ALERT: Supreme Court of Canada Overturns Random Alcohol Testing Policy

Drug and alcohol testing is a complex topic that raises issues relating to workplace safety, disability discrimination, and privacy rights. Random testing, in particular, is very contentious. While there are fewer objections to testing a worker who, say, smells of alcohol or is slurring his words or who just rammed his forklift into a wall, testing a random selection of workers without having any reason to believe they're drinking on the job usually draws an outcry. The Supreme Court of Canada just issued its long-awaited decision on the validity of a random alcohol testing policy in a paper mill. Here's a look at this decision. (And to learn more about the case, the Court's reasoning and the implications of this decision, attend our webinar on **July 25, 2013**. Check the 'Upcoming Webinars' page at OHSInsider.com for details and registration information, which will be available soon.)

THE CASE

What Happened: A paper mill in New Brunswick implemented a policy of annual mandatory random alcohol breathalyzer tests of 10% of all workers in safety-sensitive positions. If a worker tested positive for alcohol, he could be disciplined, including fired. The union challenged the policy. The arbitration board ruled struck it down, ruling that the mill didn't have a proven history of 'prior incidents of alcohol-related impaired work.' It also noted that although the mill's operations were dangerous, they weren't 'ultrahazardous.' But the appeals court upheld the testing policy. It explained that random alcohol testing has generally been allowed when it's limited to workers in safety-sensitive positions and done by breathalyzer, which is minimally intrusive. And the appeals court concluded that evidence of an alcohol problem in the workplace wasn't necessary for a random testing policy if the workplace was inherently dangerous, which the paper mill was [*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, [2011] NBCA 58 (CanLII), July 7, 2011]. The union appealed this decision.

What the Court Decided: The Supreme Court of Canada struck down the random alcohol testing policy.

How the Court Justified the Decision: The Court explained that prior cases have established that when a workplace is dangerous, an employer can test an individual worker if there's reasonable cause to believe that he was impaired while on duty, was involved in a workplace incident or was returning to work after treatment for substance abuse. It noted that arbitrators have 'overwhelmingly rejected' mandatory
random testing of workers in a dangerous workplace as an unjustified invasion of privacy *unless* there's evidence of a general problem with substance abuse in the workplace. However, the dangerousness of a workplace doesn't *automatically* justify the unilateral imposition of random testing with disciplinary consequences. There must still be a balancing of the employer's interest in maintaining a safe workplace with workers' privacy rights, said the Court.

Here, although the paper mill was a 'dangerous work environment,' it didn't prove that it had a general problem with workplace alcohol abuse. The arbitration board had concluded that eight incidents of alcohol consumption or impairment at the mill in a 15-year period'and no actual incidents, injuries or near misses tied to alcohol use'wasn't sufficient to establish an overall alcohol problem that would warrant universal random testing. In fact, in the 22 months that the policy was in effect, no worker tested positive for alcohol, further indicating the lack of an alcohol problem in the mill. And the Court found that decision to be reasonable [*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, [2013] SCC 34 (CanLII), June 14, 2013].

ANALYSIS

The *Irving Pulp* decision doesn't close the door on random alcohol testing. The Court was careful to note that this decision was made in the context of an employer's rights and powers under a collective agreement. That is, in a unionized workplace, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on workers' privacy rights. (Although even in a *non-unionized* workplace, an employer must still justify the intrusion on privacy resulting from random testing by reference to the particular risks in that particular workplace.) Instead of engaging in its own balancing of interests, the Court supported the arbitration board's conclusion that the expected safety gains to the paper mill ranged 'from uncertain . . . to minimal at best,' while the impact on worker privacy was much more severe.

The Court criticized the lower court for basically setting an automatic rule that when a workplace is deemed dangerous, no balancing is required and worker privacy rights essentially go out the window. But it added, 'This is not to say that an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.' Plus, an employer can always negotiate with the union for the imposition of a random testing policy.

Bottom line: In a dangerous workplace, if the employer can demonstrate the existence of a drug or alcohol use problem among its workforce, it may well be able to justify the imposition of a random testing policy.

OHS Insider Resources

The OHS Insider has more information on drug and alcohol testing in the workplace, including discussions of some of the cases cited by the Court in the *Irving Pulp* decision, such as:

- Model Post-Incident Drug and/or Alcohol Testing Procedures
- Checklist for Reasonable Cause Testing for Drugs and/or Alcohol.