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EMPLOYMENT ALERT

IN THIS ISSUE

CLEARING THE CANNABIS CLOUDS OF DOUBT

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CLEARING THE CANNABIS CLOUDS OF DOUBT

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Most disciplinary codes already contain clauses either prohibiting an employee from testing positive for cannabis or being under the influence of cannabis. Note that the courts have found that there is in fact a distinction between the two in that, an employee may test positive for cannabis but not necessarily be under the influence.

Cannabis use is highly detectable and can be detected by urinalysis, hair analysis, as well as saliva tests for days or weeks. The most common, cheap, and fast urine test for cannabis actually detects a metabolic product that can linger for days – well after the user is no longer mentally affected, that is, “under the influence.”

Unlike alcohol, for which impairment can be reasonably measured using a breathalyser (and the degree of intoxication also confirmed with a blood alcohol content measurement), valid detection for cannabis is time-consuming and tests cannot determine an approximate degree of impairment. The lack of suitable tests and agreed-upon intoxication levels is an issue in the legality of cannabis debate, especially regarding intoxicated driving.

It often happens that a urine test indicates the presence of cannabis, however, the employee tells his boss he smoked cannabis days before. One of the options would be for the employer to send the sample to a lab for a spectrophotometric test, which takes around two days and may cost up to R2,000.

Another challenge with cannabis is that it has varying effects on people. Occasional users may be under the influence after using cannabis in small doses whilst seasoned users may not be under the influence after using the same amounts. This poses a problem in defining “under the influence” in a workplace policy, as is the case with alcohol.

The Occupational Health and Safety Act for example, creates obligations for employers to create a safe working environment. For jobs involving heavy machinery, the requirement is that an employee cannot be under the influence of any mind-altering substance; whether it is legal or illegal doesn't really come into play.

Michael Yeates was named the exclusive South African winner of the **ILO Client Choice Awards 2015 – 2016** in the category Employment and Benefits as well as in **2018** in the Immigration category.



CLEARING THE CANNABIS CLOUDS OF DOUBT

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The policy may be justifiable due to the inherent risks involved in such industries.




A solution for companies may be to impose a zero-tolerance policy. With the zero-tolerance policy the aim is not to prohibit being under the influence of cannabis but rather prohibits employees from testing positive for cannabis regardless of the amount of cannabis present in their system. The effect of this may of course be that it prohibits such employee from using cannabis at all, the constitutionality of which may be challenged.

It must be borne in mind that not all employers may adopt a zero-tolerance policy. A zero tolerance policy will have to be justified having regard to the nature of the employer's business. For example, chemical industries, the transport industry, industries which involve the operation of heavy machinery, may all justifiably adopt a zero-tolerance policy.

The policy may be justifiable due to the inherent risks involved in such industries. The possible effects of cannabis such as impaired concentration and body coordination will make operating in such industries dangerous, not only for other employees but for the public in general. However, it is reiterated that the mere use of cannabis may not necessarily impair an employee's ability to work and therein lies the constitutional challenge.

For more information on implementing of policies, listen to this [radio interview by Jose Jorge](#), a director in our Employment practice. To read more on the effects on possession and use in the workplace see this [article by Gavin Stansfield, Michael Yeates and Shane Johnson](#) in our Employment practice.

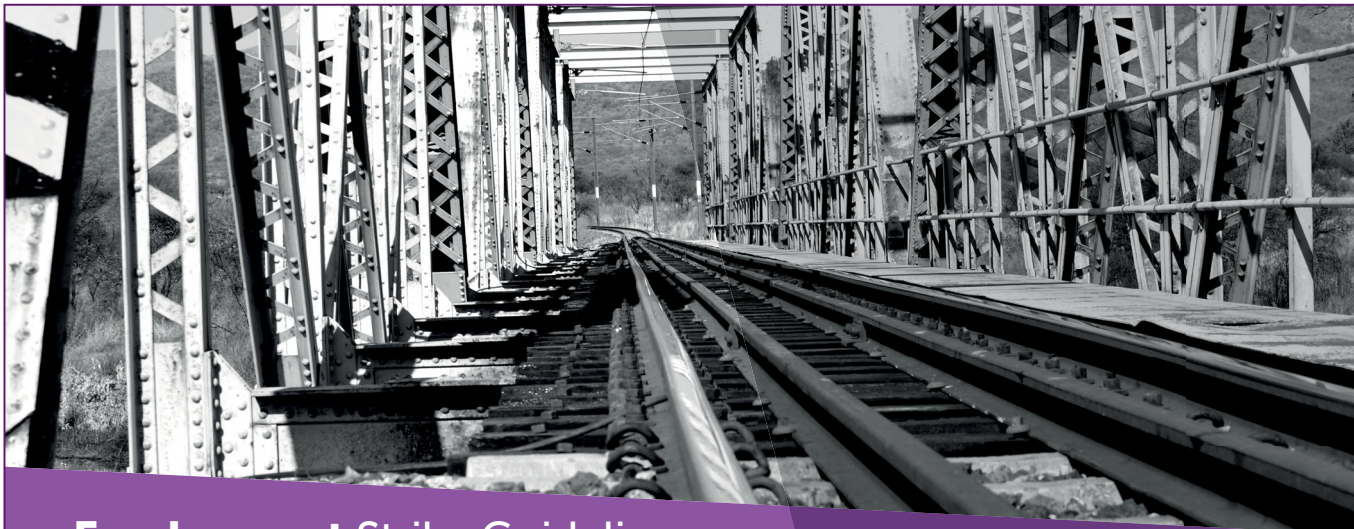
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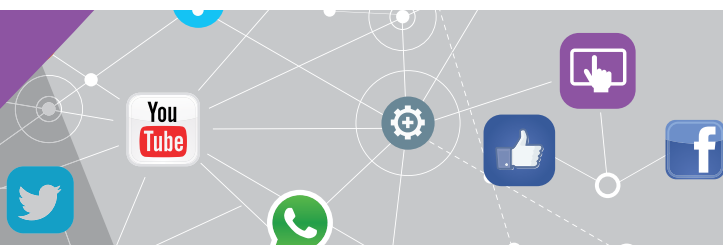
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