

Cannabis and the Workplace – a layer of complexity for Employers

With proposed federal legislation at committee now, it is time that employers and the mining sector establish protocols to deal with the legalization of Cannabis and the potential effect on employment standards, occupational health and safety and other protocols that will be addressed in this paper.

By proactively setting the standards now for you, your company and your workers, my hope is that this paper will help your organization look at your internal and external policies and amend them for the coming “ new reality “ with what has traditionally been a banned substance that can have wide reaching implications for your business.

Your current standards for employee safety return to work, duty to accommodate and progressive discipline will all have to be revamped.

Most of the sites that you work at are considered “dry camps “which in essence means no alcohol or drugs are allowed at mine sites. If small amounts of cannabis are considered legal, what is the legal standard that will be established after the first court challenge, and how long will it take for Case Law and precedence to be established.

There are a host of testing methods available for alcohol, and drugs currently, but testing could be difficult in the field at remote sites, where the viability and security of sampling could be challenged by the employee in the Court of Law.

Purely from my perspective as a risk manager, I see that the current rules and procedures will have to be amended, with the new reality. All governing bodies that administer or have a stake in Occupational Health and Safety will have to provide some tools to Mining Industry Employers to assist in the proactive guidelines, before the legislation takes effect.

Here are some questions that I challenge you, your business and Government to consider from a risk management and mitigation standpoint

How does an employer **monitor recreational use of cannabis during off hours**? What is the half-life or the threshold of impairment in the workplace, especially with operations revolving around heavy equipment, diamond drills, and underground tunnelling and exploration drilling, or machinery?

What is the employer's **obligation to "accommodate"** an employee who is legally prescribed cannabis for chronic pain or other health ailment?

What is an **acceptable level of impairment** for different staffing, management versus shop worker versus field staff? Is there a **difference and what is the benchmark** as we have with alcohol at .08 mg per 100 ml of blood?

Will the current regime of **random and scheduled testing be sufficient** to cover the occasional user that is aware or potentially plays the testing system, will testing procedure, costs and potential for errors increase or decrease?

Under Bill C-45 commonly referred to as the Westray Bill ,under Section 217.1 of the Criminal Code an employer or supervisor be held **criminally responsible** for injury to a worker, or others after an incident, if the employer has knowledge of cannabis use by the employee and did not take progressive steps to reassign or accommodate?

Risk Management consists of 4 areas as a starting point which are:

Avoidance – avoid the hazard

Transfer – transfer the risk to a third party

Acceptance – cost of doing business as no other strategy can be implemented

Mitigation – establish procedures to reduce the risk by incorporating all of the basic risk management principals

Avoidance Strategy – “Avoid or eliminate the Associated Risk “

In the Mining Sector many of the exploration and operational site are considered dry camps, where the employees are on site for an extended period and access to alcohol or drugs are forbidden. In most cases, employees are made aware of the restrictions and are tested randomly and on a scheduled basis.

New hires under the proposed legislation will have to be screened further for pre-employment, as well as established protocols for testing, zero tolerance, and termination with cause provisions, which the employer will also have to review with existing employees and contain consent to revision of current employment agreements.

Potential Pitfalls:

Zero tolerance means just that, it has to be consistent for all employees from labourer to senior management, as the policy can be challenged if not applied consistently across the entity. If not applied across the board, will be deemed to be implied consent and can be challenged in the Courts.

Transfer Strategy – “transfer the risk to a third party “

Random and scheduled testing by an independent third party is an acceptable strategy to transfer the risk.

Pitfall:

Sampling by third party in remote locations, with results that cannot be tampered with will be a challenge for employers, not only for viability of samples and transportation and security, but the cost factor to the employer to ensure employees are not impaired while on the job. If samples cannot be

secured and can be tampered with, then a court of law may not accept the evidence in a wrongful dismissal situation.

Acceptance Strategy – “cost of doing business”

Once the Legislation is enacted, regulation and enforcement guidelines will be established by agencies that are entrusted to protect workers.

Pitfalls:

While this may be an acceptable strategy for an employer, most of the regulation will be drafted with limited or no consultation with the Industry, which could lead to onerous compliance and costly enforcement regime. Once again I want to emphasize, that there will be litigation in some form come out of the legalization that will take years in the Courts to sort out, in essence making the proposed regulation and enforcement a moving target.

Mitigation Strategy - :”minimize the impact of the risk by getting out front of the issue”

Get out front of the regulation – engage with all stakeholders to propose to Government a mutually agreeable standard that is fair and consistent

Establish Protocols for testing – both timed and passive

Develop and vet progressive discipline, termination and duty to accommodate policies for your Company

Work with all levels in the Workplace to develop safety & awareness campaigns to engage and clearly spell out expectations with employees.

This discussion paper is just the tip of the iceberg on what I see as an emerging risk for the Mining Sector, and I think that the concepts are transferable to many other sectors in the Canadian marketplace.

For more on this, stay tuned and if you feel that you need some assistance navigating this emerging risk, please feel free to contact me for a discussion.

Bernie Robertson CAIB,CPIB,CRM - Risk Manager

Knox Insurance Brokers Ltd – bernie.robertson@kibl.com