



Drafting and Implementing Effective Drug and Alcohol Policies

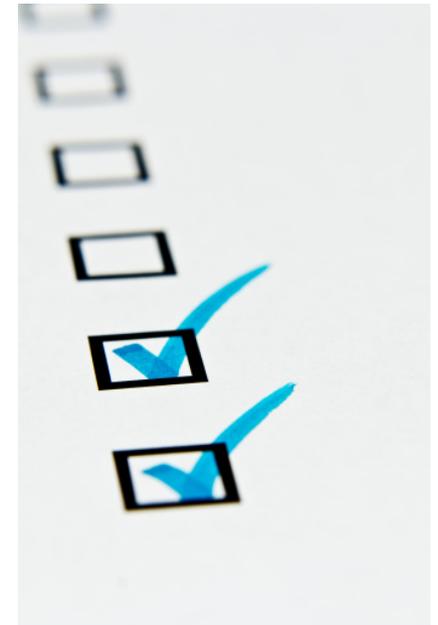
Natalie Cuthill, McMillan LLP

Bongarde Media Webinar – April 24, 2019



Agenda

- Overview of occupational health and safety obligations of employers and workers
- Review of the duty to accommodate
- Review of permissible drug testing
- Best practices for drafting drug and alcohol policies
- Best practices for implementing drug and alcohol policies



OH & S Obligations

- Employers and workers in each jurisdiction have obligations to protect their workplaces from impairment from drugs and alcohol
- Obligations are set out in the applicable occupational health and safety legislation
- For example, sections 4.19 and 4.20 of the British Columbia *Occupational Health and Safety Regulation* provide that
 - Workers with impairments which may affect their ability to safely perform assigned work must inform their supervisor or employer of the impairment, and must not knowingly do work where the impairment may create an undue risk to the worker or anyone else
 - A worker must not be assigned to activities where a reported or observed impairment may create an undue risk to the worker or anyone else
 - A person must not enter or remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else
- The employer must not knowingly permit a person to remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else



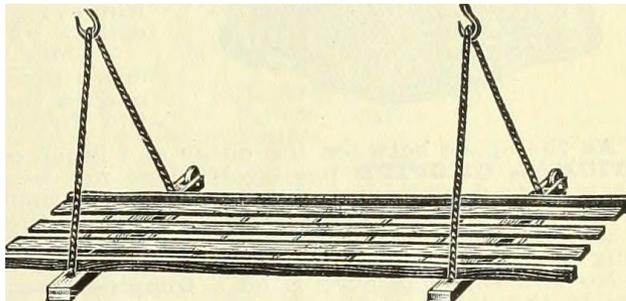
Duty to Accommodate

- Employees with disabilities, including addiction, are protected by human rights legislation
- Accommodation is required if the employee has a disability
- Accommodation is not required for recreational drug or alcohol use
- Accommodating cannabis for medical purposes, for example, is the same as any other medically prescribed drug
- Employers have a duty to accommodate to the point of undue hardship



Duty to Accommodate Cont.

- *French v Selkin Logging*, 2015 BCHRT 101
 - Strict application of a zero tolerance rule, without consideration of accommodation, might offend the Human Rights Code in circumstances where the individual may be legitimately using marijuana for a medical purpose
- *Aitchison v L & L Painting and Decorating Ltd.*, 2018 HRTO 238
 - Employees do not have an absolute right to smoke cannabis, including medical cannabis, at the workplace
 - Having a policy sets out the employer's expectations for employees
 - Remind employees of policies at least yearly, and require them to sign a form acknowledging that they are aware of the employer's policies



What if Employee Comes to Work Impaired?

- Record physical and behavioural observations
- Consider whether drug and alcohol testing is necessary
- Send the employee home – complies with OH&S obligations
- Ask employee why they came to work impaired
- Does the answer trigger a duty to inquire or accommodate under human rights law?
- Disciplinary response will depend on circumstances
- Remind employee of the company's drug and alcohol policy
- Repeated violations of the policy require progressive discipline

How Does an Employer Determine Impairment?

1. Physical and behavioural observations

- Train supervisors on detecting impairment, such as impairment from Cannabis
- Example course
 - “Impairment and Cannabis in the Workplace” e-course and other online information guides by Canadian Centre for Occupational Health and Safety – recommended by WorkSafeBC and the Government of Canada
 - Lancaster House skills training in-person and e-courses on recognizing impairment
 - SureHire Drug and Alcohol e-course

2. Drug and alcohol testing

Permissible Drug Testing

- Whether requiring an employee to undergo a drug or alcohol test was reasonable will be considered on a case-by-case basis
- Alcohol and drug testing is generally permissible in the following circumstances:
 1. where there are reasonable grounds to believe that an employee was impaired while on duty;
 2. where the employee was directly involved in a workplace accident or significant incident; or
 3. where the employee returns to work after treatment for substance abuse.



Permissible Drug Testing - Reasonable Grounds

- Reasonable grounds to believe an employee is impaired at work
 - Where employer has made personal observations of appearance, behaviours, speech, and/or odours that are consistent with drug or alcohol use
- Generally permissible for safety sensitive positions or workplaces
- Observe, confirm, document, discuss and test (if necessary)



Permissible Drug Testing - Reasonable Grounds Cont.

- For example:
- *Canadian National Railway Co. v CAW, Local 111 (CAW12-2011-00071), Re, [2013] CLAD No. 248*
 - Supervisor had noticed that a mechanic in a railway equipment shop had bloodshot eyes, a flushed complexion and an inattentive demeanour. The supervisor consulted with another supervisor who confirmed his suspicions that the employee showed signs of drug and alcohol use
 - Employer required employee to undergo a drug and alcohol test.
 - Employee grieved this alleging that the employer did not have reasonable and probable grounds
 - Grievance dismissed

Permissible Drug Testing - Post-Incident or Near Miss

- Generally permissible for safety-sensitive positions after a significant accident or “near miss”
- Determination of what is reasonable to investigate must be judged on the circumstances and what was realistic at that time
- Post-incident testing may not require an employer to have a basis to believe that the employee was impaired before testing
- Drug testing should be a part of a larger investigation into the workplace accident or near miss

Permissible Drug Testing - Post-Incident or Near Miss Cont.

- Elements to post-incident testing:
 - (a) The incident which precipitated the testing meets a sufficiently serious threshold to justify testing;
 - (b) The employer has engaged in the necessary degree of inquiry before making the decision to request a test; and
 - (c) There is a sufficient nexus between the incident and the employee to justify the demand for a test.

Weyerhaeuser Co. v CEP, Local 447, (Roberto Grievance) [2006] A.G.A.A. No. 48



Permissible Drug Testing - Post-Incident or Near Miss Cont.

- For example:
- *Tolko Industries Ltd. and USW, Local 1-425 (Lipke), Re, 2017 CarswellBC 3151 (BC Arbitration)*
 - Grievor was in a safety-sensitive position, and drove a piece of heavy equipment into another piece of equipment (which another employee was occupying) causing substantial property damage
 - Both employees were subject to post-incident testing because of the possibility of severe harm
 - The grievor tested positive for marijuana in his system and he was terminated.
 - Arbitrator found that the employer was not required to demonstrate that an employee consumed drugs or is impaired by drugs before demanding a test - the employer's decision to submit the grievor to drug and alcohol testing was reasonable.



Permissible Drug Testing - Return to Work

- Generally permissible for safety sensitive positions/workplaces as part of a return to work after a policy violation or after rehabilitation
- May be unannounced and random for a reasonable period of time where reasonable to believe alcohol and drugs could have impact
- Requires balance between privacy and safety



Permissible Drug Testing – Should Employers Drug Test?

- Training supervisors to detect impairment should be the first step
- Need to be able to identify possible impairment to support reasonable cause testing – supervisor's observations may provide reasonable cause
- Permissible drug testing results may not yield accurate information on current impairment - important to have other supporting information
 - behavioural and physical observations



Drug and Alcohol Policy

- Recommended that employers have a written policy on drug and alcohol consumption in the workplace
- This is supported by WorkSafeBC, for example
- Existing policies may have to be revised to address legalization of cannabis
- Properly drafted policies:
 - Set expectations for employees regarding use of drug and alcohol and impairment at the workplace
 - Set expectations for consequences of policy violations
 - Support employee discipline and termination for workplace impairment
 - Can withstand human rights scrutiny if accommodation is properly addressed



Example of Effective Drug Policy

- *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30
- Drug policy required employees to disclose a drug-related addiction before a drug-related incident occurred
- Failure to disclose an addiction and subsequent involvement in a drug-related incident results in termination
- Mr. Stewart's termination upheld because:
 - The policy was clear that there were "no free accidents"
 - The employee received training on the policy and signed an acknowledgment that he understood the policy
 - The policy provided that employees who disclosed an addiction in advance would receive treatment
 - The letter terminating the employee was unequivocal that it was the violation of the policy and not the employee's addiction that was the reason for termination
 - Even though immediately terminated, he was still offered accommodation



Construction Industry in British Columbia

- The Construction Labour Relations Association of British Columbia and the Bargaining Council of BC Trades Unions jointly developed a policy specific to the construction industry
- The Construction Industry of British Columbia Substance Abuse Testing & Treatment Program Policy is applicable to all union construction workers in British Columbia
- Object of policy is to enhance safety on the job and rehabilitation for workers with substance abuse problems
- Policy provides for:
 - Testing on employees who are involved in workplace accidents or near-misses, and when there is reasonable suspicion of impairment on the job
 - Requires reasonable suspicion training for supervisors
 - Where required by clients or project owners, employees may also be subject to testing prior to starting work on a new project
 - The program tests for current impairment from alcohol and for a panel of common drugs including cannabis



Best Practices for Drafting Drug and Alcohol Policies

- Contents of the policy
 - Purpose and application of the policy

This policy applies to all employees and all work environments, including all Company facilities, Company-related settings and Company-sponsored events. This policy also applies to vendors, contractors, customers, agents and suppliers who conduct business with or visit the Company's employees or facilities.

- Key definitions: alcohol and drugs

Alcohol: Means the intoxicating agent in beverage alcohol, ethyl alcohol, methyl alcohol, isopropyl alcohol, and includes distilled spirits, wine, beer, malt beverages or intoxicating liquor.

Drugs: Means illegal drugs or unauthorized consumption or quantities of legal medicines, inhalants, stimulants, hallucinogens, and other narcotic or non-narcotic drugs, including cannabis, which have the effect of altering mood and/or impairing physical and/or mental function, including, but not limited to, drugs "controlled" under the Controlled Drugs and Substances Act.



Best Practices for Drafting Drug and Alcohol Policies Cont.

- Prohibit manufacture and sale of alcohol and drugs in the workplace

The unlawful manufacture, distribution, dispensing or sale of alcohol or drugs in the workplace or while engaged in Company business, or any attempt to do so, is strictly prohibited. Such conduct will result in disciplinary action including the immediate termination of an employee's employment for cause or the immediate termination of a contractors' agreement.



Best Practices for Drafting Drug and Alcohol Policies Cont.

- Prohibit the use and possession of alcohol and drugs in the workplace

The possession and use of drugs in the workplace, including cannabis, or while engaged in Company business is strictly prohibited. Similarly, the unauthorized possession and consumption of alcohol in the workplace or while engaged in Company business during regular business hours is also strictly prohibited. The consumption of alcohol may be authorized for specific business events. Even when such authorization is provided, it is expected that employees will practice moderation if consuming alcohol.

- Address Company events

The consumption of alcohol may be authorized for specific business events. Even when such authorization is provided, it is expected that employees will practice moderation if consuming alcohol.

- Address over-the-counter medications: must be used properly and not cause impairment

Best Practices for Drafting Drug and Alcohol Policies Cont.

- Alcohol and drug testing

Alcohol and drug testing may be used if there is reason to believe that substance use is affecting fitness for work or was a factor in a near-miss incident or accident at the workplace. It may also be used when certifying employees and contractors for safety-sensitive positions or reinstatement after suspension for alcohol and drug problems. This testing will only be used as part of a broader assessment of substance use.

- Consequences for breach of the policy

A breach of this policy may result in disciplinary action including the immediate termination of an employee's employment for cause or the immediate termination of a contractor's agreement.



Best Practices for Drafting Drug and Alcohol Policies Cont.

- Require employees to disclose need for accommodation of medications before fitness for work or near miss/accident occurs
- Require employees to disclose the need for accommodation of an addiction

No employee or contactor with a dependency or addiction will be disciplined or involuntarily terminated because of the employee's involvement in a rehabilitation effort or for voluntarily requesting rehabilitative help in overcoming the problem. However, involvement in a rehabilitative effort or seeking rehabilitative help for an abuse, dependency or addiction problem **after** a work related incident or a near-miss has occurred, or **after** a demand is made for the employee to undergo testing under this policy, will not prevent an employee from being disciplined or terminated.

- Note regarding cannabis for medical purposes

Best Practices for Implementing Drug and Alcohol Policies

- Ensure employees are properly informed of the policy
 - On hire
 - Intranet
 - Monthly meetings
- Reminded of the policy
 - Annually
- Have employees acknowledge the policy in writing
 - Put signed acknowledgement in personnel file



Questions



Natalie Cuthill

Lawyer

P: 236.826.3260

E: natalie.cuthill@mcmillan.ca

McMillan offices

Vancouver

Royal Centre, 1055 West Georgia Street
Suite 1500, PO Box 11117
Vancouver, British Columbia
Canada V6E 4N7
t: 604.689.9111

Calgary

TD Canada Trust Tower, Suite 1700
421 7th Avenue S.W.
Calgary, Alberta
Canada T2P 4K9
t: 403.531.4700

Toronto

Brookfield Place, Suite 4400
181 Bay Street
Toronto, Ontario
Canada M5J 2T3
t: 416.865.7000

Ottawa

World Exchange Plaza
45 O'Connor Street, Suite 2000
Ottawa, Ontario
Canada K1P 1A4
t: 613.232.7171

Montréal

1000 Sherbrooke Street West
Suite 2700
Montréal, QC
Canada H3A 3G4
t: 514.987.5000

Hong Kong

3502 Tower 2 Lippo Centre
89 Queensway
Hong Kong, China
t: 852.3101.0213