

Cannabis Coverage

Benefits plans and medical cannabis — to cover or not to cover

By **Sukhvinder Dulay**



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(June 5, 2019, 11:32 AM EDT) -- Since Oct. 17, 2018, the date that the use of recreational cannabis was legalized across Canada, employers have been turning to their legal counsel to update workplace policies addressing safety, impairment and accommodation issues. With cannabis use garnering widespread attention for the last year, employers are also grappling with a question that is arising with greater frequency: will cannabis use for therapeutic purposes or “medical cannabis” be covered under the employer-provided health and benefit plan?

In response, employers and their counsel need to be aware of the changing landscape of benefits coverage related to cannabis (and its derivatives). Helpfully, the Ontario Human Rights Tribunal has recently reconfirmed that human rights legislation does not require every possible treatment to be covered by a health and benefits plan, including medical cannabis (*Rivard v. Essex (County)*, 2018 HRTO 1535).

More broadly, since there is no statutory or common law requirement for employers to provide benefits coverage, there can be legitimate reasons to exclude coverage for medical cannabis specifically from a health and benefits plan (on the basis of cost, for example).

Before an employer starts to weigh whether or not new or additional coverage for medical cannabis is desirable, however, the first step is to review whether the current health and benefits plans provide reimbursement for cannabis products used for therapeutic or medical purposes.

Identifying existing terms

When considering what an existing benefits plan has to offer, the first step is to ensure that the complete set of terms and conditions is located.

Most human resources professionals are aware that the terms of their health and benefits plan can be located in an official policy and the accompanying employee booklet or brochure. However, additional coverage obligations can arise out of other documents and communications related to the employment relationship.

A common source of such obligations is a collective agreement, but benefit coverage obligations can also be found in employment contracts or employee communications, including verbal representations made to employees.

These additional terms are often not reflected in the employee-facing description of the

benefits plan, particularly if the employee benefits booklet or brochure is an “off-the-shelf” product created by an insurer or consultant. As a result, if you are assisting an employer in the review of an existing benefits plan, it is important to review any relevant employment or collective agreements.

Analyzing benefit plan

Once all the relevant terms are identified, they need to be examined to see if the use of medical cannabis is included or excluded. Since the source of the obligation to provide benefits to employees will be unique to each workplace, this review process will not be the same for each employer. Nevertheless, there are common terms that arise in many benefit plans that can be flagged for review.

Definitions — drugs, prescriptions, over-the-counter coverage

The most common criteria for reimbursement under a benefit plan is that the claimed drug or treatment possess a Drug Identification Number (DIN) issued by Health Canada. Cannabis does not have a DIN and is often excluded from coverage on this basis alone. In addition, if a benefit plan contains further criteria for reimbursement related to the medical necessity of a treatment, the absence of a DIN can be a relevant consideration weighing in favour of exclusion.

Coverage (or restrictions on coverage) can also be tied to whether a treatment is obtained by prescription. Medical cannabis is not obtained by prescription. Rather, pursuant to Health Canada’s existing access to cannabis for medical purposes regime (now incorporated, with modifications, into the federal *Cannabis Regulations*), medical cannabis is obtained by individuals through a medical document. This medical document contains prescribed information similar to that contained in a prescription but is more often referred to as an “authorization.”

“Authorizations” are not often explicitly addressed in benefit plans, and as a result, a medical document may or may not be captured by a benefits plan’s definition of “prescription.”

An additional factor that may be relevant, depending on the terms of the plan and the treatment at issue, is that certain cannabis products, particularly products that: (i) make health claims; and (ii) contain a phytocannabinoid, have been listed on Health Canada’s Prescription Drug List since Oct. 17, 2018.

Similarly, special consideration should be paid to how “over-the-counter” treatments are covered under existing benefit plans. It is reasonable to think about the legalization of recreational cannabis as similar to other medical treatments becoming available as over-the-counter products. As a result, if over-the-counter treatments remain broadly covered under a benefits plan, it is possible that such coverage could encompass recreational or medical cannabis, including the tools used to consume or grow it.

However, it is also important to note that not all forms of cannabis are available legally for purchase. For example, the sale of edible cannabis products is not yet legal in Canada, although further changes in relation to edibles are expected later this year.

Listed treatments

In addition to looking at the general categories of coverage in a benefit plan, specific sections that explicitly list excluded and included treatments should be carefully examined. For employers who do not want to leave any question about whether reimbursement for medical cannabis is covered, cannabis (and products from its derivatives, including the cannabinoids THC and CBD) can be added to a list of included or excluded treatments, as

desired.

Since the terms of the benefit plan could be subject to the terms of a collective agreement or written employment contract, caution should be exercised when advising employers regarding their ability to unilaterally amend the benefits plan. This remains true regardless of whether the change is driven by the employer or their insurer/plan administrator.

Next steps — evolving coverage options

Following the review of an existing benefit plan, if an employer wishes to offer coverage for medical cannabis to respond to employee requests or as a marketing/recruitment tool, this coverage is increasingly available in the insurance marketplace and can be incorporated into existing insured plans or accommodated under an employer-funded plan.

With respect to the insurance market, it should be noted that the currently available options typically limit coverage through the use of relatively modest annual caps on reimbursement and/or by limiting reimbursement to the treatment of a limited set of conditions.

These coverage restrictions may change as the legalization of recreational cannabis provides more opportunities to study the effectiveness of cannabis to treat medical conditions and insurers gain more data about how coverage is utilized. The fact that cannabis can be a relatively costly treatment when compared to existing, more widely recognized treatments, however, should also not be discounted.

While the cost considerations would remain, greater flexibility in designing coverage for medical cannabis is available to employers who sponsor self-funded, administrative services only arrangements or who provide health-care spending accounts. Medical cannabis coverage can be provided under these plans without risking their tax effectiveness, as the Canada Revenue Agency has recognized medical cannabis as an eligible medical expense under Canada's *Income Tax Act*.

If you are assisting an employer with a review of how cannabis impacts their workplace, it is important to flag that the landscape for providing benefits coverage for medical cannabis is evolving as well.

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