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Research Prohibiting Recreational Cannabis for Safety-Sensitive Workers in Canada: A Legal Evaluation of the New Workplace **Policies**

Author and Purpose



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Context

Cannabis Abstinence Policies (CAP) The CAP Test is offered as an aid for the parties and future decision makers for assessing the enforceability of CAP, and contributes to the scholarship on

This paper proposes a

custom-made test to

assess the

enforceability of

Relations Industrielles / Industrial Relations On October 17, 2018, the consumption of cannabis for recreational purposes became legal in Canada. This article is a first attempt to consider the enforceability of workplace cannabis rules. Several Canadian employers in safety-sensitive industries are in the early stages of implementing new workplace rules prohibiting employees from consuming cannabis, even on

vacation. New Cannabis Abstinence Policies intend to safeguard

the workplace from risks associated with impairment; however,

they must be considered along side the employee's entitlement

to privacy, as described in privacy and human rights statues, and

the labour arbitration jurisprudence

employee privacy rights

2. <u>Demonstrating sufficient benefit of the policy to justify the consequence:</u> improvements in workplace safety outweigh the breech of employee privacy. **Foundation & Medical Aspects** Relations Industrielles / Industrial Relations There is strong evidence that

The analysis identifies two main challenges facing employers:

1. Establishing a workplace problem: consumption of cannabis has an impairing

effect for the period of prohibition.

The Test

Two important decisions

serve as the foundation for

the accepted standard for

balancing workplace safety

and employee privacy: the

long standing KVP Test from a

1965 decision and the SCC's

evaluation of a mandatory

random alcohol testing policy

implemented by Irving Pulp

and Paper Ltd in 2013

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Where CAP has been introduced, the unions are

not likely to dispute the safety-sensitive status of

Setting aside unusual contract language

safeguarding an employee's prerogative to

consume legal cannabis, it is not likely that

unions will argue that CAP is inconsistent with

By way of review, six observations stem from the

analysis of the four provincial privacy statutes.

employee's right to privacy is subject to

reasonable limitations, thus suggesting that CAP

All support the abstract concept that

users experience

compromised executive and

psychomotor function in the

first eight hours after

consumption. Cognitive

performance returns to

normal as the user achieves

eight hours to 20 days of

abstinence but attention and

concentration remain

disrupted as the effect of

withdrawal are observed.

the workplace. To date, CAP has been limited to industries with an established history of safetysensitive classification such as commercial airplane pilots, air traffic controllers, parts of the armed forces, the rail industry and law enforcement. 2. The CAP must not be inconsistent with the collective agreement and

1. Establish that a breach of

privacy arises from the policy

the collective agreement. B) Human Rights: Despite the added considerations that come with recreational cannabis use, human rights laws are not likely to block CAP, provided the employer meets the obligations outlined in Irving (2013). C) Provincial legislation

Where CAP has been introduced, the unions are not likely to dispute the safety-sensitive status of the workplace. 3 (2): Provide evidence of a workplace problem

> a significant hardship. The consequence for non-users is minor: they are required by a workplace rule to abstain, rather than being permitted to continue choosing to abstain.

a) Degree of the privacy breach and the resulting

the prohibited.

3 (3): Employer response is

consequence

reasonable

achieves the same benefit? In keeping with the requirements set out in the proposed CAP Test, a policy prescribing a shorter period of prohibition will still need to be justified

technology will pose a challenge.

concerns of the affected jobs.

c) Weigh the benefit against the consequence

lack of testing technology capable of detecting the time of consumption within the shorter period, or extend the prohibited period to 30 days to align with the limitations of existing testing technology and face criticism for a lack of scientific evidence justifying the extended prohibition period. Either alternative poses a considerable challenge for the employer.

The CAP must be brought to the attention of the employee affected before the company can act on it The employee concerned must have The CAP should have been consistently enforced by the been notified that a breach of such rule company from the time it was introduced. could result in his discharge if the rule is used as a foundation for discharge.

Notwithstanding the significant challenges facing employers, it is the position of this paper that CAP is

defendable, provided the right case facts are at hand

Winter 2021 Relations Industrielles / Industrial Relations 76 years of research RELATIONS INDUSTRIELLES in Industrial **DEPUIS 1945** Relations **Editor:** Anthony Morven Gould **Associate Editor :** Yves Hallée **Editorial Committee acting** President: Johanna Weststar

is consistent with the applicable privacy legislation The CAP must not be unreasonable. 3(1): Establish that it is a

dangerous workplace

applicable legislation

A) Collective Agreement:

the prohibited period is justified by evidence of an impairing effect equal in duration. In addition, an employer may be required to demonstrate that the workplace suffers from a greater than normal cannabis problem. It must establish a connection between consuming cannabis and impairment for the entire length of

CAP causes a breach of employee privacy by

prohibiting a legal activity. For heavy chronic

consumers, an abstinence requirement may pose

At a minimum, an employer must show that

cannabis impairs performance to the point of

concern in safety-sensitive jobs and the length of

Finally, the consequence of CAP for daily users will be significant and more modest for the remaining users who consume less often. b) Benefit of the CAP that addresses the workplace problem CAP is only effective in promoting safety if the

policy is enforceable. Employers must have a

method to catch offenders: identify cannabis

related impairment and determine that

Furthermore, there is a well-recognized lack of

correlation between serum levels of cannabis and

<u>impairment</u>, meaning that there is no reliable

way to test impairment. For employers defending

CAP, the limitations of existing drug testing

Is there a less privacy-invasive alternative that

and is highly dependent on the particular safety

An employee's right to privacy is "a core

In other words, while an employee's expectation

of privacy is worthy of arbitral protection, it must

be weighed against the needs of the employer.

workplace value, albeit one that is not absolute."

consumption was within the prohibited period.

Thus, the employer faces a conundrum: reduce the prohibited period of consumption to align with the scientific evidence regarding the length of impairment and make the rule vulnerable for

Relations Industrielles / Industrial Relations The CAP must be clear and unequivocal

and the appropriate arguments are made at arbitration. The jurisprudence does not require a flawless policy, just one that generates more benefit than harm.

Other Considerations

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