Canadian Companies Should Educate Their Employees Prior to Marijuana Legalization

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I previously discussed the increased likelihood that Canadians (and other foreign nationals) will be denied entry to the United States once marijuana becomes legal in Canada on October 17, 2018. This is because many individuals still mistakenly believe that marijuana legalization will protect them from adverse U.S. immigration consequences.

In reality, marijuana legalization will offer only limited protection to Canadians (and other foreign nationals) who cross the border into the United States. However, it will give them a false sense of security and prompt many to volunteer potentially harmful information to United States Customs and Border Protection ("USCBP"), without realizing that it will earn them a lifetime ban from the United States.

Employees of Canadian cannabis companies in particular are at risk of being banned from the United States. Employees of such companies could be barred from the United States as controlled substance traffickers, solely because they work for a company that is engaged in a legal cannabis business in Canada.

With marijuana legalization less than ten days away, Canadian companies should consider educating their employees now. Doing so will reduce the risk that these employees will be barred from entering the United States after October 17, 2018.

Will Marijuana Legalization Offer Any Protection?

As mentioned above, marijuana legalization will offer some protection to Canadians (and other foreign nationals) but only on a limited basis. On October 17, 2018, the following will occur:

- Marijuana possession and use will no longer be a criminal offence in Canada, provided that these activities occur in compliance with the *Cannabis Act*[1]. Therefore, individuals who engage in such activities will no longer be charged with or convicted of a criminal offence.
- Admitting to marijuana possession or use in Canada, which took place *after* legalization, will not be considered an admission to a criminal offence.

As a result, marijuana possession or use occurring *after* legalization should not result in inadmissibility under INA §212(a)(2)(A)(i)(II), which states that individuals who have been convicted of, or who admit to having committed the essential elements of, a controlled substance offense are inadmissible.

Unfortunately, marijuana legalization will not eliminate the effect of any prior convictions for marijuana possession. It will also not prevent an individual who committed a marijuana-related offence prior to legalization from being barred even if it does not come to the attention of USCBP until after October 17, 2018. For example, an individual who smoked marijuana many years ago (but who was never charged) can still be barred from the United States if he admits to a USCBP officer after October 17, 2018, that he committed the offence.

Even possession or use of marijuana after legalization could still result in a bar under one of the following grounds:

- Under INA §212(a)(1)(A)(iii), an individual is inadmissible if they have been determined to have a physical or mental disorder and a history of behavior associated with the disorder that may pose (or has posed) a threat to the property, safety or welfare of themselves or others. They may also be barred if they previously had such a physical or mental disorder, which is likely to recur or lead to other harmful behavior. As alcoholism can result in a bar under this ground of inadmissibility, marijuana use could also result in a finding of inadmissibility, provided that associated harmful behavior also exists. For example, driving a vehicle while under the influence of marijuana could be considered evidence of associated harmful behavior.
- Under INA §212(a)(1)(A)(iv) a person is inadmissible if they are determined to be a drug abuser or drug addict. Harmful behavior is not a relevant factor in rendering a determination of ineligibility under this ground. There is also no requirement that the use of a particular controlled substance actually be illegal in the jurisdiction where it occurs. However, use of controlled substances for medical purposes is not considered substance abuse.

For the above grounds to apply, a USCBP officer will need to refer the individual to an approved Panel Physician, who will make a medical determination regarding whether that individual has a mental disorder (with associated harmful behavior) or is a drug abuser/addict. Despite the additional requirement of a medical determination, it is still possible for USCBP to bar an individual who uses marijuana after it has become legal, under either of the above grounds.

Increased Risks for Employees of Canadian Marijuana Companies

Employees of Canadian marijuana companies face additional risks when travelling to the United States. They could potentially receive lifetime bans under INA §212(a)(2)(C), the controlled substance trafficking ground. The media has reported that this has already occurred at some ports of entry. In at least one case, an investor in a Canadian cannabis company also received a lifetime ban.

Under INA §212(a)(2)(C), an individual is inadmissible if an immigration officer has “reason to believe” that they are or have been an illicit trafficker in a controlled substance (a knowing assister, abettor, conspirator, or colluder). Some USCBP officers have apparently taken the

position that mere employment with a legal cannabis business in Canada makes that individual an assister/abettor/conspirator/colluder in illicit controlled substance trafficking.

Although this appears to be an overly broad interpretation of INA §212(a)(2)(C), when Politico recently interviewed Todd Owen, Executive Assistant Commissioner for USCBP's Office of Field Operations, he also stated that working in the Canadian cannabis industry would be grounds for inadmissibility. In other words, there is a very real danger that employees of Canadian cannabis businesses could receive lifetime bans as controlled substance traffickers.

Recommended Strategies

In order to minimize the risk of employees being barred from the United States, Canadian employers should educate their workforce on the above issues prior to (or soon after) October 17, 2018. This can be achieved through a company-wide letter sent to all employees. If necessary, we can assist in the drafting of such a letter.

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[1] S.C. 2018, c. 16.