NOT ALL CANNABIS IS CREATED EQUAL: REIMBURSEMENT FOR MEDICAL MARIJUANA

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A recent Ontario arbitration[1] involved a grievance alleging that the denial of a claim for reimbursement for medical marijuana under a group health plan breached the collective agreement and is a helpful reminder that notwithstanding the attention medical marijuana has received in recent years, there are practical limits and issues for employers to deal with in claims related to medical marijuana.

Facts

The grievor's spouse had a medical document from a licenced physician, which suggested that she ingest three grams of dried marijuana per day for a period of six months to address two medical conditions. The grievor's spouse obtained the recommended dosage of marijuana from a licenced producer as well as a receipt for the purchase.

The employer's collective agreement set out the following requirement for reimbursement for drugs under its group health plan: "Drug claims must indicate the prescription number, name, strength and quantity of the drug plus the drug identification number." Health Canada has not designated dried marijuana with a drug identification number ("DIN"). Accordingly, the group health plan administrator denied the reimbursement claim because the claim form did not contain a DIN, as required by the collective agreement.

The union grieved the denial of reimbursement as being contrary to the collective agreement, the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*.

Arbitrator's Analysis

The arbitrator reviewed the existing legislative framework associated with medical marijuana. The arbitrator affirmed that Health Canada, through the *Food and Drug Act* ("FDA"), sets the general framework for the authorization of drugs for sale in Canada. If Health Canada, upon reviewing and testing the submitted evidence of a drug manufacturer, is of the view that the overall benefits of the drug outweigh its risks, the product is authorized for sale in Canada and designated with a DIN.

The arbitrator reviewed the explanation provided by the Ministry of Health as to why dried marijuana has not

been designated with a DIN, which in essence is that Canadians who require marijuana for medicinal purposes have been found to have a right of reasonable access, but that doesn't mean that the Ministry has to certify dried marijuana as a therapeutic product.

The arbitrator reviewed the impugned clause in the collective agreement and, applying the principles of collective agreement interpretation, found that it was the parties' intention that a DIN was a mandatory element of any claim, acting as verification that the drug for which reimbursement is being sought has the "stamp of approval" of Health Canada and is an approved drug under the FDA.

The arbitrator did not hear argument on the Ontario *Human Rights Code* and the *Canadian Charter of Rights* and Freedoms and that issue has been left to another day.

What Employers Should Know

Issues related to medical marijuana and the workplace are arising with increased frequency. This decision demonstrates that medical marijuana and the issues related thereto often require situation-specific responses from employers. While this decision provides support for the argument that denying a reimbursement claim for medical marijuana may be justified in certain circumstances, the decision also suggests medical marijuana may be eligible for reimbursement in cases involving broader language in a collective agreement or group health plan.

In other words, not all marijuana is treated equal. It is worth noting that certain drugs containing cannabis have been approved for sale and designated with a DIN by Health Canada. These products include a buccal spray containing extracts of cannabis, a capsule containing synthetic THC, and a capsule containing a synthetic cannabinoid. When dealing with an employee who has a prescription for medical marijuana, it is important to work with the employee to ensure that the prescription is for a form of marijuana that will have a minimal impact on the employee's ability to perform work, while still achieving the employee's therapeutic needs.

When confronted with an issue related to medical marijuana and the workplace, employers should obtain case-specific legal advice.

by Dave J.G. McKechnie and Stefanie Di Francesco

1 *The Corporation of the City of Hamilton and the Hamilton Professional Firefighters' Association* (2016 CanLII 16885)[ps2id id='1' target=''/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.