



**Cannabis is coming  
to the workplace.  
Are you ready?**

Travel implications of  
cannabis legalization



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This year, recreational cannabis is set to become legal in Canada. In the US, however, the *Controlled Substance Act (CSA)*, in conjunction with the *Immigration and Nationality Act*, classifies cannabis as a Schedule 1 narcotic – making its use, sale and distribution illegal, and potentially making your key employees inadmissible to the US.



Globalization has resulted in a world that is vastly interconnected. International borders are crossed thousands of times a day by business travellers and key employees of organizations to conduct business in multiple countries. The implications of not understanding the disparities between impending cannabis legalization in Canada and existing rules in other countries, such as the US, brings complexities around the sale, use, possession or distribution of cannabis, and may impact your employees' ability to travel where cannabis is federally illegal and, ultimately, can impact your business operations.

So, what should you know?

## Canada, the US and the laws on cannabis

On 28 November 2017, the Government of Canada introduced the Cannabis Act (previously Bill C-45), to allow for the sale, possession, distribution and consumption of adult-use recreational cannabis across the country. Bill C-46 will similarly amend Canada's Criminal Code provisions related to cannabis legalization and sets out disciplinary procedures related to drug-impaired driving and set limits for blood concentration. Having received Royal Assent on 21 June 2018, both Acts will be in full effect on 17 October 2018.

The new laws will allow adults over the age of 18 or 19, depending on the province or territory, to legally purchase, possess and share, up to 30 grams of cannabis with other adults, and cultivate up to four cannabis plants per household for personal use. The new legislation will also create a new license category for the export of cannabis for medical and scientific purposes.

The US Government has the overarching constitutional authority over the use, sale, distribution and consumption of cannabis. That being said, in the US, nine states – including Colorado, Washington, Nevada and California – and the District of Columbia have passed legislation legalizing cannabis for recreational purposes. In total, 30 states allow the use of some form of cannabis for medical purposes.

On 4 January 2018, the Trump Administration ended Obama-era policies (albeit informal) that would not subject individuals conducting state-legal cannabis activities to federal prosecution so long as these activities did not conflict with then federal objectives as preventing illegal trafficking and non-compliant sales practices to youth. This became an impetus for states to re-evaluate their cannabis laws and for additional states to legalize cannabis (both medically and recreationally). Cannabis once again is in the political, economic and social spotlight. Further, despite the fact that the Food and Drug Administration recently approved its first phytocannabinoid-derived

pharmaceutical product, cannabis is classified as a Schedule I substance in the US and thus is still *federally illegal*.

As immigration and nationality law remain under federal jurisdiction in the US, the laws surrounding admission relating to use are as follows:

*“An alien is inadmissible if he or she is convicted or admits to having committed a violation of any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in... the Controlled Substance Act).”<sup>1</sup>*

In other words, the simple admission to a US immigration official that a person has at some point in time consumed cannabis could very well render that person inadmissible into the US. In addition, the fact that cannabis will be legal in Canada later this autumn does not mean that past convictions in Canada will be expunged.

## Requests for admission to the US

There are various methods of seeking entry into the US, including border crossings at ports of entry, pre-flight inspection at the outbound airport and inspection at the inbound US airport. The overall review and assessment process to determine admissibility by the inspecting officer is the same no matter the method or point of entry.

<sup>1</sup> INA 212(a)(2)(A)(i)(II).

As noted above, the question to be considered by admitting inspectors is: has the individual seeking admission into the US violated laws or regulations of the US, a US state or a foreign country with respect to a controlled substance?

## Trusted traveller programs

The US has set up various programs for what they deem to be trusted travellers, including ESTA (for nationals of over 35 countries), NEXUS and Global Entry, among others. However, when individuals seek entry into the US through programs such as visa waiver programs or programs to facilitate quick mobility, such as NEXUS, they are required to attest that they are compliant with all laws when seeking admission. Further, the programs allow for random inspections, and findings of any cause for inadmissibility can result in bars from the programs and, potentially, render the individual inadmissible to the US.

## US border officers and cannabis-related questioning

In our experience, anything presented in the public space (e.g., attire, visibly present tattoos, social media) may be used by an inspecting officer to review and question an individual's admissibility to the US. To this end, immigration inspectors have wide discretion and authority to raise questions about an individual's past as it relates to criminal or other grounds of inadmissibility.

Moreover, US and Canadian law enforcement authorities (including immigration agencies) share high-level information of citizens' convictions and arrests. Having a previous conviction might lead to additional questions regarding drug use, for example.

It's also important to note that an individual's social media activity or mention of the individual's association to the cannabis industry in a news article, press release or website could be a basis for a finding that an individual has previously consumed cannabis or is or has been involved/employed in the cannabis industry, thus rendering them inadmissible. Imagine a situation where an individual posts a photo of themselves consuming or promoting cannabis after its legalization in Canada. US immigration authorities are using these tools to review and determine the suitability of non-immigrants' admission to the US.

Recent news reports have highlighted these issues for foreign nationals working in either the cannabis industry or ancillary industries. In these reports, there have been instances where individuals who are even remotely related to the soon-to-be legal cannabis sector have been permanently barred from admission to the US.<sup>2</sup>

## Employees denied admission to the US following cannabis-related questioning

A finding of inadmissibility to the US can result in more than just a denial of entry and a temporary bar. The findings by US immigration officials can result in detention, permanent lifetime bans, fines and even imprisonment, depending on the extent of the infraction. The upcoming legalization of adult-use recreational cannabis in Canada is expected to make cannabis consumption and involvement with the industry a more common line of inquiry for US Customs and Border Protection officers.

Having an employee detained by US authorities can have serious ramifications if the situation is not properly addressed and actioned. First, the employee is seeking admission for the purposes and under the direction of your organization. Second, the employee's specific business responsibilities in the US may now be delayed. Reports show that detention for questioning can sometimes exceed six hours, and detention doesn't always lead to admission if the person is deemed to be inadmissible. An organization's reputational or liability risks ("my manager knew about my marijuana use!") could be potentially quite serious.

Being found inadmissible to the US is not an easy hurdle to overcome when an immigration officer hands the employee their written findings. Once that determination has been made, the individual must obtain advance permission to enter the US by making an application for waiver of their inadmissibility. However, this is neither timely to receive nor cheap, as they require legal counsel to properly prepare and advise on the matter.

Overcoming criminal inadmissibility is not simple or clear, nor is it a permanent solution. Waivers take time to prepare, and once submitted for review they're at the full discretion of immigration authorities to be adjudicated. An approval of a waiver of inadmissibility can take 8 to 12 months (or longer) and can only be issued for a maximum duration of five years.

Even so, authorities may decide to issue them in one-year increments, requiring a continual reapplication process.

## Prepare for cannabis legalization through precautionary policies and measures

We recommend that our clients review and communicate their policies on alcohol and drug use – including use of cannabis for medical and non-medical purposes – and provide guidance for employees who frequently travel to the US for business purposes.

At EY our team of experienced professionals includes US immigration attorneys and Canadian employment and labor lawyers who can provide 360-degree review of and advice on your current policies and proposed business undertakings.

Depending on your business needs, it's important to ask some better questions of your advisors:

- ▶ Do discrepancies between the US and Canadian federal laws related to the legality of cannabis, and following a review of your current policies, necessitate a separate employment and travel policy on non-medical use of cannabis?
- ▶ How similar or different does a policy regarding cannabis use while traveling for business purposes need to be compared to existing policies that relate to alcohol use?
- ▶ Should there be additional policies and guidance for key employees who are frequent business travellers?
- ▶ Are these policies compliant with appropriate employment and labor laws?
- ▶ What culture do you want to instill at your organization with these policies, and what are the organizational values you want to promote?
- ▶ Are HR, mobility, and supervisory personnel in your organization trained, ready and comfortable with clearly communicating to your workforce on these matters and handling questions from your employees? How will modifications or additions to current policy be communicated to your employees?
- ▶ Is there an accessible source of support, guidance and education for employees for further information, and can this be handled with discretion and privacy?

<sup>2</sup> Lupick, Travis, "U.S. reportedly issuing lifetime travel bans for anyone even remotely connected to Canada's legal cannabis industry." *The Georgia Straight*. Vancouver Free Press, 10 July 2018. Web. 11 July 2018.

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EY Law LLP is a Canadian law firm, affiliated with Ernst & Young LLP in Canada, offering comprehensive business immigration services, business law services and tax law services. Contact our team of legal professions to provide multidisciplinary, integrated and comprehensive legal advisory and services surrounding cross-border travel as impacted by cannabis legalization.



**Alex Israel**

Partner

+1 416 943 2698

[alex.d.israel@ca.ey.com](mailto:alex.d.israel@ca.ey.com)



**Shali M. Peiris**

Attorney

+1 416 943 2999

[shali.m.peiris@ca.ey.com](mailto:shali.m.peiris@ca.ey.com)

