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The Basics of Workplace Drug and Alcohol Testing

By Malcolm MacKillop and Hendrik Nieuwland

The Toronto Transit Commission has recently had some trouble with impaired employees. This has thrust workplace drug and alcohol testing into the spotlight. How to introduce a drug and alcohol testing policy in your workplace is probably one of the most difficult challenges you can face as a human resources professional. Careful consideration must be paid to a number of legal principles, like occupational health and safety, privacy, and human rights.

The Ontario Court of Appeal has given useful guidance in the 2000 landmark decision *Entrop v. Imperial Oil Ltd.* ["*Entrop*"] and its 2009 follow-up decision in *Imperial Oil Ltd. v. C.E.P.U.C., Local 900* ["*Nanticoke*"]. Further guidance has been given in two (2) recent decisions from a British Columbia arbitration board (*Rio Tinto Alcan Primary Metal v. CAW-Canada, Local 2301* ["*Rio Tinto*"]) and the New Brunswick Court of Appeal (*Irving Pulp & Paper Ltd. v. C.E.P.U.C., Local 30* ["*Irving*"]).

Taking cue from these authorities, here are answers to three common questions about workplace drug and alcohol policies.

Can my company introduce drug or alcohol testing?

Almost all of the case law on this point comes from unionized workplaces. In general an employer can introduce a workplace policy so long as it is reasonable. Some arbitrators have held that for such a policy to be reasonable an employer needs to show a history of drug or alcohol-related workplace incidents and that less intrusive measures to counter the problem have failed. However more recent case law, in particular the New Brunswick Court of Appeal's decision in *Irving*, says that this evidence is not necessary where the testing policy is introduced in a workplace that is inherently dangerous and where the policy targets employees in safety-sensitive positions.

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Can the drug or alcohol testing be random?

With respect to random alcohol testing, the arbitral case law is divided. Some arbitrators have held that testing for alcohol impairment is only reasonable where there is “just cause”. Examples of just cause include using alcohol testing to investigate a workplace accident or “near miss”, or using it as part of an agreed upon alcohol rehabilitation program. Other arbitrators, along with the Ontario and New Brunswick Courts of Appeal, have found random alcohol testing reasonable where it is limited to employees in safety-sensitive positions and is done by a breathalyser. The use of a breathalyser is key because the Courts consider it less intrusive of employee privacy and – most importantly – it can accurately determine whether an employee is currently impaired by alcohol. This ability of the breathalyser was pivotal to the Ontario Court of Appeal’s conclusion in *Entrop* that Imperial Oil’s random alcohol testing policy complied with the *Human Rights Code*; the random testing was a bona fide occupational requirement only because it could confirm that an employee was currently impaired by alcohol and thereby promote the policy’s objective of improving workplace safety.

Random drug testing, however, is universally frowned upon. As noted by the Ontario Court of Appeal in *Nanticoke*, this is principally because there is no test available to accurately determine whether an employee is currently impaired by drugs. Blood, urine and saliva tests at best show that an employee used drugs in the past, but they do not show that the employee was actually impaired by drugs at the workplace. Furthermore, such tests are considered highly invasive of employee privacy. It is for these reasons that a majority of arbitrators have held that any form of workplace drug testing is unreasonable, although a minority (like the arbitrator in *Rio Tinto*) have held that drug testing can be used if there is “just cause”.

Can I fire an employee who refuses or fails a drug or alcohol test?

In provinces without privacy legislation,¹ employers whose testing policy is otherwise deemed to be reasonable (because it applies to safety sensitive positions or there is “just cause”) are able to require employees to take the test. If the employee refuses to take the test, or takes but fails the test, an employer can impose discipline. Whether termination is justified will depend on the employee’s personal circumstances. Both the Courts and arbitrators have found that a “zero tolerance” policy is unreasonable and contrary to the

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Human Rights Code. Since drug and alcohol abuse are considered “disabilities”, a positive test may signal dependency and thereby trigger the employer’s duty to accommodate the employee to the point of undue hardship. The Courts have stated that the duty to accommodate requires the employer to tailor the severity of discipline to reflect the specific circumstances of the employee.

¹ Federally regulated employers are subject to PIPEDA and may be required to first obtain the employee’s consent.

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