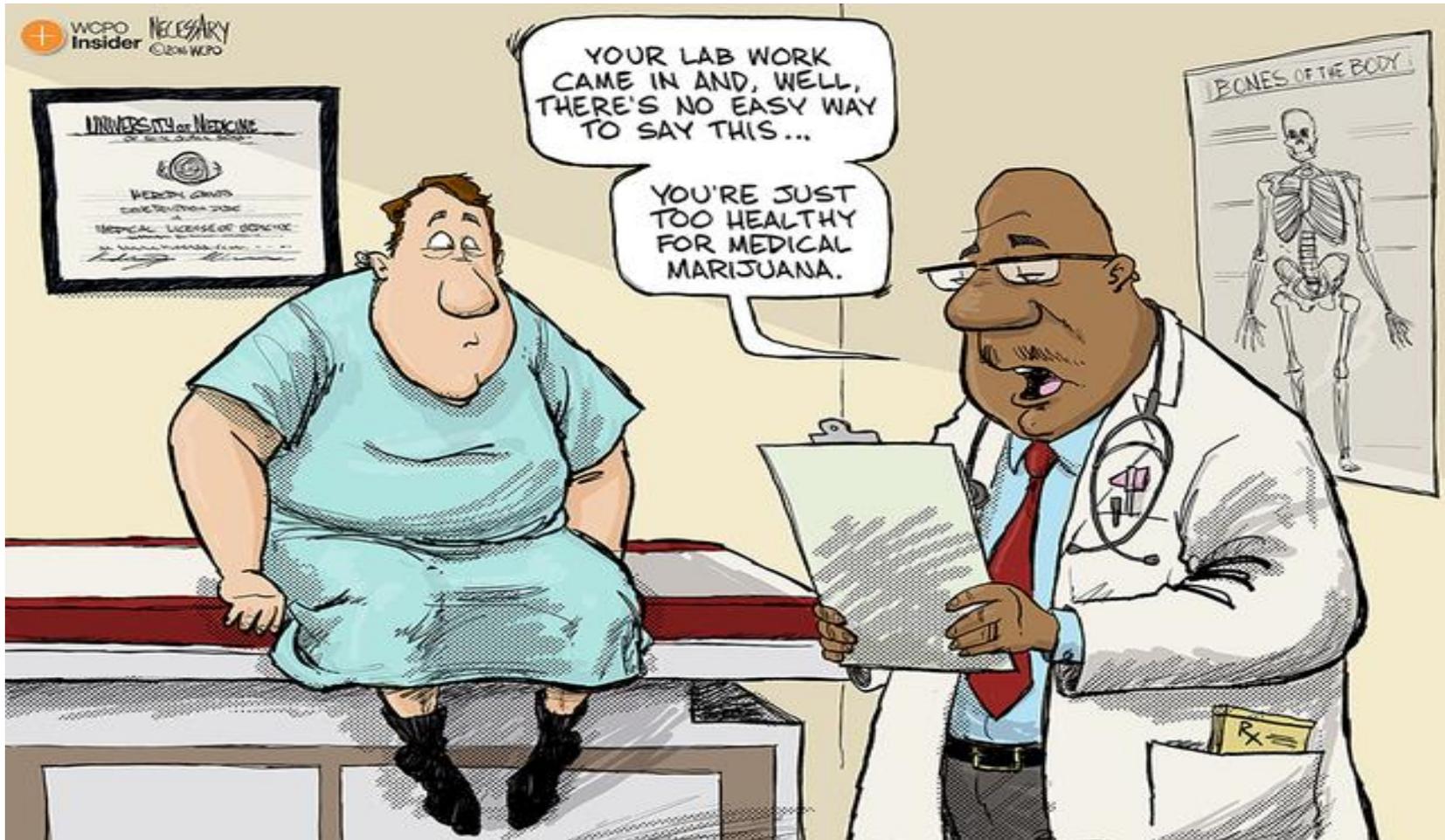
Note: The period of use cannot exceed one year

Health care practitioner's given name
and surname:

Profession :

Health care practitioner's business address:

Cannabis Authorization



Validate Authorization

- Ensure authorization includes
 - All required information specified
 - Attestation of health care practitioner (HCP) confirming accuracy of information
 - Signed, dated by health care practitioner
- May want to review invoice/actual product purchased
- Consider requesting additional information from HCP to validate and/or assess ability to accommodate

Independent Medical Assessment

- Next step, if needed
 - More costly and requires employee cooperation
- Ideally by physician knowledgeable in occupational health
- Physician
 - Considers duties and responsibilities
 - Gives opinion on:
 - Ability to work safely
 - Alternatives that can be considered

Purpose and Scope of a Drug and Alcohol Policy



Purpose for Implementing Policy

- Implementing a Drug and Alcohol policy helps an employer
 - Provide a safe, productive workplace
 - Control workplace activity
 - Communicate standards of conduct
 - Promote consistent manager response
 - Ensure all employees are treated fairly and with respect

Scope of Policy

- Important to consider all sources of intoxicating substances
 - Alcohol
 - Prescription and over-the counter drugs
 - Cannabis (and related products)
 - Illegal drugs

Drug and Alcohol Policy – Key Elements



Drug and Alcohol Policy

■ Prohibit:

- Working ‘while under the influence’ of an intoxicant
- Use, possession, transfer, or sale of an intoxicant while:
 - At work (includes vehicles)
 - At a Company-sponsored social function
- Use of Company property to make, store or distribute intoxicant

Drug and Alcohol Policy

- Require employee to
 - Disclose drug or alcohol dependency or use for medical disability if use may result in employee being intoxicated in the workplace
 - Include prescription and over-the-counter medication
 - Seek permission prior to bringing any intoxicant onto company premises

Drug and Alcohol Policy

- Other employee obligations

- Provide medical information when required to assess ability to work safely and/or need for accommodation, e.g.

- Follow accommodation plan

- Modified scheduling, hours, work environment

- Possible re-assignment of duties

- Short or long-term leave

Drug and Alcohol Policy

■ Accommodation

- Applies if drug or alcohol dependency or use of intoxicant is prescribed for medical disability
 - Duty to accommodate employee to the point of ‘undue hardship’
- Accommodation process is confidential, but
 - Supervisor/Manager, HR and employee need to participate in process
- Specific accommodation depends on individual circumstances

Drug and Alcohol Policy

- Last chance agreement
 - Consider reasonableness when implementing
 - Relapse is a symptom of addiction and must be accommodated to a point



Drug and Alcohol Policy

- Factors considered in assessing undue hardship
 - Health and safety
 - History of accommodation
 - Prognosis for recovery
 - Size of the employer
 - Cost of accommodation
 - Availability of alternative positions



Drug and Alcohol Policy

■ Inspection

- ❑ With reasonable cause, employer may inspect all property on its premises for the presence of an unauthorized intoxicant
- ❑ Right to report any unlawful intoxicant found on the premises to the police

Drug and Alcohol Policy

- Testing for employee in position performing safety-sensitive work
 - Arises in three possible circumstances
 - Reasonable Suspicion of Impairment
 - Post-Incident or Near Miss
 - Post-Return to Work or Last Chance Agreement

Drug and Alcohol Policy

■ Safety-sensitive position

□ Generally refers to a position requiring the performance of work, which if not performed in a safe manner can:

- Cause direct and significant damage to property
- Injury to the employee, others around them, or the public
- Significant harm to the environment

Drug and Alcohol Policy

■ Reasonable Suspicion Testing

- Need “reasonable cause” to believe employee is impaired in the workplace
- Most commonly will be physical signs of impairment (*e.g.*, slurred speech, red eyes, odour, stumbling) or account of use by other employee(s)

Drug and Alcohol Policy

- Post-incident or Near-miss Testing
 - Must be significant (not trivial) incident in the workplace or “near miss”
 - Must be part of broader investigation
 - Should be some link between employee’s situation and incident to justify testing
 - Circumstances may be considered (*e.g.*, history of past incidents, other indicia of impairment, *etc.*)

Drug and Alcohol Policy

■ Return to Work Testing

- To ensure safety when returning to work in a safety-sensitive position following a leave of absence to get treatment
- May be permitted for non-safety sensitive positions as part of a “last chance agreement”
- Requires balance between:
 - Privacy/human rights
 - Safety

Drug and Alcohol Policy

- Consult with HR/legal before requiring testing
 - Individualized assessment
 - Need sufficient justification
- Consider
 - Timing (available window for detection)
 - Method (on-site or laboratory analysis)
 - Testing/analysis limitations (oral fluid, urine)
 - Ability for tampering

Drug and Alcohol Policy

- Policy violation (examples)
 - ❑ Failure to disclose
 - ❑ Sale/distribution in workplace
 - ❑ Intoxicated in workplace
 - ❑ Refusal to comply with testing
- Individualized analysis - must consider duty to accommodate before determining if discipline appropriate

Drug and Alcohol Policy

- Prior to implementation

- Consider

- Identification of work considered “safety-sensitive”
 - Consultation with Union, if applicable
 - Training

Detecting Use/Intoxication

■ Assess/observe

- Odour of alcohol/drugs
- Red or glassy eyes
- Unsteady gait
- Poor coordination
- Slurred speech
- Erratic behaviour



Detecting Use/Intoxication

- Be mindful of other signs of potential substance dependency
 - ❑ Attendance issues or long unexplained breaks
 - ❑ Inconsistent work performance
 - ❑ Unusual mood changes
 - ❑ Unexplained changes in work behaviour
 - ❑ Change in personal care
 - ❑ Personal problems (relationships, financial, legal)

Detecting Use/Intoxication

- Speak to employee about concerns
 - Provide opportunity for employee to acknowledge/explain
- Address any immediate safety concerns
- Consider accommodation if required
- Document observations, conversations and outcome

Responding to Use



Culpable vs. Non-Culpable Conduct

- Response should be individualized, but consistent
- Consider whether conduct is culpable or non-culpable
 - Non-Culpable - causal connection between conduct and *addiction or disability*
 - Culpable - misconduct related to recreational use of drugs or alcohol

Culpable vs. Non-Culpable Conduct

■ Response

- ❑ Accommodation triggered if employee has a disability/perceived disability
- ❑ Accommodation not required for recreational drug/alcohol use



Decisions of Interest

- *Marsh v Spinrite LP* (2010) HRTO
 - Employee sentenced to jail for narcotics trafficking
 - Employee requested accommodation (leave of absence to serve sentence)
 - Employer refused and dismissed employee for failing to attend work

Decisions of Interest

- *Marsh v Spinrite LP (2010) (Con't)*

- Dismissal upheld as adjudicator found that disability did not cause the absence:

- *“Even if the applicant could prove that he suffered from a disability of substance abuse around the time of his dismissal, he would not be able to establish that his unauthorized absence from work due to incarceration was causally connected to that disability”*

Decisions of Interest

■ *UFCW v Fearman's Pork Inc.* (2017)

□ Electrician with 29 years of service terminated for intoxication in workplace

□ Prior discipline for intoxication

■ 2007: 1-day suspension for intoxication

■ 2009: 10-day suspension, 1-year LCA and required participation in an “alcohol abuse” program

□ Dismissal occurred 2 months after expiry of LCA

Decisions of Interest

■ *UFCW v Fearman's Pork Inc.* (2017)

□ Employee reinstated by the arbitrator

- Neither party previously recognized Employee's *disability* or “seriously turned their minds to the accommodation of alcoholism”

□ Conditions of reinstatement included:

- Abstention from drug and alcohol consumption
- Random drug and alcohol testing
- Continued participation in treatment program and involvement of physician in recovery

Decisions of Interest

- *Lower Churchill v IBEW, Local 1620 (2018)*
 - Conditional employment offer rescinded after candidate failed pre-employment substance testing
 - candidate used medical cannabis every night for pain from arthritis and Crohn's disease
 - Employer argued safety-sensitive position and safety risk due to cannabis use was undue hardship

Decisions of Interest

- *Lower Churchill v IBEW, Local 1620 (2018)*
 - Arbitrator accepted position was safety sensitive and candidate had disability
 - Arbitrator found undue hardship because
 - No scientific consensus on what is safe interval of time between cannabis use and performance of safety sensitive duties
 - Current testing methods do not enable employer to determine impairment

Decisions of Interest

■ *Aitchison v L & L Painting and Decorating* HRTO - (2018)

- Painter dismissed after he was caught smoking medical cannabis at work (37 flights up on a swing-stage)
- Applicant did not request accommodation or permission to use his medical cannabis
- Claimed the employer failed to consider its duty to accommodate

Decisions of Interest

- *Aitchison v L & L Painting and Decorating*
 - HRTO found no discrimination given the health and safety risk posed given the safety-sensitive nature of the applicant's position
 - *"I would have no difficulty in concluding that the applicant's preferred accommodation presented an undue hardship in light of the health and safety concerns particular to this workplace"*

Decisions of Interest

- *Stewart v. Elk Valley* (2017)
 - ❑ Employer policy required employee to disclose drug addiction/use
 - ❑ Employee in safety sensitive position did not disclose prior to incident
 - ❑ Employee tested positive for cocaine post incident employment terminated (claimed addiction)
 - ❑ Court found termination for failure to disclose, not addiction, and disability did not prevent disclosure

Decisions of Interest

- *Compass Minerals Canada v. Unifor (2016)*
 - Employer imposed post incident alcohol testing (breathalyzer) on haulage truck driver following accident (vehicle damage but no personal injury)
 - Arbitrator found employer did not have just cause to administer breathalyzer and awarded \$200
 - Test not warranted because
 - Incident not significant (damage minor)
 - No indication grievor was impaired
 - No known history/issues with alcohol or drugs

Questions?





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