

11 Elements of a Drug & Alcohol Testing Policy that Doesn't Violate Human Rights



Testing workers for drugs and alcohol is one of the most complex and contentious issues in workplace safety. Impaired workers pose safety risks to themselves and others. But compelling workers to submit to, say, a blood test for such substances is an invasion of their privacy. Plus, firing workers who test positive may implicate human rights protections if they're addicted.

The Ontario Human Rights Commission recently released a new policy on drug and alcohol testing. Although the policy is based on human rights law in Ontario, it still provides useful guidance for employers in other jurisdictions as the law in this area is similar across Canada.

The policy explains that the main reason for conducting drug and alcohol testing should be to measure impairment—not to deter drug or alcohol use or monitor moral values among employees.

Even testing that measures impairment can be justified as a bona fide requirement only if it's demonstrably connected to performing the job, such as if an employee occupies a safety sensitive position and after a significant incident or near miss, and only then as part of a larger assessment of drug and alcohol addiction.

After a positive test, employers should offer a process of individualized assessment of drug or alcohol addiction and must accommodate addicted employees to the point of undue hardship. Treating casual users as if they're addicts and imposing consequences on this basis may be prima facie discrimination based on 'perceived disability.'

The Commission advises that a drug and alcohol testing policy that respects human rights and may be justifiable under human rights law is one that:

1. Is based on a rational connection between the purpose of testing (minimizing the risk of impairment to ensure safety) and job performance
2. Shows that testing is necessary to achieve workplace safety
3. Is put in place after alternative, less intrusive methods for detecting impairment and increasing workplace safety have been explored
4. Is used only in limited circumstances, such as for-cause, post-incident or

post-reinstatement situations

5. Doesn't apply automatic consequences following positive tests
6. Doesn't conflate substance use with substance addiction
7. Is used as part of a larger assessment of drug or alcohol addiction
8. Provides individualized accommodation (to the point of undue hardship) for people with addictions who test positive
9. Uses testing methods that are highly accurate, able to measure current impairment, are minimally intrusive and provide rapid results
10. Uses reputable procedures for analysis
11. Ensures confidentiality of medical information and the dignity of the person throughout the process.

For more on drug and alcohol testing, see the following:

- The Supreme Court of Canada's decision in *Irving Pulp* on the legality of a random alcohol testing program
- A checklist for reasonable cause testing for drugs and/or alcohol
- Model post-incident drug and/or alcohol testing procedures.