Member's Quarterly Winter 2017 Edition

Feature

Random Drug and Alcohol Testing: Navigating the Legal Maze

Case law update

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There are many types of drug and alcohol testing. Some employers test before employment starts, some test after an accident or near-miss and others test with reasonable cause. Some employers do all three.

All such tests are designed to deter employees from being impaired while on duty or to check that they are not impaired. Therein lies the problem. Testing does not necessarily achieve that specific purpose. While alcohol testing does show current impairment, drug testing does not. Employers are left with imperfect tools in an attempt to achieve a safe work environment. Employees are left feeling that their privacy rights have been violated. Perhaps unsurprisingly, this has led to litigation.

The 2013 Supreme Court of Canada case *Irving Pulp & Paper* is the most recent Supreme Court of Canada case addressing how to properly balance the employer's safety interests and the employee's privacy rights. Over three years later, there remains some confusion over the proper thresholds to be applied and the implementation of random drug and alcohol testing continues to be a tricky exercise for employers.

In *Irving*, the Supreme Court upheld the arbitration decision that the drug and alcohol testing at issue was not justified in the circumstances. However, the Court was clear that "this is not to say an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified."

The Court in Irving indicated that such justification of random alcohol or drug testing for employees in "safety sensitive" positions would occur in situations where there is

(1) a dangerous workplace; and

(2) enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

However, the Court was not specific regarding the threshold required to establish the existence of a "problem".

Soon after *Irving*, the Alberta arbitration Board decision in *Re Suncor Energy Inc. and Unifor, Local 707A* was released. This case considered the balancing act discussed above but also considered whether or not Suncor could unilaterally impose random testing for its unionized employees under the terms of the applicable collective agreement. Relying on *Irving*, the arbitration Board held that Suncor's random drug and alcohol testing policy was not justified. The Board noted the lack of guidance in the jurisprudence regarding the threshold of establishing "a general problem in the workforce." It did not find that Suncor had demonstrated that the problem with substance abuse in its oil sands operations was sufficiently serious nor that any such problem was linked to accident or injury incidents.

Another Alberta arbitration Board came to a similar conclusion in a 2015 decision, *Re Teck Coal Ltd and UMWA, Local 1656 (Drug and Alcohol Policy)*. The Board did not find that the evidence of drug or alcohol use in the workplace met the threshold set out in Irving mainly because there was no evidence establishing a link between workplace safety incidents and the use of drugs or alcohol.

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Unifor was judicially reviewed and deemed by the Court of Queen's Bench to be unreasonable. The Court of Queen's Bench applied an interpretation of *Irving* that is much more favourable to employers wanting to implement random drug and alcohol testing than the arbitration decisions following *Irving*. The Court of Queen's Bench relied upon the dissenting reasons in *Irving* to hold that evidence of a substance abuse problem in the workplace does not need to be 'significant' or 'serious' in order to justify random drug and alcohol testing, and further, that a problem of substance use does not need to be linked to accident or injury incidents in order to justify random drug and alcohol testing.

While the Court's decision in *Unifor* seems to provide some further guidance to the application of the Supreme Court's test for the justification of random drug and alcohol testing by clarifying that the evidence need not support a 'serious' or 'significant' problem, it still fails to answer the question that remains from the decision in *Irving* — what is the threshold of a "problem" with substance abuse in the workplace? What evidence must an employer establish to show the existence of such a problem? This remains the greatest challenge to employers in defending their random drug and alcohol testing policies in the courts.

The *Unifor* decision is currently being appealed to the Alberta Court of Appeal. The outcome of this appeal will significantly affect the ability of employers to implement random alcohol and drug testing. Permission to intervene has been granted to the Mining Association of Canada, Construction Labour Relations, Electrical Contractors Association of Alberta, Enform Canada and the Construction Owners Association of Alberta. Hopefully the Court of Appeal will provide some much-needed clarification on this highly important issue.

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