MEDICAL CANNABIS: WSIB AND BENEFITS CONSIDERATIONS

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With the legalization of recreational cannabis continuing to be a hot topic, many employers are reviewing their benefit plans and considering the interaction of medical cannabis with WSIB. To clarify WSIB entitlements to medical cannabis, the WSIB has recently released a policy, which is discussed below.

Further, in a decision released by the Human Rights Tribunal of Ontario (Tribunal), the Tribunal found that the denial of coverage for medical cannabis under the employer's benefits plan was not discriminatory. The decision, outlined in further detail below, will be of practical interest to municipal employers when considering their benefit plans.

WSIB Policy on Medical Cannabis

Effective March 1, 2019, the Workplace Safety and Insurance Board (WSIB) has issued Policy 17-01-10 Cannabis for Medical Purposes (the Policy). Prior to the release of this Policy, there was not a specific policy addressing cannabis and entitlement was determined on a case-by-case basis.

To receive entitlement to medical cannabis under the new Policy, a worker must have one of five conditions. The person's condition must also be clinically associated with a work-related injury/illness or the treatment of a work-related injury/illness. The five work-related conditions set out in the Policy are:

- neuropathic pain;
- pain and other symptoms in palliative care;
- spasticity resulting from a spinal cord injury;
- chemotherapy-induced nausea and vomiting;
- loss of appetite associated with HIV or AIDS.

Before the WSIB will consider entitlement to medical cannabis for one of these five conditions, there are a number of elements that must be satisfied:

- the person must first exhaust appropriate conventional treatments for the work-related condition;
- the treating health care professional must complete a clinical assessment of the person;
- the worker must have a valid medical document or a written order and must comply with the dosing and route of administration criteria in the Policy;
- the potential therapeutic benefits must outweigh the risk of harm to the worker.

The Policy also sets out limits on dosing and administration and addresses the source of the medical cannabis. Regular monitoring and follow up is also outlined in the Policy.

Overall, the new Policy provides municipal employers with clarity and sets out a detailed framework for adjudicators.

Rivard v Essex (County)

In *Rivard v Essex (County)*, the applicant, a dependent of an employee of the Corporation of the County of Essex (the Employer), was authorized to obtain medical cannabis by a health professional and sought reimbursement for the cost of this treatment through the Employer's health and benefits plan (the Plan).

Medical cannabis does not have a Drug Identification Number (DIN) and the Plan, administered by Green Shield Canada Inc. (the Administrator), limited reimbursements to treatments with a DIN. As a result, the Administrator denied the applicant's reimbursement request.

Although the applicant alleged that the denial constituted discrimination in the provision of services by the Administrator on the basis of her disability, the Tribunal found that the Administrator did not act in a discriminatory manner when it denied the applicant's coverage request in this particular case. It was determined that the Administrator was administering the Plan pursuant to its terms.

The Employer submitted that the applicant's claim was denied solely on the basis of the fact that medical cannabis does not have a DIN, and that restriction was not related to the applicant's disability. The Tribunal held that the applicant had not provided sufficient evidence indicating that the decision to deny coverage for medical cannabis was connected to her disability. In addition, the Tribunal noted that the existence of benefit plans that do cover medical cannabis does not establish a connection between an applicant's disability and the decision to deny coverage in individual cases.

The claim against both the Employer and the Administrator was dismissed, as the application had no reasonable prospect of success.

Considerations for Municipal Employers

This decision should provide some comfort and clarity to employers in Ontario that valid exclusions in benefits plans can continue to apply to medical cannabis.

Jessica Toldo and Amanda Cohen specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Jessica at 416-864-7529 or Amanda at 416-864-7316. They may also be reached by email at: jessica-toldo@hicksmorley.com and amanda-cohen@hicksmorley.com.

END OF THE BILL 148 ERA – WHAT'S CHANGED?

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On November 21, 2018 the government passed Bill 47, *Making Ontario Open for Business Act, 2018*. This legislation undid many key changes implemented a year earlier with Bill 148. The range of changes to the *Employment Standards Act* and the *Labour Relations Act* have significant impacts on municipalities and other employers.

Changes to the *Employment Standards Act*
As noted above, Bill 47 repealed a number of changes introduced to the *Employment Standards Act* (ESA) last year.

The most highly publicized reversion was to the minimum wage increases. The increase to $15.00 scheduled for January 1, 2019 was cancelled. The minimum wage will now remain at $14.00 through 2019 and will be tethered to the consumer price index moving forward. The next scheduled adjustment should occur on October 1, 2020.

Bill 47 also repealed the expanded equal pay for equal work provisions relating to employment status. Bill 148 prohibited an employer from paying different rates to part-time, casual or temporary employees where the employee was doing substantially the same job as their full-time counterpart. This requirement has now been removed, although the ESA will continue to require equal pay for equal work between genders.

Bill 47 proposes an entirely new structure to personal emergency leave days. The eight unpaid and two paid days have been repealed and replaced by three new leaves, all of which are unpaid. Employees employed for two consecutive weeks are now entitled to: three sick days, three family responsibility days and two bereavement leave days.

All of these leaves renew on a yearly basis. That means that employees receive two bereavement leaves *per year* (not per death). Further under Bill 47, where an employee has a contractual entitlement to a paid sick leave and takes a sick day under their contact, they will be deemed to have used one of their statutory sick days as well. This prevents the stacking of the statutory entitlement onto existing contractual entitlements.

The scheduling provisions pegged to come into force on January 1, 2019 were also cancelled. The only remaining change is the modified three hour rule. This applies where an employee who "regularly works" more than three hours a day is "required" to present themselves at work, but works less than three hours (despite being available to work longer). Under this rule, the employee is to be paid wages for three hours, based on the calculation set out in the legislation. This provision will not be triggered where employees do not "regularly work" more than three hours or where they are not "required" to attend work (e.g. overtime). It also does not apply where the employer is unable to provide work due to causes beyond their control (e.g. fire, lightening).

Despite all these changes there are some provisions that will remain in effect. The new vacation entitlements and the other leaves of absence (including the paid domestic and sexual violence leave days) introduced with Bill 148 continue to be enforced.

Changes to the *Labour Relations Act*
Bill 47 has also repealed a number of changes to the *Labour Relations Act* (LRA).

Trade unions will no longer be permitted to request employee lists where 20% support of the proposed bargaining unit is established. Where trade unions have already received employee lists under the current provisions they are required to immediately destroy them. Bill 47 also removes the requirement for remedial certification where the Board finds that an employer has contravened the LRA. Further, the provisions giving the Board broad authority to consolidate bargaining units will also be removed. The Board will now have a more general review power. Finally, Bill 47 repeals the provisions for card based certifications in specific industries.

Case Law Insight – The After-Effects of Bill 148
The recent decision in *Huron Superior Catholic District School Board v CUPE, Local 4148* has provided some insight on the potential after-effects of Bill 148.

The grievance involved signed, but not yet implemented, Minutes of Settlement (Minutes). The Minutes provided for significant wage increases for non-full-time caretakers to ensure that the School Board was in compliance with the equal pay for equal work provisions in Bill 148. The Minutes outlined that the increase was specifically provided "in accordance with the requirements of the *Employment Standards Act, 2000*" (ESA).

At arbitration the Board argued that since the relevant provisions of the ESA had been repealed, the statutory requirements for this increase no longer existed. Although the Arbitrator agreed that no wage adjustment was required to comply with the ESA post-January 1, 2019, she rejected the Board's argument that the wage rates should revert to the lower rates set out in the collective agreement. She found that there was nothing in the minutes that suggested this intention. Further she noted that:

> […] [p]aragraph 2 of the MOS states that the Board will "adjust the rate" of these caretakers effective specific dates in 2018. In agreeing to "adjust [their] rates", the MOS altered the operation of the collective agreement with respect to the wage rate of these employees. Accordingly, their rate of pay as of December 21, 2018 was $23.00 per hour.
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> Bill 47 does not provide any authorization for an employer to rescind any wage adjustments made in 2018 to comply with Bill 148. The legal requirements of the ESA with respect to the period in 2018 when Bill 148 was in effect continue.

In the wake of this decision, employers who have contractually agreed to specific altered wage rates or personal emergency leave entitlements in response to Bill 148 will have to carefully consider whether such increases should disappear with the passing of Bill 47. It is unclear how this decision will be applied to employers who modified their practice to ensure compliance with Bill 148 without any contractual amendment.

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