HR Compliance Briefing: Key Trends in Employee Drug Testing Law

What's At Stake

An employer's right to test and discipline employees for workplace drug and alcohol use or impairment comes down to a balancing of competing interests:

- The employer's interest, nay imperative, in maintaining a safe workplace; and
- The employees' right to privacy and, where the employee has a dependency or addiction, accommodations for disabilities.

Responsibility for making this crucial balance falls not to legislators but courts, arbitrators, human rights and other tribunals who have to draw the lines in particular cases. And while it's been going on for decades, the process of lawmaking via litigation assumed an added importance when Canada officially legalized marijuana in October 2018.

What We Can Learn from the 2019 Cases

One of the disadvantages of this case law model is that it's not accessible to HR managers and other non-lawyers without training in legal research and analysis. And because HR budgets typically don't allow for hiring lawyers to track case developments, it becomes imperative to find other reliable sources of analysis. Like HR Insider. With this in mind, we did a sweep of the significant new cases involving employer regulation of workplace drug/alcohol use over the past year. Here's a quick briefing of what we found. Click here for a Scorecard summarizing all of the key cases.

The 5 Most Common Issues

There were 17 significant cases involving an employer's right to test and/or discipline an employee for workplace drug- or alcohol-related use or impairment. Employers won only 7 of these cases, which is actually a relatively high percentage compared to most years. The most commonly litigated issues in 2019 were pretty much consistent with prior years, including:

- For-cause testing (random drug testing cases are becoming less frequent given how hard they are for employers to win);
- Disciplining employees for refusing to undergo testing;
- Subsequent violations by employees who've already signed a drug/alcohol-related last chance agreement;
- Whether employees disciplined for a drug/alcohol violation had an addiction or dependency; and
- Whether the duty to accommodate requires employers to tolerate an employee's off-duty medical marijuana use.

The 6 Takeaways

Keeping in mind that each case is different and that drawing general lessons from specific cases is far from an exact science, here are 6 lessons you can take away from this year's drug/alcohol cases.

1. There's a Big Difference Between Addiction & Casual Use

The legally appropriate response to a positive test result or other drug/alcohol offence depends entirely on the answer to one question: Does the employee have a dependency or addiction? If so, the employee is considered to have a disability requiring accommodation to the point of undue hardship. So, if you immediately and automatically discipline the employee for the violation, you violate your duty to accommodate. By contrast, if the employee is just a casual user, the disability discrimination laws don't come into play and you can impose discipline in accordance with your progressive discipline and other policies and procedures.

- **Employer Wins:** Federal arbitrator finds just cause to terminate train engineer for using cocaine on the job when medical evidence shows he was a casual user and not an addict [*Teamsters Canada Rail Conference v Canadian Pacific Railway,*2019 CanLII 89682 (CA LA)].
- **Employer Loses:** Federal arbitrator reinstates engineer fired for testing positive for alcohol after driving his locomotive into a vehicle because medical evidence shows he had an alcohol addiction [*Canadian Pacific Railway v Teamsters Canada Rail Conference*, 2019 CanLII 8545 (CA LA)].

2. Accommodation ≠ Letting Safety-Sensitive Employees Work while Impaired

The duty to accommodate may require you to let employees use legal medical marijuana to treat a disability when they're offsite. This is true even if their job is safety-sensitive. But accommodations are required only to the point of undue hardship. And allowing safety-sensitive employees to use or be impaired by medical marijuana or any other substance, whether legal or illegal, while they're working is undue hardship.

Example: Refusing to hire applicant who uses medical marijuana each night after work for safety-sensitive construction job isn't a failure to accommodate, rules Newfoundland court, noting that the type of marijuana applicant uses has high THC levels that remain in body at potentially impairing levels for at least 24 hours [*IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.,* 2019 NLSC 48 (CanLII)].

3. Accommodation Is a Two-Way Street

Accommodating addictions, dependencies and other disabilities frequently requires employers to perform a medical assessment and make a determination of the employee's capabilities. Employees have a duty to cooperate in this process by providing you the medical information you need to make an assessment and identify appropriate job tasks and work conditions to offer. Your duty to accommodate ends if employees unreasonably withhold this information, obstruct or otherwise fail to cooperate.

Example: Alberta Human Rights Commission dismisses failure to accommodate claim of cement operator who made a stink about and then failed to show up for the medical assessment he had to undergo after testing positive for marijuana so that his employer could figure out what non-safety-sensitive jobs he could do [*Bourassa v Trican Well Service Ltd.,* 2019 AHRC 13 (CanLII), May 2, 2019].

4. Generalized Suspicion Doesn't Justify For-Cause Testing

While less controversial than random testing, for-cause testing can also generate grievances. Explanation: Employers need to be careful not to abuse for-cause testing policies by treating anything and everything as a trigger for testing, including a general suspicion of workplace drug/alcohol use at the site.

Example: Alberta arbitrator nixes testing of all employees on shift at the time a supervisor found a drug paraphernalia kit in the plant washroom. Just being at the plant when the kit was found wasn't sufficient evidence to trigger testing under the policy. There had to be at least circumstantial evidence linking the kit to the particular *individuals* tested [*Weyerhaeuser Canada v Unifor Local 447*, 2019 CanLII 116919 (AB GAA)].

5. The Evidence Counts as Much as the Law

When an employer loses in court, the main reason is usually lack of evidence rather than legal mistake. In other words, having the law on your side doesn't help if you don't also have the proof.

- **Employer Wins:** Ontario Labour Relations Board finds ample evidence of waste management worker's marijuana use at work, including a co-worker's cell phone video showing him toking on the job, to uphold termination for cause [*Miller Waste Systems Inc. v Christopher Charlebois*, 2019 CanLII 29752 (ON LRB), April 2, 2019].
- **Employer Loses:** Sask. arbitrator finds no just cause to terminate nurse accused of stealing a bottle of morphine tablets from a patient's home, citing the lack of eyewitnesses and strong circumstantial evidence she didn't do it. Since the evidence was indecisive, the party with the burden of proof, i.e., the employer, lost [*Saskatchewan Health Authority v CUPE*, 2019 CanLII 2192 (SK LA)].

6. Credibility, Personality & Subjective Factors Can Be Decisive

Cases often turn on the credibility and even the likeability of the personalities of the people involved in the case. Although judges and arbitrators swear an oath to be objective, they're also human and susceptible to subjective influences even if they don't recognize it. Consider the following cases where credibility and sympathy appeared to be the decisive factors:

- **Employer Wins:** In ruling for the employer, a Québec tribunal made little effort to hide its lack of sympathy for a warehouse worker fired for drinking beer in his car while on duty as shift safety supervisor, citing his false denials, lack of respect in showing up late for his disciplinary hearing and insincere apology—he wasn't sorry, only sorry that he got caught, according to the tribunal [*Pelletier and Costco Wholesale Canada Ltd. / Costco Lévis*, 2019 QCTAT 4890 (CanLII)].
- **Employer Loses:** BC arbitrator compliments housekeeper's "candor" and "forthrightness" in acknowledging her past alcohol use in reinstating her with no loss of pay after she was terminated for violating her last chance alcohol use agreement [*Harrison Hot Springs Resort v Unite Here, Local 40*, 2019 CanLII 28162 (BC LA)].