

Drug and alcohol testing: Where are we now?

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The issue of employee drug and alcohol testing has been a controversial one in Canada over the past few years and a handful of cases in different jurisdictions show there is no uniform approach across the country.

Whether a drug-testing policy can be rationalized can depend on where the employer is located and the purpose of the policy.

In 2000, the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd.* found random universal drug and alcohol testing of employees to be discriminatory because the drug test did not reflect actual or future job impairment. The court pointed to a lack of evidence with both the relationship between drug use and job performance and the effectiveness of testing on detecting impairment. It did, however, allow testing that could detect current impairment for safety-sensitive positions.

More recently, however, the Quebec Court of Appeal in *Section locale 143 du Syndicat Canadien des communications, de l'énergie et du papier c. Goodyear Canada Inc.* struck down an employer's policy of random drug and alcohol testing for safety-sensitive positions, ruling it would unduly

interfere with the privacy rights of employees and violate Quebec's Charter of Human Rights and Freedoms. There was no evidence random tests were essential to ensure the health, safety or physical integrity of employees, said the court.

In *Chiasson v. Kellogg Brown & Root (Canada) Co.*, a construction company terminated a new employee who failed a mandatory pre-employment drug test. The Alberta Court of Appeal upheld the employer's policy on the belief such testing legitimately "perceives that persons who use drugs at all are a safety risk in an already dangerous workplace." The court also pointed to evidence that the effects of marijuana can linger for several days.

Notwithstanding the Quebec decision in *Goodyear*, an employer has more latitude if random drug and alcohol testing relates to safety-sensitive positions. In *Milazzo v. Autocar Connaissance Inc.*, a Quebec bus driver was terminated following a positive result in a random drug test. The testing of bus drivers was a "legitimate way to promote road safety," found the Canadian Human Rights Tribunal, and the policy was reasonable and necessary.

In U.A., *Local 488 v. Bantrel Constructors Co.*, the Alberta Court of Queen's Bench upheld a testing policy even though it

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3 things to keep in mind

When it comes to drug and alcohol testing in Canada, employers would be wise to heed the following three points:

- Broad-based or universal testing may be discriminatory. If an employer wanted to test everyone on a random basis it would likely be unlawful, especially in Ontario.
- If the testing policy was a bona fide occupational requirement of the job, particularly in a safety-sensitive position, an employer might have better luck defending the policy.
- The employer needs to be mindful of how it administers the policy. The test should interfere as little as possible with employee privacy rights and be administered in a respectful and dignified way.

could not reflect present impairment. The employer required employees be tested for drugs and alcohol before gaining access to a dangerous work site and the court pointed to several factors — including a failed test that did not lead to automatic termination, the unreliability of alternative methods, fair warnings given to employees and the seriousness of the safety issues.

To pass legal scrutiny, policies related to drug and alcohol testing must have a clear and legitimate purpose. In *Alberta (Human Rights and Citizenship Commission) v. Elizabeth Métis Settlement*, two employees were terminated for refusing to be tested in accordance with an employer policy that the employer said was key to maintaining a clean image. The Alberta Court of Appeal disagreed with the employer's

reasoning and refused to uphold the terminations.

Drug and alcohol testing policies must also be conducted in a reasonable manner. In *Weyerhaeuser Co. v. C.E.P., Local 447*, an employee suffered humiliating conditions during testing. The policy led to "unacceptable invasions of an employee's rights where their refusal to test is based not on the employer's own unreasonable conduct," found the arbitrator.

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