

Feature

Drug & Alcohol Testing in the Workplace: A Balancing Act

Limit your liability as employers

Drug and alcohol testing in the workplace is a contentious issue and should be implemented with caution. Failure to consider factors such as the stage in the employment relationship, the purpose of the testing and its connection to the nature of an employee's job before administering drug and alcohol testing could expose an employer to liability.

For many employers, this means no testing. However, for those who have determined the need to administer these tests (given what their employees do), we outline below the basic legal parameters.



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Drug and alcohol testing: the basics

Substance abuse such as alcoholism and drug addiction (both legal and illicit) is classified as a form of substance dependence, which the Ontario Human Rights Commission (OHRC) recognizes as a disability within the meaning of the *Ontario Human Rights Code* (the "Code").

The issue with alcoholism and drug addiction, however, is that despite being a disability, many employers wish to utilize drug and alcohol testing for various reasons, such as preventing workplace injury in safety sensitive positions (i.e. positions where drug/alcohol impairment could result in direct and significant injury to others).

While the OHRC views drug and alcohol testing as prima facie discriminatory, the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd.* ("Entrop") has indicated that, except in the most explicit cases of direct discrimination, the employer can justify it if they meet the following three criteria:

- The employer has adopted the test for a purpose that is rationally connected to the performance of the job;
- The employer adopted the particular test in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose;
- The test is reasonably necessary to accomplish that work-related purpose

The first two criteria may not be as difficult to establish, especially for employees in safety sensitive positions. The third criterion is, however, harder to establish and this is where employers usually get into trouble. In order for an employer to show that the test is "reasonably necessary", they must demonstrate that there really is no other way of addressing the work-related purpose. Doing so, the argument goes, would impose undue hardship on the employer. This is very difficult to do.

What the law says on how to implement drug and alcohol testing

In order to limit their liability, employers wanting to administer drug and/or alcohol testing should note the following:

1) Pre-employment Testing

Application stage

The *Code* and applicable OHRC policy prohibits any type of pre-employment medical examination at the application stage which includes alcohol and/or drug testing. Any employment-related medical examination

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or inquiry at this stage must be limited to assessing an individual's ability to perform the essential duties of the job. This is because a positive pre-employment drug or alcohol test cannot forecast future impairment on the job. An employer therefore cannot justify using pre-employment testing as a decisive means to hire non-impaired workers.

Conditional offer stage

The OHRC supports the view that an individual should not be requested to submit to a medical examination, including testing for drug or alcohol use, until after a conditional offer of employment has been made.

It should be noted, however, that if an employee requests accommodation in order to enable him/her to perform the essential duties of the job, the employer is obligated to provide individual accommodation to the point of undue hardship. In other words, even if an employee tests positive at this stage, the story is far from over as far as the employer is concerned.



2) Random Testing on the Job

The Court of Appeal in *Entrop* held that random on-the-job drug testing violates the *Code* because it does not establish current impairment, but instead only establishes prior use which has no effect on one's ability to perform their job. The Court noted the absence of any medical test which measures current drug impairment, as opposed to the mere presence of drugs in the body at some point in the past.

In contrast, alcohol testing has been found to be a reasonable requirement for safety sensitive positions because alcohol testing can indicate actual impairment of ability to perform one's job. However, employers must still notify employees that alcohol testing is a condition of employment and must also satisfy its duty to accommodate the needs of any employee who tests positive.

Random alcohol testing of an employee in a non-safety-sensitive position, however, is not acceptable. Unless an employer has reasonable cause to believe the employee is unfit to do his or her job as a result of alcohol use (addressed below), an employer cannot demonstrate that it is reasonably necessary to administer breathalyser tests to ensure effective job performance.

3) For Cause and Post Incident Testing

Drug or alcohol testing in non-safety sensitive positions may be permissible under very specific circumstances. For example, it is reasonable for an employer to assess employee impairment following a workplace accident or reports of dangerous behaviour, especially if such impairment could have contributed to the incident. Such testing, however, should be conducted as part of a wider prohibition of drug or alcohol abuse in the workplace and administered in accordance with a carefully crafted policy.

Ultimately, it is a good idea for employers to review their approach with a competent advisor to ensure that a careful balancing act is maintained.

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