Navigating the Legal Aspects of Workplace Health & Safety

Canadian Manufacturers & Exporters
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Agenda

- Drug & Alcohol Testing
  - Balancing competing legal considerations
  - When is testing permitted?
- Accommodation and Return to Work
  - Principles of accommodation
  - Obligations of workplace parties
- Workplace Harassment
  - Bill 132 amendments
Drug and Alcohol Testing
Competing Legal Considerations

- Employer has an obligation to protect safety of employees, clients/customers and public

- Policies requiring testing:
  - May breach *Human Rights Code*
    - Concern re: discrimination
  - May violate collective agreement rights
    - Concern re: privacy
Competing Legal Considerations

- Human Rights Considerations:
  - *Code* prohibits discrimination on basis of disability and perceived disability
  - Drug and alcohol addiction is a disability
  - *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)
    - Now called “Substance Use Disorders”
    - Measured on continuum: mild, moderate, severe
Competing Legal Considerations

Privacy Considerations:
- Highly personal information
- Bodily integrity
- Arbitrators’ “balancing approach”:
  - Privacy vs. safety
- Tort of intrusion upon seclusion
Safety Sensitive Workplaces/Positions

What does ‘safety sensitive’ mean?
- Generally, risk or harm to self or others (or other serious consequences) if impaired
- Hazardous environment
- Remote location
- Limited direct supervision

Position can be safety sensitive even if the workplace, as a whole, is not
Is Consent Required?

- Employee consent required
- Form of consent
  - Collective agreement
  - Employment contract
  - Workplace policy
- Consent does *not* eliminate liability (e.g. human rights complaint)
When is Testing Permissible?
Pre-Employment Testing

- Non-unionized employees:
  - Human rights considerations paramount
  - Is testing *prima facie* discriminatory?
    - Some recognition of connection to managing safety risk in safety sensitive workplace/position
    - Emphasis on effect of policy in each individual case rather than on policy itself
  - Critical to incorporate into policy individual assessment and accommodation
Pre-Employment Testing

- **Unionized employees:**
  - Generally, not permissible, even for safety sensitive workplace/position
  - Results only indicate past use
  - Cannot predict future job performance
  - Therefore utility of testing does not outweigh privacy interest
Pre-Employment Testing

- Testing may be permissible where there is reasonable cause to suspect substance abuse
  - Employer can demonstrate – through direct evidence – existence of substance abuse problem at workplace

- If candidate fails test:
  - Opportunity for further medical assessment
  - Be prepared to accommodate if addiction
Random Testing

■ Typically not permitted for unionized employees

■ *Irving Pulp and Paper* (2013 SCC)
  
  - Employer introduced *random* alcohol testing:
    - Only for “safety sensitive positions”
    - 10% of employees were randomly tested
    - A positive test would result in significant discipline, including discharge
    - Failure to submit = immediate discharge
Random Testing

- SCC upheld arbitrator’s award:
  - Testing was invalid use of management rights
  - Insufficient evidence of a workplace problem of alcohol abuse:
    - 1991-2006: 8 documented incidents re: consumption/impairment; no accidents/injuries
    - Dangerousness of a workplace is not an “automatic justification”
Random Testing

Limitations of testing technology present additional hurdles to random drug testing:

- Urine test does not detect current or future impairment or quantity of drug consumed
- Saliva test does not yield immediate, reliable results

Random testing cannot detect imminent safety risk and therefore cannot outweigh privacy interest
Random Testing

Non-unionized employees:

- *Entrop v. Imperial Oil* (2000 ONCA)
  - Permitted – random alcohol testing for employees in highly safety sensitive positions subject to minimal supervision
  - Not permitted – random drug testing due to limitations of testing technology

- Effect of test result including individual assessment and accommodation is critical
Return to Work Testing

- Typically permitted for safety sensitive position
- **May** be permitted for non-safety sensitive position
- Rehabilitative testing requires balance between:
  - Privacy/human rights
  - Safety
Post-Incident Testing

Testing is generally permissible as part of a larger investigation into a workplace accident or “near miss”

Needs to be some reasonable basis upon which the employer believes impairment may have been a factor in the accident
Reasonable Cause Testing

- Similarly, where employee’s actions or appearance in the workplace suggest impairment (e.g. stumbling, slurred speech, smell of alcohol) testing may be permissible.

- For both post-incident and reasonable cause testing, there should be a broader workplace policy in place setting out the circumstances in which testing may occur.
## Drug and Alcohol Testing Methods

<table>
<thead>
<tr>
<th>Method</th>
<th>Test Matter</th>
<th>Current Impairment?</th>
<th>Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breathalyzer</td>
<td>Alcohol</td>
<td>Yes</td>
<td>Doesn’t test for drugs</td>
</tr>
<tr>
<td>Urinalysis</td>
<td>Drugs and Alcohol</td>
<td>No</td>
<td>Tests recent use, false positives, delay</td>
</tr>
<tr>
<td>Hair analysis</td>
<td>Drugs</td>
<td>No</td>
<td>Tests use over longer period, cultural differences, expensive, delay</td>
</tr>
<tr>
<td>Saliva</td>
<td>Drugs and Alcohol</td>
<td>Maybe</td>
<td>Delay, possibility of false positives and false negatives*</td>
</tr>
<tr>
<td>Blood</td>
<td>Drugs and Alcohol</td>
<td>Yes</td>
<td>Short detection period, invasive</td>
</tr>
</tbody>
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*Imperial Oil Ltd. V. CEP, Local 900 Ont. C.A.*
Accommodation and Return to Work
Principles of Accommodation

Principles of accommodation are the same if disability is …

work-related (WSIB)

or

non-work-related
Principles of Accommodation

- **Human Rights Code:**
  - Duty to accommodate to the point of undue hardship
  - Workplace and non-workplace disabilities

- **Workplace Safety and Insurance Act:**
  - Workplace injuries/illnesses/disabilities *only*
  - Duty to cooperate in work reintegration
  - Duty to offer re-employment
Principles of Accommodation

Duty to cooperate with WSIB lasts until:

- Loss of earnings benefits can no longer be reviewed by the WSIB (usually 72 months after the date of injury)
- Employment ceases (resignation or termination for unrelated reasons)
- WSIB is satisfied no suitable work exists
Principles of Accommodation

- Discrimination on the basis of any protected ground is prohibited by the *Human Rights Code* (the “*Code*”)

- Protected grounds include:
  - Religion
  - Family status
  - Gender expression & identity
  - Disability
  - Etc.
Principles of Accommodation

- **Direct:**
  - Differential treatment based on any of the grounds listed in the Code

- **Indirect:**
  - The application of a rule adversely impacts employee

- If *prima facie* discrimination is found, duty to accommodate arises (to point of undue hardship)
Principles of Accommodation

- **Undue hardship:**
  - Very high standard to meet
    - Employer bears onus
  - Case-by-case analysis
  - Includes:
    - Intolerable financial costs
    - Serious disruption to business
    - Health & safety risks
  - Evidence must be objective, real & direct
Principles of Accommodation

- May require changes to workplace or job functions to overcome limitations & allow the performance of job functions
- Highly individualized, tailored to the employee’s specific needs
- Duty is substantive and procedural
Principles of Accommodation

Examples of accommodation include:

- Modification of existing job duties
- Assignment to another job (vacant position)
- Bundling of tasks to create new job:
  - Grouping tasks employee capable of performing
- Modification of workplace
- Provision of equipment & assistive devices
Principles of Accommodation

- What an employer need not do:
  - Create a job consisting of duties that were previously non-existent & not required by employer
  - Ask other employees to assume unacceptable health & safety risks
  - Accept an employee’s failure to participate in his/her own accommodation or improve his/her own abilities, where possible
Principles of Accommodation

Steps:

1. Identify the need for accommodation
2. Consult appropriate workplace parties
3. Make an informed decision
4. Communicate decision
5. Implement & monitor decision closely
Obligations of Workplace Parties

- All workplace parties have a role to play in the accommodation process, including:
  - The employer
  - The employee
  - Co-workers
  - The union (if applicable)

- Obligation to accommodate ultimately rests with the employer
Obligations of Workplace Parties

Employer:

- Determine if employee’s own job can be appropriately modified:
  - Determine ‘core functions’ and whether employee can perform, with or without accommodation

- Look for available work, the core functions of which employee can perform with or without accommodation
Obligations of Workplace Parties

Employer:

Obligation is ongoing:

- If accommodated work not available now, document ongoing attempts
- Keep in touch with employee to determine changes in restrictions

Process can be as important as outcome:

- Document all steps to satisfy Tribunal
Obligations of Workplace Parties

- **Employee:**
  - Alert employer to the need for accommodation (in most cases)
  - Participate in the accommodation process
    - But not responsible for finding solution
  - Attempt modified work except where to do so puts employee at risk
Obligations of Workplace Parties

Employee:

- Provide medical information
- Attend at doctor’s to have subsequent questions answered
- Accept reasonable accommodation that keeps him/her closest to pre-accommodate rate:
  - Employee does not get to ‘pick & choose’ work he/she desires
Obligations of Workplace Parties

- Co-workers:
  - May have to carry greater share of the ‘load’ if certain tasks must be removed from employee’s day to day job

- Union (if applicable):
  - Participate in accommodation process
    - Potentially including agreement to amend application of certain collective agreement provisions (e.g. job posting)
**Additional Considerations for Unionized Employers**

- **Collective agreement obligations:**
  - Seniority rights
  - Shift schedules
  - Job assignments
  - Job postings

- Accommodation duties prevail over the collective agreement (but not to the point of displacing another worker)
Medical Information

- Employer is entitled to **sufficient** medical information, including:
  - Detailed information about limitations and restrictions
  - Prognosis for the future
  - Regular status updates

- Not entitled to diagnosis (not relevant):
  - Exception for cases of mental illness?
Medical Information

- If the doctor/employee is unable or unwilling to provide necessary information:
  - Consider offering access to a more suitable provider
  - Consider having company/third party doctor evaluate information or discuss situation with employee’s doctor
  - Employee must consent
Return to Work

When employee returning from medical leave, employer entitled to sufficient medical information to outline limitations (including expected duration) & confirm ability to safely return to work:

- “John can return to work on Monday”
  - May not be sufficient
- Dependent upon duration of & reason for absence
Return to Work

- A written return to work plan is required under the *Accessibility for Ontarians with Disabilities Act* for organizations with 50 or more employees.

- Should include:
  - Position
  - Modifications and/or restrictions
  - Hours of work
Return to Work

- Signed off by all parties
- Frequent ‘check ups’ to ensure compliance or amend accordingly
  - Discipline for non-compliance may be appropriate
- Ensure employee raises any concerns with modified work or compliance with plan
- Should be reviewed regularly following return to work
Return to Work

- Information regarding accommodation on ‘need to know’ basis:
  - Employee’s supervisor likely needs to know more than co-workers
  - In appropriate situations ask employee what may be shared with co-workers:
    - Duration of modified work? General nature of restrictions?
Workplace Harassment and Violence

IT'S NEVER OKAY:
AN ACTION PLAN TO STOP SEXUAL VIOLENCE AND HARASSMENT
Bill 132 – New Employer Obligations

- New obligations following September 8, 2016
- Requires an employer to update ‘Bill 168’ Workplace Violence and Harassment Policies and Programs
- Definition of ‘workplace harassment’ amended to include reference to ‘workplace sexual harassment’ (now also defined)
Workplace Sexual Harassment

‘workplace sexual harassment’ means,

- engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
Workplace Sexual Harassment

- making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.
“Reasonable Manager” Exemption

A reasonable action taken by an employer or supervisor relating to the management and direction of a worker or the workplace is not ‘workplace harassment’

Consider incorporating into your policy
Changes to H&S Policies

- Identify to whom someone complains if alleged perpetrator is their supervisor/manager
- Set out how investigation will be conducted
- Specify that information gathered in investigation will be kept as confidential as possible
- Set out how complainant and respondent will be informed of results and any corrective action
In Addition…

- Employer must ensure ‘appropriate’ investigation
  - Who will perform investigation?
  - Must be, and be perceived to be, unbiased
  - Should be trained
  - Needs to reach conclusion and be able to show why

- MOL has ability to order employer to retain appropriate investigator at employer’s expense
In Addition…

- Program is to be developed in consultation with JHSC (where applicable)
  - No obligation to report results of harassment investigation to JHSC

- Must review the policy and program at least annually
Harassment Investigations

- Bill 132 Mandates specific requirements for workplace harassment policy and program
- Employer must investigate a workplace harassment complaint in a manner “appropriate in the circumstances”
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