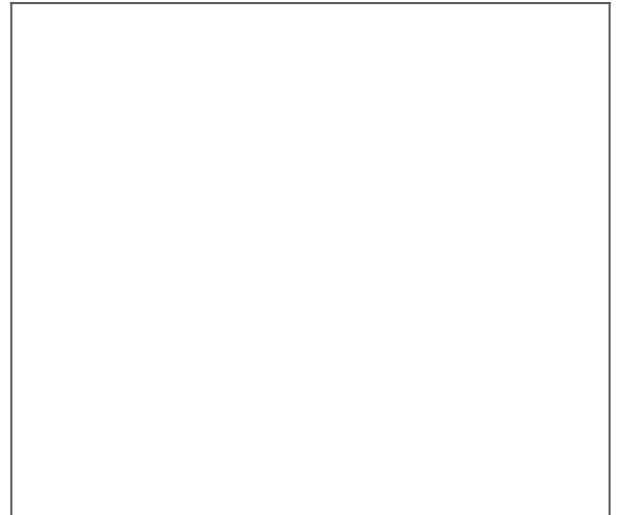


Drug and Alcohol Testing in the Workplace

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Intoxicants have any number of deleterious consequences in a workplace including effects on performance, the health and safety of others and an employer's reputation. It is then no wonder that employers are keen to introduce drug and alcohol testing policies into the workplace. However, courts and arbitrators have been live to this fact, attempting to balance the rights of the employee against the rights of the employer. As a result of this balancing act, there are a number of decisions which offer guidelines for employers with respect to the implementation of drug and alcohol testing policies.



Bona Fide Occupational Requirement

To that end, in order to understand drug and alcohol testing in the workplace, one must first address the concept of a *Bona Fide Occupational Requirement* ("BFOR") which, in general, can be described as a workplace standard or requirement which is discriminatory, but justifiably so. For illustration, in *British Columbia (Public Service Employee Relations Commission) v. British Columbia G.S.E.U. ("Meiorin")*, the Supreme Court of Canada outlined a three-part test to determine if a discriminatory standard was justifiable (i.e. a BFOR).

According to *Meiorin*, in order to justify a discriminatory standard, the standard must:

1. be rationally connected to the performance of the job;
2. have been adopted in an honest and good faith belief that it is necessary to the fulfilment of a legitimate work related purpose; and
3. actually be necessary to fulfill the legitimate work-related purpose (i.e. that it is impossible to accommodate the individual(s) to whom the standard is discriminatory without imposing undue hardship on the employer).

Random Drug and Alcohol Testing

It was in light of the BFOR test that a landmark case on drug and alcohol testing was made. In *Entrop v. Imperial Oil Ltd ("Entrop")*, Imperial Oil implemented an extensive drug and

alcohol policy in the wake of the Exxon Valdez disaster. The policy implemented by Imperial Oil included pre-employment drug testing; mandatory drug and alcohol testing if there was reasonable cause, an accident or a near accident; and *random* drug and alcohol testing for employees in safety sensitive positions.

Following a human rights complaint that the policy was discriminatory, the case eventually found its way to the Ontario Court of Appeal, where the Court of Appeal concluded, amongst other things, that:

- Drug testing (random or not) was not justifiable because the method of testing could not show current drug use or future use. Thus, drug testing could not accomplish the goals of a safe workplace free of impairment;
- Alcohol testing could be acceptable in some circumstances, because the method of testing (breathalyser) was capable of showing current impairment; and
- Random alcohol testing was not justifiable unless the employer was able to meet its duty to accommodate employees who test positive.

Recent Drug and Alcohol Related Decisions

While the *Entrop* decision remains applicable in non-unionized environments, in workplaces where unions are present, the law regarding drug and alcohol testing has continued to develop and is, arguably, even more stringent.

For example, in *Imperial Oil v. C.E.P., Local 900*, Imperial Oil again found itself fighting over the appropriateness of random drug testing. In response to *Entrop*, Imperial Oil had created a new policy which re-introduced random drug testing into the workplace, but with a new method of testing (oral buccal swabs). Imperial Oil argued that its new method of testing was less intrusive to employees and therefore, justifiable. However, the Board of Arbitration disagreed, determining that Imperial Oil was restricted from conducting a drug test, unless it established reasonable cause for the test.

More recently, the Supreme Court of Canada reaffirmed the requirements for employers unilaterally implementing drug and alcohol testing policies, in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* ("*Irving Pulp & Paper*") In that case, the Supreme Court began with a review of established arbitral jurisprudence, outlining that when an employer unilaterally implements a drug and alcohol policy, it must be:

1. consistent with the collective agreement; and
2. reasonable.

In order for the policy to be reasonable, drug and alcohol testing must be limited to

employees in safety sensitive positions and only occur in circumstances where:

- there is reasonable cause for the testing (i.e. circumstances giving the employer cause to believe an employee is impaired);
- there is an accident or near miss; and/or
- when an employee is returning to work after treatment for substance abuse.

With respect to *random* drug or alcohol testing, the Supreme Court confirmed that it would only be justified in extreme circumstances; such as where the workplace is safety sensitive and where there is a demonstrated problem with alcohol or drug use in the workplace.

Thus, from the Supreme Court decision in *Irving Pulp & Paper*, it is clear that while drug and alcohol testing can occur in certain workplaces, if that testing is random it will only be permitted in the rarest of circumstances (i.e. where the workplace is a safety sensitive one and where there is a demonstrated general problem with alcohol or drugs). However, this raises the inevitable question: *what constitutes a general problem with alcohol or drugs in the workplace that would justify random testing?*

This question was recently tackled by a board of arbitration in the *Unifor, Local 707A v. Suncor Energy Inc., Oil Sands* ("Unifor") decision. In that case, the employer had implemented a random drug and alcohol testing policy for employees in safety sensitive positions, arguing that there was a pervasive drug and alcohol problem in its workplace, thereby justifying the implementation of the policy.

However, the board of arbitration set out that in order to justify a random drug or alcohol testing policy, the employer would be required to show:

- a serious or significant problem with drugs and/or alcohol in the workplace;
- a connection between the testing and a legitimate business interest in improving safety; and
 - (i.e. that there was a causal connection between the problem and the employer's accident, injury and/or near miss history)
- that the degree of infringement on the employees' right to privacy was outweighed by the benefit to be gained by the employer in the workplace.

Armed with these principles, the board of arbitration turned to a consideration of the evidence proffered by the employer in support of its random testing policy.

With respect to random *alcohol* testing, the board concluded that the employer's evidence did not distinguish between unionized employees, non-union employees and contractors on the worksite. Thus, the evidence was unable to show a problem in the particular bargaining unit. Moreover, the evidence did not distinguish between incidents in the *workplace* and

incidents in the employer's camp *accommodations*. Given this lack of specificity, the board was unable to conclude that there was a pervasive culture of alcohol consumption in the workplace and thus, the random alcohol testing policy was deemed unreasonable.

With respect to random *drug* testing, the board determined that the employer's evidence suffered from the same deficiencies (i.e. not specific to the bargaining unit and workplace). As a result, the board was again unable to conclude that there was a pervasive drug problem in the workplace. Moreover, even if the employer had been able to establish the pervasive drug problem, the method of testing chosen by the employer (urinalysis) was incapable of showing present levels of impairment. As a result, the method of testing would not have served the employer's purposes of proving an employee was working while impaired. Accordingly, the "gain" of the testing would not have outweighed the infringement on employee privacy rights.

While the *Unifor* decision may still be subject to judicial review, the principles applied therein are consistent with the rationale espoused by the Supreme Court in *Irving Pulp & Paper*. As a result, for the time being, when drug and alcohol testing policies are unilaterally implemented in safety sensitive workplaces, an employer must ensure that testing is limited to when: 1) there is reasonable cause for the test; 2) an accident or near-miss has occurred; or 3) an employee has returned to work after receiving treatment for drug or alcohol abuse.

On the other hand, when it comes to *random* drug and alcohol testing, it will only be permitted in the most exceptional of circumstances, such as where the employer demonstrates: 1) a significant/serious drug or alcohol problem in the workplace; 2) a causal connection between the drug or alcohol problem and the employer's safety record; and 3) the infringement on the employee's privacy rights is outweighed by the "gain" an employer may receive with respect to safety. In this regard, a significant/serious drug or alcohol problem must be shown within the specific bargaining unit and workplace to which the policy applies.

Conclusion

It is clear from the above noted cases that drug and alcohol testing in the workplace is subject to very stringent conditions. However, decision makers are always attempting to balance the rights of the employees against the work-related concerns of employers. In the end, no matter what an employer is attempting to accomplish, if it infringes on an employee's rights, an employer must ask itself if the actions are reasonable. The standard of reasonability will not be a rigid bar that one party must attain, but rather a line drawn in the sand that can shift and move depending on the situation. Therefore, all parties must be live to the situation and willing to communicate clearly with one another in order to reach the most beneficial solution.

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