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Employers' Advisor

WORKPLACE NEWS COAST TO COAST

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INSIDE:

The Legalization of Marijuana and the Workplace

The legalization of marijuana has recently been subject to significant discussion and debate. While marijuana is currently only legal in Canada for medical purposes, the federal government has passed legislation which will legalize access to marijuana for non-medical use, a development which will have a significant impact upon employers across Canada. Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and Other Acts*, which will decriminalize marijuana, was passed by the Senate on June 19, 2018 and has now received Royal Assent. Marijuana will become legal on October 17, 2018.

The challenges faced by employers in the context of marijuana use will no longer be confined to the legal use of prescribed medical marijuana; post-legalization, employers will also be confronted with the myriad issues that accompany legal recreational use. Such issues include the preparation and administration of substance use policies, as well as workplace safety considerations faced by employers in the wake of legalization.

Substance Use Policies

It should be emphasized that the legalization of marijuana does not amount to a licence for impairment. Following legalization, employers may treat marijuana use similarly to alcohol and other prescription or over-the-counter drugs with impairing effects. Employers will be able to prohibit the use and possession of marijuana at work, as well as impairment within the workplace.

Employers should ensure that drug and alcohol policies distinguish between the use of marijuana for medical purposes and its use for recreational purposes. Employers will be able to prohibit the use of recreational marijuana within the workplace, and should outline the disciplinary process to be followed if an employee possesses or uses recreational marijuana while at work. Policies should also address the use of medical marijuana, and outline the forms of medical documentation which will be required to substantiate the use of medical marijuana, as well as available accommodation(s). Employers are required to accommodate employees using a medical marijuana prescription to treat a disability to the point of undue hardship.

Policies should also address substance use and addiction, which may also engage an employer's duty to accommodate. A reference to the applicable Employee Assistance Program may be sufficient to discharge an employer's obligation to incorporate accommodation measures into a policy, however, employers may also wish to address whether employees are required to proactively disclose any addiction to marijuana (or any other impairing drug) to the employer. Pursuant to the Supreme Court's recent decision in *Stewart v. Elk Valley Coal Corp.*, an employer is entitled to implement a policy requiring the proactive disclosure of

problems of drug or alcohol abuse, dependency and addiction, with an aim of treating and rehabilitating such dependency issues. Should an employee fail to adhere to such a policy, and only disclose an addiction or dependency following an incident giving rise to discipline, the employer may still be entitled to discipline the employee for failure to adhere to the policy. In such instances, the employer may discipline the employee for the breach of the disclosure element of the policy, and not for the employee's addiction itself (which would likely contravene applicable human rights legislation).

Workplace Safety

Another predominant concern for employers relating to the legalization of marijuana is workplace safety. Section 25(2) of the *Occupational Health and Safety Act* (the "*OHSA*") imposes a duty upon employers to "take every precaution reasonable in the circumstances for the protection of a worker" – in other words, employers are required to ensure the health and safety of workers and to protect against injuries arising out of the course of employment, as far as may be reasonably practicable. While employers are not explicitly required to have a drug or alcohol policy as part of their *OHSA* obligations under section 25(2), adjudicators have recognized limiting *OHSA* liability as a reasonable basis for imposing disclosure and testing policies.

Employers are subject to significant sanctions for breaches of the *OHSA*, and, with the recent introduction of Bill 177, the *Stronger, Fairer Ontario Act (Budget Measures)*, face tripled corporate fines, with a new maximum penalty of $1,500,000 per charge. Currently, there is no indication that the provincial or federal government will introduce regulatory safety standards governing the use of marijuana within the workplace. Because legalization will occur in the near future, employers would be well advised to develop comprehensive policies governing the use of marijuana within the workplace. This is of particular importance in safety- sensitive environments where employees working under the influence of marijuana can have very serious consequences.

While employers currently contend with the accommodation of medical marijuana within the workplace, following the legalization of marijuana, employers will face additional challenges concerning the use and possession of marijuana by employees for recreational purposes. As outlined above, it is important that employers proactively develop policies which explicitly address marijuana, and which set clear expectations concerning both medical and recreational drug usage. Such policies should focus on impairment and on ensuring that employees have an overall fitness to work.

Federal Government Introduces Legislation to Address Violence and Harassment in the Workplace

In the wake of the #metoo campaign, which has grown to include several shocking revelations of sexual harassment on Parliament Hill, the Government of Canada has introduced Bill C-65 – *An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1* (the "Bill" or "Bill C-65").

Bill C-65 was introduced to Parliament in November of 2017 amid a flurry of high-profile sexual harassment complaints that embroiled Hollywood at the time. Second reading of the Bill occurred on January 29, 2018, shortly after several allegations of sexual harassment rocked Canada's political landscape.

Broadly speaking, Bill C-65 seeks to address the issue of harassment and violence in the workplace, including sexual harassment and violence, by bringing those issues under the umbrella of occupational health and safety and by creating further obligations on federally regulated employers with respect to adequately addressing and preventing such occurrences as well as providing support to victims.

Currently, the Canada Labour Code (the "*Code*") mandates only that federally regulated employers have a policy in place with respect to sexual harassment and that instances of workplace violence are dealt with in accordance with the regulations. In contrast, the Bill will streamline and clarify the process for dealing with both violence and harassment, including those instances of a sexual nature, by introducing several new obligations on affected employers. Notably, the Bill will include the following amendments to the *Code*:

- The addition of "physical or psychological injuries and illnesses" as a preventative purpose of Part II of the *Code*.
- A specific duty on employers to "investigate, record and report… all occurrences of harassment or violence" in accordance with the regulations.
- A specific duty on employers to:
    - take the prescribed measures with respect to harassment and violence in the work place; and
    - to respond to occurrences of harassment and violence in the work place; and

- to offer support to employees affected by harassment and violence.

- The exclusion of complaints relating to harassment and violence from the internal investigation process as set out in the *Code's* Internal Complaint Resolution Process.

The "prescribed measures" currently in effect include an obligation on federally regulated employers to appoint a competent person to investigate and report on the incident and to make recommendations to the employer if the employer is unable to resolve the matter directly with the complainant.

A "competent person" is currently defined in the regulations as someone who is (a) impartial or seen to be impartial, (b) has knowledge, training and experience in issues relating to workplace harassment and violence, and (c) has knowledge of relevant legislation.

The Bill will also extend these protections to parliamentary employees through Part II of the Bill, which incorporates by reference certain sections of the *Code*, including the provisions dealing with harassment and violence.

The Bill is currently before the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (the "Committee"), where it continues to undergo changes.

Notably, the Second Reading of the Bill was criticized due to the lack of a definition with respect to harassment and violence. Concerns were raised that without a precise definition, not all forms of harassment and violence would be treated as such. To address these concerns, the Committee has included the following addition to section 122(1) of the *Code*:

> "*harassment and violence means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment*"

In even more recent news, the Bill has also been criticized for its potential chilling effect on an employee's ability to seek redress through the *Canadian Human Rights Act*.

It remains to be seen exactly what, if any, changes will be forthcoming or when the Bill will take effect. Accordingly, federally regulated employers would be well advised to take stock of their current obligations and to remain up to date on the progress of the Bill. This will ensure affected parties are prepared to adequately prevent, address and resolve workplace harassment and violence once those rights and obligations are finalized.

The Supreme Court Broadens the Limits of Workplace Discrimination: *Schrenk v. British Columbia Human Rights Tribunal*

In an important decision for employers across Canada, the Supreme Court of Canada has addressed (and greatly widened) the scope of "employment" for purposes of human rights legislation in many Canadian jurisdictions.

The case originated in British Columbia and involved a civil engineer (the "Complainant") who was employed on a road improvement project. Like many construction worksites across Canada, many different employers and contractors were involved in the project. The Complainant was himself supervised by a foreman, Mr. Schrenk, whom was employed by a different employer. What was undisputed in the case was that Mr. Schrenk made a number of homophobic and racist statements towards the Complainant.

After the Complainant reported the conduct, Mr. Schrenk was removed from the job site and later fired by his employer. A human rights complaint was then brought against Mr. Schrenk, Mr. Schrenk's employer, and the employer of the Complainant.

The issue to be determined in *Schrenk* was whether discriminatory conduct engaged in by someone who lacked employment related authority over a complainant could be categorized as discrimination "regarding employment" for purposes of the British Columbia *Human Rights Code* (the "BC *Code*"). If not, the complaint against Mr. Schrenk and his third party employer would not be permitted to proceed.

The Court of Appeal determined that the complaint should not proceed, finding that not all discriminatory comments and actions occurring at a workplace necessarily constitute discrimination *"regarding employment"* for purposes of the BC *Code*. The Court of Appeal reasoned that not all insults inflicted upon employees amount to discrimination "regarding employment," and that the Human Rights Tribunal was without jurisdiction to address complaints made against a person whom is "rude, insulting or

insufferable but who is not in a position to force the complainant to endure that conduct as a condition of his/her employment".

The Court of Appeal's decision was an important one for businesses whose employees work on multi-employer job sites, as it provided greater certainty of the liabilities which might arise from misconduct engaged in by employees of other entities. This was short lived, however, as in December of 2017 the Supreme Court of Canada overturned the Court of Appeal's decision.

The Supreme Court of Canada ruled that the BC *Code* protects individuals from discriminatory conduct regarding their employment no matter the identity of the perpetrator. In the words of the Court, the BC *Code* "does not restrict who can *perpetrate* discrimination" rather it "prohibits discriminatory conduct that targets *employees* so long as that conduct has a sufficient nexus to the employment context."

The basis of the Supreme Court's decision was the specific wording of section 13 of the BC *Code*, which prohibits a "person" from discriminating against another person "regarding employment". The Supreme Court reasoned that the use of "person" rather than "employer" served to extend the BC *Code*'s protection beyond the typical employee/employer relationship.

In the Supreme Court's view, discrimination "regarding employment" may be made out on an analysis of the following non-exhaustive factors:

1) whether the perpetrator was integral to the complainant's workplace;
2) whether the discrimination occurred in the complainant's workplace; and
3) whether the complainant's work performance or work environment was negatively affected.

The Supreme Court's decision in *Schrenk* expands the availability of remedies for claims of discrimination in employment to encompass complaints against perpetrators who are not the employee's direct employer or superior in the workplace – rather they need only be "integral" to the workplace itself. This could potentially encompass customers, contractors, suppliers and other third parties depending on the circumstances in each case.

Outside of British Columbia, the impact of this decision will largely depend on the wording of each province's unique human rights legislation. Some provinces, such as Alberta, specify in their human rights legislation that it is only discrimination in employment by "employers" which is prohibited. Saskatchewan, as a contrasting example, expressly prohibits discrimination by both employers and employees. Other jurisdictions, such as Newfoundland, the Yukon Territories and Nunavut, beyond prohibiting discrimination in employment, also prohibit "harassment" in workplace establishments or employment by any person. As of the date of this article, *Schrenk* has been applied by courts and tribunals in the federal jurisdiction, Ontario, Quebec, Nova Scotia, and (of course) British Columbia.

For those contractors and employers in provinces with human rights statutes containing provisions similar to that found in the BC *Code* (for instance, Ontario, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and the Northwest Territories), the *Schrenk* decision is an important one. Following the logic employed by the Supreme Court, your organization may potentially be named in complaints not only by your employees, but also by individuals with whom you have no employment relationship. Your employees may also be permitted to file human rights complaints against suppliers, customers, or contractors.

About Mathews Dinsdale

Mathews Dinsdale is Canada's only national boutique labour and employment law firm. With six offices across Canada, and connections to the Ius Laboris global network of HR law firms, we are uniquely positioned to assist employers with all their local, national or international workplace law needs

If you have questions about any of these topics or any other questions relating to workplace law, please do not hesitate to contact a Mathews Dinsdale lawyer.