

What could the legalisation of cannabis mean for employers?

Susan Rowe, Shaun Brookes

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If cannabis is legalised employers will need to strike a balance between encroaching on the lawful activities employees might engage in during their own time, and ensuring employees are safe and productive at work. Most of us spend a significant amount of our adult lives at work. Arguably employers can only control what an employee does in their personal time as far as those activities impact their ability to safely and productively perform their role.

Employers should not panic that the possible legalisation of cannabis will mean that employees will be allowed to come to work stoned. The same principles that apply to impairment from alcohol at work, will apply to impairment from cannabis. Employers will still be able to require their employees to attend work in a fit state to carry out their duties safely, responsibly, and to the best of their ability.

Impaired employees tend to have slower reaction times, reduced decision-making ability, be less productive, and can be disruptive in the workplace. Employers are responsible for managing risks at their workplaces, including the risks associated with impaired workers carrying out safety sensitive roles, such as drivers, machinery operators, farm workers or forestry workers. Part of managing these risks will be having policies and procedures in place to address impaired employees, including testing.

The employer's ability to test its employees for the presence of drugs or alcohol is likely to remain unchanged if cannabis is legalised. Employers should have a drug and alcohol policy in place that details its expectations and specifies when the employer can require drug and alcohol testing. The policy should also spell out the process that is to be followed if an employee returns a non-negative result or refuses to test.

The three common situations that employers' drug and alcohol policies can lawfully request a drug or alcohol test from an employee are:

- Following an accident or an incident in the workplace involving the employee ("post-incident testing")
- If the employer has reasonable cause to suspect the employee is impaired by drugs or alcohol, for example with slurred speech ("reasonable cause testing")
- Randomly, where the employee holds a safety sensitive position and has agreed in his or her employment agreement to undergo random drug testing ("random testing").

The difficulty with cannabis testing is that a positive test may only **indicate previous** use rather than **current impairment**. If cannabis is legalised, acceptable thresholds of drug detection may need to be considered. An employee having cannabis present in his or her system will not necessarily mean that the employee is unsafe for work or unable to perform his or her duties at the expected level. For example, an employee may not be unsafe or unproductive from having smoked a joint days or weeks before attending work but may fail a urine drug test.

Where recreational cannabis use is lawful, it may be that the employer will need to be able to prove that the employee was actually impaired during work time before it can take disciplinary action against the employee. The accuracy of testing methods will also require consideration. Currently, the most common cannabis testing is urine testing. This can identify cannabis use up to 30 days earlier. Hair sample testing can indicate cannabis use up to 90 days earlier, while less invasive oral swab testing indicates more recent use (approximately in the last 24 hours). However, oral swab testing is a developing technology and is not considered to be as reliable as urine testing.

So could a positive urine test be proof enough to fire an employee for being impaired at work? If an employee is tested on the grounds of a reasonable suspicion (such as smelling of cannabis and behaving unusually) and urine test results are positive for cannabis, then the employer might reach the conclusion that it is more likely than not that the employee is impaired. It is the combination of the employer's observations of the employee (the smell of cannabis and the behaviour) and the positive test result that might satisfy the employer that the employee is impaired by cannabis. Where random testing takes place, more robust proof of impairment (rather than previous use) may be needed, such as oral swab testing. Where a positive result is obtained, secondary testing may be necessary if there is doubt about the reliability of the first test. However, it might still be possible to have a zero tolerance testing policy for employees who hold safety sensitive roles

(would you want to fly with a pilot who had tested positive for a small amount of cannabis in his or her system?).

Even if cannabis is legalised, being under the influence of cannabis (or any drug or alcohol) in the workplace will not be tolerated in most workplaces. To minimise confusion about possible legalisation, employers should work with their employees to ensure they know the contents of their workplace drug and alcohol policy, the employer's expectations regarding cannabis consumption, and when the employer is entitled to request drug and alcohol testing.

This article was written by Susan Rowe and Shaun Brookes for the NBR (May 2019).

Auckland

**PwC Tower
188 Quay Street
Auckland 1010**

**PO Box 1433
Auckland 1140
New Zealand**

**P: +64 9 358 2555
F: +64 9 358 2055**

Wellington

**Aon Centre
1 Willis Street
Wellington 6011**

**PO Box 2694
Wellington 6140
New Zealand**

**P: +64 4 499 4242
F: +64 4 499 4141**

Christchurch

**83 Victoria Street
Christchurch 8013**

**PO Box 322
Christchurch 8140
New Zealand**

**P: +64 3 379 1747
F: +64 3 379 5659**