

What does the Cannabis referendum mean for your workplace?

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With the referendum on the legalisation of cannabis looming, employers are asking what legalisation might mean for their workforce. Will an employee be able to smoke a joint before work, or during their lunch break? What can an employer do if its employees appear stoned at work? It is clear that any change to legislation will also require close scrutiny of existing workplace policies.

The draft Cannabis Legalisation and Control Bill would allow adults to consume cannabis products so long as it is in a private property or on a licensed premise. Some workplaces will be considered private property, so conceivably cannabis could be lawfully consumed at those premises by employees. However, given the duties owed by both employers and employees under the Health and Safety at Work Act 2015 in relation to health and safety, it is unlikely that this could occur. Employers will be able to direct their employees not to consume cannabis at work or bring cannabis into the workplace.

Analogies can be drawn from workplace requirements in relation to alcohol use. Few employers would tolerate an employee consuming alcohol before or during their workday, particularly given statutory health and safety requirements. Most employment agreements or employment policies have clear expectations of employees in relation to alcohol consumption at work social events. Likewise, policies should be developed to cover what is and what is not acceptable to the employer in relation to cannabis, if it is legalised. These policies will need to be fair and reasonable, having regard to the type of work the employee is required to do.

The key questions employers will need to grapple with are:

1. What level of THC (the main psychoactive compound in cannabis) presence am I prepared to accept in my employee's system when they are at work?
2. What testing regime will I need?

Some employers might decide that due to the safety sensitive nature of their work, a zero-tolerance policy is necessary for their workplace. Most people would agree that they would prefer their aircraft pilots and aircraft engineers to be completely free of cannabis (and any other intoxicating substance).

The situation will be different in other industries. In many employment situations, a trace amount of cannabis in the employee's system may not have an adverse effect on that employee's ability to perform his or her role. In these cases, an employer should be able to justify where it draws the line for employee cannabis use.

If employers want to be able to enforce their drug and alcohol policy, they should have an ability to lawfully test employees. Currently employers can only test their employees for drugs and alcohol if there is a contractual ability to do so and in the following circumstances:

- Pre-employment. With consent of the applicant as part of an assessment of suitability for the role.
- Post-incident, eg after an accident or incident in the workplace.
- Reasonable cause, eg where the employee is exhibiting behaviour that indicates that he or she may be impaired by drugs or alcohol.
- Random testing will only be lawful where the employee is in a safety sensitive role.

With the legalisation of cannabis the focus is going to shift to testing regimes that can measure impairment not just the mere presence of THC. Practical enforcement of a drug policy will require objective cut-off levels in a similar way that the law provides objective levels for drink driving offences.

Currently some workplaces adopt the AS/NZ cut-off levels for drug testing. However, consideration should be given about whether the current THC cut off level under the standards is an accurate and appropriate measure of probable impairment, or merely an indicator that the test subject has consumed cannabis product in the previous days or weeks.

Employer drug policies will also need to consider issues such as:

- The type of testing to be carried out (urine or oral swab for example)
- Consequences for refusing to submit to a test
- What support will be provided to employees who become dependent or regular users
- Medicinal cannabis use.

The referendum is a timely reminder for employers to review existing drug and alcohol policies and give careful consideration to what, if any, amendments are required should legislation be enacted.

This article was written by [Susan Rowe](#) and [Shaun Brookes](#) for the [NBR](#) (August 2020).

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