

DRUG & ALCOHOL TESTING IN THE WORKPLACE

The issue of drug and alcohol testing in the workplace has long caused confusion for employers. What type of testing is allowed? When is such testing permissible? Drug and alcohol testing policies that don't conform to recent legal developments can expose employers to claims of discrimination, putting them at risk for sanction under human rights legislation. As a previous or existing dependence on alcohol or a drug is considered a physical disability, individuals who believe they have been treated unfavourably, or who lose or are denied employment as a consequence of a positive test result, may file discrimination complaints against the employer.

New Policy on Alcohol and Drug Testing

The release of the Canadian Human Rights Commission's Revised Policy on Alcohol and Drug Testing (the "Policy") in July 2002 provides an opportunity to revisit the state of the law in this area. However strictly speaking, the Policy applies only to federally-regulated employers. Many issues addressed in the federal Policy will also apply to the consideration of workplace drug and alcohol testing by human rights commissions under provincial human rights legislation. The guidelines set out in the Policy provide a useful tool for employers seeking to establish drug and alcohol testing policies, which balance the need to ensure workplace safety and the obligation to protect the rights of individual employees under human rights legislation. A copy of the Policy can be obtained from the Commission's web site at www.chrc-ccdp.ca.

Guidance from Case Law

Part of the impetus for the release of the revised Policy was to ensure that the Policy accurately reflected recent jurisprudence in this area. The leading case on drug and alcohol testing in the workplace, which is referred to extensively in the Policy, is a decision of the Ontario Court of Appeal called *Entrop v. Imperial Oil*. *Entrop* sets out the guiding principles for workplace drug and alcohol testing policies and makes it clear that the scope of permissible testing will vary depending on when the testing takes place; whether the testing is related to alcohol or drugs; whether or not the employee in question holds a safety-sensitive position; and whether or not the employer can establish that the testing is a bona fide occupational requirement ("BFOR").

Pre-employment Testing

Generally, the Policy states that pre-employment drug and alcohol testing



Ayla Akgungor

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

1900, 350 - 7TH AVENUE S.W.
CALGARY, AB T2P 3N9
PH: 403.260.8500

203, 5102 - 50TH AVENUE
YELLOWKNIFE, NT X1A 3S8
PH: 867.920.4542

www.fieldlaw.com

are not acceptable because a positive pre-employment drug or alcohol test will not be able to predict whether the individual will be impaired at any time while on the job. As such, it is unlikely that an employer would be able to argue that pre-employment testing constitutes a BFOR because the pre-employment testing cannot be shown to effectively assess an applicant's ability to discharge their employment responsibilities.

However, there may be limited circumstances where an employer could perform drug or alcohol testing as a pre-condition for employment or as part of a "fitness for duty" check, such as where the individual has disclosed an existing or past drug abuse problem or where a general medical exam provides reasonable cause to believe that the employee may become impaired while on the job. Ultimately, if an employer is considering administering a pre-employment drug or alcohol test, the best course of action is to obtain the individual's consent to administer the testing as a pre-condition to employment.

Random On-the-Job Testing

In the case of on-the-job testing, it is important to note that the Policy distinguishes between whether the testing is for alcohol or drug use. Random on-the-job drug testing is not permissible because of the inability of current drug testing methods to detect current or future impairment. A positive drug test shows only past drug use. It cannot show how much was used or when it was used. Because such testing cannot demonstrate that a particular person is incapable of performing the essential duties of their position, employers will generally not be permitted to conduct random drug testing in the workplace.

Random on-the-job alcohol testing is permissible; however, such testing will usually be confined to the testing of employees in safety-sensitive positions, where supervision is minimal or non-existent. The Policy defines a safety-sensitive position as one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be

categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high-risk operation.

Unlike drug testing, random alcohol testing is permissible because a breathalyser reading can identify whether or not a person is impaired while on the job. Since alcohol testing can demonstrate an inability to perform the essential duties of the job due to impairment, employers will be able to establish that such testing is a BFOR and is reasonably necessary to ensure the safety of the workplace when administered to employees in safety-sensitive positions.

A critical caveat on random alcohol testing is that if an employer is planning to administer random testing to employees in safety-sensitive positions, the employer must give employees advance warning of the policy. Further, if new employees are hired into safety-sensitive positions, the employer should notify job applicants of the requirement at the time that an offer of employment is made.

Random alcohol testing will only be justifiable to the extent that it has a demonstrable relationship to job safety and performance. As a result, random alcohol testing of employees in non-safety sensitive positions is generally not acceptable. For the most part, it is not reasonably necessary to administer breathalyser tests to ensure effective job performance of employees in non-safety sensitive roles.

Further, it is important to note that because the focus is on testing for impairment of the employee's ability to perform the essential duties of the position, a workplace policy that provides zero tolerance for alcohol no matter when consumed will generally be considered unnecessarily strict.

Reasonable Cause or Post-incident Testing

Mandatory testing for either drug or alcohol use for existing employees may be permissible if there is just and probable cause to suspect that an

employee is impaired on the job based on hard evidence such as observation by supervisors or colleagues of unsteady balance, slurred speech or reduced motor skills, observation of drinking or smoking drugs in the plant, or the occurrence of an accident or a "near miss" because of the employee's clumsiness.

Following accidents and reports of dangerous behaviour, an employer will have a legitimate interest in assessing whether the employee in question had consumed substances that are psychoactive and which may have contributed to the incident. The results of the assessment may provide an explanation of the cause of the accident. As such, an employer can generally establish that "for cause" and post-incident testing is reasonably necessary to ensure the heightened safety standard that is necessary in risk-sensitive environments.

Duty to Accommodate

It is important for employers to recognize that even though drug and alcohol testing may be permissible in certain circumstances, discrimination complaints will only be avoided if the employer fulfils its duty to accommodate employees who test positive for substance use to the point of undue hardship. The point of undue hardship will generally be met where the cost of accommodation would alter the nature or affect the viability of the enterprise or where the health or safety risks to other workers or members of the public are so serious that they outweigh the benefits of accommodating the worker with a dependency problem.

To meet the duty of accommodation, employers must ensure that accommodation measures are individualized and personalized to the needs of the particular employee. The extent of any particular employer's duty to accommodate will vary depending on the resources of the organization and the specific circumstances of the case.

Accommodation should include referring the employee to a substance abuse professional to determine if in fact he or she is drug-dependent, providing the necessary support to permit the employee to undergo treatment or a rehabilitation program, and considering sanctions less severe than

dismissal. The employee, in turn, is under a correlative duty to participate in good faith and make reasonable efforts to succeed in the rehabilitation program, or other stipulated accommodation measures.

It is important to note that workplace policies that result in automatic loss of employment, reassignment, or that impose inflexible reinstatement conditions without regard for personal circumstances are unlikely to meet the duty to accommodate.

The Bottom Line

Any drug or alcohol testing conducted by an employer should be limited to determining actual impairment of an employee's ability to perform or fulfil the essential duties or requirements of the job. Testing in this context will generally only be permissible in circumstances of random alcohol testing for employees in safety-sensitive positions, and possibly in cases of reasonable cause or in post-incident situations.

Employers must also keep in mind their duty to accommodate employees who test positive for drug or alcohol use. Given the potential difficulties which may stem from the imposition of workplace drug and alcohol testing programs, employers may also want to consider achieving the same objectives through less intrusive means such as employee assistance programs, enhanced supervision and observation, and positive peer reporting systems.

DISCLAIMER This article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to the author:

Ayla Akgungor at 780-423-3003

REPRINTS

Our policy is that readers may reprint an article or articles on the condition that credit is given to the author and the firm. Please advise us, by telephone or e-mail, of your intention to do so.