

Workplace Drug and Alcohol Testing in Canada: A Primer for Manufacturing Employers

August 29, 2019

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Under [Canadian health and safety laws](#), an employer must take all reasonable steps to protect workers in the workplace. However, workplace drug and alcohol testing must balance an employer's goal of creating a safe workplace and an employee's rights to privacy and to be free from discrimination. Testing rules are typically set out in an employer's drug and alcohol policy, which, among other things, should set out the particular scenarios that require an employee to submit to a test.

This article considers the Canadian manufacturing landscape as related to drug and alcohol testing. We examine various scenarios where testing may or may not be permitted and offer practical suggestions for implementing drug and alcohol policies.

Pre-employment Testing

Canadian jurisdictions have not been consistent regarding the extent to which pre-employment testing is permissible. Adjudicators in the province of Ontario have generally forbidden the practice. It could be argued that Alberta has taken a more permissive approach.

The reason for the divided landscape relates to the concern that a pre-employment testing regime could be used to engage in unlawful discrimination against persons with addiction-related disabilities. For this reason, an employer may be wary of implementing pre-employment testing because it may trigger an accommodation obligation before a candidate has commenced employment.

Given the inconsistent and unsettled state of the law, manufacturers pursuing such a practice may want to consider

- adopting a pre-employment testing regime only where necessary to promote legitimate workplace safety objectives; and
- designing a pre-employment testing regime that does not automatically disqualify any candidates who test positive or that, at a minimum, contemplates the possibility that in appropriate circumstances candidates can overcome a positive test to secure employment.

Random Testing

The threshold for justifying random employee testing is very high. For random testing to be a reasonable intrusion on employee privacy, courts have required that

- employees subject to random testing occupy “safety-sensitive” and “inherently dangerous” positions;
- evidence exist of an enhanced safety risk, such as a general workplace problem of substance abuse, and that less invasive efforts to remedy the issue have been unsuccessful; and
- the means chosen to implement random testing is proportional in that it achieves or is likely to achieve the goal of workplace safety while also being minimally invasive on the employee’s privacy.

Random testing of the general employee population in nonsafety-sensitive positions is essentially prohibited. Hence, an employer will likely want to ensure it has different drug and alcohol testing procedures for each sector/area of the manufacturing plant, based on risk to safety to the employee, other workers, or third parties.

Reasonable-Cause Testing

Testing of an individual employee may be allowed in specific cases where there is reasonable cause to believe the employee is impaired by drugs or alcohol while on duty or is unable to work safely due to impairment from alcohol or drugs.

Employers may consider implementing a policy that requires , wherever practicable, the supervisor (who intends to direct an employee to undergo drug and alcohol testing based on his or her observations) to seek a second opinion from another supervisor or another person in a position to observe the employee in question. This second member would attempt to observe the employee for signs of impairment.

Where reasonable cause is established, this category of testing is justified as protecting legitimate workplace safety objectives, which are put at risk by *present impairment*. Thus, an employer may want to consider carrying out the testing procedures for reasonable cause impairment as soon as possible after observing signs of impairment.

Additionally, an employer may want to include in its reasonable-cause drug and alcohol testing policies a statement that a refusal to undergo testing will be treated as a positive test or is otherwise disciplinary. Decision makers have readily upheld discipline where reasonable cause is established and an employee refuses to submit to testing.

Post-incident Testing

A manufacturer may also test an employee who was involved in a workplace “incident.” Post-incident testing requires assessing whether (1) there is reasonable cause to suspect that an employee involved in a workplace incident may have been impaired by drugs or alcohol, and (2) the appropriate balancing of employee and employer rights and interests demonstrates that the need for drug or alcohol testing outweighs the employee’s privacy interests. In its policy, a manufacturer should consider specifying that the meaning of “incidents” relates to risks specific to its workplace, which could include circumstances that caused or had the potential to cause:

- personal injury;
- lost working or production time; or
- property damage greater than a nominal amount.

Employers may want to take some factors into consideration, such as asking the employee and witnesses for an explanation of the incident, and considering whether there is a reasonable explanation that does not involve impairment of the employee, before ordering a test.

Return-to-Work Testing

Courts have generally accepted return-to-work testing for an employee who has previously breached a drug and alcohol policy as reasonable. As part of an employee’s rehabilitation program, a policy requiring return-

to-work testing may involve regular and/or random alcohol or drug testing for a specified period of time.

Drug and Alcohol Testing: Practical Suggestions

In developing and implementing a drug and alcohol policy, a manufacturing employer in Canada may want to ensure that

- testing (other than reasonable cause testing) exists only where there is a critical issue that needs to be addressed, such as a threat to safety in the possibility of employee impairment;
- the decision to test is made only after considering all contextual factors;
- managers and supervisors are trained on the testing regime, including how to identify reasonable cause to believe there is present impairment; and
- policies are tailored to the legitimate safety objectives of the workplace and are responsive to specific workplace concerns based upon documented evidence.

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