

QUESTIONS & ANSWERS

Cannabis and the Human Rights Code



**Ontario
Human Rights Commission**
**Commission ontarienne des
droits de la personne**

Questions and answers: Cannabis and the *Human Rights Code*

Cannabis or “marijuana” laws are changing in Canada. 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.¹ Cannabis use for a medical purpose (medical cannabis) continues to be legal.

Employers and employees, housing providers and residents, and other organizations and individuals are asking about the implications under Ontario’s *Human Rights Code* (the *Code*).

1. Do the new cannabis laws change how the *Human Rights Code* or OHRC policies are applied?

No. The *Code* and OHRC policies still apply in the same way they do for other drugs.

Like other drug use, the *Code* protects people with disabilities who use cannabis for a medical purpose from discriminatory treatment, including harassment, in employment, housing and service delivery.

The *Code* also prohibits discrimination against people who have or are perceived to have an addiction to cannabis based on the ground of disability. It also protects people with disabilities affected by cannabis smoke or vapour.

These groups have the right to disability-related accommodation to the point of undue hardship – that is, significant health and safety risks or excessive costs.

2. Do the new laws mean employees can smoke or vape cannabis for a medical purpose in an enclosed workplace?

No. Like tobacco, Ontario prohibits smoking or vaping cannabis for a medical or recreational purpose in enclosed workplaces.² Employers may have a duty to accommodate employees who smoke or vape cannabis for a medical purpose related to a disability by allowing them breaks to go outside to spaces where smoking or vaping is permitted by law.

3. What about edible cannabis?

An employee can consume edible cannabis for a medical purpose related to a disability at work, as long as it does not interfere with health and safety or performance of essential job duties.

4. What if cannabis use for a medical purpose causes impairment at work?

Similar to alcohol and other drugs, 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.

5. Does the duty to accommodate extend to cannabis?

Yes. Organizations still have a legal duty to accommodate the disability-related needs of people who use cannabis for a medical purpose unless it would cause undue hardship – that is, significant health and safety risks or excessive costs.

The duty to accommodate also applies to people who are addicted to cannabis, or are affected by cannabis smoke or vapour because of a disability.

The duty to accommodate does not apply to recreational cannabis use.

6. Does the duty to accommodate cannabis use for a medical purpose still apply if the employee is in a safety-sensitive job?

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.

However, in these situations an employer must first try to reduce risks, and may need to change some job duties or offer alternative work to accommodate someone who uses cannabis for a medical purpose related to a disability.

Someone with a cannabis addiction might need an employee assistance program (EAP), time off to attend a rehabilitation program or have access to other job-related supports.

7. Do people have to show medical authorization for cannabis use or disclose the nature of their disability?

The person seeking accommodation 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.

An organization 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 or other duties might be necessary for accommodation in some situations, particularly in safety-sensitive environments.

Medical or other information might also be necessary to support accommodation needs when cannabis use negatively affects people with other disabilities.

Everyone is expected to cooperate in the accommodation process.

8. What if an employee is unable to ask for accommodation?

Some employees may be reluctant or unable to recognize or disclose that they have disability-related accommodation needs.

Employers have a duty to inquire where an employee is clearly unwell and is known to have, or perceived to have, disability needs related to cannabis use for a medical purpose or cannabis addiction. However, an organization might not be expected to accommodate a disability-related need if the person does not participate in the accommodation process.

9. Can an employer insist on a drug test for cannabis in safety-sensitive positions?

It depends. An employee drug-testing program might be justified for safety-sensitive positions in some circumstances. Drug tests typically screen for cannabis.

Drug testing has particular human rights implications and must be designed in a way that makes sure testing does not discriminate against people who use cannabis for a medical purpose related to a disability, or who have, or are perceived to have, a cannabis-related addiction disability.

Employers can drug test for cause, for post-incident or post-reinstatement situations. Random testing might be permissible under the *Code* if employees are in safety-sensitive positions, staff supervision is minimal or non-existent, and there is evidence of risk in the particular workplace such as a general problem with substance abuse.

The technique used to test for drugs must be highly accurate, able to measure impairment at the time of the test, minimally intrusive and provide rapid results. It is more difficult to measure impairment through drug testing. To date, the scientific research has not confirmed that a method of drug testing exists that is analogous to the alcohol breathalyzer in meeting this criteria.

Employers have a duty to accommodate the needs of people with disabilities who test positive for drugs, to the point of undue hardship. See the OHRC's *Policy on drug and alcohol testing* for more information.

10. Can an employee be fired for using cannabis at work, failing a drug test, or refusing to ask for help?

Employers should offer assistance and accommodation before imposing consequences when an employee is unable to do the essential duties of their job, they come to work impaired, or they fail a drug test, due to cannabis use for a medical purpose related to a disability, or due to cannabis addiction.

Workplace policies that automatically discipline people for not coming forward and disclosing cannabis use for a medical purpose or cannabis addiction may be discriminatory.

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 and to ask for disability-related accommodation before harmful incidents happen.

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.

11. Can residents smoke cannabis in their apartment or condo unit?

Generally yes. People can smoke, vape or consume edible cannabis in their residential units and balcony or terrace either for medical or recreational purposes, except where laws or rules prohibit smoking or vaping cannabis and tobacco for public health reasons. Ontario prohibits smoking or vaping cannabis for either purpose in common areas of apartment and condo buildings.³

Residents can consume edible cannabis for a medical purpose related to a disability anywhere on the premises of their residential building.

12. What happens if cannabis smoke from other units affects people with disabilities like asthma?

Smoke or vapour from cannabis used for medical or recreational purposes might negatively affect other building residents, including people with chemical sensitivities and other disabilities

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 disability, as well as of other people with disabilities who are affected by cannabis smoke or vapour, unless it would cause undue hardship.

All parties have an obligation to cooperate in the process of finding solutions.

13. Can a landlord or condo board ban smoking in residential units, balconies and terraces?

Yes. There are no laws against banning cannabis smoking or vaping in units, balconies or terraces.

However, a housing provider would still have a duty to accommodate a person who smokes or vapes cannabis for a medical purpose related to a disability, unless it would cause undue hardship.

A rule that permits residents to smoke or vape tobacco in their units and balconies but prohibits cannabis use for a medical purpose related to a disability might violate the *Code*.

14. Can people who live in a retirement or long-term care home or psychiatric facility smoke or vape cannabis for a medical purpose in their units?

No. People living in these types of residential institutions cannot smoke or vape medical or recreational cannabis in their units.

Ontario allows, but does not require, a separate common room for smoking or vaping cannabis or tobacco in these types of residential institutions.⁴ The room must be constructed and ventilated in accordance with government regulations.

Residents in these types of institutions can consume edible cannabis for a medical or recreational purpose anywhere on the premises.

15. Can people smoke or vape cannabis for a medical purpose while in hospital?

No. Ontario prohibits people from smoking or vaping cannabis for a medical or recreational purpose while in hospital. Patients might be able to consume edible cannabis under a doctor's orders.

16. Can people smoke, vape or use edible cannabis for a medical purpose in a hotel room?

Yes. Similar to tobacco, people can smoke or vape cannabis for a medical or recreational purpose but only in guest rooms designated by the hotel, motel or inn. The guest room must conform to any prescribed government regulations including the posting of signage. People can consume edible cannabis for a medical purpose related to a disability anywhere on the premises.

17. Can children and youth smoke, vape or consume cannabis for a medical purpose?

Yes, but only if a doctor authorizes cannabis use for a medical purpose for a child or youth in accordance with professional medical standards.⁵

18. Can students use cannabis for a medical purpose at school?

Ontario prohibits smoking or vaping cannabis for a medical or recreational purpose anywhere on school premises. Students can consume cannabis for a medical purpose related to a disability in edible form while at school.

19. Can people smoke or vape cannabis for a medical purpose in a restaurant, retail store, mall or other service centre?

No. Like tobacco, Ontario prohibits smoking or vaping cannabis for a medical or recreational purpose in enclosed public places like restaurants, retail stores, malls or other service centres.

People can carry cannabis and consume edible cannabis for a medical purpose related to a disability in enclosed public places.

20. Can people smoke cannabis for a medical purpose outside in public spaces like in a park or on a sidewalk?

Yes. People can use cannabis for a medical or recreational purpose in many outdoor public places, except where laws or rules prohibit smoking or vaping cannabis and tobacco for public health reasons.⁶

People can carry cannabis and consume edible cannabis for a medical purpose related to a disability in outdoor public places.

21. What can organizations do to effectively meet their obligations?

Organizations should review their existing policies and practices, or develop new ones, to make sure everyone understands their rights and obligations relating to cannabis use and the *Human Rights Code*.

Organizations should accept disability-related accommodation requests in good faith and act promptly.

¹ See the Ontario Government's online publication, Cannabis legislation:
www.ontario.ca/page/cannabis-legalization.

² *Ibid.*

³ There are specific restrictions and exceptions for residential care facilities. See, Cannabis legislation, *supra* note 1.

⁴ *Supra* note 1.

⁵ See College of Physicians and Surgeons of Ontario policy on Marijuana for Medical Purposes, online: www.cpso.on.ca/Policies-Publications/Policy/Marijuana-for-Medical-Purposes.

⁶ *Supra* note 1.