
Hot Topics in Health and Safety

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CME/EAC Health & Safety Symposium

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Agenda

- Drug and Alcohol Testing
- Legalization of Cannabis
- Workplace Harassment
- Health & Safety Aspects of Bill 148

Drug and Alcohol Testing



Drug and Alcohol Testing Methods

| Method | Test Matter | Current Impairment? | Limitations |
|---------------|-------------------|---------------------|--|
| Breathalyzer | Alcohol | Yes | Doesn't test for drugs |
| Urinalysis | Drugs and Alcohol | No | Tests recent use, false positives, delay |
| Hair analysis | Drugs | No | Tests use over longer period, cultural differences, delay |
| Saliva | Drugs and Alcohol | <i>Maybe</i> | Delay, possibility of false positives and false negatives* |
| Blood | Drugs and Alcohol | Yes | Short detection period, invasive, delay |

* *Imperial Oil Ltd. V. CEP, Local 900 Ont. C.A.*

Pre-Employment Testing

■ Non-unionized employees:

- ❑ Human rights considerations paramount
- ❑ Impact of policy on employee is focus rather than policy itself – importance of individual assessment and accommodation

■ Unionized employees:

- ❑ Privacy considerations paramount
- ❑ Testing generally not permitted: only shows past use, does not predict future performance

Return to Work Testing

- Typically permitted for safety-sensitive positions
- May be permitted for non-safety-sensitive positions
- Rehabilitative testing requires balance between:
 - Privacy/human rights
 - Safety

Post-Incident Testing

- Generally permitted as part of a larger investigation into a workplace accident or “near miss”
- Need a reasonable basis to conclude impairment may have been a factor

Reasonable Cause Testing

- Testing may be permitted if employee's actions or appearance in the workplace suggest impairment (*e.g.*, stumbling, slurred speech, smell of alcohol, *etc.*)
- For both post-incident and reasonable cause testing, there should be a broader workplace policy in place setting out when testing may occur

Random Testing

- Historically not permitted for unionized employees:
 - *Irving Pulp and Paper* (2013 SCC) - employer introduced *random* alcohol testing for “safety sensitive positions”, required a “general problem of substance abuse in the workplace”
- Leading case in non-unionized environment:
 - *Entrop v. Imperial Oil* (2000 ONCA) – permitted for alcohol but not drug testing (but older technology)

Recent Cases

- *ATU, Local 113 v Toronto Transit Commission*
 - ATU grieved TTC's drug policy years ago – arbitration continues
 - TTC announced expansion of policy to include random testing; ATU sought an injunction
 - Injunction denied: no finding of irreparable harm to ATU or members, balance of convenience favoured TTC

Recent Cases

- *Unifor Local 707A v Suncor Energy Inc.*
 - Suncor implemented random testing in 2012
 - Arbitration Panel: Suncor unable to demonstrate “significant” or “serious” problem in the bargaining unit, did not show causal connection between substance use and accident rate
 - Court of Queen’s Bench and Court of Appeal disagree – Supreme Court to consider leave application this month

Recent Cases

■ *Stewart v Elk Valley Coal Corp*

- Mine – employee drove a loader
- Drug policy: required employees to disclose drug use
- “No free accident” rule
- Supreme Court upheld the termination
- Found that failure to comply with a disclosure policy cannot automatically be assumed to be a result of an addiction

Cannabis in the Workplace



Background

■ History:

- Permitted for medicinal use since 1999
- Big changes in the medicinal regime in 2014
- High level of illegal use
- July 1, 2018 = legalization for recreational use

Background

■ Raises some questions:

- Can employees smoke at work?
- Can I ask an employee about their cannabis use?
- Can I insist on a drug-free workplace?
- Can I implement drug testing?
- How will this affect work safety, performance, and attendance?

Comparison to Alcohol

SAME

- Legal but controlled
- Causes impairment
- *May* engage human rights protections

DIFFERENT

- Less information on the effects of short- and long-term use
- Harder to detect use and testing issues
- Employers have less experience

Applicable Statutes

■ Occupational Health and Safety:

- Employer duty to create and maintain a safe workplace
- All practices and policies should connect to safety

■ Human Rights:

- Addiction
- Treatment for disability

Duty to Accommodate

- Same accommodation analysis as any other medically prescribed drug
- When is accommodation analysis triggered?
 - Employee reports medical marijuana use
 - Employer becomes aware indirectly

Accommodating Cannabis

- Discuss alternate *methods of use* and timing
 - Smoking *at work* may not be the *only* option
 - Alternatives to smoking: ingesting in food/tea, juicing, vaporizing
 - Employee push back – ask for medical supporting delivery route
- If smoking necessary:
 - Designated area
 - During scheduled breaks

Get the Information You Need

- Manage like any other illness that requires accommodation
 - Request medical documentation
 - Is there a disability?
 - Alternative treatment options?
 - Dosage and frequency of use?
 - Expected timeframe usage required?
 - Usage necessary *at work*?
 - Consider independent medical assessment

Other Considerations

- Modified work schedule
- Leave of absence during treatment
- More frequent breaks
- Where possible impairment is an issue, may have to find suitable alternative work

Health and Safety Considerations

- Accommodation ≠ allowing employee to carry out duties while impaired
- *OHSA*
 - Obligation to take every precaution reasonable in circumstances to protect health and safety of workers
 - Identify hazards if employee working under influence
 - Employee duty to report hazards

Recent Cases

- *Calgary (City) v CUPE, Local 37*
 - ❑ Employee worked with Roads Department – Equipment Operator 7
 - ❑ Chronic pain, used cannabis (no prescription but did have Health Canada permit to possess)
 - ❑ Removed from safety-sensitive position pending investigation
 - ❑ Arbitrator criticized investigation and ordered reinstatement, but put in place protections to deal with any ongoing safety concerns

Recent Cases

- *Terra Nova Employers' Organization v CEP, Local 2121*
 - Employee was millwright at offshore petroleum platform
 - Small amount of cannabis found in pocket during screening
 - Terminated based on drug policy upheld by Court of Appeal

Recent Cases

■ *Francisco v Ontario*

- Duty to accommodate not unlimited
- HRTO refused to permit Mr. Francisco to smoke medical marijuana during hearing
- Human rights application dismissed as an abuse of process when Mr. Francisco refused to comply with HRTO direction

Tips

- Don't panic – already have to deal with similar substances (including current illegal users of cannabis) and all of the same principles apply
- Have a drug policy
- Train supervisors and employees on the policy

WSIB/Insurance Considerations

- WSIB will reimburse on a case-by-case basis (WSIAT Decision No 221/17 lays out the principles)
- High-profile changes to benefits coverage to include medical cannabis:
 - Loblaws
 - Students at University of Waterloo/UBC Okanagan
 - Sun-Life

Workplace Harassment



Harassment Generally

- Human rights and occupational health and safety legislation affords protection from discrimination and harassment
- Harassment is commonly defined as:

*“Engaging in a course of **vexatious comment or conduct** that is **known or ought reasonably to be known to be unwelcome**”*

Sexual Harassment

- Human rights and occupational health and safety legislation provides protections specifically against “sexual harassment”
- Sexual harassment is defined as:

“unwelcomed conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”

Janzen v. Platy Enterprises Ltd., [1989] SCJ No. 41

Sexual Harassment

- One of two broad categories:
 - Overt *quid pro quo* demand
 - More subtle conduct, comment, action, *etc.* resulting in a poisoned work environment
- Negative and demeaning comments may also constitute sexual harassment
- Anyone can be a victim of sexual harassment

Employer Liability for Harassment

- An employer has a positive obligation to provide a workplace free of harassment, including sexual harassment:
 - Take proactive steps to prevent it
 - Investigate a complaint or occurrence
 - Act immediately to cease and remedy a situation
- An employer may be held vicariously liable for employee conduct

Employer Liability for Harassment

- An employer may also be liable for actions of a:
 - Client and/or customer
 - Other third party
- Liability may flow where the employer's response is deemed to be inadequate
 - *Boucher v. Wal-Mart*, 2014 ONCA 419

New Legal Developments

- Increasing focus on sexual violence and harassment
- Ontario Bill 132, *Sexual Violence and Harassment Action Plan Act*
 - Came into force September 2016
 - Enhances employer obligations re: workplace harassment:
 - Bolstered policies
 - Obligation to investigate and report on a complaint
 - Inspector may order impartial investigation at employer's expense

New Legal Developments

- No published data from the Ministry re: enforcement of Bill 132
- Anecdotally, an increasing number of Ministerial orders to conduct investigation that is “appropriate in the circumstances”
 - Unless expressly stated in order, not obligated to retain an external investigator
 - ...but you may want to...

New Legal Developments

- *Colistro v Tbaytel*, 2017 ONSC 2731
 - Tbaytel announced rehiring of Mr. Benoit
 - Ms. Colistro advised Tbaytel she had been sexually harassed by Benoit
 - Tbaytel confirmed the allegation, but rehired Benoit and offered Colistro a reassignment
 - Colistro declined offer and filed constructive dismissal claim
 - Awarded \$650,000 in damages

Investigation Is Critical

- In some jurisdictions employer has *legal obligation* to investigate allegation of sexual harassment
- In all jurisdictions, it is *advisable* to investigate whenever a complaint is received
- Too often litigation begins because of how the complaint was investigated (or because an investigation was never conducted)

Consequences of an Improper Investigation

- Claim by dissatisfied complainant (constructive dismissal, human rights complaint, grievance)
- Complaint by dissatisfied respondent (wrongful dismissal claim, grievance)
 - May seek punitive and aggravated damages in addition to compensatory remedies
- Negative publicity and reputational harm
- Internal employee discontent
- Potential for repeated conduct

Basic Investigation Steps

- Appoint a trained and unbiased investigator
 - Internal vs. external?
- Collect and review relevant evidence
- Interview witnesses separately
- Take notes/statements
 - No editorials!

Basic Investigation Steps

- Prepare a written report
 - Summarize steps of the investigation, the complaint, the response and evidence
 - Make findings of fact
 - Conclude whether harassment occurred
- Provide report to employer to take action
- Provide results to complainant and respondent

Health & Safety Aspects of Bill 148



No High Heel Requirements

- The OHSA now prohibits employers from requiring a worker to wear footwear with an “elevated heel” unless the elevated heel is required for the worker to perform his or her work safely.

Personal Emergency Leave

- 50 or more employee threshold eliminated
- Every employee in province entitled to PEL
- 10 PEL days per calendar year
- **First 2 PEL days with pay**
- Employer can request evidence to support need for PEL **but** cannot require a note from a “qualified health practitioner”

Personal Emergency Leave

- Does not mean the employer is prohibited from requesting a doctor's note for accommodation or return to work purposes—only that a note cannot be requested to justify the need for a PEL day
- Where an employer has its own policies (*e.g.*, sick leave and bereavement leave policies) counsel can assist in making amendments to have these policies dovetail with new PEL entitlements

On-Call Pay

- **Effective January 1, 2019** - Employees will be entitled to three (3) hours of pay if they are required to be on call and do not work, or are required to work less than three (3) hours.

Domestic and Sexual Violence Leave

- To be taken for prescribed reasons related to the domestic violence or sexual assault of an employee or employee's child, or the threat of such violence
- Employee has to have been employed for 13 weeks
- 10 days and 15 weeks of leave a year

Other Changes

- Minimum wage increase
- Equal pay for equal work
- Scheduling restrictions
- Enforcement and record keeping
- Card-based certification for certain industries
- Employee lists
- First contract mediation/arbitration
- Successor Rights



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