

Testing for cannabis in the workplace: Is zero tolerance justifiable?

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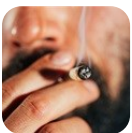
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Following the [Constitutional Court's *Prince* judgment](#), cannabis use, possession and cultivation in South Africa has been decriminalised with adult persons now permitted to use, possess and cultivate cannabis in a private place for personal consumption. Given that *Prince* does not deal with the effects of the decriminalisation of cannabis in the workplace, many unanswered employment related questions emerge which we set out below.



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What can be said at this stage is that *Prince* does not affect an employer's obligation to maintain a safe working environment for all of its employees, which includes prohibiting employees who are "intoxicated" from entering the workplace, and policies and testing applicable to alcohol use in the workplace are not likely to be appropriate in dealing with cannabis use.



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Cannabis in the workplace

In terms of *Prince*, the use, possession and/or cultivation of cannabis by adults is permitted "in private". Although cannabis use, possession and cultivation is not confined to one's "home" or a "private dwelling", it is likely to be difficult for an employee to argue that the workplace is a "private" space, especially given that the use of cannabis in public or in the presence of non-consenting adult persons is not permitted.

The more difficult issue is where employees use cannabis in private, outside of the workplace, and thereafter report for duty. Cannabis can affect an employee's occupational capacity in various ways, including performing tasks more slowly, performing poorly when handling routine, monotonous tasks, difficulty in multi-tasking, difficulty in taking instructions from

superiors, difficulty in making crucial decisions (especially in high risk situations), difficulty in operating machinery and/or motor vehicles. It is these consequences that an employer will have to consider when the employee reports for work and test positive for cannabis use.

The above scenario may not seem very different to employees using alcohol in private and then reporting for work. The difference, however, between alcohol and cannabis in relation to workplace policy is that for as long as alcohol is detected in the human body, it results in impairment; cannabis may be detected in the human body for months after use, which at that time may no longer cause impairment.



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Testing of employees for cannabis

Medical testing of employees remains regulated by section 7 of the Employment Equity Act (EEA). Medical testing of employees is permitted if it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job. An employer who wishes to test an employee for cannabis may be able to justify such testing relying on the provisions of the EEA. A number of tests (some of which are not available in South Africa at present) are used to test for cannabis: breath, blood, oral fluid (saliva), urine, sweat and hair.

Saliva tests will show cannabis use in the past 24 hours (which could be an indication that the employee is still impaired) but hair testing will show cannabis use for up to months after use (which could mean that the employee is no longer impaired). It will not necessarily be the actual testing that will be problematic, but what one does with the test results.



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Workplace policies and procedures

Most employers enforce a zero tolerance approach to the use of any drugs and/or alcohol in the workplace. Prior to *Prince*, it was relatively easy to deal with cannabis at work as cannabis use, possession and cultivation was a criminal offence. Following *Prince*, and given that traces of cannabis may remain in the body for months after use (which does not automatically result in impairment) employers may need to regulate cannabis as a separate issue and by implication through a separate policy and procedure. Zero tolerance policies may not be justifiable.

Employers and their occupational medical practitioners should consider the safety requirements at the workplace and determine whether a zero tolerance approach is justifiable or whether there is an acceptable limit of cannabis trace after some time of use. This may include conducting a screening test (such as a saliva test) that will show immediate past use and then conducting further tests to establish the level of impairment.

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