Learn about Drug Testing Rules & Using Privilege to Protect Incident Reports



In addition to a track that focuses on the Ontario OHS reform movement, the OHS Summit 2012 has a track for OHS practitioners and another on OHS risk assessment. We recently spoke to Reagan Ruslim, a lawyer with Dunsmore Law, about two sessions his firm is presenting, one on each of the non-Ontario tracks.

The State of the Law on Drug Testing

Ruslim himself will be presenting a session on drug testing in the workplace as part of the OHS practitioner's track. The session will explain the current state of the law on drug (and alcohol) testing in Canada, which Ruslim notes is somewhat different from the law in the US. For example, random drug testing is more common and more easily permitted in the US than in Canada, he explains. For that reason, he'll focus on reasonable cause/post-incident testing. (Ruslim will briefly discuss, however, the random drug testing pilot project recently launched in Alberta.)

Across Canada, before you can implement a reasonable cause/post-incident drug testing regime, Ruslim says you need to establish that the workplace is "safety-sensitive." For example, a plant that manufactures fireworks is more likely to be considered a safety-sensitive workplace than an accounting

office. Many workplaces fall somewhere in between these extreme examples. In determining whether a workplace meets this standard, courts and arbitrators consider various factors including the "consequences of human error," explains Ruslim. For instance, the consequences of, say, Homer Simpson coming to work at the nuclear power plant high on drugs go far beyond his own safety or even that of his co-workers.

In discussing what safety sensitive means and the importance of this concept in the context of drug testing, Ruslim will use a case his firm handled in which a company's plan to implement a reasonable cause/post-incident drug testing program was challenged by the union. He says the case is a good illustration of the challenges companies face when trying to implement a drug testing program. Attendees will get practical advice on how to overcome these hurdles as well as how to assess their own workplace and determine what aspects of it support an argument that it's safety-sensitive. Ruslim recommends that attendees from manufacturing or industrial workplaces that contain machinery and/or hazardous substances attend his session.

***Insider* Says:** For a preview of some of the issues Ruslim will cover at the Summit, see "Drug & Alcohol Testing, Part 1: What Are the Legal Limits on Testing Policies'" and "Drug & Alcohol Testing, Part 2: How to Create an Enforceable Testing Policy."

Using Privilege to Protect Results of Incident Investigations

All attendees of the Summit will find the session on "privilege" by Ruslim's colleague Ross Dunsmore very informative. This session is part of the OHS risk assessment track. One of a safety professional's key jobs is investigating or participating in the investigation of safety incidents after they've occurred. But the last thing you want is for the results of your incident investigation and any recommendations to be used by the government against your company. And the solution isn't to not conduct incident

investigations or avoid putting the results on paper, he adds. That's where the concept of privilege comes in, says Ruslim.

In essence, privilege protects certain communications with a lawyer from disclosure to government officials. Privilege is a "common law" idea that's the same across Canada and is a "fundamental principle of justice," Ruslim explains.

Although privilege is a legal concept, Ruslim stresses that the session is *not* geared toward lawyers. Yes, Dunsmore will explain what privilege is and how it applies to safety incident investigations. But more importantly, he'll provide practical advice on how you can use privilege if an OHS inspector appears on your doorstep, Ruslim says.

For example, attendees to Dunsmore's session will get a checklist of basic, fundamental steps to take after a safety incident to avoid waiving privilege and properly protect the investigation with privilege, says Ruslim. To make these steps more concrete, Dunsmore will discuss a case in which the court ruled that the government couldn't use an incident investigation report and recommendations it had obtained from a company because this information was protected by privilege. Ruslim notes that the company in this case took all of the correct steps and that's why it prevailed.

***Insider* Says:** To brush up on privilege and incident investigations before the Summit, see "Using 'Privilege' to Keep Incident Investigation Reports Confidential" and "Surviving OHS Investigations: What to Do When OHS Officials Demand Your Incident Reports."

***INSIDER* SOURCE**

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