

What the law says about drug and alcohol testing in the workplace



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Employer's concerns of drug and alcohol use in the electrical industry are heightened due to the "safety-sensitive" nature of the work. Relying on drug and alcohol testing to control substance use might seem attractive, but it's not without restrictions or risk.

Restrictions of testing

In Ontario, courts and arbitrators have held that an employer seeking to test its workforce for drugs and alcohol that must be able to demonstrate the method of testing provides an effective assessment of the worker's current level of impairment.

Unfortunately, many methods of drug testing cannot detect current impairment; only that a drug is present in the body (including a trace level from several days or weeks prior, having no therapeutic effect). Even when testing can confirm current impairment, the results are not obtained immediately and so the purpose of the drug test is frustrated.

Alcohol testing is different. It identifies current impairment, and for that reason is generally accepted where there are grounds to suspect an employee is impaired on the job.

Random testing

In 2013, the Supreme Court of Canada decided that in a unionized workplace random drug and alcohol testing is a serious infringement on personal privacy, and will not be permitted unless the workplace is considered dangerous and there is "cogent direct non-anecdotal evidence from that workplace" of a drug or alcohol problem.

In a non-unionized workplace, while there is no collective agreement to import a right to privacy, workers have successfully relied on human rights legislation to argue that a policy of random testing is invalid because it requires too high a level of personal intrusion. That said, where there is evidence of rampant abuse of drugs or alcohol in the workplace, testing may be justified in order to protect the health and safety of workers.

Pre-employment and pre-access testing

An employer may wish to test an individual before hiring or permitting access to the workplace. However, this type of testing is generally impermissible on the basis it is akin to random testing. However, similar to random testing, there are some exceptions. Pre-employment or pre-access testing may be permitted if there is sufficient evidence of heavy use of drugs or alcohol in the workplace or some additional demonstrable need to justify the otherwise recognized invasion of privacy inherent in such testing.

Conduct-based testing

Where the workplace has an appropriate policy in place, conduct-based testing (testing triggered by the actions of an employee) is permissible in three circumstances:

1. In a safety-sensitive position following an incident or near miss when all other causes have been investigated and ruled out;
2. As a condition of return to work following a positive test; or
3. Where there is cause to suspect an employee is impaired at work.

Disability under the Code and the duty to accommodate

Under the Code, substance dependency may be considered a "disability" that must be accommodated. In practical terms this means that if an employer chooses to implement a testing policy it must incorporate the principles of accommodation (to the point of undue hardship to the employer).

Accommodation entails an objective, individualized assessment of the facts; not generalized assumptions or an automatic dismissal or withdrawal of an offer of employment or access to a site.

What constitutes undue hardship is workplace specific, though the burden of proof falls to the employer. The Human Rights Tribunal of Ontario considers two principal factors: (i) health and safety risks to the individual requesting accommodation, other employees and the general public; and (ii) cost, including the present cost of carrying out accommodation and reasonably foreseeable costs.

Arbitrators tend to show a little more leeway and have considered factors such as: health and safety, history of other accommodation, prognosis of the employee's recovery, the size of the employer, cost, and the availability of an alternative position for the individual.

The future of drug and alcohol testing

In 2015, the Supreme Court of Canada is expected to release a decision that may put to bed any lingering confusion in this area. A unionized employer has argued that its random testing policy is valid because its worksite is inherently dangerous and there is direct evidence of a sustained and serious substance abuse problem at that site. This includes the fact that three of the seven workers who have died at the site since 2000 were each under the influence of drugs or alcohol at the time of their death.

This case offers a rare opportunity for the court to define what constitutes a significant enough substance abuse problem in the workplace to meet the high threshold for random testing. If the court disagrees with the employer, and random testing is found impermissible at that worksite, the already restrictive conditions in which unionized employees may be randomly tested will be narrowed even further.

We will continue to monitor this area of the law and keep our readers updated. ☺

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