

**DRUG AND ALCOHOL TESTING
COMING TO AN EMPLOYER NEAR YOU**

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1. INTRODUCTION

One of the most interesting, problematic and frankly confusing developments in an employer and employee relations is the recent trend of employers to impose drug and alcohol testing on its employees. Employees in a non-union environment have a difficult time defending against such tests. Their only recourse is through Human Rights legislation. Employees in a unionized sector have a leg-up on the non-union employees in that in addition to Human Rights protection, collective agreements may also provide some buffer against an employer's desire to test employees for drug and alcohol.

2. THE TYPES OF TESTS

The analysis of drug and alcohol testing has to start with looking at the different types of tests employers want to perform. Generally, the test can be divided into five categories:

- A. Pre-employment or pre-access testing;
- B. Reasonable cause testing;
- C. Post-incident testing;
- D. Random testing and
- E. Testing as a part of a return to work protocol

Briefly pre-employment or site access testing was first proposed in Alberta wherein employers particularly in safety sensitive jobs in the construction industry desire to test employees prior to being hired or subsequent to being hired but before attending at the job site.

Reasonable cause testing occurs when an employer feels that it has some cause to suspect an employee is impaired as a result of drugs or alcohol being in the employee's system. For example, if an employee is slurring his words, has an uneven gait, is being belligerent, an employer may view that as cause to test the employee.

Post-incident testing occurs after an accident where an employer feels that an employee is at fault and drugs or alcohol may be a factor that caused the accident.

Random testing is exactly what it suggests, an employer desires to pick and choose at any time which employees to test for drugs and alcohol.

Finally, return to work testing usually occurs as part of a last chance agreement where an employee has confessed to having a drug and alcohol problem but the employer has given the worker a second chance and the employer usually with the assistance of a union have drafted a last chance agreement that includes some form of random testing in order to ensure that the employee is maintaining sobriety.

THE METHODS OF TESTING

There currently exists three types of testing. Breathalyzer, a urine analysis and a saliva swab.

Breathalyzer Testing:

Breathalyzer testing is perhaps the oldest form of testing particularly for alcohol. It is generally accepted that a breathalyzer test will be able to determine current impairment as a result of alcohol but is ineffectual for determining whether an employee is impaired as a result of drugs.

Urine analysis

This is the second oldest form of testing and it is generally accepted that a urine analysis for drugs just indicates whether drugs are in the employee's system and is not an indicator of current impairment.

Saliva Swab

This is the most recent technological advance in testing. Although the medical evidence is somewhat divided on this it would be fair to say that employers and some medical practitioners take the position that the saliva swab is can measure

current impairment. The difficulty is that it takes some time for the test to be returned to the employer. There is no on the spot analysis of the saliva swab unlike with the breathalyzer test.

THE CASE LAW

There has been a tug of war between individuals and unions, on one hand versus employers on the other over an employer's "right" to institute a drug or alcohol test. The courts have swayed both ways on this issue. One line of reasoning suggests that there is a divide within Canada. An East/West divide which explains the conflict in case law. The analysis goes that the Alberta Courts are more in favour of an employer's desire to test for drug and alcohol and the Ontario Courts and Labour Board are less inclined.

Suffice it to say that the case law is confusing at best. In Ontario as the law as it currently stands must be viewed through the Court of Appeal decision in Entrop and the OLRB decision in Sarnia Cranes.

The Alberta Court of Appeal in the Chaisson decision has suggested that an Employer does have the right to pre-access drug testing of its employees or potential employees. We believe that there is no way to reconcile the case law. This is probably a matter that needs the Supreme Court of Canada to make a pronouncement on. Unfortunately, the Supreme Court of Canada has refused leave to hear the Court of Appeal decision in Chaisson. There is a recent case out of Nanticoke involving Imperial Oil wherein the Divisional Court upheld the decision of Mr. Picher striking down an employer's desire to do random drug tests. This matter is currently before the Ontario Court of Appeal.

WHAT TO DO AS A BUSINESS AGENT

Inevitably, one of the employers of a bargaining unit of yours will want to institute a drug or alcohol testing process. Your first question should be what type of test i.e. random or pre-access etc. does the employer desire to institute. Your second question would be the method of testing. Whether it is the saliva swab or urine analysis or breathalyzer. Your next step should be to take a look at the collective agreement which may suggest some restriction on that employer's desire to institute such testing. Finally, it goes without saying that you should ask the

employer the reason for now instituting a drug or alcohol testing process. Does the employer feel that there is a problem? If there is a problem is it a problem with a particular employee or group of employees or the entire plant. And is there some other way to address the safety concerns of the employer without the invasive process of drug and alcohol testing.

SAFETY SENSITIVE POSITIONS

Most of the case law deals with safety sensitive positions whether it is in the construction industry or within a plant with safety sensitive areas. It is fair to say that the more safety sensitive the job the more likely a court or an arbitrator will give them some leeway in for drug and alcohol testing provided that there is some evidence of a problem that need addressing.

CONCLUSION

It is impossible if not impossible to reconcile the conflicting case law both at the arbitration level and the court level. This is a developing area of law and there are no right or wrong answers at this point in time. If there are some general conclusions to be made the courts and arbitrators are less inclined to allow random drug testing and will probably give their stamp of approval to some sort of return to work drug testing if a union, and an employer and employee have agreed to it. Pre-access testing is probably not allowed in most provinces except Alberta. As for post-accident and "for cause" testing the jury is still out.