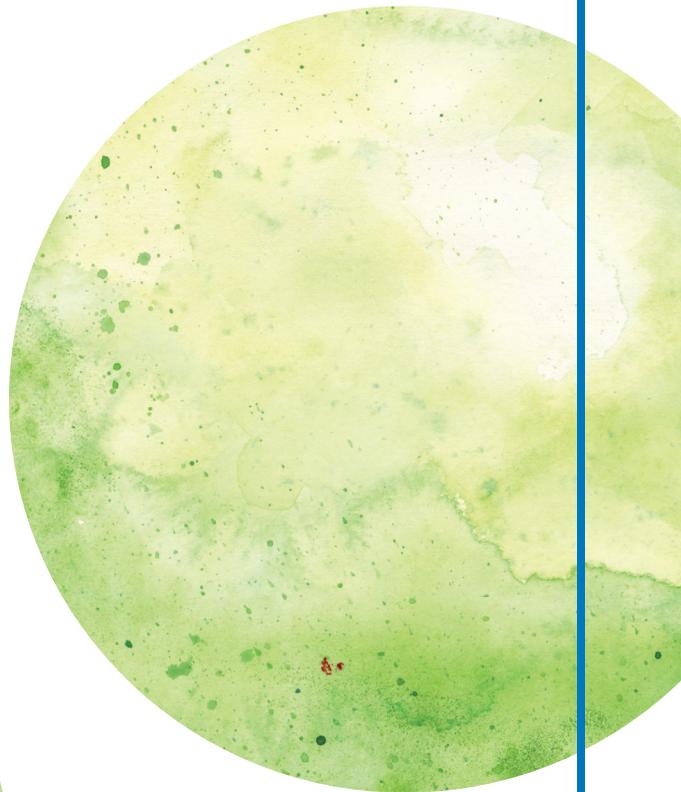


HOW TO ADAPT THE WORKPLACE TO THE LEGALIZATION OF CANNABIS



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THE LEGALIZATION OF CANNABIS: BE PREPARED!

The consumption of cannabis for recreational use will be legal in Canada in July 2018. To assist organizations that will have to meet the challenges raised by this new reality, the Ordre has prepared this guide, How to adapt the workplace to the legalization of cannabis. It presents employer/employee obligations, workplace prevention measures, and useful information for introducing and implementing a policy on drugs.

According to data published by Assurex Global, Colorado and Washington, two states that have legalized cannabis in recent years, saw its use rise by 20% and 23% respectively between 2012 and 2013. It is thus very likely that we will see a similar trend in Quebec and that the greater number of users will impact, to varying degrees, issues such as safety, physical and mental health and productivity in the workplace.

Furthermore, in 2014, the Quebec Addiction Prevention Centre (Drugs: Know the facts, Cut your risks) estimated the loss of productivity tied to alcohol and drugs at over \$1 billion a year. It also predicted that absenteeism due to the use of psychotropic substances would increase by threefold, that production would be down by 30% on average and that sickness benefit claims would triple.

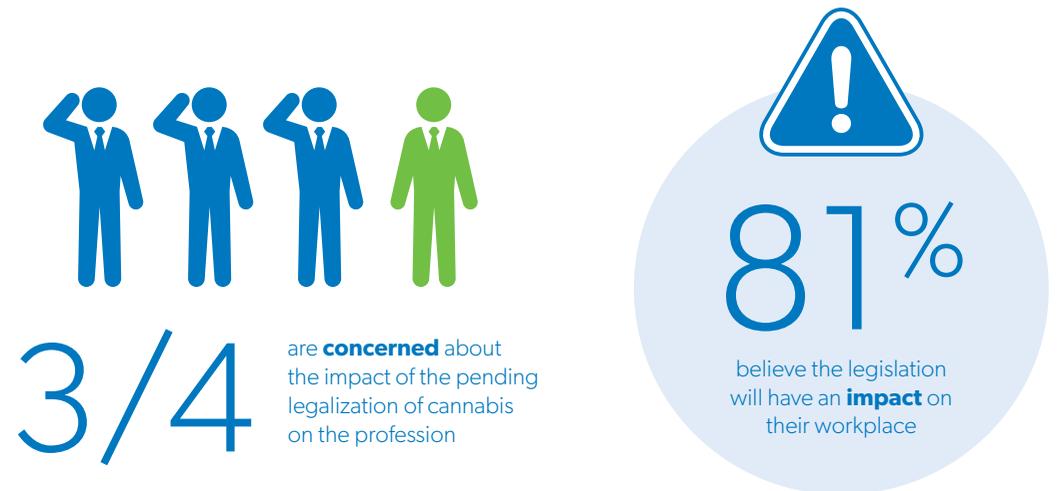
In addition to these considerations, organizations will have to address a number of other factors, such as drug testing, human rights and disciplinary measures, in anticipation of cannabis legalization.

That's why it's important to be proactive and introduce mechanisms to anticipate potentially hazardous situations as soon as possible. This guide provides advice, information and guidelines for this purpose.



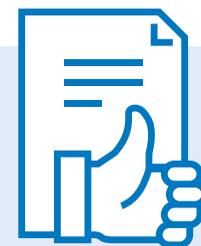
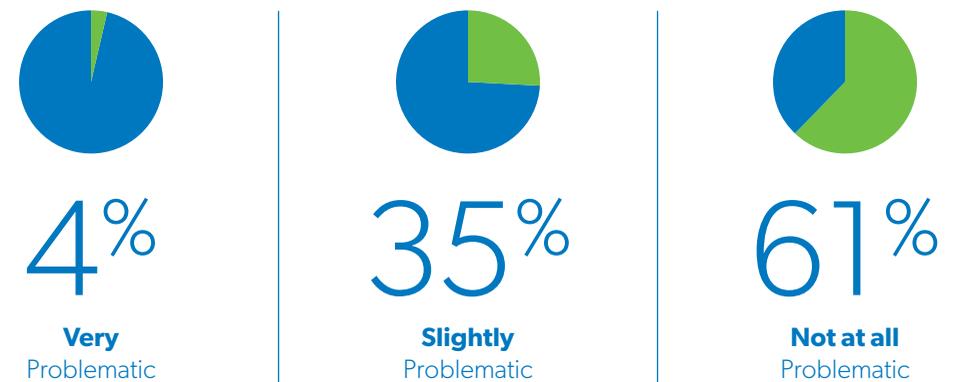
¹ Workplace Impacts of Marijuana Legalization, presentation by Paul L. Bitner at Assurex Global Loss Control and Claims meeting in September 2015, p. 6 (Online: <https://www.assurexglobal.com/wp-content/uploads/2017/01/Workplace-Impacts-of-Marijuana-Legalization-Assurex-Global.pdf>)

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CURRENTLY...

Is **drug use** problematic for organizations?



3/5 say they have adopted a **policy** on drugs

EMPLOYER OBLIGATIONS

By M^e Charles Wagner, CHRP and Me Raphaël Buruiana

Lawyers with Langlois Lawyers, LLP

1. What are employer obligations in terms of accident prevention?

All employers have a duty to protect the health, safety and physical and psychological integrity of their employees. This duty is set out not only in various legislation, such as the Act respecting occupational health and safety¹ and the Quebec Civil Code², but also in the Charter of Human Rights and Freedoms.³

Subject to the specific provisions of a collective agreement and notwithstanding the pending cannabis legalization, all employers retain the management rights entitling them to apply a policy prohibiting the possession or use of drugs in the workplace. An employer may moreover adopt a policy of “zero tolerance,” justifying the imposition of severe penalties that could even extend to the termination of any employee violating this policy. Like any policy, this policy should be clear and unambiguous, rigorously applied and clearly communicated to employees to validate the imposition of any of the penalties established therein.⁴



All employers retain the management rights entitling them to implement a policy prohibiting the possession or use of drugs in the workplace.

Even in the absence of such a policy, an employer may penalize an employee who shows up for work under the influence of or in possession of drugs. In this situation, the disciplinary action will depend upon the degree of danger inherent in the employee's actions. The courts generally agree on imposing a more severe penalty on an employee whose actions have endangered or could have endangered the health and safety of the other employees or a third party.

However, an employer's duty to protect the health and safety of its employees does not extend to allowing it to conduct the random or systematic drug testing of employees before they begin their shift or while they are at their workstation. In the Irving case⁵, the Supreme Court of Canada ruled that an employer may require an employee to take a drug test only when it has reasonable grounds to believe that the individual was impaired while on duty, was directly involved in a workplace accident or significant incident, or returns to work after treatment for alcoholism or drug addiction. Furthermore, an employer is not entitled to search employees or their personal effects, such as the contents of their locker, except in compliance with the principles established in the Irving ruling.



Drug testing

By the editorial team

There are currently no means of testing cannabis in the body that can determine with any certainty whether it constitutes a real risk for the person being tested, for others or for the environment.¹ In Canada, control tools are being developed to detect THC in drivers. However, unlike for alcohol, no acceptable maximum level has as yet been determined.

Biological testing usually involves the analysis of blood, breath, urine or saliva, which however detects only the presence of a substance in the body, not the level of impairment. As well, THC remains in the blood for several hours or even days after cannabis use. What's more, the effects on individuals vary widely and depend on a number of factors, such as frequency of use, physical and psychological health, age, THC content, etc.

In addition to the problems associated with the reliability of drug testing, Canadian employers will also have to take into account factors like human rights legislation, privacy, labour standards, collective agreements and other regulatory requirements.

¹ CANADIAN CENTRE FOR OCCUPATIONAL HEALTH AND SAFETY, Workplace Strategies: Risk of Impairment from Cannabis, June 2017, 31 p. http://publications.gc.ca/collections/collection_2017/cchst-ccohs/CC273-2-17-3-eng.pdf (Downloaded October 12, 2017).

¹ RSQ c C-21, sec. 51

² Art. 2087, Civil Code of Quebec

³ C.C12, sec. 46

⁴ Infasco, division d'Ifastgroupe et Syndicat des métallos, section locale 6839, DTE 20131-389 (TA)

⁵ Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd. [2013] 2 SCR 458.

2.

What are employer obligations in terms of accommodation?

It should first be pointed out that an employee's use of cannabis does not necessarily indicate a substance abuse problem.

This being said, the Charter of Human Rights and Freedoms⁶ protects against discrimination on the grounds of disability, and the courts have continually confirmed that drug dependence is a disability that comes under the constitutional protection enshrined in the Charter⁷. Employers are thus required to accommodate disabled employees as long as the accommodation requested does not cause undue hardship. Thus, an employer cannot simply decide to terminate a substance-dependent employee who is unable to do his or her job. The extent of an employer's duty of accommodation is determined according to the organization in question, the nature of the employee's position and the possibility of reassignment or the introduction of measures that would allow the employee to perform the job properly.

For example, employees suffering from drug addiction could be required to register in an addiction treatment program and return to work only after the treatment has been successfully completed. However, if an employee asks an employer to pay for participation in a significant number of treatment programs, the employer could demonstrate that such payment would constitute undue hardship. Furthermore, as indicated in the Irving ruling, an employer may require an employee to be tested for drugs on return from addiction treatment.

Medical cannabis

**By M^e Charles Wagner, CHRP
and M^e Raphaël Buruiana
Lawyers with Langlois Lawyers, LLP**

Employees using medical cannabis are seldom able to do their job. In general, cannabis is prescribed for individuals whose physical or psychological situation is such that they can no longer work. When applicable, these employees should be assessed to determine whether they are able to perform their duties.

In cases of dependency or use for medical reasons, under the Charter of Human Rights and Freedoms, an employer is required to attempt to accommodate a disabled employee in the performance of his or her duties to the point of undue hardship. Undue hardship is assessed on a case-by-case basis, taking the employee's job into consideration.

For example, accommodation could range from modifying the position's tasks to adapting the workstation or tools. Naturally each case should be analyzed on an individual basis and the organization is not required to adopt any measure that would constitute undue hardship.

One question that will no doubt arise after the cannabis legislation comes into force will be whether family physicians will be more likely to prescribe cannabis now that it is legal. In this context, it is to be expected that some employers will contest these prescriptions.

3.

Employers' role in cases of substance dependence

As previously mentioned, the courts consider drug dependency to come under the protection against discrimination set out in the Charter of Human Rights and Freedoms. For employers to be proactive in such cases, they first have to be aware of the situation. Unfortunately, an employer often only learns about an employee's addiction when the employee is disciplined or terminated. That's why employers should make sure they include an employee's duty to disclose any dependency or addiction issues in their organization's policy.⁸

In general, once an employer has spent time and sometimes even money (for one or more addiction treatment, for instance), it would like to have some assurance that the employee will not relapse. The employer may then require the employee to sign a "Last chance agreement," in which, on returning to work, the employee commits to abstain from using substances to which he or she was previously addicted and to submit to random testing and searches. This type of agreement also provides for the employee's termination in the event of failure to comply with these obligations. However, the courts have sometimes ruled that last chance agreements that provide for termination in the event of a relapse contravene the provisions of the Charter of Human Rights and Freedoms. Accordingly, it's important not only to draft a last chance agreement that clearly sets out the applicable penalties, but also to analyze the appropriate nature of the penalty should the employee fail to comply with its obligations.

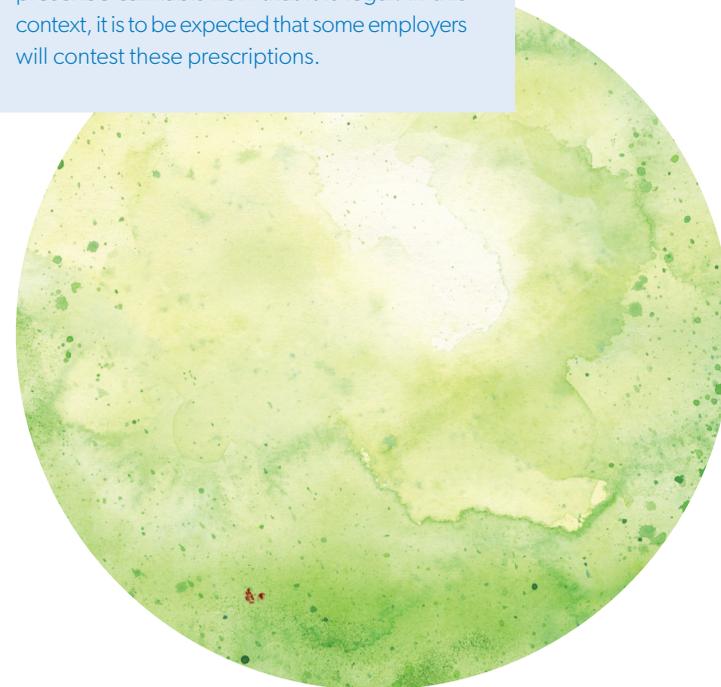
Supporting substance-dependent employees

**By Candide Beaumont, Psychologist,
Clinic director, Association des
intervenants en dépendance (AIDQ)**

Although the problems of substance use and dependence in the workplace have been little documented, they are an inescapable reality. While friends and family view consumption as a problem, the addict often sees it as a panacea for boredom, sadness, pain, anxiety, relationship problems, a need to belong, physical problems, sleep disorders, work-related stress, etc. Addicts often hesitate to reveal that they are users and take steps to change, fearing the consequences of their admission.

To admit there is a problem and try to solve it, an addict needs understanding and motivation rather than confrontation and guilt. Threats, in any case threats alone, seldom effect change. Intervention has to be tailored to each particular situation. Colleagues' support and attention have proven effective, as has early intervention. But it should never be forgotten that the only decision to change that has a chance of success must come from the person with the dependency.

A number of types of treatment have been successful. They are not the same for everyone and do not always aim for abstinence; relapses, which are the rule rather than the exception, are all part of the rehabilitation process.



...the courts have sometimes ruled that last chance agreements that provide for termination in the event of a relapse contravene the provisions of the Charter of Human Rights and Freedoms.

⁶ CQLR c C-12

⁷ See for example, Union des routiers, liqueurs douces et ouvriers de diverses industries, section local 1999 (teamsters) and Domfer poudres métalliques Itée – l'usine d'atomisation DTE 2006Rr-905. (See also Stewart v. Elk Valley Coal Corp., 2017 CSC 30.

⁸ Stewart v. Elk Valley Corp. 2017, SCC 30.

EMPLOYEE OBLIGATIONS

By M^e Charles Wagner, CHRP and Me Raphaël Buruiana

Lawyers with Langlois Lawyers, LLP

1. What are employee obligations in terms of occupational health and safety?

The primary duty of all employees is to do their job as the employer is entitled to expect. This duty is moreover prescribed in article 2085 of the Civil Code of Quebec. Furthermore, under article 2088 of the Code, employees are required to perform their work with prudence and diligence; in other words, according to the rules of conduct laid down by the employer. Employees are thus required to comply with any policy respecting the use or possession of drugs in the workplace. Even when such a policy is lacking, all employees must comply with the universally applicable rules of law. Thus, an employee may be subject to criminal charges for impaired driving, possession or trafficking of drugs, or for actions performed in the workplace. In addition, under the Criminal Code, everyone who undertakes or has the authority to direct how another person works or performs a task is required to take the necessary steps to prevent bodily harm to that person or any other person arising from that work or task.

2. What are the possible penalties for employees who fail to comply with the policy?

Employees who fail to comply with an employer policy on the possession or use of drugs in the workplace are first subject to disciplinary action, ranging from a simple verbal notice to termination. It should be remembered that for any penalty provided for under the policy to be imposed, employees must have been informed of it. The policy must also be uniformly applied.

In the absence of such a policy, the employer is free to impose the appropriate disciplinary measure, taking into consideration aggravating and mitigating factors. Trafficking drugs in the workplace and drug use are generally considered to be serious breaches of an employee's obligations and lead to the imposition of severe penalties.

In certain circumstances, an employer will have to manage an employee's file from an administrative rather than a disciplinary perspective, particularly in the case of involuntary incapacity; for example if the employee is substance dependent. The employer's approach will then focus more on rehabilitating the employee to enable a return to work within a reasonable timeframe. However, disciplinary action could be taken if the employee refuses to participate in addiction treatment, for example.

The primary duty of all employees is to perform their job as the employer is entitled to expect.

SIGNS AND EFFECTS OF THE INFLUENCE OF CANNABIS

By the editorial team



Signs

It isn't always easy to detect the signs that someone is under the influence of cannabis. Several factors come into play, including frequency of use and the THC concentration of the substance inhaled or ingested. Most studies however agree on the following signs:

- bloodshot eyes;
- talkativeness;
- increased appetite;
- hilarity;
- euphoria;
- lack of inhibitions.

Effects

The effects, which are both physical and psychological, are here again extremely variable. Some examples are presented below:

- impaired coordination;
- slowed reflexes;
- lapses of attention and concentration;
- impaired memory;

and in the most serious cases:

- disorientation, confusion;
- anxiety attacks, paranoia, hallucinations.

DEVELOPING A CLEAR POLICY

In terms of prevention, best practices include making workers aware of the issue, educating managers, and introducing and communicating a clear policy. Measures on cannabis use and the ensuing penalties can very well be integrated into a general policy on the consumption of alcohol, medication and drugs in the workplace.

By **Hugo Morissette, CHRP**

Director, Analysis and public affairs, Octane

1. How to develop a clear policy tailored to your organization

Although the law applies to all Canadians, each organization, like each industry or job category, is unique. The policy should thus be tailored to reflect the reality of your organization.

The first step is to conduct consultations before drafting the policy in order to identify potential sources of conflict and the organization's strengths, assess the impact of cannabis in your organization, and determine your personnel's knowledge of the issue and any related prejudices.

You should decide on the nature of the policy and clearly express your position; that is, whether your organization will tolerate use up to a certain point or whether it will opt for zero tolerance. The reasons underlying your position, the means of application and the steps that will be taken to ensure policy compliance should also be determined.

If you decide to tolerate consumption, you should clearly define the maximum acceptable limit (before the substance is considered to affect the faculties) and adopt a preventative, non-repressive approach.

Your policy should also provide concrete examples of what will not be tolerated. It should measure the impact of the legislation in your organization, cover all forms of consumption (dried cannabis, creams and lotions, edible products, etc.), distinguish medical cannabis from recreational cannabis, since they will be treated differently, and take into account the possession of these products in the workplace.

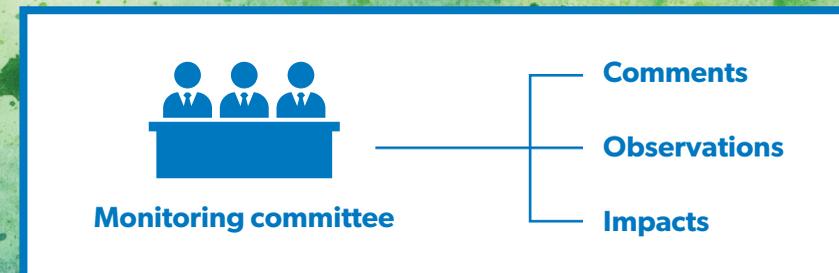
Lastly, the policy should include possible penalties (graded scale) that would be applicable in cases of non-compliance.



The policy should thus be tailored to reflect the reality of your organization.

2. Who should be involved?

A committee could be set up to ensure uniformity across the organization and employee support. Members could include representatives from the human resources, legal and communications departments, as well as union representatives or, when applicable, employee representatives.



3. How to avoid generational conflicts

A clear, comprehensive and fact-based policy will limit potential generational conflicts in your organization. Everyone should participate in drafting this policy to ensure effective and transparent communication and thus help combat prejudices and myths before they spread throughout the organization.

4. Why is it important to keep your policy up to date?

The legalization of cannabis will create new situations that will promote the development of related case law. That's why it will be important to keep current with the decisions and rulings that have been rendered in order to make sure your policy is up to date. What's more, a regular review of the policy could also provide the opportunity to remind everyone of its goals, limitations and constraints, as well as the support measures provided by the organization.

5. How to implement your policy on cannabis use

In order to make sure that the policy is communicated to all employees, information and awareness activities could be organized for this purpose. As well, management training is crucial to ensure managers understand the reasons for the policy and its goals. Mechanisms for receiving comments and offering appropriate support should also be determined.

6. Clearly communicating the policy within your organization

Good communication is essential to the understanding, acceptance and monitoring of the policy. The organization should also make sure that the person introducing the policy presents it objectively, offering no personal opinions or value judgments. Your personnel should feel that the organization is open to dialogue rather than simply imposing a new policy.

7. How to promote your policy outside the organization

Publicizing your policy outside the organization is not absolutely essential since your primary objective is to make sure it is tailored to your particular situation. Nonetheless, best practices could be exchanged at conferences or thematic seminars or via the network of the Ordre des conseillers en ressources humaines agréés. In light of the media attention the legalization of cannabis will attract, some organizations may serve as models for successfully implementing such a policy or innovative ways of applying it. This is where public relations and media experts can become important assets.



Good communication is essential to the understanding, acceptance and monitoring of the policy.



EXAMPLE OF A POLICY ON CANNABIS USE IN THE WORKPLACE

Since each case is unique, there is no “one size fits all.” The success of a policy depends on how well it is adapted to the workplace in question and focuses on specific features of the organization, taking its history, strengths and weaknesses into account. However, a number of sections are essential and could be structured around the following points.

1. Introduction

- A. Review of the major points of the legislation
- B. Review of employer obligations
- C. Definition of the policy’s scope

2. Objectives

- A. Prevention, information, safety, protection of the organization’s image, definition of everyone’s role, etc. The objectives should be sufficiently detailed to clearly indicate the organization’s intentions, in compliance with other legislation, codes and charters.

3. Definitions

- A. Define the main terms used in the policy to prevent any misinterpretation or challenges arising from a lack of clarity.
 - i. Cannabis (marijuana): different ways and forms of consumption
 - ii. Employee
 - iii. Manager
 - iv. Zero tolerance
 - v. Impairment
 - vi. Workplace
 - vii. Working hours
 - viii. Safety-sensitive jobs
 - ix. Testing
 - x. Other

4. General principles

- A. Key points of the policy (zero tolerance or not, job categories, sale and distribution, tolerance limit, testing, penalties, etc.)

5. Scope

- A. Who the policy applies to (employees at work, on call, on or in all the organization’s premises, vehicles or property, social activities)
- B. The policy should be applied impartially, with discernment and respect confidentiality.



6. Roles and responsibilities

- A. Employees
- B. The organization
- C. Policy monitoring committee

7. Testing

- A. Select the type of testing
- B. When is testing done (reasonable grounds, after a work accident, for employees considered to be at risk, for instance)?
- C. Impact in the event of refusal
- D. Here, the principle of zero tolerance will be problematic because cannabis can be detected in the blood for a month, in contrast to alcohol, which can be detected for several hours. It will be hard to manage the test results and impose disciplinary action. The limit between zero tolerance at work and in private life needs to be examined in more depth and will no doubt be the focus of considerable case law.

8. Prevention and employee support

- A. Addiction support
- B. Contact information of the department responsible

9. Disciplinary and administrative measures

- A. Presentation of possible penalties and their graded scale
- B. Explanation of the procedure
- C. Presentation of possible recourse

10. Application and coming into force of the policy

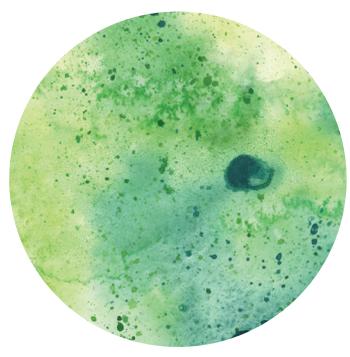
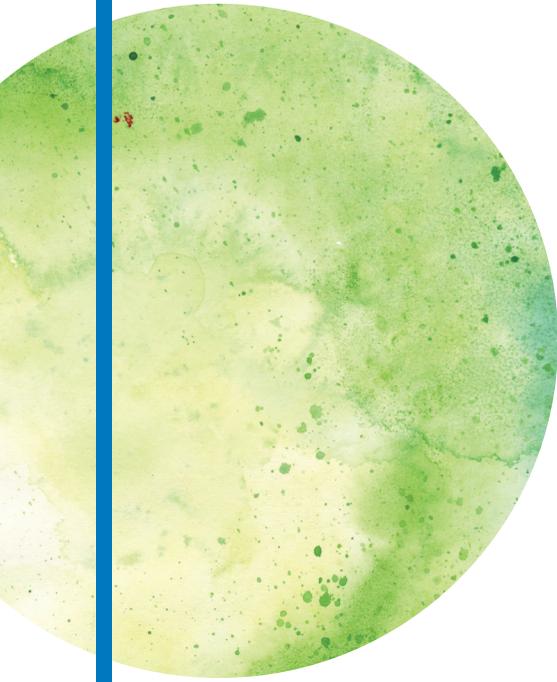
- A. Reminder of the confidentiality of information obtained
- B. Department in charge of application
- C. Date policy comes into force

11. Appendices

- A. List of safety-sensitive positions – zero tolerance
 - i. Vehicle driver
 - ii. Machine operator
 - iii. Instructor/Teacher
 - iv. Healthcare workers and practitioners
 - v. Workers handling sharp or dangerous objects
 - vi. Factory workers
 - vii. Others, at the organization’s discretion (with explanation)
- B. Canadian legislation
 - i. Link to or summary of the scope of Canadian legislation
 - ii. And, if available, link to and scope of Quebec legislation and regulations
- C. List of symptoms
 - i. This list will be of considerable help to managers in detecting a potential problem with an employee.







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