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EMPLOYEE DRUG & ALCOHOL TESTING IN CANADA

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Many Canadian employers are uncertain about the extent to which it is legal to test employees for alcohol and drug use. This uncertainty can be attributed to a number of factors, including the fact that there is generally no legislation in Canada specifically permitting or regulating drug and alcohol testing of employees. In the absence of such legislation we are therefore required to rely on court and tribunal decisions to provide guidance to employers on what testing is permitted. In addition it should be noted that the applicable rules in Canada are quite different (and generally much more restrictive) from the rules in the US. Even within Canada the rules may vary between provinces.

From an employer's perspective some of the most common questions asked about drug and alcohol testing are:

Pre-Employment Screening: Can an employer test employees for drug & alcohol use before hiring?

Mandatory pre-employment testing is **generally not permitted**, even in a "safety sensitive" or dangerous workplace. While there may be some exceptions, the Courts in Canada have generally decided that testing **before** hiring an employee (and a "zero tolerance" policy for prospective employees who failed such a test) is discriminatory under Human Rights legislation.

The one exception to this rule may be in Alberta, where, based on a decision of the Alberta Court of Appeal it was determined that mandatory pre-employment drug testing was permissible for certain employers hiring in a highly safety sensitive workplace (Synchrude's Fort McMurray oil sands plant).

Random Testing: Can an employer randomly test employees during their employment?

Random testing during an employee's employment is **almost never permitted** in Canada. The uncertainty that previously surrounded this issue has now been resolved by a decision of the Supreme Court of Canada released just last month.



In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.* our Supreme Court considered the impact of random drug and alcohol testing on an employee's right to dignity and privacy and balanced this right against the employer's concerns for workplace safety and discipline. Ultimately siding with the employees on this issue, the Court decided that **random** drug and alcohol testing of employees would **not** be permitted even in a dangerous work environment, **unless** an employer could prove that there was a general problem with alcohol or drug abuse in its workplace. Based on this decision, the vast majority of Canadian employers will not be permitted to maintain policies for random drug and alcohol testing.

Post Incident testing: Can an employer test employees who are involved in an accident or other workplace incident?

The answer to this question is generally: **yes**. Employees who have been involved in a workplace accident, or in an incident that raises reasonable grounds for suspecting that an employee was impaired by drug or alcohol use, may generally be required to undergo testing as a condition of continuing their employment.

Furthermore, employees who are suspended or placed on leave in order to undertake a program of drug or alcohol rehabilitation may be asked to undergo a post-rehab testing program for a reasonable period of time on their return to work to ensure that they remain "clean and sober" while at work.

It must be kept in mind that for "post-incident" testing it is generally not the "testing" itself that triggers legal or Human Rights law concerns. Instead it is how an employer treats (or disciplines) an employee who tests positive (and who is dependent on drugs or alcohol) that results in most legal challenges. In most cases such an employee cannot be summarily dismissed, but must instead be offered a rehabilitation program to give them an opportunity to kick their habit and return to work.

Conclusion

It should be emphasised that the legal landscape regarding permissible drug and alcohol testing in Canada remains complex. The above summary therefore significantly oversimplifies the applicable rules. There may be exceptions and qualifications to some of these rules depending on the industry and circumstances faced by certain employers. It is therefore crucial for employers to obtain specific legal advice on their particular workforce, workplace and situation before adopting a drug and alcohol policy and before making any disciplinary decision involving an employee who may be using (or is suspected of using) drugs or alcohol while on the job.