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DRUG AND ALCOHOL TESTING IN THE WORKPLACE: A LEGAL BALANCING ACT

By Scott Hoepfner

The law in Canada regarding drug and alcohol testing in the workplace has largely developed within the context of labour and human rights law. Even with the number of decisions which have emerged in recent years, the law remains relatively complex, and at times, difficult to interpret. For example, depending upon the context in which drug or alcohol testing is required (i.e., unionized vs. non-unionized), different considerations can and will apply. As a result, there are a significant number of pitfalls for employers wishing to institute drug and alcohol testing in their workplaces.

In spite of the complexity and difficulties in interpreting and applying the law, a number of useful principles have emerged of which both employers and employees should be aware:

- Alcohol and drug dependence is recognized as being a disability;
- An employer is prohibited from discriminating against a person as a result of a disability;
- An employer is prohibited from discriminating against a person on the basis of a perceived disability;
- In varying degrees, most provincial human rights laws impose a requirement of “reasonable accommodation” for the special needs of an individual who is disabled; and
- An employer may discriminate against employees in certain circumstances where there is a *Bona Fide Occupational Requirement* (referred to as the “BFOR test”) underlying the discrimination.

More recently, privacy legislation and health and safety legislation are proving to be emerging contexts within which drug and alcohol testing must be considered. To illustrate, decision-makers must consider whether a testing policy violates an employee’s right to privacy under provincial or federal privacy legislation, but they also must consider the testing in light of an employer’s obligations to provide a safe workplace under health and safety legislation. The result is a balancing of rights, wherein decision-makers must attempt to balance an employer’s interest in the safety of their workplace against an employee’s right to dignity, respect and privacy.

As a result of this balancing act, drug and alcohol testing is most often restricted to employees in safety sensitive positions, and even then, tests are usually permissible only after an accident or a near-miss incident.

While there are additional circumstances where drug and alcohol testing may be lawfully administered to employees, testing remains a highly contentious issue. Consequently, courts and arbitrators continue in their struggle to balance the rights of employees against the legitimate business interests and obligations of employers. As a result, both employers and employees must be mindful of the differing rights and interests and stake, and remain willing to communicate with one another in order to address those interests.

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If you would like more information on this topic or wish to discuss issues of a legal nature, [Scott](#) can be contacted by phone at 204.934.2355 or by e-mail at sjh@tdslaw.com.

For assistance with this or any other labour or employment matter, please contact any member of the TDS [Labour & Employment](#) Practice Group.

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