

Random Drug Testing Policy Struck Down By Arbitrator



In its decision on a recent policy grievance, an Arbitrator refused to allow an employer to unilaterally impose a random alcohol and drug testing program, serving as a reminder of the challenges facing employers in the implementation of such policies.

On the facts, in 2012 the employer, an oil company, attempted to implement a urinalysis based random alcohol and drug testing policy. The union representing 34% of the employees who would be subject to the policy filed a policy grievance. The policy was not collectively bargained between the employer and union. A previous drug testing policy, which had been in place since a policy grievance in 2008 was already in operation in the workplace. The existing policy tested employees “for cause” only after incidents occurred. The policy also required all employees to be “fit for duty”.

The workplace was highly integrated between union employees, non-union employees, and contractors. All three types of employees worked closely together, many in safety-sensitive capacities. The Arbitrator concluded that, in order to justify a random testing program, the employer had to establish a causal connection between alcohol and drug use by union members in the workplace and the workplace’s safety record. Since the implementation of the previous policy, positive alcohol or drug tests following incidents had drastically decreased, from 8.6% in 2009 to 3.5% in 2013, even as the workforce grew. The Board concluded that this did not constitute a causal connection. For the same reason, the Arbitrator rejected the use of random tests as a deterrent, concluding that the decreasing rates of positive tests under the existing program indicated that users were already being deterred and the random testing program had minimal potential to improve the situation.

The employer was also unable to prove that union members were the cause of the alleged drug and alcohol problem. In fact the little evidence that came before the Arbitrator on that issue indicated that the contractors were the primary source of the problem. That being so, the Arbitrator rejected the use of random testing as a method of implementing testing for the contractors as well, holding that the behaviour of individuals outside the bargaining unit cannot justify an invasion into the privacy of bargaining unit members. The Board also rejected the urinalysis aspect of the program. holding that urinalysis is not sufficiently effective to justify the invasion into the privacy of the employees. Urinalysis was found to give positive results even after a user was no longer impaired, and it was noted that a more detailed analysis takes time. Positive tests therefore are not necessarily indicative

of a problem or a solution.

Ultimately, the Arbitrator's finding is another piece in a growing body of jurisprudence challenging random drug testing policies. Despite the dangers involved in the workplace, the Arbitrator was unprepared to allow the employer to invade the privacy of union members without compelling evidence that it was necessary to do so. The fact that the random testing policy was a permanent policy and not a pilot project to gather information was significant. It remains an open question whether the Arbitrator may have been more prepared to allow a pilot project to gather information before making a final determination. Whether that would have been the case, it is clear that employers wishing to implement random drug testing policies will need to marshal persuasive evidence to justify their programs. Employers also should consider building their drug policy in incremental steps, or through collective bargaining. This case reinforces the difficulties any employer will have in unilaterally implementing a random program for unionized employees, even in a safety sensitive workplace.

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