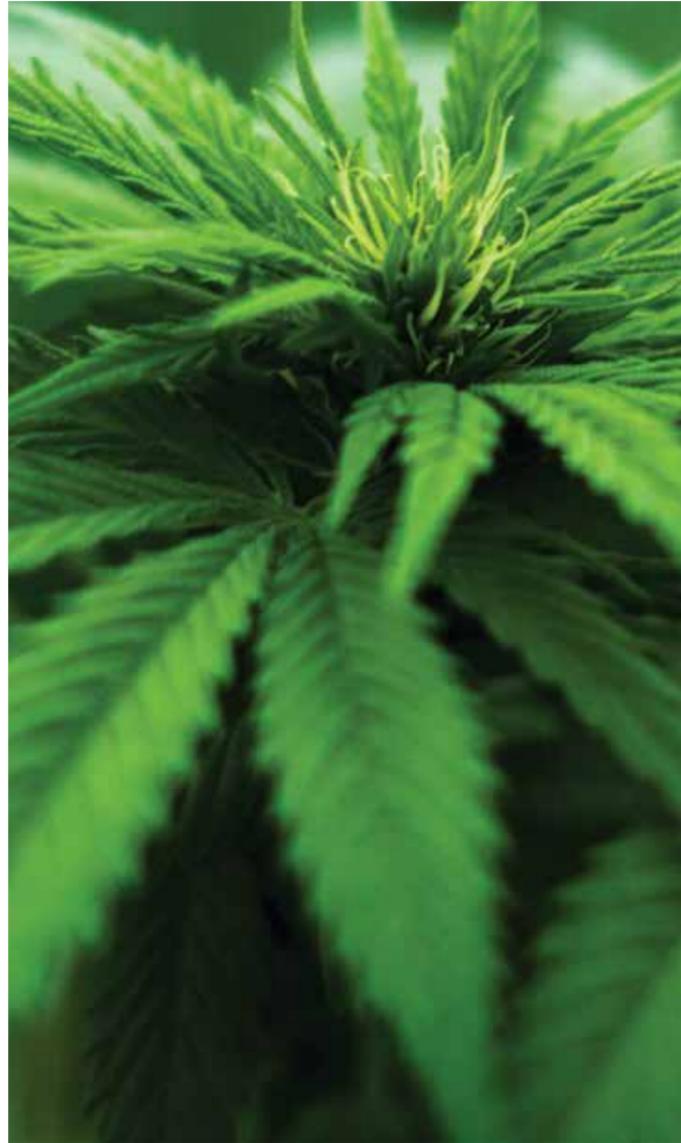


# Cannabis Legalization and Employee Screening



With the expected legalization of recreational cannabis on October 17, 2018 employers may be left wondering what impact recreational cannabis may have on zero-tolerance policies, especially as they relate to pre-employment testing, prior to hire, or pre-access testing. Essentially, the contest in every alcohol and drug testing case is between the employer's right and obligation to take reasonably necessary steps to maintain a safe workplace and the individual's right to privacy.



Additionally, discrimination on the prohibited ground of disability in employment is contrary to the *Saskatchewan Human Rights Code (SHRC)*, whether real or perceived. Even at the hiring stage, the duty to accommodate can apply. There are two scenarios that depict pre-employment or pre-access screening for drugs and alcohol in non-unionized settings, where the potential for a human rights complaint is equally at issue in both.

## SCENARIO 1: PRE-EMPLOYMENT SCREENING – A JOB OFFER IS CONDITIONAL ON A “CLEAN” TEST

- Potential hire has the choice whether to participate in the drug test, but knows that refusal to do so will result in the job offer being revoked.
- There is no employment relationship between the parties and arguably no damages could result if the job offer is revoked.
- If an individual tests positive for a drug, and the employment offer is subsequently revoked, this could result in a complaint of either real or perceived disability.
- Even at the hiring stage, the duty to accommodate can apply – discrimination on the prohibited ground of disability in employment is contrary to the SHRC.

## SCENARIO 2: PRE-ACCESS SCREENING – WORKSITE ACCESS BY GENERAL CONTRACTOR OR OWNER CONDITIONAL UPON A “CLEAN” TEST

- Requires employees of its sub-contractor or trades to participate in mandatory testing prior to gaining access to the job site.
- Non-compliance or failed tests results in no access to the worksite/ inability to work on that particular project or contract.
- Where an employee fails to test clean and is not permitted on the worksite, and subsequently has no available work, the sub-contractor will be liable to pay reasonable notice or severance to its employee, not the general contractor who required the testing.
- Limiting access to private property to those who test clean is not in and of itself discriminatory and thus protected by the SHRC. So long as the refusal to permit access arises from the breach of the policy to test clean, and not from a real or perceived disability, any human rights complaint is unlikely to be successful.

## WHAT NOW?

It is arguable that like random testing, pre-employment testing suffers from two primary flaws. First, because such testing only indicates past use, no evidence that a person is, or will be, incapable of safely performing the essential duties of the job is provided. Second, the sanctions for a failed test are generally more stringent than needed to ensure a safe workplace.

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Polls show that between 20% and 40% of Canadians expect to occasionally use recreational cannabis. If it is not a strictly legal issue, it may very well become a human resource issue, if zero-tolerance policies for Tetrahydrocannabinol (THC) levels consistently weed out qualified and ready to work sub-contractors.

To the extent possible, sub-contractors and trades required to agree to stringent pre-access testing should inform themselves of developing industry standards respecting concentrations of THC that indicate impairment and seek modifications to general contractors' drug and alcohol policies so (as much as possible) testing cut-off limits for cannabis are high enough so as not to “catch” occasional recreational users of cannabis, with the resulting refusal of access.



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