

Drugs & Alcohol: Does Your Drugs/Alcohol Testing Policy Discriminate?



- First came the OHS laws requiring employers to control health and safety hazards;
- Next came the human rights laws requiring employers to make accommodations for employees with disabilities up to the point of undue hardship;
- And after that came the court cases interpreting drug and alcohol addiction as 'disabilities' under the human rights laws.

All 3 of these legal developments were not only justifiable but essential for social progress. But they also had an unintended consequence by pitting HR and OHS directors in one heckuva' dilemma:

**an unintended consequence by pitting HR and OHS directors in one heckuva' dilemma:
How do you deal with a drug/alcohol addict who creates intolerable safety risks but is
also due accommodations under human rights laws'**

Safety Wins, But Accommodation Still Counts

The clear consensus is that when the house is on fire and only one can be saved, safety trumps disability discrimination protections. Or, to put it in discrimination jargon, tolerating safety hazards created by workers impaired on the job goes beyond reasonable accommodation and constitutes undue hardship.

But while the value judgment is pretty clear, applying it to actual situations is anything but. The challenge typically arises after a worker is disciplined after testing positive for drugs or alcohol. The legality of the discipline then often boils down to a crucial question: Does the testing policy recognize and respect the worker's accommodation rights'not only in the way it's written but also its execution'

Ontario Guidance Help Employers Reconcile Safety & Accommodation

Unfortunately, there's no set formula for reconciling testing with accommodations rights. But while it's up to courts and arbitrators to resolve the issue case by case, in 2016, the Ontario Human Rights Commission helped the situation by issuing a policy setting out benchmarks for employers to evaluate the legality of their own drug and alcohol testing policies. And while the guidance comes from Ontario, it works equally in all parts of the country.

The only justifiable reason for testing should be to measure impairment, not to

deter drug or alcohol use or impose moral values, the guidance explains. But having the right objective isn't enough. To be justified as a bona fide requirement, testing must be demonstrably connected to performing the job. Thus, for example, testing is generally permissible only if the employee performs a safety-sensitive job. There should also be a reason for performing a particular, e.g., after the employee is involved in a safety incident or near miss. Random testing is allowed only in extremely limited circumstances, and only then as part of a larger assessment of drug and alcohol addiction. ([Click here](#) to find out about recent random drug testing cases from Alberta and Ontario)

What employers do *after* the test is equally important. Knee-jerk discipline in response to positive test results is unacceptable. Instead, employers need to initiate a process of individualized assessment to determine whether the employee has a drug or alcohol addiction. If so, the employer must accommodate addicted employees to the point of undue hardship.

16 Questions to Ask when Vetting Your Testing Policy

Does your testing policy and means of implementing it measure up to these standards? A good way to make that determination is to ask the following 16 questions. While there's no scientific formula, the more items you can honestly check off, the sounder your policy is likely to be.

☐ 1. Our testing policy is based on a rational connection between the purpose of testing, i.e., minimizing the risk of impairment to ensure safety, and job performance

☐ 2. We can show that testing is necessary to achieve that workplace safety purpose

☐ 3. We adopted the policy only after exploring and ruling out less intrusive methods for detecting impairment in the interest of ensuring workplace safety

☐ 4. The testing policy applies only to safety-sensitive employees and/or job applicants

☐ 5. Testing is only performed in limited, prescribed circumstances, such as after safety incidents or prior to employment to safety-sensitive positions

☐ 6. Employees are not subject to automatic discipline for positive tests

☐ 7. An individualized assessment is conducted after positive tests to determine whether the employee has a substance addiction

☐ 8. Employees determined to have substance addictions are offered individualized accommodations suitable to their particular situation and needs to the point of undue hardship

☐ 9. The testing policy recognizes and respects the difference between substance addiction, which requires accommodation, with substance use, which does not require accommodation

☐ 10. Testing is used as part of a larger assessment of drug or alcohol addiction

- ☐ 11. Procedural controls are in place to ensure the integrity of samples from collection to transmission through actual testing
- ☐ 12. Testing is performed by qualified health care professionals
- ☐ 13. Testing methods are scientifically accurate and indicative of and capable of measuring current impairment
- ☐ 14. Test results are analyzed using scientifically reliable methods
- ☐ 15. Initial positive test results are reliably and accurately confirmed
- ☐ 16. Test results and data are kept confidential and not used or disclosed except as permitted or required by law