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Tips to avoid tipsy workers

Drug and alcohol testing in the workplace.

While many employers worry about drugs and alcohol at work, a manufacturer's worries are heightened due to the "safety-sensitive" nature of the workplace. Relying on testing to control substance use in a plant might seem appealing; but can an employer legally test for drugs and alcohol in the workplace? The short answer is testing is only permitted in rare circumstances.

Pre-employment and pre-access testing

An employer may wish to test an individual before hiring or permitting him (or her) access to the plant floor. In Ontario, courts and arbitrators have held that this type of testing is not permissible because it neither demonstrates impairment at work (testing occurs before work); nor predicts future use.

However, a recent Ontario decision, *Re Mechanical Association Sarnia et al*, has suggested pre-access testing may be permissible if an employer can demonstrate – through direct evidence – an existing substance abuse problem at its workplace. General statistical evidence regarding substance use in a region, for example, will not be considered sufficient evidence.

Random testing

An employer may want to deter substance use through random testing; regardless of suspicions of impairment. Here the courts have differentiated between drug testing and alcohol testing.

Random drug testing is not permitted, because most drug tests are unable to confirm impairment as at the time the test was taken; they only confirm that a drug was present in the body at some time (which may be several days or weeks prior). Even where testing can confirm impairment at the time the test was taken (for example, through saliva swabbing) immediate results are not provided. As such, the test can't identify an imminent safety risk, the purpose for which the test is utilized.

Random alcohol testing is not permitted either, subject to a few narrow exemptions. In the recent decision of CEP, Local 30 v Irving Pulp & Paper Ltd., the Supreme Court of Canada held that random alcohol testing in a unionized workplace is permissible where there's evidence of a pervasive substance abuse problem in the workplace. In a non-unionized workplace, where there is no collective agreement that imports a right to privacy, Ontario courts have held that random alcohol testing is permissible where: (i) an employee works in a safety-sensitive position; and (ii) workplace supervision is non-existent or minimal. There is no requirement to demonstrate an issue with substance abuse in the workplace generally.

Post-incident and reasonable cause testing

After a workplace accident or "near miss", if it is suspected impairment may have been a factor, an employer may wish to test the individuals involved. This is referred to as "post-incident" testing. Similarly, where a worker's actions suggest impairment (such as slurred speech), an employer may wish to test the worker. This is "reasonable cause" testing. Both types of testing are generally permissible provided the workplace has appropriate policies in place identifying the circumstances in which testing may occur.

Return to work testing

Testing may be appropriate where an employee returns to work following treatment for substance abuse. Such testing is typically part of a last chance agreement, stipulating that a positive result will result in termination.

Duty to accommodate

Any testing protocol must be consistent with the Ontario Human Rights Code, under which substance dependency is considered a "disability". An employee with a disability is entitled to accommodation, which typically involves a leave of absence and treatment.

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