How to Keep Your Workplace Drug-Free after Marijuana Is Legalized

What’s At Stake
Moral or immoral, legal or illegal, marijuana, aka cannabis, is an impairing drug that you don’t want your workers to ever use while they’re on the job. That’s why you probably have a zero tolerance policy for cannabis and other impairing substances. But how will you enforce that policy when cannabis is legalized by July 2018?

Even after legalization, you’ll still be able to keep workers from using cannabis in the workplace if you implement a legally sound substance abuse policy.

Adjusting Zero Tolerance for Legalized Cannabis
While sound in principle, the traditional zero tolerance policy that companies use to regulate workplace substance abuse is and has long been too inflexible to enforce. There are 2 legal problems zero tolerance doesn’t account for:

- Medical marijuana, which has been legal in Canada since 2001; and
- More significantly, addiction to drugs, which has long been recognized as a disability under discrimination laws.

Example: A BC glazier is fired for testing positive for cannabis. Although he violated the company’s...
zero tolerance policy, the glazier was using medical cannabis legally for chronic back pain. And because back pain is a disability under human rights law, the firing was disability discrimination and the company had to not only reinstate the glazier but pay him damages for injuring his “dignity” and “self-respect.”

Legalized recreational cannabis will pose a new limitation on zero tolerance policies. The good news is that the impact of that isn’t as great as some may believe. The key is that just as it is today, safety will continue to be the predominant consideration once cannabis is legalized. After all, while laws and moral may be subject to debate, the one thing about cannabis abuse that nobody disputes is that it renders workers unfit for duty and creates an intolerable safety danger, especially at safety-sensitive work sites.

The Bottom Line: Even after cannabis is legalized, you’ll still be allowed—in fact, required—to impose strict prohibitions on workplace cannabis use. But you’ll need to base the policy not on legality or even morality but strictly on safety. While you can still use the term “zero tolerance,” you may want to consider recasting your current substance abuse policy as a fitness for duty policy.

14 Things to Include in Your Policy

1. Policy Statement
Set the tone by stating that workplace substance abuse creates a safety risk and won’t be tolerated. But while laying the legal groundwork for discipline, you should also acknowledge that substance abuse is a health issue and that getting workers help is your ultimate goal [Model Policy, Sec. 1].

2. Statement of Purpose
Clarify that the policy is all about ensuring workers are fit for duty at all times (as opposed to ensuring they act morally and obey the law) [Model Policy, Sec. 2].

3. Scope of Policy
Explain that the policy applies to all individuals working for your organization regardless of employment status or physical location of the work. But also indicate that the policy is subject to the terms of applicable collective agreements and employment contracts [Model Policy, Sec. 3].

4. Explanation of “Fit for Duty”
Define exactly what you mean by being fit for duty. Other key terms to define include “substance abuse,” “safety-sensitive job” and “drugs” [Model Policy, Sec. 4].

5. Specification of Workers’ Duties
The heart of the policy is the list of worker requirements, including being fit for duty at all times, refraining from using, buying, selling or distributing drugs/alcohol, notifying supervisors of violations and submitting to testing [Model Policy, Sec. 5].

6. No Exemption for Legal Cannabis Statement
Workers might assume that they’ll be allowed to use or be high on pot once cannabis is legalized. Debunk this popular misconception by expressly saying that impairment at work is never justified regardless of whether the cannabis or other substance that causes it is legal [Model Policy, Sec. 6].

7. Statement of Support
Restate your commitment to helping workers with substance abuse issues and describe your organization’s employee assistance program and other resources for providing support, counseling, treatment, rehab, etc. [Model Policy, Sec. 7].

8. Encouragement for Self-Reporting
Encourage workers to come forward voluntarily if they have substance abuse issues; indicate that those who do self-report won’t be subject to discipline as long as they were and are fit for duty when they do their job [Model Policy, Sec. 8].

Establish your right to perform proactive medical assessments before workers are assigned to safety-sensitive jobs and that failure to pass such assessments will be grounds for denying those positions. Indicate that assessments will be performed by qualified medical or substance abuse professionals and that you’ll keep the results confidential as required by privacy laws [Model Policy, Sec. 9].

10. Investigation Procedures
Explain how you investigate suspected violations. List investigation triggers, which should include:
Complaints, concerns or reports of substance abuse;
- Declining performance;
- Erratic behaviour;
- Involvement in safety incidents including near misses;
- Arrests for impaired driving, drug offences and similar violations; and
- Other indications of substance abuse issues or lack of fitness for duty.

[Model Policy, Sec. 10].

11. Alcohol & Drug Testing Procedures
Explain your use of testing to enforce the policy. Testing is a complex issue that many organizations deal with in a separate policy. However you do it, be sure to address both the testing involved, i.e., alcohol and drugs, and the basis for each kind of testing, including:
- Pre-employment testing;
- Random testing; and
- For-cause testing, e.g., after safety infractions or incidents.

Be sure that your testing procedures aren’t overly privacy intrusive and that you limit the strictest testing to workers with safety-sensitive jobs [Model Policy, Sec. 11].

12. Privacy of Test Results
Acknowledge that testing results are privacy-protected information that you’ll keep them secure and confidential to the extent allowed by the law [Model Policy, Sec. 12].

13. Response to Violations
Make it clear that workers found to be unfit for duty will be subject to discipline up to and including termination. Describe your organization’s disciplinary procedures. Although zero tolerance is fine as a principle, you need to give yourself the flexibility to deal with each worker on an individual basis which typically includes entering into Last Chance agreements offering reemployment if the worker successfully completes treatment, rehab and other reinstatement conditions [Model Policy Secs. 13 and 14].

14. Acknowledgment of Workers’ Accommodation Rights
Last but not least, include a provision acknowledging that addiction is a disability under human rights laws for which you’ll provide reasonable accommodations up to the point of undue hardship [Policy, Sec. 15].

---

**FITNESS FOR DUTY & SUBSTANCE ABUSE POLICY (FEDERAL VERSION)**

1. Policy Statement
ABC Company recognizes that employees who use or are impaired by drugs or alcohol while performing work endanger not only themselves but their co-workers and others affected by the work. ABC Company’s policy with regard to such conduct is one of zero tolerance and employees must be aware that any violations they commit may result in disciplinary action up to and including termination.

However, ABC Company also recognizes that addiction to drugs or alcohol is a serious health problem. The intent of this Policy is to accomplish the health and safety goal in a manner that is fair, humane and consistent with employees’ accommodation rights under discrimination laws. The ultimate goal is not to punish but help employees identify and get help for their substance abuse issues so that they can return to work healthy, safe, happy and productive.

2. Purpose
The objective of this substance abuse policy is to ensure that all employees report to work fit for duty. Adopting this Policy is part and parcel of ABC Company’s duty to ensure that the health and safety of every person it employs is protected under Section 124 of the Canada Labour Code (Labour Code).

3. Scope
This Policy applies to all individuals that work for ABC Company including but not limited to full-time, part-time, temporary and contract employees, independent contractors, volunteers and employees of third party contractors or subcontractors that ABC Company engages to perform work at its facilities.

a. Union Employees
This Policy applies to both union and non-union employees but is not intended to supersede or circumvent the provisions of any current collective agreement that ABC has negotiated with an employee’s union. In the event of a conflict between this Policy and a collective agreement, the latter shall control.

b. Contractor Employees
This Policy applies to individuals employed by contractors and subcontractors that perform work at ABC Company facilities but is not intended to supersede or circumvent the provisions of any current collective agreements that those contractors or subcontractors have negotiated with their own workers and their unions. In the event of a conflict between this Policy and a contractor employment agreement or collective agreement covering the worker, the latter shall control.

4. Definitions
For the purposes of this Policy:

- **“Drugs”** includes:
  - Narcotics and illegal drugs;
  - Marijuana whether used or obtained legally or illegally; and
  - Legal prescription and over-the-counter medications and drugs that cause or have the potential to cause impairment and render an employee not fit for duty.

- **“Fit for duty”** means a state of physical and mental that allows an individual to perform his or her job duties safely and effectively without impairment due to the use of or after-effects of alcohol, illegal drugs, legal medications or other health conditions.

- **“On duty”** includes:
  - Scheduled work;
  - Unscheduled call-in work;
  - Work performed on ABC Company facilities;
  - Work performed for ABC Company away from Company facilities, including but not limited to driving or traveling to and from work.

Continued on page 4
9. Fitness for Duty Medical Assessments
Employees must undergo medical assessments to ensure they are fit for duty before being placed in a safety-sensitive job. Assessments will address substance abuse and be performed:
- Prior to employment when individuals are applying for safety-sensitive jobs;
- Before current employees are transferred from non-safety-sensitive to safety-sensitive jobs; and
- Periodically for as long as the employee remains in a safety-sensitive job.

Medical assessments will be performed by qualified healthcare professionals following appropriate medical practices and results will be kept confidential to the extent required by personal privacy laws.

10. Disciplinary Investigations
ABC Company may open a disciplinary investigation to check whether an employee is engaged in substance abuse or otherwise in violation of his/her fitness for duty obligations under this Policy in response to:
- Complaints or concerns by co-workers, supervisors, etc.;
- Declining performance;
- Erratic behaviour;
- Involvement in safety incidents including near misses;
- Arrests for impaired driving, drug offences and similar violations; and
- Other indications that the employee has substance abuse issues or is otherwise not fit for duty.

Investigations will be carried out in accordance with ABC Company’s Disciplinary Investigation Procedures.

11. Drug & Alcohol Testing
Employees may be tested for alcohol and drugs in accordance with ABC Company’s testing policies. [List the conditions for testing under your organization’s own testing policies. Be sure to address: i. Alcohol and drug testing; ii. Safety-sensitive and non-safety-sensitive employees; and iii. Random and for-cause/post-incident testing.] Supervisors will escort employees to the screening site for testing. Refusal to submit to testing will be grounds for immediate termination under this Policy.

12. Privacy
ABC Company recognizes that test results and related information is protected personal information under privacy laws and will keep it confidential and secure and refrain from using or disclosing it except as permitted or required by law.

13. Consequences of Violations
Violation of this Policy is grounds for discipline up to and including termination in accordance with the ABC Company Progressive Discipline Policy. Employees with substance abuse issues on administrative leave may also be referred for counselling or assistance through the ABC Company Employee Assistance Program or outside agencies.

14. Assistance & Reinstatement
ABC Company reserves the right to place employees with substance abuse issues on administrative leave and enter into Last Chance Agreements offering them the opportunity to return to work if they successfully complete the terms of their treatment and rehabilitation program, pass drug and alcohol tests and meet other conditions of reinstatement.

15. Employee Right to Accommodations
ABC Company recognizes that drug and alcohol addiction is deemed a disability under the Canadian Human Rights Act. Accordingly, in administering the disciplinary and other provisions of this Policy, addictions and other substance abuse related to disabilities, such as use of medical marijuana or prescription drugs for chronic pain and debilitating conditions, will be treated as non-culpable violations and employees will be offered reasonable accommodations based on their individual circumstances and capabilities to the point of undue hardship.
CASE OF THE MONTH
Fighting Fire with Fire: Must You Arm Workers to Protect Them from Workplace Violence?

OHS laws require employers to take all “reasonable” precautions to ensure health and safety. Such precautions include furnishing workers appropriate PPE. Most PPE is inherently passive and purely defensive in nature—hard hats, goggles, pads, etc. But if the hazard being guarded against is workplace violence, PPE may include guns. Does the duty to take reasonable precautions against violence mean employers must arm their workers? Here’s how a new Nova Scotia Labour Board ruling handled that hot potato.

THE CASE

What Happened: After doing a workplace violence hazard assessment, an independent expert listed 51 things the Sheriffs Department could do to protect Sheriffs from violence. The Violence Prevention Plan the agency ultimately came up with incorporated most of the recommendations. But it declined the recommendation to issue firearms to Deputy Sheriffs performing prisoner transport and other high risk duties. The union cried foul, claiming that rejecting the recommendation was a violation of the agency’s OHS duty to “take every precaution reasonable in the circumstances” to protect the Sheriffs.

What the Board Decided: The Nova Scotia Labour Relations Board disagreed and tossed the union’s appeal.

How the Board Justified Its Decision: First and foremost, the agency’s Violence Prevention Plan was reasonable, even without the firearms, the Board reasoned. The Plan included other measures adequately addressing the violence risks cited in the assessment, including:

- Arming some Sheriffs with Tasers;
- Radio-tracking of vehicles transporting prisoners;
- High volume/high risk court facilities; and
- Portable access control measures for high risk court appearances.

The Board also noted the agency’s strong justifications for not wanting to arm its Sheriffs:

- The evidence, including statistics from the hazard assessment, showed that there have been very few incidents of injury to or use of force by Sheriffs in Nova Scotia;
- Arming Sheriffs is not the norm across Canada (although a few provinces do it including BC, Alberta, Saskatchewan, Ontario and Québec); and
- Issuing firearms would represent “an extreme and drastic change in the culture” for Sheriffs, some of whom may not be physically or psychologically able to deal with the situation.

Rioux v Nova Scotia Government and General Employees Union, 2017 NSLB 93 (CanLII), July 20, 2017

TAKEAWAY

The question of whether issuing firearms is a reasonable measure for protecting against violence is relevant not only to law enforcement but private sector employers wrestling with workplace violence issues. Before Rioux, the leading ruling on the issue was a 2007 case called Re Parks Canada and Martin and Public Service Alliance of Canada finding that arming national parks officers was a required reasonable measure. The union in Rioux tried to make hay with the Parks Canada case and the Board went to great pains to distinguish it from the situation with the Nova Scotia Sheriffs:

- Parks officers are much more likely than Sheriffs to come into contact with people who are armed;
- Unlike Sheriffs, parks officers carry a “banger pistol” that looks like a gun on their belt which makes it look like they’re armed;
- Parks officers’ vulnerability is increased by specific risk factors including terrain, weather, lack of reliable power sources and telecommunications and relative lack of back-up; and
- Whereas the Sheriffs would have Tasers, a “longarm, baton, shovel, stick or other weapon of opportunity” wouldn’t give parks officers power to subdue a violent person.

The Bottom Line: The answer to the question of whether providing X, Y or Z PPE to protect a particular worker is ALWAYS the same: It depends. It depends on the risk, the effectiveness of the PPE and whether alternative measures would provide commensurate protection.

However, when the PPE involved is a weapon, it also depends on another crucial factor: public safety. A gun is an altogether different proposition from a hard hat and can be justified as a reasonable safety measure only in very limited and compelling circumstances. ✷
Month in Review

FEDERAL

LAWS & ANNOUNCEMENTS

Asbestos
July 12: Strict new OHS asbestos rules cut the OEL for asbestos from 1 to 0.1 fibre per cubic centimetre and require employers to implement asbestos exposure management programs providing for:

- Investigation by a qualified person to determine if work poses low, moderate or high risk of asbestos exposure
- A training and education plan
- Use of signs and labels to identify asbestos-containing materials
- Use of removal, enclosure, encapsulation or other engineering controls
- Keeping on-site asbestos records available for workers to examine.

Get Ready for WHMIS Inspections in October
Oct. 1: Federal OHS officers will be conducting WHMIS inspections at worksites across the country to check for compliance with new GHS requirements. From now through Dec. 1, 2018, the official compliance deadline for employers, you’ll need to have documentation showing that:

- You comply with either current labels/MDSDS or new GHS labels/SDS rules; and
- Your workers have received appropriate GHS training.

TDGA
June 24: The government proposed new Transportation of Dangerous Goods Act regulations to beef up railway security and head off terrorist threats. Key requirements:

- Have a rail security coordinator on staff
- Immediately report potential threats to Canadian Transport Emergency Centre
- Provide security awareness for workers
- Train workers in security plan
- Conduct security inspections of placarded railway vehicles
- Keep on-site records available for inspection
- Use of signs and labels to identify hazardous materials
- A training and education plan

LAWS & ANNOUNCEMENTS

BRITISH COLUMBIA

LAWS & ANNOUNCEMENTS

Young Workers
July 19: WorkSafeBC launched an outreach campaign to prevent injuries to young workers. 18 young workers died of workplace injuries in BC between 2012 and 2016.

OHS Enforcement
July 4: Changes to the policy WorkSafeBC uses to calculate the amount of repeat penalties for OHS offences took effect.

OELs
Sept. 1: That’s the deadline to comment on WorkSafeBC’s proposal to extend the period for reviewing occupational exposure levels for hazardous substances from one to 3 years. Tripling the length of the review window will enhance stability and give industry more time to prepare for OEL changes, the agency contends.

Materials Handling
Aug. 1: WorkSafeBC is expected to issue guidelines for the new OHS regulations for storage racks of 2.4 m or higher (or lower heights that are loaded/unloaded by other than manual methods). Key requirements: Effective Jan. 1, 2018, employers must ensure that storage racks are:

- Capable of safely supporting items stored
- Designed and constructed in accordance with good engineering practice
- Used in accordance with the specifications and instructions of the manufacturer or a professional engineer
- Installed by a qualified person

Workers’ Compensation
July 6: Key recommendations of the new review panel report on reforming Alberta’s workers’ comp system:

- Make return-to-work a mandatory requirement for injured/ill workers
- Create new independent office to ensure fairness of the WCB process
- More assistance with appeals and reviews for workers and employers
- More physician choices for injured workers
- Adjust benefits policies that are unfair to workers.

CASES

Solicitor-Client Privilege Doesn’t Make Entire Investigation Record Off-Limits
An energy company refused to give OHS officials any materials from its internal investigation of a worker’s death claiming that they were privileged since the investigation was made by a lawyer in contemplation of litigation. After nearly 3 years of ping-ponging around in judge’s chambers, the Alberta high Court ruled in the government’s favour. Although the solicitor-client privilege did apply, not all of the material related to the investigation was necessarily privileged. Each document and bundle of materials had to be assessed individually to determine if it was shielded by the privilege (Alberta v Suncor Inc, 2017 ABCA 221 (CanLII), July 4, 2017).

CN Fined $2.25 Million for Bissell Fuel Yard Oil Spill
Environmental officials traced the source of oil in the North Saskatchewan River to the Canadian National Railway fuel station 8 km away, specifically to an oil-water separator that didn’t meet petroleum storage tanks requirement. Now CN has pleaded guilty to 4 environmental offences carrying $2.65 million in fines, including $2 million for depositing a deleterious substance into fish-bearing water in violation of the Fisheries Act (Canadian National Railway, Govt. Press Release, June 16, 2017).

CASES

Solicitor-Client Privilege Doesn’t Make Entire Investigation Record Off-Limits
An energy company refused to give OHS officials any materials from its internal investigation of a worker’s death claiming that they were privileged since the investigation was made by a lawyer in contemplation of litigation. After nearly 3 years of ping-ponging around in judge’s chambers, the Alberta high Court ruled in the government’s favour. Although the solicitor-client privilege did apply, not all of the material related to the investigation was necessarily privileged. Each document and bundle of materials had to be assessed individually to determine if it was shielded by the privilege (Alberta v Suncor Inc, 2017 ABCA 221 (CanLII), July 4, 2017).

Alberta Fined $2.25 Million for Bissell Fuel Yard Oil Spill
Environmental officials traced the source of oil in the North Saskatchewan River to the Canadian National Railway fuel station 8 km away, specifically to an oil-water separator that didn’t meet petroleum storage tanks requirement. Now CN has pleaded guilty to 4 environmental offences carrying $2.65 million in fines, including $2 million for depositing a deleterious substance into fish-bearing water in violation of the Fisheries Act (Canadian National Railway, Govt. Press Release, June 16, 2017).

LAWS & ANNOUNCEMENTS

OIL & GAS

Workers’ Compensation
Sept. 15: That’s the deadline to comment on a new WorkSafeBC proposal to stop using the projected capitalized value, award amounts would be included as they’re paid out to workers over time.

Clothing Allowance
June 26: WorkSafeBC clarified the rules for clothing allowances to workers wearing an upper limb brace, i.e., brace worn at or above the wrist, which will be paid at the upper and lower limb rate, effective Jan. 1, 2018.

Cases
High Court: No Negligence Suits against WorkSafeBC for Workers’ Comp Denials

CASES

Alberta Fined $2.25 Million for Bissell Fuel Yard Oil Spill
Environmental officials traced the source of oil in the North Saskatchewan River to the Canadian National Railway fuel station 8 km away, specifically to an oil-water separator that didn’t meet petroleum storage tanks requirement. Now CN has pleaded guilty to 4 environmental offences carrying $2.65 million in fines, including $2 million for depositing a deleterious substance into fish-bearing water in violation of the Fisheries Act (Canadian National Railway, Govt. Press Release, June 16, 2017).

ALBERTA

LAWS & ANNOUNCEMENTS

Oil Sands
Aug.: Public consultations are taking place on the government taskforce’s recommendations on what industry should be required to do to implement the 100 megatonne limit on oil sands emissions, including:

- Mandatory use of Best Available Technology Economically Achievable for new facilities and expansions
- Submission of non-binding Greenhouse Gas Management Plans
- Create roadmaps to track costs of deploying innovative abatement technologies.

Workers’ Compensation
July 6: Key recommendations of the new review panel report on reforming Alberta’s workers’ comp system:

- Make return-to-work a mandatory requirement for injured/ill workers
- Create new independent office to ensure fairness of the WCB process
- More assistance with appeals and reviews for workers and employers
- More physician choices for injured workers
- Adjust benefits policies that are unfair to workers.
A helicopter factory technician collected workers comp after hurting his back at work. But the Board cut off his benefits after finding his degenerative disc to be a preexisting condition that the work incident didn’t aggravate. Having exhausted his appeals options, the technician sued the Board for negligently mishandling his claim. Although the strategy was creative, it was a legal non-starter. The Board has exclusive jurisdiction to determine if injuries are work-related under workers’ comp and is immune from civil lawsuits for money damages, ruled the BC Court of Appeal [Gill v. WorkSafeBC, 2017 BCCA 239 (CanLII), June 15, 2017].

**MANITOBA**

**LAWS & ANNOUNCEMENTS**

**Workplace Safety**

June 19: Highlights of Manitoba WCB’s 2016 Annual Report:

<table>
<thead>
<tr>
<th>Metric</th>
<th>2016 Result</th>
<th>2016 Target</th>
<th>2015 Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lost time injury rate (per 100 workers)</td>
<td>2.9</td>
<td>2.9</td>
<td>3.0</td>
</tr>
<tr>
<td>Days lost to injury rate (per 100)</td>
<td>1.67</td>
<td>1.67</td>
<td>1.68</td>
</tr>
<tr>
<td>Total work injuries</td>
<td>28,960</td>
<td>28,100</td>
<td>28,969</td>
</tr>
<tr>
<td>Total time loss injury claims</td>
<td>14,167</td>
<td>--</td>
<td>14,442</td>
</tr>
<tr>
<td>Severe injuries</td>
<td>2,548</td>
<td>2,450</td>
<td>2,524</td>
</tr>
</tbody>
</table>

**Pharmacare**

June 26: In a move designed to help Manitobans recover from opioid addictions, Pharmacare has removed coverage criteria for suboxone, a drug often used as an opioid replacement option.

**NEW BRUNSWICK**

**LAWS & ANNOUNCEMENTS**

**Smoke-Free Workplaces**

July 6: Newly proposed regulations would let government inspectors and peace officers issue tickets for smoking in public places including:

- Within 9 metres of doorways, windows and air intakes of indoor workplaces or enclosed public buildings
- On or within 3 metres of patios where food and alcohol is served
- On or within 20 metres of kids’ equipment and sports areas in outdoor public places
- On the grounds of regional health authorities
- Within provincial parks, rented campsites, golf courses and designated park areas

**Climate Change**

June 20: The Auditor General tabled her report on progress in cutting greenhouse gas emissions. Punchline: The province is on track to meet its 2020 deadline; but more will have to be done to hit targets for 2030 and 2050, which may include new and more ambitious reductions legislation. Emissions reductions under the status quo won’t get it done:

**NEWFOUNDLAND & LABRADOR**

**LAWS & ANNOUNCEMENTS**

**Climate Change**

June 25: Unlike New Brunswick, Newfoundland is not on track to meet its 2020 greenhouse gas emissions reduction target of 10% below 1990 levels, according to the Auditor General. The government will have to implement additional measures to achieve its targets, the report says.

**Environmental Assessments**

EPA environmental assessment actions in July (from most to least recent):

- Registration of Springdale Junction Agriculture Forage and Pasture Land [Reg. 1910]
- Registration of Buchans Plateau ATV Trails [Reg. 1911]
- Release of Portugal Cove Road Quarry [Reg. 1882]
- Release of Petty Harbour Microbrewery [Reg. 1892]
- Release of Twillingate Microbrewery [Reg. 1897]
- Release of Peterview Gravel Quarry (subject to conditions) [Reg. 1886]
- Registration of Crown District 23 Five-Year Forestry Operating Plan [Reg. 1909]
- Registration of Crown District 2 Five-Year Forestry Operating Plan [Reg. 1902]
- Appointment of EAS Committee for Health Science Centre Berm [Reg. 1887].

**NUNAVUT**

**LAWS & ANNOUNCEMENTS**

**Wood Bison Conservation**

July 14: The government added wood bison to the NWT List of Species at Risk as Threatened species. Impact: While no new protections are automatically triggered, the government now has 2 years to construct a recovery strategy for the species.

**矿产**


**NOVA SCOTIA**

**LAWS & ANNOUNCEMENTS**

**Workers’ Compensation**

June 15: An all-time low time-loss injury rate of 1.74 and a robust solvency ratio of 84.1% are the headliners of the WCB’s 2016 Annual Report.

<table>
<thead>
<tr>
<th>Metric</th>
<th>2016</th>
<th>2015</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time-loss claims</td>
<td>5,847</td>
<td>6,014</td>
<td>5,953</td>
</tr>
<tr>
<td>Lost time injury rate (per 100 workers)</td>
<td>1.74</td>
<td>1.84</td>
<td>1.82</td>
</tr>
<tr>
<td>Total claims</td>
<td>24,311</td>
<td>23,933</td>
<td>24,505</td>
</tr>
<tr>
<td>Acute workplace fatalities</td>
<td>2</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Chronic fatalities</td>
<td>18</td>
<td>19</td>
<td>14</td>
</tr>
<tr>
<td>Leading cause of injury</td>
<td>Sprains/strains: 65.5%</td>
<td>Sprains/strains: 64%</td>
<td>Sprains/strains</td>
</tr>
<tr>
<td>Solvency ratio</td>
<td>84.1%</td>
<td>80.4%</td>
<td>76.99%</td>
</tr>
</tbody>
</table>

**Workers’ Compensation—Services**

June 15: The WCB launched a new web service enabling injured workers to submit and manage their claims online. The WCB Online service can also be used to conduct the return-to-work process.

**CASES**

**Firing Mechanic Just 2 Weeks after Work Refusal — Retaliation**

A plant mechanic was fired just 2 weeks after engaging in a LOTO-related work refusal—his third refusal in 2 months. The mechanic claimed retaliation but the plant argued that the timing was coincidental and that he was fired for his inability to get along and show respect for colleagues and company processes. The arbitrator agreed. The plant’s reasons for firing the mechanic were legitimate and not related to his refusals. The fact that the firing came after the refusal didn’t prove that it came because of the refusal, the arbitrator reasoned [Jewers v. DSM Nutritional Products Canada Inc., 2017 NSL 82 (CanLII), July 4, 2017].
Workers’ Compensation

June 14: WSCC issued a warning to seasonal morel mushroom workers: If you want workers’ comp coverage, you won’t get it through your employer. Instead, you need to buy Personal Optional Coverage from the WSCC.

ONTARIO

LAWS & ANNOUNCEMENTS

Fall Protection

Oct. 1: That’s the new deadline for employers who’ve received extensions to provide fall protection training to workers working at heights on a construction project.

Suspending Work Platforms

June 13: The MOL issued guidelines to help designers, engineers, owners and suppliers of suspended access equipment on construction projects comply with the new OHS Construction Regulations rules (Sects. 136(1) to 142.06) for suspended work platform systems and hoistway chains.

OHS Scorecard

July: OHS fines issued this month (listed from most to least recent):  

<table>
<thead>
<tr>
<th>Fine</th>
<th>Offender(s)</th>
<th>Offence(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>$50,000</td>
<td>ClubLink Corporation LLC</td>
<td>Failure to install machine guard to block access to wood chipper vent resulting in injury to young worker whose arm was sucked into the vent while he was checking to see if air was coming out of it</td>
</tr>
<tr>
<td>$200,000</td>
<td>Orbit Garant Drilling Services Inc.</td>
<td>Failure to ensure safe exit to diamond drilling workplace and other reasonable precautions after worker killed by falling tree while he was exiting a bulldozer</td>
</tr>
<tr>
<td>$65,000</td>
<td>NexCycle Industries Ltd.</td>
<td>Recycling plant worker permanently injures wrist while trying to clear jam in cardboard baler that wasn’t locked out. Company fined for failing to guard machine’s pinch point.</td>
</tr>
</tbody>
</table>

Mental Stress

July 7: The WSIB completed public review of its proposed coverage rules for work-related chronic mental stress. The operable word is “chronic,” which means that workers will be covered not just for traumatic stress but “mental stress caused by a substantial work-related stressor, including bullying or harassment.” Decisions or actions affecting the worker’s job duties, work conditions and/or discipline would not be deemed due to work-related chronic stress, according to the WSIB.

CASES

Lying on Security Clearance = Just Cause to Fire Nuke Worker

A nuclear plant worker being investigated for harassing his colleagues was said to have lied on his security clearance questionnaire—he claimed he was unemployed even though he was actually working for another company. The Ontario high Court ruled that the plant had just cause to terminate the worker given his access to nuclear facilities and information vital to national security [Aboagye v. Atomic Energy of Canada, 2017 ONCA 598 (CanLII), July 11, 2017].

Linesman Who Threatens Supervisor Gets Last Chance to Keep His Job

A hydro lineman threatened to punch his supervisor in the face while receiving a negative performance review. The union acknowledged that the lineman had violated the plant’s workplace violence policy but contended that termination was too harsh. The arbitrator reluctantly agreed. Although violence is a serious issue, especially at “a profoundly safety-sensitive workplace... where lives are on the line every day,” the linesman sincerely apologized and accepted responsibility. So he should be reinstated on a last chance basis on the understanding that any act of workplace violence over the next 12 months would be grounds for immediate termination with no right to file a grievance [Energy + Inc. v Power Workers’ Union (CUPE Local 1000), 2017 CanLII 45560 (ON LA), July 16, 2017].

QUEBEC

LAWS & ANNOUNCEMENTS

OES

July: The Advisory Committee wants more time to review the occupational exposure limits for contaminants listed in Annex 1 of the Regulations. So CENSSST has pushed back close of the review period to Oct. 31, 2017. The contaminants in question are those that have OELs based on levels differing from ACGIH exposure values and ratings.

Environment

June 26: The federal government and Quebec announced plans to jointly invest $76.5 million for St. Lawrence River conservation initiatives over the next 5 years. The new program will support 50 joint projects designed to protect the area’s water quality, biodiversity and sustainable use.

CASES

OK to Deny Environmental Assessment for Lack of ‘Social Acceptability’

Quebec denied environmental certification of a proposed uranium mine in the James Bay Northern Quebec Agreement (JBnQA) territory. The certification was opposed by the local Cree population and the denial cited the project’s lack of social acceptability. The mining company, which had already gotten the needed federal approvals, sued noting that the statute doesn’t say anything about social acceptability. The court agreed but still dismissed the company’s $200 million lawsuit. The social acceptability of a project on JBnQA lands is a criterion that must be considered in the environmental assessment even if it’s not specifically mentioned in the law, said the court [Resources Strategie inc. c. Procureure générale du Québec, 2017 QCCS 2679 (CanLII), June 21, 2017].

SASKATCHEWAN

LAWS & ANNOUNCEMENTS

Workers’ Compensation

July: Summary of Policy changes made by the Workers’ Compensation Board since May:  
- Clarification that workers may request removal of irrelevant medical information from their claim file  
- Clarification of when waiting period for locating missing workers can be shortened  
- Clarification that a lawyer’s letter is an acceptable consent form alternative to a WReP (Worker’s Authorization Letter of Representation) document.

CASES

Grain Terminal Not Liable for Worker’s Silo Engulfment Death

A worker fell about 20 feet after tripping on a footrest inside the cabin of a dragline excavator. He survived but suffered serious injuries. The mining company, which is based in Edmonton, pleaded guilty to failing to ensure a safe work system and working environment and was fined $210,000 [Prairie Mines & Royalty LLC, operating as Westmoreland Coal Company, Govt. News Release, July 13, 2017].

YUKON TERRITORY

LAWS & ANNOUNCEMENTS

Workers’ Compensation

July: Yukon is raising its 2018 workers’ comp average assessment rates 6% to $1.87 per $100 of assessable payroll. The hike in the territory’s already high premium rates was made necessary by a 5% decline in the Compensation Fund funded level, which now stands at 150%. Continuation of the 19% subsidy (27%) is the only thing preventing an even greater increase. Industry rates will be announced later in the year.
MANAGING YOUR OHS PROGRAM:
Give Your JHSC an Annual Effectiveness Check-Up

As a health and safety pro, you understand that simply having an OHS program isn’t much good if you don’t regularly monitor its effectiveness. The same principle applies to the joint health and safety committee (JHSC). The OHS laws say you must not only establish a JHSC, but support, cooperate and consult with it. But what they don’t require you to do is evaluate whether the JHSC is actually effective.

There is one notable exception. While several provinces recommend the practice, in April 2017, BC (OHS Regs, Sec. 3.26) became the first province to make it mandatory for employers to perform an annual evaluation of JHSC effectiveness. Even if you’re not in BC, JHSC check-ups are highly advisable. Here’s how to conduct them based on BC requirements, OHS guidelines from other provinces and private sector best practices.

A. How Often
You should evaluate your JHSC at least once a year.

B. When
Although BC doesn’t stipulate a date, a good approach is to incorporate JHSC evaluation into your annual OHS program review.

C. Who
In BC, the evaluation must be performed by either:
- The employer or its representative; or
- The JHSC co-chairs or members designated by each co-chair.

If the employer or a rep does the evaluation, he/she must get the input of each JHSC co-chair.

D. How to Prepare
You’ll need to gather the materials you need to evaluate JHSC effectiveness, including:
- The JHSC’s terms of reference, bylaws and procedures;
- Minutes of JHSC meetings;
- JHSC meeting attendance records;
- JHSC written recommendations;
- Records of response to JHSC recommendations, including corrective action reports;
- JHSC workplace inspection reports;
- JHSC incident investigation (including near misses);
- Records created by JHSC members involved in work refusals;
- JHSC member training and certification records; and
- Previous JHSC evaluations.

Note: In Québec, the JHSC must keep records tracking its own activities for the year and submit them to CNESST by March 31 of the subsequent year.

E. How to Evaluate
The evaluation must be in writing and cover each of the JHSCs in the workplace.

F. What to Evaluate
There are 2 broad themes around which to organize your evaluation:
- Compliance with the JHSC requirements listed in your jurisdiction’s OHS laws; and
- The JHSC’s overall effectiveness and actual impact on workplace health and safety.

Compliance: The 12 specific things BC requires employers to cover in the evaluation speak largely to the compliance theme, including whether:
- The JHSC has the proper number and types of members;
- The worker JHSC members were properly selected;
- The employer JHSC members were properly selected;
- The JHSC performed each of its required functions and responsibilities;
- The JHSC met regularly as required;
- The employer properly responded to JHSC recommendations;
- Each JHSC member got the time off required by law;
- The JHSC got the equipment, space, clerical information and information it was entitled to receive from the employer;
- The JHSC properly prepared and distributed its meetings reports;
- The employer met its duties with regard to posting and keeping JHSC information; and
- Each JHSC member received all of the instruction and training required.

Overall Effectiveness: While it’s important to verify compliance, doing everything the law requires doesn’t necessarily mean that your JHSC is effective. So the evaluation should focus on whether the JHSC is making a real and positive difference. BC Regs. say this but don’t specify how—although WorkSafeBC guidelines flesh out some of the details. Based on guidance from BC and Nova Scotia and examples of private sector companies that actually do JHSC evaluations, questions to ask in assessing JHSC effectiveness include:
- Do members understand and capable of articulating the JHSC’s role and extent of its authority?
- Do workers know the JHSC exists and what it does?
- Do workers know who the JHSC’s members are and what they do?
- Do workers direct health and safety suggestions or complaints to the JHSC?
- Do supervisors consider the JHSC a threat or an ally?
- Do supervisors work with or around the JHSC?
- Do JHSC members reach out to workers, supervisors and management?
- Does the JHSC act fast to deal with matters brought to its attention?
- Are the JHSC’s recommendations specific and realistic?

G. What Comes Next
In BC it’s mandatory and outside BC it’s advisable to:
- Distribute a copy of the written evaluation report to both the employer and JHSC;
- Ensure the JHSC discusses the evaluation at its next meeting and records the discussions in the meeting minutes.
WORKPLACE INSPECTIONS:
Does Duty to Inspect Workplace Cover Off-Site Locations?

**THE RULE:** OHS laws require employers to take measures to identify, assess and control “workplace” health and safety hazards.

The Common Interpretation: The duty applies to hazards located on the grounds of the employer’s actual facility or site.

The Problem: The OHS laws define the word “workplace” broadly to include not just the four corners of the physical site but any location in which the work is carried out.

Translation: You could be liable for failing to control hazards outside your facility, especially if your workers perform job functions off-site. Adding to the concern is the traditional attitude of courts that the OHS laws are “remedial” in nature and should be interpreted as broadly as possible to effectuate their objective of protecting worker health and safety.

The Good News: So far at least, the courts haven’t taken the bait. Here are the two leading cases.

**The Canada Post Case**

The most recent case challenging the elasticity of OHS workplace safety duties is a federal ruling in July involving the Burlington, Ontario post office. At the centre of the controversy was Section 125(1)(z.12) of the Canada Labour Code which requires employers to allow the JHSC to do an annual inspection of not just the workplaces they control but the ones they don’t control to the extent they control the work activity carried out there.

The JHSC inspected the Burlington facility. But the committee also wanted to inspect the carriers’ routes. When management refused, the JHSC worker members filed a complaint. The OHS inspector agreed with the JHSC and cited Canada Post for violating Section 125(z.12).

But the OHS Tribunal overturned the citations. Sure, the OHS Act is remedial. But the point of the inspection rule is to make employers identify and fix hazards, the Tribunal reasoned. And CP couldn’t fix hazards along the carriers’ routes because it had no physical control over those locations.

The JHSC appealed but the court found the ruling reasonable and refused to overturn it. According to the court, requiring CP to inspect carriers’ routes would “over-extend the workplace inspection obligation beyond what is reasonable and logical” [Canadian Union of Postal Workers v. Canada Post Corporation, 2017 FCA 153 (CanLII), July 13, 2017].

**The Blue Mountain Case**

Significantly, this isn’t the first time that a court has resisted the call to overextend OHS “workplace” duties in the name of safety. The leading case is a 2013 ruling from Ontario in which a hotel guest drowned in an unguarded swimming pool. The OHS inspector claimed the death was a “workplace” fatality and cited the hotel for not reporting it to the MOL (under Sec. 51(1) of the Ontario OHS Act).

The Labour Board upheld the MOL but the hotel had the last laugh when the Ontario high court shot down the citation. Interpreting the pool as a “workplace” was unreasonable, said the Court of Appeal. By the Board’s logic, employers would have to report “whenever a non-worker dies or is critically injured at or near a place where a worker is working, has passed through or may at some other time work, regardless of the cause of the incident.” This goes way beyond what the legislature could have intended in enacting the reporting rule, the Court added [Blue Mountain Resorts Limited v. Ontario (Labour), 2013 ONCA 75 (CanLII), Feb 7, 2013].

**The Bottom Line**

As witnessed by the adoption of regulations requiring employers to protect workers who work alone or in isolation, the geographical scope of workplace duties is based on employer control rather than property lines. At the same time, while OHS laws are meant to be interpreted broadly to serve the health and safety objective, there are also limits on how far safety duties can be stretched.

---

**COMPLIANCE ALERT:**

Ready or Not, Here Come the WHMIS Inspectors

Starting October 1, federal OHS inspectors will be visiting workplaces across the country to check for compliance with the new GHS WHMIS requirements.

What’s Going On

GHS (short for Globally Harmonized System) changes are designed to bring Canada’s WHMIS laws into line with UN standards. The idea is that all industrial countries should have the same basic chemical safety laws so that it’s easier to do global business. The GHS changes affect 3 groups along a “controlled product’s” life cycle:

- The companies that manufacture it;
- The companies that import or distribute it; and
- The companies that buy and use it downstream, i.e., employers—which is probably you, if you’re reading this ezine.

The deadline for employers to comply with the GHS requirements is December 1, 2018. But the federal inspectors will still be targeting employers.

The 3 Things Inspectors Will Be Looking for

The latest round of inspections, which will continue through December 31, is more about assistance than gotcha’. But employers can still get fined if they don’t have the goods the feds are looking for, namely documentation showing that:

1. You’ve provided adequate GHS training to your workers;
2. Your WHMIS labels meet either current WHMIS label requirements or GHS standards; and
3. You have either a WHMIS-compliant MSDS (Material Safety Data Sheet) or GHS-compliant SDS (Safety Data Sheet—they’ve dropped the “M”) for each controlled product used, processed or stored at your workplace.

Once December 1, 2018 rolls around, the old fangled WHMIS label and MSDS will no longer be acceptable and only GHS labels and SDSs will do.

---
The duty to control “workplace” hazards may extend to off-site locations. That’s because the OHS laws define the word “workplace” broadly to include not just the four corners of the physical site but any location in which the work is carried out. Here’s the specific definition of each jurisdiction.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Definition of “Workplace”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td><strong>Work place</strong> means any place where an employee is engaged in work for the employee’s employer (Canada Labour Code, Sec. 122(1))</td>
</tr>
<tr>
<td>Alberta</td>
<td><strong>Work site</strong> means a location where a worker is, or is likely to be, engaged in any occupation and includes any vehicle or mobile equipment used by a worker in an occupation (OHS Act, Sec. 1(cc))</td>
</tr>
<tr>
<td>BC</td>
<td><strong>Workplace</strong> means any place where a worker is or is likely to be engaged in any work and includes any vessel, vehicle or mobile equipment used by a worker in work (Workers’ Compensation Act, Sec. 106)</td>
</tr>
<tr>
<td>Manitoba</td>
<td><strong>Workplace</strong> means any building, site, workshop, structure, mine, mobile vehicle, or any other premises or location whether indoors or outdoors in which one or more workers, or self-employed persons, are engaged in work or have worked (Workplace Safety &amp; Health Act, Sec. 1)</td>
</tr>
<tr>
<td>New Brunswick</td>
<td><strong>Place of employment</strong> means any building, structure, premises, water or land where work is carried on by one or more employees, and includes a project site, a mine, a ferry, a train and any vehicle used or likely to be used by an employee (OHS Act, Sec. 1)</td>
</tr>
<tr>
<td>Newfoundland &amp; Labrador</td>
<td><strong>Workplace</strong> means a place where a worker or self-employed person is engaged in an occupation and includes a vehicle or mobile equipment used by a worker in an occupation (OHS Act, Sec. 2(n))</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td><strong>Workplace</strong> means any place where an employee or a self-employed person is or is likely to be engaged in any occupation and includes any vehicle or mobile equipment used or likely to be used by an employee or a self-employed person in an occupation (OHS Act, Sec. 3(ah))</td>
</tr>
<tr>
<td>Ontario</td>
<td><strong>Workplace</strong> means any land, premises, location or thing at, upon, in or near which a worker works (OHS Act, Sec. 1)</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td><strong>Workplace</strong> means a place where a worker is or is likely to be engaged in an occupation and includes a vehicle, fishing vessel or mobile equipment used or likely to be used by a worker in an occupation (OHS Act, Sec. 1(y))</td>
</tr>
<tr>
<td>Québec</td>
<td><strong>Workplace</strong> means any place in or at which a person is required to be present out of or in the course of work, including an establishment and construction site; <strong>Establishment</strong> means all the installations and equipment grouped on one site and organized under the authority of one person or of related persons in view of producing or distributing goods or services, except a construction site; this word includes, in particular, a school, a construction enterprise and the lodging, eating or recreational facilities put at the disposal of workers by the employer, excepting, however, private lodging facilities; <strong>Construction site</strong> means a place where foundation, erection, maintenance, renovation, repair, alteration or demolition work is carried out in respect of a building or of civil engineering works, on and at the site itself, including the preparatory work of land clearing or earth moving and any other work determined by regulation, and the lodging, eating or recreational facilities put at the disposal of the construction workers by the employer; (OHS Act, Sec. 1)</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td><strong>Worksite</strong> means an area at a place of employment where a worker works or is required or permitted to be present (Sask. Employment Act, Sec. 3-1(1)(hh))</td>
</tr>
<tr>
<td>Northwest Territories &amp; Nunavut</td>
<td><strong>Work site</strong> means a location where a worker is, or is likely to be, engaged in work, or a thing at, on, in or near which a worker is, or is likely to be, engaged in work (Safety Act, Sec. 1)</td>
</tr>
<tr>
<td>Yukon</td>
<td><strong>Workplace</strong> means a place where a worker is engaged in work (OHS Regs., Sec. 1.02)</td>
</tr>
</tbody>
</table>
## OHS Compliance Calendar:
### Upcoming Deadlines, Regulatory Changes and Enforcement Events

<table>
<thead>
<tr>
<th>Date</th>
<th>Jurisdiction</th>
<th>Deadline/Regulatory Change/Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 12</td>
<td>Federal</td>
<td>New asbestos rules took effect</td>
</tr>
<tr>
<td>July 31</td>
<td>Alberta</td>
<td>Deadline to comment on Alberta cannabis legalization plan</td>
</tr>
<tr>
<td>Aug. 1</td>
<td>Alberta</td>
<td>New OHS safety regulations (Part 23) for flow piping systems at oil and gas facilities take effect</td>
</tr>
<tr>
<td>Sept. 1</td>
<td>Ontario</td>
<td>MOL Residential Construction Blitz begins</td>
</tr>
<tr>
<td>Sept. 1</td>
<td>BC</td>
<td>Deadline to comment on WorkSafeBC proposal to extend OEL review period from 1 to 3 years</td>
</tr>
<tr>
<td>Sept. 15</td>
<td>BC</td>
<td>Deadline to comment on WorkSafeBC proposal to stop using projected total cost of permanent disability awards to calculate employers’ experience rating (ER)</td>
</tr>
<tr>
<td>Oct. 1</td>
<td>All jurisdictions</td>
<td>Federal WHMIS compliance inspections begin (and continue thru Dec. 31)</td>
</tr>
<tr>
<td>Oct. 1</td>
<td>Ontario</td>
<td>Deadline to provide fall protection training to workers exposed to vertical fall hazards at construction sites for employers with extensions</td>
</tr>
<tr>
<td>Oct. 1</td>
<td>Ontario</td>
<td>MOL Fall Protection Blitz begins</td>
</tr>
<tr>
<td>Oct. 1</td>
<td>Ontario</td>
<td>MOL Ladder Safety Blitz begins</td>
</tr>
<tr>
<td>Oct. 31</td>
<td>Québec</td>
<td>New deadline for Advisory Committee to complete review of OELs for Annex 1 substances</td>
</tr>
<tr>
<td>Dec. 31</td>
<td>Manitoba</td>
<td>Deadline for government to complete 5-year OHS laws review</td>
</tr>
<tr>
<td>Jan. 1</td>
<td>BC</td>
<td>New OHS storage rack requirements take effect</td>
</tr>
</tbody>
</table>