

12 Things to Include in Your Drug & Alcohol Testing Policy



MYTH

Drug testing of workers will be illegal once Canada legalizes recreational cannabis later this year.

WHAT'S AT STAKE

Wrong, wrong, wrong!

The truth is that legalized cannabis will have little to no direct impact on *workplace* drug policies and the testing methods used to enforce them. But what it likely *will* do, at least based on the experiences of U.S. states that have legalized recreational cannabis, is increase use. And that will make drug testing and testing policies even more important than they are now.

Bottom Line: So as the days to legalization tick down, if you don't have a testing policy, you should strongly consider implementing one; and if you do already have a policy, you should give it a good hard look. This story will help you do both of these things.

IS TESTING LEGAL'

While testing is highly controversial, there are 3 things on which all sides agree:

- Workplace drug and alcohol use and impairment is a safety hazard;
- Testing is one of if not the best ways to enforce anti-drug and alcohol policies; and
- Workers and unions hate testing and often go to court or arbitration to contest it.

Heading into litigation, unions enjoy some major legal advantages, including the

fact that:

- Testing is highly privacy intrusive;
- Drug and alcohol *addiction* (although not casual use) is a disability requiring accommodations under human rights laws; and
- Employers bear the burden of justifying their testing policies as a needed and unavoidable safety measure.

The legality of a particular testing policy depends on a number of factors including:

- What's tested for, i.e., drugs or alcohol;
- Who's tested, e.g., all workers or safety-sensitive ones; and
- The basis for performing a test, i.e., pre-employment, for cause/post-incident or at random.

Thanks to decades of litigation, including recent random drug testing cases from Alberta and Ontario, we have a pretty good sense of where courts and arbitrators stand on different types of testing:

Where Courts/Arbitrators Stand on Testing

Worker Tested	Post-Incident/For-Cause		Random	
	Drugs	Alcohol	Drugs	Alcohol
Safety-Sensitive	Yes	Yes	Only as necessary safety measure to prevent hazard caused by drug use	Only as necessary safety measure
Non-Safety-Sensitive	Highly unlikely	Unlikely	No	No

THE 12 THINGS TO INCLUDE IN YOUR TESTING POLICY

Knowing how particular types of testing *may be* justified is just the starting point. The windows for justification are extremely tight and you won't squeeze into any of them if you don't have the right testing policy. ([Click here](#) for a Checklist of general criteria used by courts and arbitrators to evaluate the legality of testing policies.)

While the *Insider's* Model Testing Policy is designed as a standalone, you can also incorporate the testing policy into a larger workplace drug and alcohol use policy. In either case, there are 12 things you should include in the policy. ([Click here](#) for a Model Testing Policy.)

1. Policy Statement

Like many employers, you may want to set the tone by stating that your organization has a zero tolerance drug and alcohol use policy. But while stating larger principles is recommended, you need to be careful about phrasing your

policy as a workplace safety and fitness for duty rather than a moral or even legal imperative (especially after cannabis is legalized) [Policy, Sec. 1].

Example: An offshore platform millwright is fired for violating company policy banning possession of 'illegal drugs' after screeners find a tinfoil packet containing a small amount of cannabis in his jeans pocket. The millwright claims it was all a big mistake but the arbitrator dismisses the grievance, saying that mere possession was a violation regardless of the millwright's intention. But while the employer did win, the strategy is not sustainable. After all, if this very same case had taken place after legalization, the cannabis would have not been deemed 'illegal' and the millwright would not have been guilty of a policy violation [*Terra Nova Employers' Organization v Communications, Energy and Paperworkers Union, Local 2121*, 2018 NLCA 7 (CanLII), Jan. 24, 2018].

2. Statement of Purpose

Acknowledge that testing is intrusive but state that it's essential to enforcing your zero tolerance policy and its workplace safety objective [Policy, Sec. 2].

3. Policy Scope

The policy must be balanced in scope. Testing should be limited to safety-sensitive workers but at the same time broadly to any and all individuals that meet the criteria for performing safety-sensitive jobs regardless of their employment status, including employees of contractors and people applying for safety-sensitive jobs at your organization [Policy, Sec. 3].

4. Workers' Duties

If the testing policy is freestanding, you may want to restate or refer to workers' duties under the organization's drug and alcohol use policy, including coming to work sober and fit for duty and remaining in that state at all times while on duty [Policy, Sec. 5].

5. Bases for Testing

The meat of the policy are the rules for different bases of drug and alcohol testing, including:

- Pre-employment testing: Mandatory for job applicants who receive offers for safety-sensitive positions [Policy, Sec. 6.1];
- For-cause testing: Allowed when there's grounds for reasonable suspicion of impairment with such grounds specifically listed [Policy, Sec. 6.2];
- Post-incident testing: A form of for-cause testing allowed after accidents, near misses and other safety incidents [Policy, Sec. 6.3];
- Random testing: Permitted only in narrow safety-driven circumstances [Policy, Sec. 6.4];
- Post-Rehabilitation Testing: May be required for workers that test positive who are offered the opportunity for rehab in lieu of termination [Policy, Sec. 6.5]; and
- Scheduled Periodic Testing: May be required as part of a fitness for duty medical exam [Policy, Sec. 6.6].

6. Testing Procedures

There are 6 crucial procedural issues you need to address in your testing

policy:

- How job applicants and workers give their consent to be tested [Policy, Sec. 7.1];
- How samples are collected and who can collect them [Policy, Sec. 7.2];
- The controls in place to ensure the integrity of the sample from collection to transporting to the lab and actual testing [Policy, Sec. 7.3];
- The methods used to confirm initial positive test results [Policy, Sec. 7.4];
- The criteria for a positive result which should generally track the applicable regulatory limit for the substance tested for, e.g., BAC for alcohol [Policy, Sec. 7.5]; and
- Procedures for retesting and appeals after positive results [Policy, Sec. 7.6].

7. Privacy of Test Results

Acknowledge that test results are privacy-protected information that you'll keep secure and refrain from using except as allowed or required by law. Also indicate that test records are organization property but that you'll make them available for inspection and copying as required by law [Policy, Sec. 8].

8. Violations

Explain that violations include not just testing positive but tampering or attempting to tamper with samples and/or refusing to submit to testing in the first place [Policy, Sec. 9].

Example: A truck driver with a penchant for speeding takes a corner too fast and drives her vehicle into a ditch. The for-cause drug test she must take as a result comes back positive for cannabis. After confirming that she wasn't an addict, the company fires her. The arbitrator upholds the decision. The positive test didn't prove the driver was impaired *at the time of* testing. But the nail in the coffin was the evidence that the driver got a substitute urine sample. And cheating on the drug test was just cause to terminate [*Gilbert and D & D Energy Services Ltd., Re*, 2017 CarswellNat 2499 (Can. Lab. Code Adj.)].

9. Consequences of Violations

Make it clear that workers who commit violations will be subject to discipline up to and including termination in accordance with your organization's disciplinary policies and procedures; also specify that violations by job applicants is grounds for revoking an offer of employment (or termination if the violation is discovered only after the applicant has started working) [Policy Sec. 10].

10. Rehab Rather than Termination

Reserve your right to offer workers who test positive the opportunity to enter a last chance agreement in lieu of immediate discipline or termination. Typically, the worker is put on administrative leave and allowed to return to work provided they successfully complete a rehab program, which usually involves regular testing [Policy, Sec. 11].

11. Acknowledgment of Employee Accommodation Rights

To insulate against liability risks for discrimination, acknowledge that drug and alcohol addiction are disabilities under human rights laws and that you'll provide reasonable accommodations to workers with addictions up to the point of undue hardship [Policy, Sec. 12].

12. Attach Consent Form

Last but not least, attach a copy of the form you require job applicants and workers to sign to consent to testing as an Exhibit to your policy [Policy, Exhibit A]. ([Click here](#) for a Model Consent Form.)