

# Medicinal cannabis



A guide for employers  
and employees



Te Puna  
Whakaiti Pāmamae  
Kai Whakapiri  
New Zealand  
Drug Foundation

DENTONS



The Southern Initiative  
Māori & Pasifika  
Trades Training

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# 1

## Introduction

# Why have we written this guide?

Workers with a medicinal cannabis prescription often tell us that they are hesitant to disclose to their employer that they use it.

They express fears that they may be subject to additional scrutiny or suspicion of impairment, including increased drug testing. Some say that they would be fearful of losing their job, and many are unsure of what their rights are. Others tell us that they have faced sanctions at work, such as suspension or even dismissal, after returning a positive drug test for cannabis, and they want to know what they can do.

Employers have expressed concerns that employees with a medicinal cannabis prescription may experience side effects that will compromise their safety at work. Some have told us that they are unsure how to have conversations about an employee's use of medicinal cannabis, out of concern for maintaining privacy of medical information.

Employers may also face the issue of investigating whether impairment from medicinal cannabis use has played a role in a workplace accident.

This guide has been created to provide factual information about what medicinal cannabis is, and what it is used for.

It also provides advice on employer and employee rights, and suggests policies and procedures that can help both parties navigate the issue of medicinal cannabis use in the workplace, especially where the risk of impairment may be of concern.

## Disclaimer

This document is intended to be a general guide for employers and employees, and does not, and is not intended to, constitute legal advice.

Whether you are an employer or employee, if you are facing a legal or employment issue concerning the use of medicinal cannabis, we recommend seeking independent legal advice for your situation.

## Medicinal cannabis prescribing in Aotearoa

The Medicinal Cannabis Scheme (the Scheme) came into effect on 1 April 2020. The purpose of the Scheme is to improve access to quality medicinal cannabis products for patients. Manufacturers and importers are required to provide evidence to the Medicinal Cannabis Agency that the products consistently meet minimum quality standards before they can be supplied.

While some people use illicit or non-prescribed cannabis therapeutically to treat symptoms such as pain, emotional distress, and insomnia, the term 'medicinal cannabis' in this document refers to prescribed medicinal cannabis that patients have accessed through the Medicinal Cannabis Scheme.

## Who can prescribe medicinal cannabis?

A medicinal cannabis product can normally be prescribed by a doctor registered to practise in Aotearoa for any patient for any medical condition. Approved medicinal cannabis products can also be prescribed by nurse prescribers in some situations. Medicinal cannabis products must be dispensed in the same manner as other prescription medicines and controlled drugs. Any registered GP can prescribe medicinal cannabis. There are also specialist medicinal cannabis clinics that prescribe to patients across Aotearoa.



## 2

# Differences between illicit cannabis and prescription cannabis products



# What is the difference?

	Medicinal cannabis	Illicit cannabis
<b>Form and method of use</b>	Sold as oil or dried cannabis flower (intended to be vaporised or used as a herbal tea infusion).	Comes as dried plant material which is smoked, or as an oil usually taken orally or made into an edible product.
<b>Contents and effects</b>	<p>Most products supplied in NZ contain THC.</p> <p>Levels of THC (which is the potentially intoxicating compound) may vary by product. Some have high levels of THC, while others have only traces of it (up to 2%).</p> <p>Some products, for example CBD isolate, have no THC, and no impairing or intoxicating effects.</p>	Contains both CBD and THC, and will usually have an impairing or intoxicating effect.
<b>Quality control</b>	Undergoes testing and quality assurance to ensure there are no contaminants, and that the active ingredients on the label are correct.	May contain widely variable THC levels, and possible contaminants.
<b>Reasons it is used</b>	Can be prescribed for any medical condition within the scope of practice of the prescriber, including pain, sleep disorders, emotional distress and relief from certain other conditions.	Some people use illicit cannabis for relaxation and enjoyment. It can also be used to relieve the symptoms of a range of medical conditions.
<b>Detection in a drug test</b>	<p>Products containing THC may be detected in a drug test, even if taken as prescribed and at doses or times that would mean the patient is not impaired when tested.</p> <p>CBD-only (isolate) medicinal cannabis products will not show up in a drug test for cannabis.</p>	THC metabolites can sometimes be detected for many days after use, even though the intoxicating properties of cannabis wear off after a matter of hours.
THC (whether from medicinal or illicit cannabis) detected in the hair, body, saliva or urine by itself does not mean someone is impaired.		

## 2. DIFFERENCES BETWEEN ILLICIT CANNABIS AND PRESCRIPTION CANNABIS PRODUCTS

# What is cannabis?

Cannabis is a plant that contains over one hundred known cannabinoids. It usually comes as a dried plant that can be smoked. It can sometimes come as an oil or be made into teas or food (edibles). Cannabis may be used for relaxation and enjoyment by some people.

The two main cannabinoids with well-described pharmacological effects are cannabidiol (CBD) and tetrahydrocannabinol (THC).\*

THC interacts with the endocannabinoid system (ECS) within the body, and CBD acts at many other receptor sites. CBD and THC have different effects:

**CBD** alone does not bring on euphoria, pleasurable feelings or altered sensations. CBD by itself is considered non-intoxicating and non-addictive, and does not cause impairment. CBD has therapeutic potential for certain medical conditions.

**THC** is the euphoriant or intoxicating part of cannabis, responsible for the enjoyment some cannabis users experience. It can also result in dysphoria (unpleasurable experiences) for sensitive users or when large amounts are used. THC is also used in medicine for treatment of certain conditions such as pain, insomnia, and nausea. Illicit cannabis can contain widely variable THC levels, depending on the strain of the plant, and other factors.



\*Cannabis also contains other cannabinoids. Over time, THC changes to another cannabinoid, CBN, which may be intoxicating. However, other cannabinoids such as CBG, CBC, CBDV and others are unlikely to cause intoxication. THCA is a cannabinoid found in unheated raw cannabis plant material and is unlikely to be impairing or intoxicating.

## 2. DIFFERENCES BETWEEN ILLICIT CANNABIS AND PRESCRIPTION CANNABIS PRODUCTS

### MEDICINAL CANNABIS: A GUIDE FOR EMPLOYERS AND EMPLOYEES

## What is medicinal cannabis?

A medicinal cannabis product is a prescription-only pharmaceutical product containing one or more ingredients extracted from the cannabis plant or dried cannabis flower. Medicinal cannabis products come in a variety of combinations, strengths, and forms. They undergo testing and quality assurance to ensure there are no contaminants, and that the active ingredients on the label are correct. This is known as meeting good manufacturing practice (GMP) standards.

**CBD-only products (such as isolate CBD) do not cause impairment, intoxication or euphoria (getting high). Products that only contain CBD, such as isolate CBD, are undetectable in a drug test.** See the Ministry of Health website for a [detailed definition of a CBD product](#).<sup>1</sup>

Some medicinal cannabis products combine both CBD and THC (such as full-spectrum products). Medicinal cannabis products containing THC may contain a THC component of between 5 and 27mg/mL. Other mixed products may contain trace amounts of THC (under 2%) and certain other related substances. They cannot contain any other controlled drugs or intoxicating substances.

Products sold as oils are usually ingested orally. Dried cannabis flower products are verified by the Medicinal Cannabis Agency for use as a herbal tea or for vaporising.

Dried flower medicinal cannabis containing THC is faster acting, but the effect is shorter when vaporised rather than ingested. Smoking medicinal cannabis is discouraged. Medicinal cannabis products containing THC are usually detectable in a drug test for cannabis.

**These types of medicinal cannabis products are available in New Zealand:**

#### **Full-spectrum products**

Full-spectrum products are typically high in THC or CBD, with lower levels of minor cannabinoids, in a carrier oil.\* They also contain cannabis essential oils known as terpenes.

Full-spectrum products contain THC and CBD in a wide range of combinations and concentrations.

**Full-spectrum CBD products** contain CBD, up to 2% THC, and other minor cannabinoids.

#### **Broad-spectrum CBD products**

Broad-spectrum CBD products in a carrier oil are similar to full-spectrum CBD products, but they contain no THC.

#### **Isolate CBD products**

Isolate CBD products are refined so they contain CBD only, in a carrier oil. They contain no other cannabinoids. They may also be bioidentical factory-made (synthetic) products.

#### **Isolate THC products**

Isolate THC products are refined so they contain no active product except THC in a carrier oil.



\*An example of a carrier oil is MCT, a coconut oil extract.

## **2. DIFFERENCES BETWEEN ILLICIT CANNABIS AND PRESCRIPTION CANNABIS PRODUCTS**

## Why do people have prescriptions for medicinal cannabis?

Cannabis is prescribed for a wide range of conditions. Recent New Zealand research into users of cannabis for therapeutic purposes (both illicit and medicinal cannabis) found that 95.6% reported cannabis helping them with pain relief, sleep and anxiety.<sup>2</sup>

Conditions that medicinal cannabis is prescribed for include:

- Pain, especially persistent or chronic pain
- Insomnia (difficulty sleeping)
- Psychiatric or mood disorders, such as anxiety or depression
- Inflammatory conditions
- Neurological conditions such as multiple sclerosis or epilepsy
- Oncological conditions, such as symptoms of cancer or side effects of cancer treatment
- Palliative care (at the end of life to make someone comfortable)
- Gastrointestinal (stomach or bowel) conditions
- Dermatological (skin) conditions

People with a prescription for medicinal cannabis may sometimes find it preferable to traditional medications. Some have experienced unwanted side-effects and poorer quality of life from standard medical treatments. Research has found that medicinal cannabis may improve general health, quality of life, and condition-specific symptoms for certain patients. There are relatively few reported side-effects of appropriately prescribed medicinal cannabis.<sup>3</sup>

When health practitioners consider the suitability of a medicinal cannabis prescription for a patient, they discuss with them the potential short-term and long-term side-effects, including impairment.

## How is medicinal cannabis regulated in Aotearoa?

All medicinal cannabis products are subject to the requirements of the Medicinal Cannabis Scheme<sup>4</sup> and must meet the minimum quality standard.<sup>5</sup>

Most medicinal cannabis products are unapproved medicines, meaning the Ministry of Health has not deemed there is sufficient evidence on efficacy and safety. Being unapproved does not mean the medicine is 'unsafe', but it puts special requirements on the prescribing doctor before they can prescribe the product.\* At the time of writing there are two medicinal cannabis products listed on the Ministry of Health's website that are approved.<sup>6</sup> There is evidence on their efficacy and safety for treating multiple sclerosis spasms, or certain rare seizures.

## Who can legally possess medicinal cannabis?

People who are prescribed medicinal cannabis are allowed to possess and carry it on their person, under the Misuse of Drugs (Medicinal Cannabis) Amendment Act 2018.

People (including workers) who are in New Zealand temporarily, and who have brought their own medicinal cannabis supply with them to use, should have met all legal requirements regarding their medication and vaporisers upon their entry into the country. Further information is available on the Ministry of Health website.<sup>7</sup>

\*If a medicine has not been approved by Medsafe it is 'unapproved', or a 'section 29' medicine. Many unapproved medicines in use in New Zealand are products (both branded and generic) available overseas that may have acceptable quality, efficacy and safety, but approval to supply these medicines has not been sought in New Zealand. Unapproved medicines may be prescribed to patients, but the prescribing doctor must always provide a professional and ethical standard of care, which includes having the patient's informed consent for use of that medicine. Being unapproved does not mean the medicine is 'unsafe', and healthcare providers have a duty to discuss the benefits and risks of any unapproved medicine. Unapproved medicines are also not allowed to be advertised.

Further information is available here: <https://www.medsafe.govt.nz/profs/riss/unapp.asp>

# How do tests for cannabis work?

Different tests for the presence of drugs, including cannabis, may show different results depending on the type of test (saliva, urine, blood, or hair), and how sensitive it is. The concentration of cannabis metabolites detectable in a person's system can vary greatly depending on how much cannabis they have used, how often they have consumed it in the days leading up to the test, their sex, their body fat composition, and their metabolism.<sup>8</sup>

CBD alone is undetectable in a drug test for cannabis. If a drug test is positive for cannabis, this means the substance that was consumed contained THC.

Urine tests for cannabis usually detect the broken-down components of THC (metabolites) rather than THC itself. THC is stored by the body in fat cells and slowly released over time. The THC metabolites that are released are quickly broken down and unlikely to cause impairment, unless more THC is consumed.

The detection of THC metabolites in urine drug tests indicates previous use of cannabis, or medicinal cannabis products containing THC.

**By itself, detection of THC metabolites in a urine drug test cannot indicate if someone is impaired or not.**

THC may be detected by a urine or blood test for up to 30 days, or even more, if a person who has used large amounts for a long time stops using cannabis. Even one-off cannabis use may still be detectable in urine 72 hours later.<sup>8</sup>

However, unlike alcohol detection by a breath test or blood test, the presence of THC in any tissue, such as hair, blood, saliva or urine, cannot be used to indicate impairment. THC may still produce a positive test result long after impairment has ceased.

Drug testing cannot differentiate between illicit and medicinal cannabis. The active components of cannabis, THC and CBD, are the same chemically, whether they are from an illicit or prescribed source.

## A positive test for cannabis cannot definitively tell if someone is impaired or not.

Detection of THC metabolites in a drug test indicates previous use of cannabis or medicinal cannabis products containing THC. Products that only contain CBD, such as isolate CBD, are undetectable in a drug test.

THC metabolites can be detected in a test several hours, days or even weeks after someone last used cannabis or medicinal cannabis containing THC. In some cases, THC can be detected in a urine test more than 30 days after last use.<sup>8</sup>



# 3

## Guidance for employers

Employers should have clear workplace policies that cover impairment, drug testing (if required), and the use of medications, drugs, and alcohol in the workplace, and follow these policies carefully.



# Guidance for employers

- 1 Drug testing is not a legal requirement, and WorkSafe does not require mandatory workplace drug testing.
- 2 Both employers and employees have duties under the Health and Safety at Work Act 2015 to eliminate or minimise risks to health and safety, so far as is reasonably practicable. This is especially applicable to those working in safety-sensitive roles.
- 3 Drug tests should only be conducted where there is a reasonable and lawful purpose for doing so and in accordance with employment agreements and workplace policies. Under the Employment Relations Act 2000, employers taking any action in response to a drug test result must ensure their actions are what a fair and reasonable employer could have done in all the circumstances.
- 4 Employment agreements and workplace policies should explicitly state if an employee will be required to undergo drug testing at work. The agreement should clearly outline the situations where or when a person will be subjected to drug testing.
- 5 If an employee uses medicinal cannabis as prescribed by a medical practitioner for a medical condition, sanctioning the employee or otherwise subjecting them to detriment if they return a positive drug test result for cannabis may potentially amount to unlawful discrimination on disability grounds under both the Employment Relations Act 2000 and the Human Rights Act 1993.
- 6 Employers should exercise caution if refusing qualified job applicants a job offer purely because they tested positive for cannabis in a pre-employment drug test due to their use of medicinal cannabis to treat a medical condition. This could be challenged in court as unlawful discrimination on disability grounds.
- 7 Under the Privacy Act 2020, a person's medical information is confidential. However, job applicants or employees may have to disclose a medical condition or medications they are taking, including medicinal cannabis, if it could affect their ability to safely perform their duties, even where the employer does not carry out routine drug testing.



3.1

## Writing effective policies for workplace impairment and for use of medications, drugs and alcohol

Employers should consider reviewing their existing policies regarding health and safety, impairment, drug testing, and use of medications, drugs or alcohol in the workplace, to ensure that they cover the rights and responsibilities they might have around employees with a prescription for medicinal cannabis. Several situations that employers and employees may encounter, especially in safety-sensitive workplaces, can be appropriately handled with a robust workplace policy that covers these matters.

A good workplace policy should include how impairment from any cause will be identified and responded to. It should also explain what information must be disclosed, what happens when employees disclose that they have a prescription for medicinal cannabis, and how employees will be supported to remain working and employed, as long as there are no risks to health and safety that cannot be reasonably mitigated.

Implementing or maintaining a workplace culture where people feel comfortable and confident to disclose that they may be impaired, regardless of the cause, will go hand in hand with a robust workplace policy.

Below are some good-practice examples of information that these workplace policies may include:<sup>\*9</sup>

\*The good-practice examples on the following pages are based on the Business Leaders' Health and Safety Forum 2020 paper, with additions and amendments.<sup>9</sup>

Section	Suggested details
<b>Purpose</b>	State the purposes, objectives, and scope of the policy.
<b>Definitions</b>	<p>Define impairment.</p> <p>Define how the workplace views impairment (fatigue, alcohol or illicit drug use, medication, physical or mental ill-health, other lifestyle factors).</p> <p>Describe how the policy will fit with the workplace's overall approach to impairment.</p>
<b>Who the policy applies to</b>	<p>State who the policy applies to (e.g., all workers, or just specific teams / roles).</p> <p>State the employee's right to privacy in relation to personal information collected in the course of drug testing (e.g., their test result) and any information the employee provides regarding use of medication.</p>
<b>Roles and responsibilities</b>	<p>State the responsibilities and obligations of the employer, employees, other workers (e.g., contractors).</p> <p>State who has responsibility for monitoring and implementing the policy.</p>
<b>Use of medicines at work</b> (including medicinal cannabis)	<p>Describe how employees can confidentially report use of medicines they are taking (prescribed and over-the-counter) that could cause impairment. This could include a clear health and safety policy that encourages disclosure without fear of repercussions, and outlines the potential consequences of non-disclosure.</p> <p>Describe the workplace's position on the use of prescribed medications (including medicinal cannabis), including outlining the expectation that prescribed medications are taken as directed by a medical practitioner.</p> <p>Describe the steps the employer will take to assess whether it is safe for the worker to use medicinal cannabis (or other prescribed medication) and continue with their work.</p> <p>Describe employees' duty to take reasonable care of their own and others' health and safety at work, including informing their employer if they are feeling impaired at work from their use of their prescribed medication (particularly if they are in a safety-sensitive role).</p> <p>Describe what types of medicines are not allowed on the work premises, and, if applicable, how medicines can be stored safely.</p> <p>Describe the steps to be taken for temporary or permanent redeployment to other less safety-sensitive positions, if use of prescription medication (including medicinal cannabis) is causing impairment that poses a health and safety risk.</p> <p>Describe the steps to be taken when redeployment is not possible.</p> <p>Describe the mitigation procedures to be followed, if health and safety risk arising from impairment associated with prescription medication (including medicinal cannabis) use occurs.</p>
<b>Impairment testing</b> (if used)	<p>Describe who will be tested (e.g., roles, responsibilities, teams, or specific job roles).</p> <p>Describe methods of impairment testing the workplace will use (e.g., a mobile app such as DRUID or Alert Meter, or trained staff).</p> <p>Describe who will conduct the impairment tests or determine whether an employee is impaired.</p> <p>Describe under what circumstances tests will be conducted (e.g., as part of pre-employment checks; following a serious harm incident or high-risk near-miss; reasonable cause where there is reason to believe a person may be unfit for work; randomly; before a shift; as part of a return-to-work plan; on individual request).</p> <p>Describe where the testing might occur (e.g., any workplace premises, specific work sites).</p> <p>Describe how privacy and confidentiality will be maintained.</p>

Section	Suggested details
<b>Drug testing</b> (if used) <div>             Drug testing is not a legal requirement or a WorkSafe requirement.           </div>	<p>Describe who will be tested (e.g., roles, responsibilities, teams, or specific job roles).</p> <p>Describe who will conduct the drug tests.</p> <p>Describe the circumstances under which tests will be conducted (for example: as part of pre-employment checks; following a serious harm incident, or high-risk near miss, reasonable cause where there is reason to believe a person may be unfit for work, randomly, before a shift, as part of a return-to-work plan, on individual request).</p> <p>Describe where the testing might occur (e.g., any workplace premises, specific work sites).</p> <p>Describe what types of test might be conducted (e.g., breath, urine, saliva).</p> <p>Provide a list of all substances to be tested for, and the maximum acceptable limits for each.</p> <p>Include a statement that drug tests reveal the presence of a substance, not whether someone is impaired.</p> <p>Describe how privacy and confidentiality of personal health information will be maintained.</p>
<b>Testing results and outcomes</b>	<p>Describe what happens after a drug or impairment test, if the result is positive, or if the result is negative.</p> <p>Describe what happens if a worker refuses to have a test, or interferes with the testing process.</p>
<b>Support for substance use and return to work</b>	<p>Describe the resources available to employees for drug or alcohol counselling. This might include:</p> <ul style="list-style-type: none"> <li>• Employee assistance programme (EAP)</li> <li>• complimentary or subsidised counselling or treatment</li> <li>• paid or unpaid time off to attend counselling or treatment.</li> </ul> <p>Describe the processes for returning to work or remaining at work.</p> <p>Describe the workplace's education programme around impairment, and alcohol or drug use.</p>
<b>Disciplinary action</b>	<p>Describe the steps the employer would take in cases where disciplinary action might be undertaken because of impairment due to the use of medicines, including medicinal cannabis. Other options might include dismissal for medical incapacity or medical retirement (see paragraph 3.2.1).</p>
<b>Review</b>	<p>State the date the policy is valid until, and who can have a say when it is reviewed.</p>
<b>Further information</b>	<p>State who can be approached confidentially, without fear of repercussions, for further information on drug testing or impairment at work, and how they can be contacted. This could include a confidential request for support or understanding around use of medications or substances, or requesting medical leave to get help with use of any substance.</p> <p>List and describe reliable sources of information around substance use and harm (see suggestions on page 21).</p>
<b>Whole document</b>	<p>Use accessible, easy-to-read language.</p> <p>Explain technical and legal jargon.</p> <p>Translate into other languages as appropriate.</p>

There are several online resources available to help employers write workplace policies.

Some of these are listed below:

**Employment New Zealand – what are workplace policies?**

[employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/creating-workplace-policies-and-procedure](https://employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/creating-workplace-policies-and-procedure)

**Employment New Zealand – drugs, alcohol and work**

[employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/alcohol-and-other-drugs](https://employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/alcohol-and-other-drugs)

**WorkSafe – position on impairment and testing for drugs at work**

[worksafe.govt.nz/laws-and-regulations/operational-policy-framework/worksafe-positions/impairment-and-testing-for-drugs-at-work](https://worksafe.govt.nz/laws-and-regulations/operational-policy-framework/worksafe-positions/impairment-and-testing-for-drugs-at-work)

**Business.govt.nz – an example of how to write a policy about alcohol use in the workplace**

[wpb.business.govt.nz/workplacepolicybuilder/healthAndWellbeing/alcohol](https://wpb.business.govt.nz/workplacepolicybuilder/healthAndWellbeing/alcohol)

**New Zealand Drug Foundation – alcohol and drug policies for employers**

[drugfoundation.org.nz/topics/workplaces-and-venues/for-employers/alcohol-and-drug-policies](https://drugfoundation.org.nz/topics/workplaces-and-venues/for-employers/alcohol-and-drug-policies)

**Business Leaders' Health & Safety Forum – managing cannabis impairment risks at work**

[healthandsafety.govt.nz/assets/Documents/Business-Leaders-Forum-Cannabis-Reflective-Guide-1.pdf](https://healthandsafety.govt.nz/assets/Documents/Business-Leaders-Forum-Cannabis-Reflective-Guide-1.pdf)

# Employer obligations

**Employers must comply with relevant legislation when considering the rights of employees and their health and safety at work. This includes keeping their policies and processes up to date with legislative requirements.**

The obligations of employees and employers in relation to medicinal cannabis is an evolving area of employment law. Further clarity on the application of legislative and contractual obligations is likely to develop as use of medicinal cannabis grows and cases make their way through the Employment Relations Authority and Employment Court.

## 3.2.1

## Can employees be dismissed for using medicinal cannabis?

In most circumstances, an employee's use of medicinal cannabis on its own would not constitute serious misconduct warranting dismissal.

Employers may, however, decide that the use of medicinal cannabis is in breach of the employee's obligations under their employment agreement or the employer's policies. This would typically be in relation to health and safety obligations. A breach of these obligations may constitute serious misconduct and may warrant dismissal. However, the obligations on the employer are the same as any dismissal for serious misconduct. Dismissal must follow a process that is fair and reasonable in all circumstances.\* This will include strict compliance with the employer's policies and procedures.

If an employee cannot safely perform their duties because of their use of medicinal cannabis, and there are no reasonable steps an employer can take to ensure that the employee can safely perform their role, other approaches may be appropriate to consider:

**Medical incapacity:** dismissal for medical incapacity related to the use of medicinal cannabis could be justified where the employee is in a safety-sensitive role, and their medical condition (including treatment) is such that they cannot safely perform the full role.† This will depend on the employee's circumstances, employment agreement and relevant policies. In general, employment may be terminated where medical evidence supports that an employee is medically incapable of performing their job for the foreseeable future, following consultation with the employee. The employer must seek sufficient medical information to understand the employee's prognosis, treatment options and the likelihood of them returning to work.

**Medical retirement:** some employment agreements will contain a Medical Retirement clause allowing for employment to end on medical grounds, typically by agreement. Where an employer wishes to rely on such a clause, they must ensure any procedural requirements set out in the employment agreement are met.

\*Regardless of the reason, the employer must meet the Test of Justification set out in section 103A of the Employment Relations Act 2000. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

†There is case law to support that termination for medical incapacity may be justified where the employee performs a role that involves hazards and is unable to safely perform the full functions of their role for the foreseeable future (*Amcor Flexibles [New Zealand] Ltd v Gillan* [2018] NZEmpC 147).

## WorkSafe New Zealand

WorkSafe's position on impairment and testing for drugs at work makes it clear that it is up to employers to identify whether impairment is a risk.<sup>10</sup> Employers must manage any risk from impairment in a way that is proportionate to the task being undertaken, and the level of risk identified.

WorkSafe does not require mandatory workplace drug testing, as it is not a prescribed legal requirement. WorkSafe does not offer advice about drug testing methods, or about the use of drug testing at work.

WorkSafe's position on impairment and testing for drugs at work is available here: [worksafe.govt.nz/laws-and-regulations/operational-policy-framework/worksafe-positions/impairment-and-testing-for-drugs-at-work/](https://worksafe.govt.nz/laws-and-regulations/operational-policy-framework/worksafe-positions/impairment-and-testing-for-drugs-at-work/).

## Health and Safety at Work Act 2015

As a person conducting a business or undertaking (PCBU), employers have a duty under the Health and Safety at Work Act to eliminate or minimise risks to health and safety, so far as is reasonably practicable and to ensure that the workplace, or anything arising from it, is without risk to any person. Particularly in safety-sensitive workplaces, employers have a duty to manage the risks (so far as is reasonably practicable) arising from impairment from any cause (including medication, drug or alcohol use) in the workplace.

There is no express requirement for drug testing in legislation, or in industry codes of practice. However, some employers in safety-sensitive workplaces may decide that drug testing is one of their preferred ways to manage the risks that may arise from impairment due to medication or other drug use. Employers may also choose to use other measures to mitigate the risk of impairment from other factors, such as stress, fatigue, or physical injury, for example.

Whether drug testing is a reasonably practicable means of mitigating or eliminating the risks that may arise from impairment will depend on the specific circumstances of the workplace and the current available means of assessing impairment.

It is important to remember that workers also have duties under the Health and Safety at Work Act to take reasonable care of their own health and safety, and to take reasonable care that others are not harmed by something they do, or don't do. This means ensuring that they take any prescribed medications as directed by a medical practitioner and to inform their employer if they are feeling impaired while at work (particularly if they are in a safety-sensitive role).

Under the Health and Safety at Work Act, workers must also follow any reasonable health and safety instructions given to them by their employer, and cooperate with any reasonable health and safety policy or procedure.



## Employment Relations Act 2000

The Employment Relations Act does not set out any principles for drug testing in workplaces. However, an employer does have a broad statutory obligation to deal with employees in good faith, including when conducting drug tests. Specifically, drug tests should only be conducted where there is a reasonable and lawful purpose for doing so, and in accordance with employment agreements and workplace policies.

If drug testing is carried out at a workplace, employment agreements should expressly allow for this to occur. By signing the agreement, the employee is giving their consent to being drug tested as detailed in the employment agreement.

In addition, a written policy must be in place to enable workplace drug testing to be lawfully carried out. The policy should set out the circumstances in which testing can occur, the process for testing, and what happens after a result is returned – whether drugs are detected or not. It should also specifically set out the employer's position on medicinal cannabis (and other legal medications) and how the employer will manage the use of such medications by an employee.

Employers should make their policies and procedures readily available for their employees. In order to lawfully enforce drug testing policies and procedures, these must be reasonable. For example, in the current absence of a reliable alternative to determining impairment, employers may elect to use a negative drug test result as a measure to exclude impairment, by excluding the presence of a substance that could cause impairment. However, a drug test alone cannot definitively measure or prove impairment. A positive test result simply demonstrates the presence of the substance in an individual's system and therefore impairment cannot be excluded. Given these limits, it will generally only be reasonable to randomly drug test employees who work in safety-sensitive roles or those who work in safety-sensitive areas in the workplace, due to the risks presented by impairment in those contexts. However, it is generally considered unreasonable to require employees who work in an office environment to undergo random drug testing. As outlined above, whether drug testing is reasonable will depend on the specific circumstances of the workplace and the current available means of assessing impairment.

Statutory good-faith obligations also apply to an employer in the event an employee returns a positive drug test. If an employee returns a positive drug test and the employer seeks to take disciplinary action against that employee, the Employment Relations Act requires the employer to act fairly and reasonably in determining any such action. This includes:

- adequately investigating the allegations (given the employer's available resources);
- communicating the employer's concerns to the employee before taking action;
- giving the employee reasonable opportunity to respond to those concerns; and
- genuinely considering their responses before taking action.



## Discrimination under the Employment Relations Act 2000 and the Human Rights Act 1993

**If an employee uses medicinal cannabis as prescribed by a medical practitioner for a medical condition,** sanctioning the employee or otherwise subjecting them to detriment if they return a positive drug test result for cannabis may potentially amount to unlawful discrimination on disability grounds under both the Employment Relations Act and the Human Rights Act.

‘Disability’ is defined broadly and includes mental health disorders or impairment as well as physical illnesses, disabilities or impairments.

**Discrimination under the Employment Relations Act (and also the Human Rights Act, in the context of employment matters) includes dismissing an employee or subjecting an employee to any detriment, by reason of a prohibited ground of discrimination,** in circumstances in which other employees employed on work of the same description are not, or would not be, subjected to such detriment. ‘Detriment’ is broadly defined and includes anything that has a detrimental effect on the employee’s employment, job performance, or job satisfaction.

**For job applicants, where the applicant is qualified for the job, it is unlawful under the Human Rights Act\* for the employer not to employ the applicant for that job on any prohibited grounds of discrimination.**

This means that, where a job candidate is qualified for the job they have applied for, but is refused the job purely because they tested positive for cannabis in a pre-employment drug test due to their use of medicinal cannabis to treat a medical condition, this may potentially amount to unlawful discrimination on disability grounds.

There are, however, specific exceptions under the legislation where an employer can treat an employee or job candidate differently based on their disability. These exceptions apply where:

- the person could perform the duties satisfactorily only with the aid of special services and facilities, and it is not reasonable to expect the employer to provide those services and facilities; or
- the person’s performance of their duties will create a risk of harm to themselves or others, and it is not reasonable to take that risk, and the employer is not able to take reasonable measures to reduce the risk to a normal level without unreasonable disruption.

Where an employee is using medicinal cannabis and is in a safety-sensitive role (or applying for one), it is possible that one of these exceptions (particularly the latter) may apply. However, to be satisfied that an exception can be applied, the employer would first be required to assess the health and safety risk by seeking medical information from the employee and their doctor. The employer would also need to consider any reasonable ways in which any risk could be managed.

\*The Employment Relations Act 2000 does not apply to job applicants.

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## Privacy Act 2020

**Medical information (including information about prescribed medication) is generally considered to be sensitive personal information.** An employee cannot be made to provide their medical information to an employer unless they agree to this or are otherwise obligated to do so.

**However, there are cases where it is important for the employer to be provided with an employee's medical information.** This includes where the employee has a health condition, or is taking medication, that could affect their employment, or where their health condition or medication creates a health and safety risk to themselves or others in the workplace. The employee's employment agreement or the employer's policies may include specific disclosure obligations to assist the employer to meet its health and safety obligations. The employment agreement or workplace policies may include a specific obligation to disclose the use of prescription medication that may cause impairment, including medicinal cannabis.

This means job applicants or employees may be required to disclose a medical condition or medications they are taking, including medicinal cannabis, if it could affect their ability to perform their duties, even where the employer does not carry out routine drug testing.

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## Smokefree Environments and Regulated Products Act 1990

The Smokefree Environments and Regulated Products Act 1990 prohibits smoking and vaping in workplaces and public areas, and these rules apply to herbal vaporisers. Therefore, employers can require people who vape their medicinal cannabis to vape outside, or in a designated smoking area.

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## Land Transport Act 1998

Some employees drive vehicles as part of their work. Under the Land Transport Act 1998, the majority of the rules around illicit cannabis apply in the same way to medicinal cannabis use. For example, it is an offence under the Act to drive, or attempt to drive, a vehicle on a road if there is evidence of blood concentration levels exceeding the high-risk level for cannabis (3ng/mg). Someone would commit an infringement offence if their blood contained evidence of cannabis use at a concentration level equal to or less than 3ng/mg. However, when a person has consumed medicinal cannabis, there is a legal defence available provided they meet the criteria set out in the Land Transport Act. For example, if the person has a valid prescription and they have complied with the instructions from their health practitioner or the medicine manufacturer about driving, and not consuming alcohol or other prescription medications, they would have a medical defence allowing the person to dispute the drug driving infringement.



### 3.3

## Ensuring disabled employees are treated equitably

**Employees who are disabled cannot be treated differently than those who are not disabled, by reason of their disability.**

There are some rare exceptions to this, related to their and others' health and safety (as outlined in section 3.2.5).

Employers are obliged to make reasonable accommodations for employees with a disability (as defined under the Human Rights Act), which can include those who are prescribed medicinal cannabis to treat a medical condition. Examples of reasonable accommodations include adjusting hours of work, providing a private area for medication consumption or storage, or modifying duties.

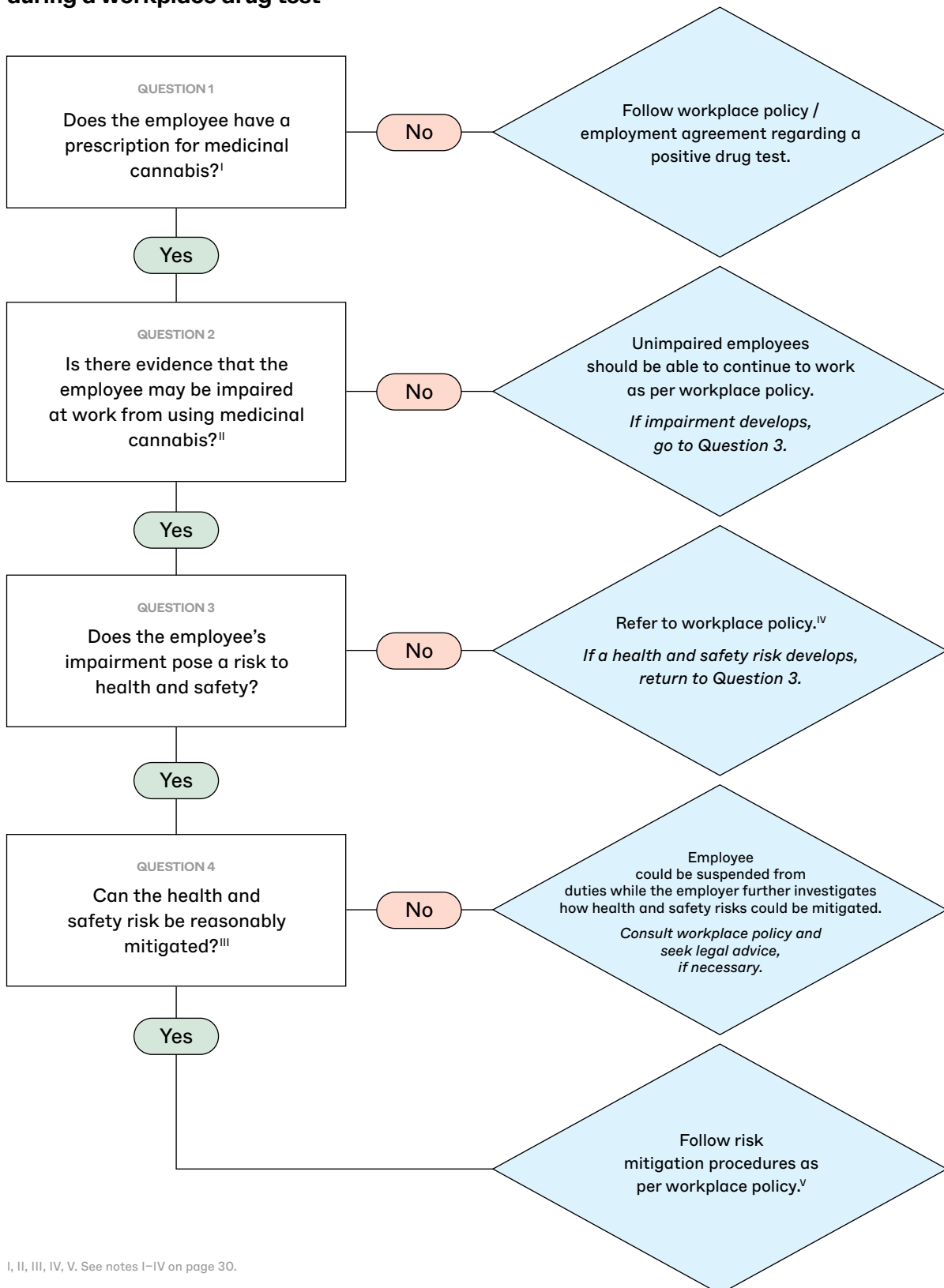
It is likely to be uncommon, but there may be times when an employee's medicinal cannabis use presents a health and safety risk to themselves or others, and the employer decides that it is not reasonable or possible to reduce that risk by making accommodations, so the employer might be justified in terminating their employment.

In many cases, if the employee has told their employer about their medication use, then the employer should be able to make accommodations. Employers are required to explore all alternatives to dismissal, for example, considering redeployment to a non safety-sensitive role, or adjusting duties.

If the employee has disclosed that they have a medicinal cannabis prescription, in most cases, the employer should be able to put any necessary specific arrangements or accommodations in place for that employee (with medical advice) so as to avoid termination of employment.

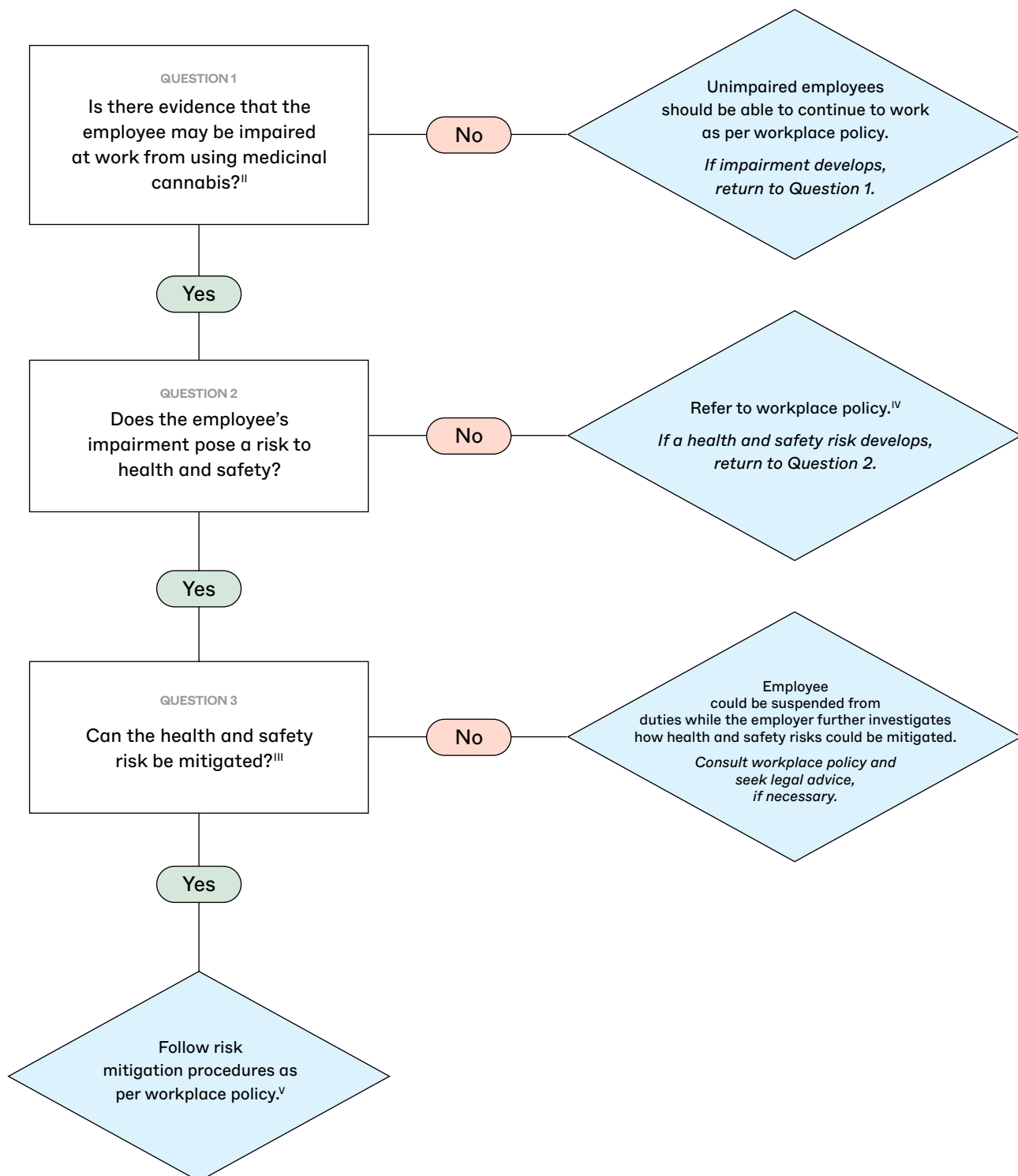
# Potential scenarios regarding medicinal cannabis use and impairment at work

## Scenario 1: An employee tests positive for cannabis during a workplace drug test



I, II, III, IV, V. See notes I–IV on page 30.

## Scenario 2: An employee discloses that they have a medicinal cannabis prescription



II, III, IV, V. See notes I–IV on page 30.

## Scenario 1 and 2: notes

- I. Confirm, confidentially, whether an employee has a prescription for medicinal cannabis, if not already known. The employee may need to obtain a letter from their prescribing doctor or prescription details of their medicinal cannabis prescription. If the prescription was not disclosed, the employer should also consult the relevant workplace policy as to the employee's obligations and how non-disclosure will be addressed.
- II. A positive drug test by itself should not be considered definitive evidence of impairment. The fact that an employee has a prescription for medicinal cannabis is likewise not sufficient evidence to suggest that they are impaired at work.  
  
Impairment may be determined in various ways, including: a discussion with an employee, a letter from the physician, a trained workplace officer making a decision, employee observation, or other sources. The workplace may use impairment detection apps such as DRUID or Alert Meter. Methods of impairment detection should be clearly outlined in workplace policies that cover health and safety, medications, drugs and alcohol, or other relevant policies.
- III. If an employee's use of medicinal cannabis results in suspected or proven impairment leading to a health and safety risk, AND that risk cannot be mitigated, they could face disciplinary action up to and including termination, subject to the employer's relevant policies.  
  
Take the following into consideration:
  - The employer will need to consider the Human Rights Act and ensure the employee is not discriminated against for being disabled (see section 3 of this guide).
  - Generally, an employee cannot be dismissed simply for using medicinal cannabis at work, if it is not impairing. Medicinal cannabis use must have the potential to cause impairment if any adverse sanction is to be imposed.
  - However, it may be lawful to suspend or even terminate an employee where they may be impaired in such a way that their or others' health and safety is compromised, or their performance is impacted, and this risk cannot be mitigated or eliminated.
  - Before making any decisions about disciplinary action, including termination, an employer would first need to consider any medical information regarding the medication use and health and safety risk, and whether there are ways to manage that risk without having to dismiss. Workplaces are strongly encouraged to develop a policy that states the process they will follow to manage any risk arising from impairment due to medicinal cannabis use, what they will do to manage that risk, and to explore all options for retaining the employee before considering termination.
  - If there is a health and safety risk arising from potential impairment, then disciplinary action including termination may be possible, especially if the employee has not properly disclosed their medicinal cannabis prescription as per the workplace's policy. However, such instances are likely to be uncommon, because if the medication is properly disclosed by the employee, in most cases, the employer should be able to put specific arrangements in place for that employee (with medical advice) so as to avoid a disciplinary sanction or dismissal on health and safety grounds. Employers may wish to explore alternative options, such as dismissal for medical incapacity, or medical retirement. Refer to section 3.2.1 of this guide for further information.
- IV. Refer to the workplace policies regarding health and safety, or medications, drugs and alcohol. A policy may outline other duties a worker could perform safely until their work day or shift has ended. Alternatively, a policy may state that an impaired worker (who does not pose a health and safety risk) may be given the option to rest, or take sick leave until impairment is no longer an issue.  
  
Please refer to the relevant sections of this document for more detailed guidance around legislation that affects employer and employee rights in these matters.
- V. A workplace policy should describe how health and safety risks due to impairment from medicinal cannabis use will be mitigated. For example, a worker could be temporarily assigned non-safety-sensitive duties, or temporarily assigned to work alongside a co-worker instead of independently, or given a chance to take a rest break, or offered sick leave. The policy should describe what will happen if there are repeated instances of health and safety risks or incidents due to impairment from medicinal cannabis use, and this may lead to the workplace concluding that they cannot be mitigated reasonably, as they would result in a worker not being able to perform their duties satisfactorily. In such a case it is possible that disciplinary action or dismissal may be justified.



## Insurance considerations

In general, insurance providers in Aotearoa do not require businesses to carry out drug testing of employees as an explicit qualifying condition for coverage.

However, all insurance policies require policyholders to exercise due care and mitigate known risks to their business. Insurance claims can be denied, and insurance policies can be cancelled, where it is proven the business did not act in 'good faith', or they engaged in conduct that was grossly negligent or reckless, and as such likely to lead to making a claim.

Depending on the type of business, workplaces will have different exclusions or conditions of policy cover. This could include exclusions relating to the use of alcohol or other substances. Therefore, as outlined above, employers may consider carrying out drug testing to eliminate the risk of impairment by demonstrating the absence of impairing substances in an employee's system. However, the employer must consider whether such testing is reasonable in their specific circumstances as outlined in section 3.2.4.



## Introducing drug testing at work

Employers should keep in mind that impairment at work may be caused by a wide range of factors, including fatigue, numerous physical or mental health conditions, or medications with impairing side-effects. A drug test alone cannot definitively measure or prove impairment.

Employers may therefore wish to explore complementary or alternative methods of measuring impairment. There are mobile apps on the market such as DRUID or Alert Meter, which measure for cognitive and motor impairment that may be due to a range of factors.

**If an employer is introducing drug testing, all affected employees should know about these plans in advance.** This procedure and any new policies must be consulted on with affected employees and union representatives (if applicable). It may be necessary to carry out a risk assessment that is specific to the use of certain prescription medication (including medicinal cannabis) in the first instance. Workplace health and safety departments should ensure that policies and procedures on drug testing in the workplace are readily available to all employees, and provide a copy upon request. This especially applies if a new policy has not already been provided to all affected employees.

Employees must follow all reasonable and lawful instructions from their employer, including in relation to matters concerning health and safety. This can include requiring an employee to take a drug test, but generally only where it would be considered lawful and reasonable in the circumstances.

**Whether drug testing is ‘lawful and reasonable’ will largely depend on whether the employer has a workplace policy that permits it.** It will also depend on the employee’s role, especially where this relates to random drug testing. Any requirement to undergo drug testing should also be recorded in the employment agreement so that employees are aware of any drug testing requirements before commencing employment. Employees may have the right to refuse a drug test if it is not stated as a condition of employment in their employment agreement or if the employer has no workplace policy that permits drug testing.

Further information is available on the Employment New Zealand website:

[employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/alcohol-and-other-drugs](https://employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/alcohol-and-other-drugs)





3.7

## Drug tests and cannabis

**Drug tests that aim to detect the presence of cannabis (medicinal or otherwise) are not tests for impairment.** Employers should have a conversation with an employee who returns a positive drug test result for cannabis (THC metabolites), about whether or not they have a medicinal cannabis prescription. If an employee states they have a medicinal cannabis prescription, employers should liaise with them to seek medical information from their doctor or other medical expert, with their consent. They could ask the employee to provide a doctor's letter or copy of their prescription, which would describe the dosage instructions and how long the employee has had the prescription. The employer should also seek advice regarding whether the dosage and the times the prescription is being used will present a risk of impairment, if there is a risk that the worker could be impaired in a way that could compromise anyone's safety in the workplace, and how that risk could be managed.

**A positive test result due to use of medicinal cannabis, or a failure to declare use of medicinal cannabis, may still be a breach of a workplace medication or drug use policy.** If so, it may be open to the employer to consider disciplinary action for that breach. However, the employer would need to take the prescription into consideration, both in terms of deciding whether to take disciplinary action, and in deciding what is reasonable in terms of disciplinary action.

## Job applicants: employers' rights and responsibilities

**Employers are entitled to ask job applicants whether they have any medical condition, or experience side effects from any medication, which may affect their ability to perform the role that they have applied for.**

Even where the applicant is not directly asked, it might be reasonably expected that a job applicant will be forthcoming with that information; particularly if the condition or medication could cause impairment that might place themselves or others in the workplace at risk of harm.

A job applicant may therefore be required in some circumstances to disclose their use of medicinal cannabis before accepting an employment offer (for example, where they are taking a medicinal cannabis product containing THC and they are applying for a safety-sensitive role). Some employers require job applicants to return a negative drug test before an offer of employment is made. In such cases, if a job applicant is using a medicinal cannabis prescription, they should disclose this prior to undergoing any drug tests.

It may be in both the employer's and future employee's interests to list all the drugs that will be tested for in a drug test, and give the applicant the opportunity to disclose whether or not they have a prescription for any of the substances that might show up in a drug test.

If a job applicant has a disability (as defined by the Human Rights Act) and is using medicinal cannabis to treat that disability, denying them a job offer solely on the basis that they use medicinal cannabis (or that they returned a positive pre-employment drug test) may amount to unlawful discrimination if the candidate is qualified and competent to do the job in all other ways.

Employment agreements should explicitly state if a person will be required to undergo drug testing at work. The agreement should clearly outline the situations where or when a person will be subjected to drug testing. Employers should also have workplace policies in place that clearly set out the process that will be followed when undertaking drug testing. See section 3.1 for more information about workplace policies.



4

# Guidance for employees and job applicants

# Guidance for employees and job applicants

- 1** Employers are allowed to ask job applicants for safety-sensitive roles to disclose any medical conditions and any side effects from medication that might be relevant to their ability to perform the role.
- 2** Before signing an employment agreement, job applicants should ensure that they understand their rights and responsibilities around drug testing at work.
- 3** If employees have a medicinal cannabis prescription, or start using one, they should tell their employer if a policy requires them to do so, if it might affect their ability to perform their role, or might create a workplace health and safety risk.
- 4** Employees need to make sure they understand and follow all policies and procedures around impairment and use of prescription medications in the workplace.
- 5** Employees cannot be treated differently based on a disability. The exception to this rule is if an employee's disability presents a health and safety risk that cannot be managed.
- 6** Employees need to follow all reasonable instructions from an employer. Employees may be entitled to refuse a drug test if it's not in their employment agreement or if the employer has no workplace policy that permits drug testing.
- 7** An employee who has been suspended or dismissed following a positive drug test for cannabis due to medicinal cannabis use should seek legal advice on their rights and obligations, and the next steps they can take.

# Employment rights regarding medicinal cannabis use

Employment rights regarding medicinal cannabis is very much a developing area of employment law. Whether or not a positive drug test result for cannabis would be grounds for disciplinary action at work will depend on a number of factors, including the employee's employment agreement, the employer's policy on alcohol and substance use, and the employee's role (i.e., whether it is a safety-sensitive role).

An employee should consider whether they are obligated to tell their employer that they have a medicinal cannabis prescription (see sections 4.3 and 4.4). Once disclosed, depending on the employee's role, appropriate investigations may be required to confirm the prescription and its use, the potential impact on the individual, the risks in the workplace, and how to manage those risks.

There are several types of medication that can cause impairment. These include some prescription-only medicines, for example opioid pain medication; some over-the-counter medicines, such as some anti-allergy medicines; and certain anti-anxiety and antidepressant medicines. Because almost all medicinal cannabis products are unapproved medicines, prescribers are required to note the patient's informed consent to use them. Consent forms may include risks around driving and using heavy machinery, and possible impairment.

An employer should address any use of medicinal cannabis by an employee on a case-by-case basis. Whether it is safe to use medicinal cannabis and continue with their work will likely depend on the individual and their role and work pattern, as well as their medical condition and the dose, frequency and times for taking the medication. As such, it will likely be difficult to apply a general approach to all employees. The employer's obligation will be to treat all employees fairly and to take a consistent approach to this matter, so far as is possible.

It is important to note that an employer cannot treat an employee differently based on a disability, except in limited circumstances, including where the employee's disability presents a health and safety risk, and it is not reasonable to take that risk, and if the employer could not take reasonable measures to reduce the risk to a normal level without unreasonable disruptions. Refer to sections 3.2.5 and 3.3 for further information.

## Job applicants' rights and responsibilities

Job applicants for safety-sensitive roles will likely be asked to disclose any medical conditions and any side effects from medication that might be relevant to their ability to perform the role.

Employers are within their rights to ask this question, as it pertains to ensuring the applicant can perform the role safely.

If they have not already been asked during recruitment, job applicants for safety-sensitive roles (or if the job involves safety-sensitive duties such as regularly driving a company vehicle) may be required to disclose medicinal cannabis use before starting work. This is especially true if the medication might impact on their ability to perform their role, or if it might create a health and safety risk to themselves or others at work.

Failing to make a relevant disclosure in these circumstances could later result in the employee being sanctioned.

If an applicant wishes to disclose, or is required to disclose, use of medicinal cannabis when applying for a job, they should make sure they have all relevant medical documents to hand before they apply for any job. That might include a prescription from their doctor, and also a recent doctor's letter that describes how long they've had their medication, the medical reason for taking the medication (if relevant), the doctor's dosage advice, and frequency and times for taking the medication.

They could also talk to the organisation's human resources department about their policies on medicinal cannabis. They could ask how they deal with people who have a medicinal cannabis prescription who also might need to have a drug test.

All job applicants should carefully read their employment agreements and the employer's workplace policies to understand any requirements for them to undergo drug testing at work, or as a pre-employment requirement.

Applicants should make sure they understand what happens if they agree to a drug test, and what happens afterwards, depending on the result.

They should be told, or ask the workplace for, as much information as possible about drug testing requirements. For example:

- **Who is tested for drugs at this workplace?** Which roles are included in drug testing, which jobs are excluded?
- **Who can employees talk to confidentially** about prescription medications they are already taking, or medications that they start taking, especially if they are worried about impairment or drug testing?
- **What drugs and medications are tested for**, and is there a list of these available?
- **What are the limits** or thresholds for each drug?
- **What type of tests will be conducted?** For example, urine drug tests, saliva tests, blood tests, breath alcohol tests?
- **What happens** if a drug test is refused?
- **What happens if the test is positive** or exceeds a threshold? What might happen right away, and what might happen in the long term?
- **What support is available to employees** regarding their rights at work? Is there a union membership scheme operating in the workplace?
- **What support is available for employees who want support with their health** at work; for example, an employee assistance programme (EAP)?
- **When are employees tested?** Is testing conducted randomly, before a shift, after a safety incident or near-miss, on a scheduled, regular basis, or if someone might be impaired?
- **Can an employee question or appeal** the test results?
- **Can the test be taken again** if the employee wants a retest?
- **How** are tests carried out?
- **How is privacy maintained** during the test (especially if urine tests are carried out)?
- **How is employees' medical information**, including test results, kept private?
- **How are employees told about any changes** to the workplace drug testing policies and procedures?
- **How can employees provide feedback** on any changes to the workplace drug testing policies?

Before signing an employment agreement, job applicants should ensure that they fully understand their rights and responsibilities around being subjected to a drug test at work. Job applicants should make sure they are given all relevant policies and information around drug testing at a particular workplace, and make sure they understand them before they accept an employment offer. Finally, job applicants should seek independent advice about these matters, as necessary, before signing the employment agreement.



## Current employees' rights and responsibilities

People who use any type of prescribed medication, including medicinal cannabis, must use it responsibly and as per prescribing directions. If they are impaired, they must avoid undertaking action that could put themselves or others at risk (for example, driving while impaired is an offence under the Land Transport Act 1998).

**Employees have a responsibility to turn up fit for work and ensure that their actions do not harm the health and safety of others.** They also have a duty to comply with any reasonable policy, procedure or instruction given by their employer about how to work in a safe and healthy way. Employees must comply with workplace policies around impairment and use of prescription medications in the workplace.

**Employees may be required to disclose medicinal cannabis use to their employer** if using that medication might impact on their ability to perform their role, or if it might create a health and safety risk to themselves or others at work.

Employees who use medicinal cannabis should seek medical documentation from their prescribing doctor about their prescription for cannabis, so that this could be provided to their employer upon request. The information should set out their prescription details (including dose, frequency and times for taking it), any health and safety risks relevant to their employment, and how those risks can be managed.

Employees should also keep themselves up to date with any changes to their employer's workplace policies on health and safety, impairment, drug testing, and use of medications, drugs or alcohol in the workplace. They should know who to talk to if they have any questions. They should refer to the policy or to their employment agreement if they are subject to drug testing and are unsure of the process or consequences.





#### 4.4

## Do I have to tell my employer if I start using medicinal cannabis?

Possibly, yes. An employee is obligated to take reasonable care that their acts and omissions don't put the health and safety of themselves or others at risk. They also may have specific contractual obligations to tell their employer about any health conditions they have, or medication they are taking, that could create a health and safety risk to themselves or others in the workplace, or affect their ability to perform their job.

This means that if an employee has a prescription for medicinal cannabis, they may be required to disclose this to their employer, even where the employer does not carry out drug tests.

Whether it is necessary for an employee to disclose their use of medicinal cannabis is case specific, but it will largely depend on their role and whether it is safety-sensitive. Other relevant factors include the type of prescription (whether it is a CBD-only product only or if it contains THC), their work pattern, the dosage and timing of using the medication, and whether disclosure is required under workplace policies.

#### 4. GUIDANCE FOR EMPLOYEES AND JOB APPLICANTS

## Is my employer allowed to ask for details of my medical conditions?

Possibly, yes. If the employee's use of medicinal cannabis is permitted by the workplace policy, the employer and the employee may need to ensure the employee is not adversely affected by their medicine while at work.

In the first instance, the employer should consider engaging with the employee about what information they would be comfortable sharing. The employer should decide whether that is sufficient to determine that the employee is not adversely affected by the use of the medicine at work, and it does not put others at risk.

If the employee gives consent, the employer may decide it is necessary to obtain medical information from the employee's prescriber. They can (and should) ask specific questions as part of assessing any relevant health and safety risk.

If the employee does not consent to providing medical information, the employer may make reasonable decisions based on the information they have available to them.

An employer is obliged to conduct a fair and reasonable investigation process before undertaking any disciplinary action against an employee. Still, employers should make sure that employees understand the potential consequences of not providing medical information.

Therefore, with the employee's consent, it may be necessary for the employer to obtain written medical advice from the employee's prescriber. The advice should be limited to the potential impact of the medication on the work that the employee does.

The prescriber may not need to provide all details about a medical condition. The advice could include:

- the employee's condition and why medicinal cannabis is recommended;
- whether there are other medication options that would not create the same health and safety risks;
- exactly what has been prescribed, including the dose, frequency, and time it should be taken;
- whether the dose taken at the prescribed time presents a risk to the employee or others when they are at work; and
- how any risk can be managed.

This information will assist the employer to understand whether that medication may present a risk to the employee or others when they are at work, and if so, how long any mitigating measures may need to be in place for. If the employer is not satisfied that the prescriber's advice is objective and reliable, the employer may need to seek independent expert medical advice. The employer may need to also provide a copy of the employee's job description, and further explain the type of work they do.

# Drug testing at work: what employees should know

**Requirements for drug testing should be set out in employment agreements.** However, drug testing may also be permissible if the employer has a substance use policy that allows for testing, and the employee has been told about it and been given a copy before signing their employment agreement. Drug testing can be introduced into the workplace as long as the employer follows appropriate processes, including consultation with employees.

Employees must follow all reasonable and lawful instructions from their employer, including in relation to matters concerning health and safety. That being said, employees are usually only required to take a drug test where this is lawful and reasonable in the circumstances.

Whether it is lawful and reasonable will largely depend on whether the employer has a workplace policy (for example, a medication, alcohol and drugs policy) permitting drug testing, and it will also depend on the employee's role (where random drug testing is concerned). Any requirement to undergo drug testing should also be recorded in the employment agreement, or outlined to the employee at the job offer stage, so that employees are aware of any drug testing requirements before commencing employment. Employees may have the right to refuse a drug test unless it is stated as a condition of employment in their employment agreement, or the employer has a workplace policy that permits drug testing.

Drug testing may be necessary to protect the safety of employees, but may also be viewed as an unreasonable intrusion into employee privacy. Employers thinking about introducing drug testing to employees should seek legal advice, particularly around the process to follow in terms of engagement with employees. Employers have a statutory duty to engage with workers when making decisions or proposing changes that relate to workplace health and safety (such as implementation of a drug and alcohol policy). Failure to engage with workers can result in significant liability under the Health and Safety at Work Act. More detailed information about workplace drug and alcohol testing is available on the Employment New Zealand website.

Employers should also seek expert advice about what testing regime should be adopted for an employee who has disclosed that they are taking medicinal cannabis, and whether their role is subject to random drug testing under the relevant workplace policy. Random testing may not necessarily be practical in these circumstances. Employers may need to work with the employee to put agreed conditions in place around testing, such as the timing and frequency of testing, and the process that would be followed if the test result is above the stated cut-off level. However, if an employer considers that random testing is needed, it may be reasonable to impose that, depending on the reasons the employer is relying on.

## Dismissal for medicinal cannabis use at work

An employee who has been suspended or dismissed from their employment following a positive drug test for cannabis due to medicinal cannabis use should seek legal advice to understand what their obligations and rights are, and what steps are available to them.

This may include an internal escalation process provided by a workplace policy, or working through the employment dispute resolution process outlined in the employee's employment agreement.

Whether the employer's actions are justified will depend on each individual circumstance and on the employer's substance use policy. Any personal grievance relating to a suspension or dismissal or other unjustified action must be raised within 90 days from the date of that action occurring.

Where any employment relationship problem arises between a current employee and their employer, the parties must attempt to resolve the problem in accordance with the relevant terms of the employment agreement.

# Where to go for further advice

**Citizens Advice Bureau:** CAB provide free, confidential, independent information and advice to anyone. They help people know what their rights are and how to access services they need. They have information on employment rights, including drug and alcohol testing at work: [cab.org.nz](http://cab.org.nz)

**Community Law:** Community Law provide free one-on-one legal help to eligible people. Their lawyers are experienced in a range of areas, including employment law: [communitylaw.org.nz](http://communitylaw.org.nz)

**YouthLaw Aotearoa:** YouthLaw Aotearoa is a free community law centre for children and young people nationwide. They provide free legal services to anyone aged under 25 who is unable to access legal help elsewhere, or those acting on their behalf: [youthlaw.co.nz](http://youthlaw.co.nz)

**Employment New Zealand:** information about employers' obligations and employee rights and responsibilities around drugs and alcohol in the workplace: [employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/alcohol-and-other-drugs](http://employment.govt.nz/fair-work-practices/workplace-policies-and-procedures/alcohol-and-other-drugs)

**Medicinal Cannabis Agency:** information about the Medicinal Cannabis Scheme administered by the Ministry of Health, including information for medical professionals, consumers, and industry: [health.govt.nz/regulation-legislation/medicinal-cannabis/about-the-medicinal-cannabis-scheme](http://health.govt.nz/regulation-legislation/medicinal-cannabis/about-the-medicinal-cannabis-scheme)

There are several resources available to people who may want support or information around substance use.

They may be useful sources to reference in a workplace substance use policy. Some of these are listed below:

**Information about the effects of drugs, safer drug use, drug checking, and the law:** [thelevel.org.nz](http://thelevel.org.nz)

**Support for drug use:** [thelevel.org.nz/finding-support/support-options](http://thelevel.org.nz/finding-support/support-options)

**Drug and Alcohol Helpline:** 0800 787 797  
[alcoholdrughelp.org.nz/helpline](http://alcoholdrughelp.org.nz/helpline)

**Community alcohol and drug treatment services:** [info.health.nz/services-support/alcohol-and-drug-services/community-treatment-services](http://info.health.nz/services-support/alcohol-and-drug-services/community-treatment-services)

**Advice on receiving mental health support:** [mentalhealth.org.nz/help/accessing-mental-health-services](http://mentalhealth.org.nz/help/accessing-mental-health-services)

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