

Travellers to U.S. could face greater scrutiny as of Oct. 17

Canadians linked to cannabis could face lifetime ban: Lawyers

BY MARCEL VANDER WIER

CANADIAN business travellers may face intensified examination procedures at the United States border following the legalization of recreational cannabis on Oct. 17, according to lawyers.

And Canadians connected to the fledgling cannabis industry, or those who have used the drug prior to legalization, may be barred for life from entering the U.S.

In British Columbia, there have already been incidents in which workers connected to the cannabis industry were handed lifetime bans when attempting to cross the border into America, according to the *Toronto Star*.

It's expected to become an even bigger issue following official legalization later this month, said Len Saunders, an immigration lawyer based in Blaine, Wash.

"Guess what's going to happen on Oct. 17? It is going to be a tidal wave of cases," he said.

While using cannabis following legalization will not in itself result in a lifetime ban, it could be the basis for a border agent to press a traveller on her past history with the drug — which could result in a ban if it was consumed while it was still an illegal substance, said Saunders.

If cannabis is found on the traveller's person or vehicle, it will be seized and a punitive fine and lifetime ban could be assessed due to violations of controlled substance law, he said.

Companies involved in cannabis may even need to cease travel to the U.S., or find employees with dual citizenship, as they face much lesser penalties, according to Saunders.

"I'm telling HR departments 'Be careful,'" he said. "Because I think it's a liability issue... it's not the companies that get barred for life, it's the employees."

Lack of guidance

To date, neither the U.S. or Canadian government have issued directives on this issue, said Saunders.

"Up to this point, it hasn't changed," he said. "It's business as usual at the border. There's been no change in individuals being deemed inadmissible to the United States over marijuana."

In September, Prime Minister Justin Trudeau warned Canadians that consuming cannabis could have consequences in terms of travel to the U.S., noting the government is working with American officials to ensure that border crossings do not become a problem as a result of the change.

"I certainly won't work to assume or impress upon the U.S. who they have to let in or not," he said on CBC Manitoba.

"They have legalized marijuana in a number of their states and we're trying to make sure that travel between our two countries is not disrupted."

A travel directive on the Canadian government's website states: "Previous use of cannabis, or any substance prohibited by U.S. federal laws, could mean that you are denied entry to the U.S. Involvement in the legal cannabis industry in Canada could also result in your being denied entry."

The government also warns against travelling to the U.S. with cannabis, as legal prosecution, fines or jail time could result.

In March, U.S. border ports from Washington to Minnesota were instructed to tighten up on anyone directly or indirectly involved with the cannabis industry, said Saunders.

"They're either inadmissible under aiding and abetting the U.S. drug industry, or reason to believe they're

involved with drugs, or living off the avails," he said.

"There are three separate sections of the Immigration and Nationality Act."

Due to a lack of federal guidance, the instructions came from a local field office in Seattle — not U.S. Customs and Border Protection (CBP) headquarters in Washington, D.C., said Saunders.

"What they've done is they've overreached with the memo and applied it very, very broadly."

That lack of national policy has allowed each port to determine interpretation, said Henry Chang, partner at BlaneyMcMurtry in Toronto.

"That leaves each individual port free to make up the rules as they go along," he said. "And we're seeing a great difference between ports right now. West coast ports, especially in the Vancouver area, are a problem."

American borders are governed by federal law, which supersedes state law, said Jason Givens, a CBP public affairs specialist covering the area of Minnesota, Montana, North Dakota, South Dakota and Washington.

"Although medical and recreational marijuana may be legal in some U.S. states and Canada, the sale, possession, production and distribution of marijuana, or the facilitation of the aforementioned, remain illegal under U.S. federal law," he said.

"CBP's enforcement of the law will remain unchanged. Consequently, crossing the border or arriving at a U.S. port of entry in violation of this law may result in denied admission, seizure, fines and apprehension."

Admissibility determinations can be made by individual CBP officers, said Givens.

Legalization of recreational cannabis in Canada could resultingly

have a dramatic effect on business travel, said Lloyd Ament, an immigration lawyer at Devry Smith Frank in Toronto.

"CBP American officers have a wide latitude of what they can ask and do, and there's not that much control over them," he said.

"You really have to be extremely careful."

"We prefer to advise our clients to be cautious, prudent and careful. The American border is fraught with all kinds of uncertainties now — way beyond just cannabis — and this adds another wrinkle."

Since discretion could vary between officers, it's impossible to predict, said Ament.

"We have to assume that it's zero tolerance," he said. "At this point, it's an unknown, uncertain area where... it's 'Border crosser beware — you have no rights, no guarantees.'"

"The border officers have tremendous power, tremendous discretion, so all we're telling everybody is 'You've been forewarned. Don't assume that you can get away with anything.'"

It's unlikely this issue is on the Canadian government's agenda, especially with NAFTA renegotiations underway, he said.

"I can't see this as being any much of a political advantage for them to push this at all."

Canadians who have consumed cannabis post-legalization are generally protected, but those who have used the drug prior to Oct. 17 could face penalties for criminal activity, according to Chang.

"Anything that you did prior to legalization was a criminal act, and you are under the criminal controlled substance possession ground," he said.

"They really shouldn't be going

on a fishing expedition, but I've seen it happen a lot of times where they'll say, 'Have you ever been convicted of an offence? Have you ever smoked marijuana?'"

Travellers who fit the typical image associated with cannabis usage will likely face random questions more often than well-dressed executives, said Chang.

"(Border officers) profile people. They're not supposed to, but it's human nature," he said.

"They're not supposed to change any of the questions just because of legalization, but the issue could come up."

Advice for HR, travellers

Employers that send workers across the U.S. border need to communicate this issue to staff, as Oct. 17 may simply be the start of an evolving issue, said Ament.

"With respect to the border, you're saying, 'Look, it's an uncer-

tain area now. While (cannabis) might be legal here, it's not there."

"We're telling you, 'You could be setting yourself up for problems and if you really want more detail or information, (you) probably should seek (your) own counsel.'"

HR could also advise travelling employees who have used cannabis in the past to refrain from using it post-legalization in order to avoid that line of questioning at the border, said Chang.

"People think — wrongly — that that just because it's legal here in Canada now, there's no problem anymore. That's just a total myth."

HR should also remind employees that travelling with cannabis and consuming it in legal states while on business are violations of federal law, he said.

"Just because it's legal under state law doesn't mean it's legal for you as a foreign national to smoke marijuana in the U.S.," said Chang.

"You're still violating federal law and that's enough to give you a lifetime ban for being a controlled substance user."

If questioned on the subject of past usage, refusing to respond at the border may be the best way forward for Canadians, he said.

"If you know that answering will make you barred and lying will make you barred, you don't really have a way to win on this," said Chang.

"It's a problem no matter how you deal with it."

"It'll come up every single time until you address the issue," he said.

"But at least you haven't made an admission; at least you can go consult with a lawyer and see if there's some way to negotiate with the port — not on the basis of the issue itself, but whether or not the question was appropriate."

The Canadian government may be required to clarify border rights

to workers — including refusal to respond, said Saunders.

"What you do recreationally in Canada or in the United States... is none of their business," he said.

"You could say nothing; nothing is better than telling them you're in the marijuana industry or you've smoked it. If you tell them that, you will receive a lifetime ban."

Appealing a lifetime travel ban from the U.S. border is not easily done, but is possible by applying for temporary waivers at an admissibility review office — though even that is becoming more difficult, said Chang.

"In the old days, they would be actually quite fair," he said.

"They'd look at it and they'd say, 'We agree, we don't think you're barred. We're going to issue a letter saying that.' But I think the current environment, they're more likely just to say, 'We think you're barred. Here's your waiver for one year.'"