The State of the Law on Random Drug & Alcohol Testing



- May 8, 2013: A BC arbitrator refuses to strike down random drug testing of coal miners in safety-sensitive jobs [*Teck Coal Ltd. v. United Steelworkers Locals 9346 and 7884,* File CT3289, May 9, 2013 (Arb. Colin Taylor, Q.C.)];
- June 15, 2013: The Supreme Court of Canada strikes down random alcohol testing of paper mill workers in safety-sensitive jobs [*Communications, Energy & Paperworkers' Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.* [2013 SCC 34 (CanLII)].

As an HR manager, you're probably confused about the current state of mandatory random drug and alcohol testing of employees. Can you or can't you? In fact, while it might seem confusing, recent cases actually clear things up quite a bit. Here's what's going on with random testing and when it is and is not allowed.

3 Ways Drug/Alcohol Testing Can Be Illegal

One of the reasons drug and alcohol testing law is so confusing is that it actually involves not one but lots of different laws. For an HR manager, the best way to understand is to recognize that there are at least 3 ways drug and alcohol testing policies can be illegal.

1. It May Be Disability Discrimination:

Human rights laws ban employers from discriminating on the basis of a disability. Drug addiction and alcoholism are considered "disabilities" under the law. So testing employees and job applicants for drugs and alcohol—and punishing them for testing positive—is potentially a form of disability discrimination.

2. It May Violate Privacy:

Alcohol and drug testing is highly invasive of privacy, not only because it enables employers to pry into an employee's private life but because testing methods themselves—especially urine testing for drugs—are personal and intrusive.

3. It May Violate the Collective Agreement:

In union workplaces, testing policies can create labour issues to the extent

employers impose them unilaterally rather than through negotiation with the union as part of the collective agreement.

Question 1: Why Is Testing Legal In Some Cases and Not in Others?

Yet, despite all of these legal obstacles, sometimes drug and alcohol testing *is* legal. What makes testing okay in one setting and not okay in another? The technical answer varies depending on which of the 3 laws you're talking about.

Rule of thumb: A testing policy is extremely hard to challenge when it's bargained for under the collective agreement. It's when employers impose testing unilaterally that the battle is joined.

But while the technical details differ, at the end of the day, the standards used to measure the legality of a unilaterally imposed, mandatory testing policy boil down to a balance between the employer's interest in safety and the employees' rights under the discrimination and privacy laws and the collective agreement.

Since both interests are equally compelling, in actual testing policy cases, courts and arbitrators have to focus on:

- Whether testing is actually needed for safety;
- How intrusive the policy is; and
- Whether the safety objective can be achieved in a less intrusive way.

Question 2: How Can You Tell If Your Own Testing Policy Is Legal?

The legality of a testing policy is essentially how these factors play out with respect to the particular policy. One of the challenges for HR managers—not to mention lawyers—is that each case and testing policy is different depending on the circumstances involved. The good news is that the case law, including the new Supreme Court *Irving Pulp* case we mentioned above, reveal patterns that make it easier to stake out what is and is not allowed in the way of employers' rights to unilaterally impose drug and alcohol testing.

4 QUESTIONS TO ASK

The best way to feel comfortable with the legality of your testing policy is to be able to answer YES to *all 4* of the following questions:

1. Is the Purpose of Testing to Protect Safety? [ ] YES [ ] NO

Protecting safety is recognized as a legitimate job-related purpose. By contrast, testing policies rooted in *moral* objections to drug/alcohol use are harder to justify—except perhaps for religious or educational institutions where there is a nexus between moral behaviour and job performance.

2. Do You Really Believe that Testing Is Necessary for Safety? [ ] YES [ ] NO

You must be able to demonstrate that you honestly believe that drug/alcohol testing is needed to promote safety. This is easier when testing targets employees who perform safety-sensitive jobs, like operating heavy equipment.

Example: Random alcohol testing policy for safety-sensitive employees at warehouse fails but could *potentially be* justified under the right conditions, but is unnecessary overkill for bank tellers and clerks [*Canadian Human Rights Commission*

v. Toronto Dominion Bank, (1998) 229 N.R.].

3. Is Testing Reasonably Necessary to Meet Safety Purpose? [ ] YES [ ] NO

This is the hardest part of the test. For a unilaterally imposed testing policy to be "reasonably necessary" it must no more restrictive than it has to be to accomplish the safety purpose. You need to consider 3 sets of factors in evaluating the reasonable necessity of testing:

a. Employees Who Can Be Tested: The more safety-sensitive the position, the more leeway employers generally have to perform testing. Several cases, including *Teck Coal* cited above, have ruled that the dangerous nature of the job is enough. But in *Irving Pulp,* the Court ruled that the employer must demonstrate not just that the job is dangerous but that there actually was a problem with drug/alcohol impairment at the *particular* workplace.

b. Basis for Testing: Testing is much easier to justify when it's done in response to an actual safety incident or where there's other reasonable cause to suspect the employee is impaired. Random testing, on the other hand, is far more problematic.

c. What You Test for: Employers have a little more room to test for alcohol than drugs. The first reason for this is that the actual methods of alcohol testing tend to be less privacy intrusive. The second reason is physiological. The physical effects of drugs generally linger in the body after the "buzz" is gone. Thus, the fact that an employee tests positive for drugs doesn't automatically prove impairment at the time of testing. By contrast, alcohol in the system is proof of current impairment. Here's a very rough breakdown of how these factors have played out in actual court cases over the years:

DRUGS OR ALCOHOL	TESTING BASIS	TESTING OK—SAFETY-SENSITIVE?	TESTING OK—NON-SAFETY-SENSITIVE?
Drugs	Random	MAYBE*	NO
Alcohol	Random	MAYBE**	NO
Drugs	Post-incident	YES	PROBABLY NOT
Alcohol	Post-incident	YES	PROBABLY NOT
Drugs	Just cause	YES	PROBABLY NOT
Alcohol	Just cause	YES	PROBABLY NOT

Notes

* Would require, at a minimum, evidence of history of drug problems at particular workplace among employees being tested and that testing be consistent with collective agreement

** Although slightly easier to justify than drug testing, would require, at a minimum, evidence of alcohol problem at particular workplace among employees being tested and that testing be consistent with collective agreement

4. Does Testing Policy Accommodate the Employee? [ ] YES [ ] NO

When the basis of the challenge is disability discrimination, there's a fourth prong to the test: The testing policy must accommodate the employee to the point of undue

hardship. In the context of drug/alcohol testing, courts demand that testing policies take into account the individual circumstances of each employee—in terms both of whether the employee must submit to tests and the consequences they incur if they fail. Thus, blanket policies, such as automatic termination for any employee that fails a drug test, is inconsistent with the duty to accommodate.

Conclusion

Drug and alcohol testing is a complicated and constantly changing area of law. Based on the recent *Irving Pulp* case, here's a summary of where things seem to stand right now:

1. You can impose just about any kind of testing policy you want as long as the union agrees;
2. If you impose mandatory testing unilaterally, you bear the burden of proving its legality in the likely event of a grievance or lawsuit;
3. To meet this burden, you must demonstrate that the safety purpose of the policy outweighs the employees' rights under discrimination and privacy laws and the collective agreement;
4. Random testing is not permissible for employees in non-safety sensitive positions;
5. Random testing of employees in safety-sensitive positions requires not just proof that the work is dangerous but evidence of a history of drug/alcohol impairment at the workplace; and
6. For cause, as opposed to random testing of employees at dangerous workplaces is allowed if:
    - There are reasonable grounds to believe an employee was impaired on duty;
    - The employee was directly involved in a work accident was impaired on duty; or
    - The employee returns to work after treatment for substance abuse.