
Drugs and Alcohol in the Workplace

Schedule 2 Employers Group Conference

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Agenda

- Understanding drug and alcohol testing
 - The legal framework
 - When is testing permissible?
- Responding to a workplace incident
 - Culpable vs. non-culpable conduct
 - Duty to accommodate & undue hardship
 - Last chance agreements
- Drug and alcohol policies

Drug and Alcohol Testing



Drug and Alcohol Testing Methods

Method	Test Matter	Current Impairment?	Limitations
Breathalyzer	Alcohol	Yes	Doesn't test for drugs
Urinalysis	Drugs and Alcohol	No	Tests recent use, false positives, delay
Hair analysis	Drugs	No	Tests use over longer period, cultural differences, expensive, delay
Saliva	Drugs and Alcohol	<i>Maybe</i>	Delay, possibility of false positives and false negatives*
Blood	Drugs and Alcohol	Yes	Short detection period, invasive

* *Imperial Oil Ltd. V. CEP, Local 900 Ont. C.A.*

Competing Legal Considerations

- Employer has an obligation to protect safety of employees, clients/customers and public
- Policies requiring testing:
 - May breach *Human Rights Code*
 - Concern re: discrimination
 - May violate collective agreement rights
 - Concern re: privacy

Competing Legal Considerations

■ Human Rights Considerations:

- *Code* prohibits discrimination on basis of disability and perceived disability
- Drug and alcohol addiction is a disability
- *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*
 - Now called “Substance Use Disorders”
 - Measured on continuum: mild, moderate, severe

Competing Legal Considerations

- Privacy Considerations:
 - Highly personal information
 - Bodily integrity
 - Arbitrators' "balancing approach":
 - Privacy vs. safety
 - Tort of intrusion upon seclusion



Safety Sensitive Workplaces/Positions

- What does ‘safety sensitive’ mean?
 - Generally, risk or harm to self or others (or other serious consequences) if impaired
 - Hazardous environment
 - Remote location
 - Limited direct supervision
- Position can be safety sensitive even if the workplace, as a whole, is not

Is Consent Required?

- Employee consent required
- Form of consent
 - Collective agreement
 - Employment contract
 - Workplace policy
- Consent does *not* eliminate liability (e.g. human rights complaint)

When is Testing Permissible?



Pre-Employment Testing

- Non-unionized employees:
 - Human rights considerations paramount
 - Is testing *prima facie* discriminatory?
 - Some recognition of connection to managing safety risk in safety sensitive workplace/position
 - Emphasis on effect of policy in each individual case rather than on policy itself
 - Critical to incorporate into policy individual assessment and accommodation

Pre-Employment Testing

- Unionized employees:
 - Generally, not permissible, even for safety sensitive workplace/position
 - Results only indicate past use
 - Cannot predict future job performance
 - Therefore utility of testing does not outweigh privacy interest

Pre-Employment Testing

- Testing may be permissible where there is reasonable cause to suspect substance abuse
 - Employer can demonstrate – through direct evidence – existence of substance abuse problem at workplace
- If candidate fails test:
 - Opportunity for further medical assessment
 - Be prepared to accommodate if addiction

Random Testing

- Typically not permitted for unionized employees
- *Irving Pulp and Paper* (2013 SCC)
 - Employer introduced *random* alcohol testing:
 - Only for “safety sensitive positions”
 - 10% of employees were randomly tested
 - A positive test would result in significant discipline, including discharge
 - Failure to submit = immediate discharge

Random Testing

- SCC upheld arbitrator's award:
 - Testing was invalid use of management rights
 - Insufficient evidence of a workplace problem of alcohol abuse:
 - 1991-2006: 8 documented incidents re: consumption/impairment; no accidents/injuries
 - Dangerousness of a workplace is not an “automatic justification”

Random Testing

- Limitations of testing technology present additional hurdles to random drug testing:
 - Urine test does not detect current or future impairment or quantity of drug consumed
 - Saliva test does not yield immediate, reliable results
- Random testing cannot detect imminent safety risk and therefore cannot outweigh privacy interest

Random Testing

- Non-unionized employees:
 - *Entrop v. Imperial Oil* (2000 ONCA)
 - Permitted – random alcohol testing for employees in highly safety sensitive positions subject to minimal supervision
 - Not permitted – random drug testing due to limitations of testing technology
 - Effect of test result including individual assessment and accommodation is critical

Return to Work Testing

- Typically permitted for safety sensitive position
- May be permitted for non-safety sensitive position
- Rehabilitative testing requires balance between:
 - Privacy/human rights
 - Safety



Post-Incident Testing

- Testing is generally permissible as part of a larger investigation into a workplace accident or “near miss”
- Needs to be some reasonable basis upon which the employer believes impairment may have been a factor in the accident

Reasonable Cause Testing

- Similarly, where employee's actions or appearance in the workplace suggest impairment (e.g. stumbling, slurred speech, smell of alcohol) testing may be permissible
- For both post-incident and reasonable cause testing, there should be a broader workplace policy in place setting out the circumstances in which testing may occur

Responding to a Workplace Incident



Culpable vs. Non-Culpable Conduct

- Employer response depends on whether conduct is culpable or non-culpable
 - Non-Culpable
 - Causal connection between conduct and *addiction*
 - Culpable
 - Misconduct related to recreational drug or alcohol use
 - Misconduct unrelated to addiction

Culpable vs. Non-Culpable Conduct

■ Response

- Accommodation *only* required if the employee has a disability or is *perceived* to have a disability
- Recreational drug/alcohol use not a disability requiring accommodation



Culpable vs. Non-Culpable Conduct

- *TTC v. CUPE, Local 2 (2011)*
 - Grievor stole copper wire from the TTC on several occasions and was discharged for theft
 - No dispute Grievor suffered from cocaine dependence
 - Union grieved discharge alleging theft was caused by Grievor's addiction and therefore TTC was required to accommodate

Culpable vs. Non-Culpable Conduct

- Discharge upheld as arbitrator found that disability did not cause the misconduct:

“The only connection between the theft and the cocaine addiction is the fact that the grievor used the money he received for selling the stolen copper wire...to purchase an eight ball of cocaine. As noted earlier the use of that money was a choice the grievor willingly made instead of using his own money that he had readily available”

Duty to Accommodate

- Duty to accommodate to point of *undue hardship* where causal connection between misconduct and addiction

Duty to Accommodate

- Common accommodation for addiction:
 - Absence/leave to obtain required treatment
 - Temporary reassignment to non-safety sensitive position where employee is subject to regular supervision

Duty to Accommodate

- Last chance agreement (“LCA”) can be form of accommodation, but consider:
 - Whether appropriate in circumstances
 - Whether terms are reasonable
 - Cannot prohibit drug/alcohol use entirely
 - Focus on attendance at workplace under the influence
 - Unionized context:
 - Employer, employee *and union* must sign LCA

Duty to Accommodate

- Record prior accommodation efforts in LCA
 - “Whereas the Employer has granted the Employee three leaves of absence...”, *etc.*
- Where applicable, record parties’ agreement that no further accommodation appropriate
- Breach of LCA not automatic right to terminate but can be evidence of undue hardship threshold

Undue Hardship

- Factors considered in assessing undue hardship appear to differ as between *Human Rights Code* and arbitration
- *Human Rights Code*:
 - Cost and outside sources of funding, if any
 - Health and safety



Undue Hardship

■ Arbitration:

- Health and safety
- History of accommodation
- Prognosis for recovery
- Size of the employer
- Cost of accommodation
- Availability of alternative positions

Undue Hardship

- Relapse is a challenge unique to accommodation of addiction:
 - Employee required to participate in treatment program
 - Duty to accommodate does **NOT** include permitting employee to attend work under influence of drugs or alcohol
 - However, relapse is a symptom of addiction and must be accommodated to a point...

Undue Hardship

- *UFCW, Local 175 v Fearman's Pork Inc.*
 - Grievor was an electrician with 29 years of service
 - Grievor received a one day suspension in 2007, and a 10 day suspension in 2009 for being intoxicated in the workplace
 - In 2009 Grievor required to participate in an “alcohol abuse” program, and execute an LCA
 - In 2010 (2 months after expiry of LCA) Grievor discharged for being intoxicated in workplace

Undue Hardship

- Grievor reinstated in part because of finding that neither party had previously recognized Grievor's *disability* or “seriously turned their minds to the accommodation of alcoholism”
- Conditions of reinstatement included:
 - Abstention from drug and alcohol consumption
 - Random drug and alcohol testing
 - Continued participation in treatment program and involvement of physician in recovery

Best Practices

**SAFETY
DOESN'T
HAPPEN BY
ACCIDENT.**

Drug and Alcohol Policy

- Implement a drug and alcohol policy:
 - If testing contemplated, set out applicable procedures and circumstances in which testing will be performed
 - Provide legitimate justification for performing testing
 - Include measures for protecting employee privacy

Drug and Alcohol Policy

- Incorporate process for accommodation:
 - Consider providing ability to self-report without fear of disciplinary consequences
 - Positive result leads to objective, individual assessment not assumptions or automatic discipline/termination
- Communicate expectations to employees
- Enforce policy consistently



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