

POLICY STATEMENT

Cannabis and the Human Rights Code



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Human Rights Commission
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droits de la personne

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Overview

Cannabis or “marijuana” laws are changing in Canada.¹ It will now be legal for people age 19 or older in Ontario to buy, possess, use and grow recreational cannabis. Provincial laws generally permit cannabis use wherever laws permit tobacco use.² Cannabis use for a medical purpose (medical cannabis) continues to be legal.

Ontario’s *Human Rights Code* (the *Code*) and the Ontario Human Rights Commission’s policies³ apply to cannabis in the same way they do for other drugs. The *Code* protects people who use cannabis for a medical purpose related to a disability from discriminatory treatment in employment, housing, services and other areas. The *Code* also prohibits discrimination against people who have or are perceived to have an addiction to cannabis based on the ground of disability.

People who use cannabis for a medical purpose related to a disability, and people addicted to cannabis, also have the right to disability-related accommodation to the point of undue hardship – that is, significant health and safety risks or excessive costs. People seeking accommodation related to cannabis use because of a disability may need to provide medical or other information to support their needs. Employees who use cannabis because of a disability may need to provide information verifying their fitness for work.

Cannabis use at work

Ontario prohibits smoking or vaping cannabis for a recreational or medical purpose in an enclosed workplace.⁴ An employee can consume edible cannabis for a medical purpose related to a disability in an enclosed workplace, as long as it does not interfere with workplace health and safety or performing essential job duties.

Example: An employer accommodates an office clerk with periodic breaks throughout the workday so he can consume edible cannabis for a medical purpose related to his disability. The cannabis helps treat some of the symptoms of his multiple sclerosis. His doctor determines the amount of cannabis consumed will not interfere with job performance or workplace health or safety and declares him fit for work.

Similar to alcohol and other drugs, employers can generally expect employees to be free from cannabis impairment while at work.⁵ Still, employers have a legal duty under the *Code* to accommodate the disability-related needs of employees who use cannabis for a medical purpose, or are addicted to cannabis use.

Accommodation does not necessarily require employers to permit cannabis impairment on the job. The duty to accommodate ends if the person cannot ultimately perform the essential duties of the job after accommodation has been tried and exhausted, or if undue hardship would result. It would likely amount to undue hardship to allow any employee, regardless of a disability or addiction, to be impaired by cannabis while doing safety-sensitive jobs like operating heavy machinery.

Example: In *Aitchison v L & L Painting and Decorating Ltd*, the Human Rights Tribunal of Ontario (HRTTO) found that the termination of a painter who smoked cannabis for a medical purpose at work during his breaks was not discriminatory. The painter worked on the outside of a building 37 floors above ground. The HRTTO concluded his actions represented a genuine health and safety risk given the safety sensitive nature of the job site. The HRTTO found no evidence that the employee asked for an accommodation. Rather, the HRTTO said the employee took it upon himself to medicate at work without authorization from his treating physician or employer. The HRTTO also found the employer's policy prohibiting cannabis smoking on the job was *bona fide* and reasonable and did not impose automatic termination or close the door to accommodating employees who use cannabis for a medical purpose into a non-safety sensitive position.⁶

Employees who use cannabis for a medical purpose or have a cannabis addiction should discuss with a doctor any concerns about fitness for work and negative effects on workplace health and safety or performance of essential duties. Employers should routinely inform employees who work in safety sensitive positions about the need to disclose if they are using a drug that could lead to on-the-job impairment. Employers should encourage employees to ask for disability-related accommodation before harmful incidents happen.

Generally, people are expected to make their accommodation needs known. Some employees may be reluctant or unable to recognize or disclose that they have disability-related accommodation needs.⁷ Employers have a duty to inquire where

an employee is clearly unwell or is known to have, or perceived to have, disability needs related to cannabis use for a medical purpose, or cannabis addiction.⁸

Everyone is expected to cooperate in the accommodation process. The employee may need to provide medical or other information to support a disability-related need, but also has a right to privacy as much as possible. The employer does not generally have the right to know the nature of the person's disability or their treatment. However, a doctor's note verifying that cannabis use related to a disability is not interfering with fitness for work might be necessary for accommodation in some situations, particularly in safety-sensitive environments.

As part of its duty to accommodate, an employer must try to reduce any risks. They may be required to change some job duties or offer alternative work to accommodate someone who uses cannabis for a medical purpose related to a disability. Other forms of accommodation include referring someone with a cannabis addiction to an employee assistance program, allowing time off to attend a rehabilitation program or providing other job-related supports.

Employers should offer assistance and accommodation before imposing consequences where an employee is impaired on the job or unable to do their essential duties due to cannabis use for a medical purpose related to a disability, or to cannabis addiction.

Workplace policies that automatically discipline employees for not coming forward and disclosing disability-related cannabis use or cannabis addiction may be discriminatory.⁹ However, an organization may not be expected to accommodate a disability-related need if the person does not ultimately participate in the accommodation process.¹⁰

Cannabis use in residential housing

Ontario prohibits smoking or vaping cannabis for a recreational or medical purpose in common areas of apartments and condos. People can smoke, vape or consume edible cannabis for either purpose in their house, condo or apartment and their outdoor space including a yard, porch or balcony, except where laws or rules prohibit smoking or vaping cannabis and tobacco for public health reasons.¹¹ Residents can consume edible cannabis for a medical or recreational purpose anywhere on the premises of their residential building.

Cannabis use might negatively affect other building residents, including people with chemical sensitivity disabilities.¹² Housing providers have a legal duty to look for solutions and accommodate the disability-related needs of people who use cannabis for a medical purpose related to a disability¹³ as well as of people with disabilities affected by cannabis use, unless it would cause undue hardship.

Example: A ground-floor tenant with a severe chemical sensitivity disability contacts the property manager about cannabis smoke drifting in from the new neighbour next door. The property manager investigates and discovers the neighbour uses cannabis for a medical purpose related to a disability. The manager offers to move the neighbour to another floor. Meanwhile, maintenance comes to reseal the two apartments to reduce smoke infiltration. The manager also begins a “turnover” policy of eventually designating all the units on the ground floor as smoke-free.

Residents seeking accommodation related to cannabis use because of a disability may need to provide medical or other information to support their disability-related needs.

Public places

Ontario generally prohibits smoking or vaping cannabis for a recreational or medical purpose in enclosed public places, as well as at schools and other prescribed places.¹⁴

People can use cannabis for either purpose in many outdoor public places, except where laws or rules prohibit smoking or vaping cannabis and tobacco for public health reasons.¹⁵ People can consume edible cannabis for a medical purpose related to a disability in any indoor or outdoor public place.

Determining when there is a duty to accommodate

1. Is the cannabis use for a medical purpose or because of an addiction?

- Organizations may have a duty to accommodate cannabis use for a medical purpose related to a disability under Ontario’s *Human Rights Code*, unless it results in undue hardship based on health and safety or cost, or ultimately the person is unable to meet the essential requirements relating to their job, housing or service provision after accommodation has been tried and exhausted

- Organizations may also have a duty to accommodate a person's disability-related needs arising from cannabis addiction, such as time off work for treatment, unless it would result in undue hardship
- There is no duty to accommodate recreational cannabis use under the *Code*.

2. Is the cannabis use for a medical purpose smoked or vaped?

- People cannot smoke or vape cannabis for a medical purpose related to a disability in places where laws or rules prohibit smoking or vaping cannabis and tobacco for public health reasons
- However, an organization might have a duty to accommodate in some way (for example, by providing breaks to allow an employee who smokes cannabis for a medical purpose to smoke outside in places where smoking is permitted by law)
- Organizations also have a duty to accommodate other people with disabilities who are negatively affected by cannabis smoke or vapour.

3. What if cannabis use causes impairment at work?

- Employers can require employees to be free from recreational cannabis impairment at work
- Impairment at work from cannabis use related to a disability may also be prohibited if it interferes with health and safety or performance of essential job duties
- Tribunals and courts have confirmed that employers can prohibit impairment from cannabis use for a medical or other purpose at work in safety-sensitive jobs
- Employers must not impose automatic termination and have a duty to accommodate employees with disabilities who use cannabis for a medical purpose, or are addicted to cannabis, short of undue hardship
- An employee may need to provide medical or other information to support their disability-related accommodation needs. They may also need to verify their fitness for work.

¹ See Federal Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, 2018.

² See the Ontario Government's online publication, Cannabis legislation: www.ontario.ca/page/cannabis-legalization.

³ See OHRC's *Policy on ableism and discrimination based on disability* (2016); *Policy on drug and alcohol testing* (2016); *Drug and alcohol testing – Frequently asked questions*; *Policy on preventing discrimination based on mental health disabilities and addictions* (2014); and *Policy on human rights and rental housing* (2009).

⁴ See, Cannabis legislation, *supra* note 2.

⁵ For related information, see the Ontario Ministry of Labour's online publication, *Impairment and Workplace Health and Safety*: www.labour.gov.on.ca/english/hs/pubs/impairment.php.

⁶ *Aitchison v L & L Painting and Decorating Ltd*, 2018 HRT0 238 (CanLII). Also see *French v Selkin Logging*, 2015 BCHRT 101 (CanLII).

⁷ *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII).

⁸ *Wall v The Lippé Group*, 2008 HRT0 50 (CanLII) at para 80; *Krieger v Toronto Police Services Board*, 2010 HRT0 1361 (CanLII).

⁹ *Aitchison*, *supra* note 6.

¹⁰ *Stewart*, *supra* note 7.

¹¹ There are specific restrictions and exceptions for residential care facilities. See, Cannabis legislation, *supra* note 2.

¹² *Borutski and others v Crescent Housing Society and another* (No. 3), 2014 BCHRT 124 (CanLII).

¹³ TET-82381-17 (Re), 2017 CanLII 94010 (ON LTB).

¹⁴ See, Cannabis legislation, *supra* note 2.

¹⁵ *Ibid.*