Testing, 1, 2, 3: The latest on drug and alcohol testing in safety-sensitive workplaces

By Denis Mahoney and Brittany Keating

THE ANSWER TO THE question, "What is employers' rationale for implementing workplace drug and alcohol testing?" is pretty straightforward: occupational health and safety and criminal law impose a duty on employers to ensure a safe workplace. But the answer to, "When can employers impose drug and alcohol testing?" isn't. Here are the answers to five of employers' most frequently asked questions about drug and alcohol testing in a safety-sensitive workplace.

1. WHEN ARE EMPLOYER ENTITLED TO ASK EMPLOYEES TO SUBMIT TO DRUG OR ALCOHOL TESTING IN SAFETY-SENSITIVE WORKPLACES?

In accordance with a well-drafted drug and alcohol policy, there are up to five situations – but the caveat to all is that a "positive" test isn't automatically grounds for discipline or dismissal; employers have a duty to accommodate both substance dependency and use of medically prescribed or authorized drugs depending on the circumstances:

Pre-employment. When the workplace is "dangerous" and the employee will occupy a "safety-sensitive position".

Reasonable grounds. When "indicators" lead to a reasonable conclusion the employee might be unable to work safely because of substance use. Indicators include: first-hand observation of the employee's conduct or physical appearance (e.g. bloodshot eyes, imbalance, staggering); the smell associated with drugs or alcohol on or around the employee; and alcohol, drugs and/or related paraphernalia around the employee or the area in which they work.

Post-incident. When the employee was directly involved in a significant incident that actually caused, or had the potential to cause (a.k.a. a "near-miss"), damage to a person, property, the environment, security or the employer's reputation and it's reasonably necessary to rule out impairment as a possible cause.

Return to work. As part of a return-to-work agreement, when the employee has returned from treatment for substance abuse, as long as it's part of a broader process to assess the employee's return and is time-limited.

Mandatory random alcohol. Only in very specific and narrow circumstances: if (and only if) the policy is reasonable based on an analysis that balances the interests of employees' privacy rights and the employer's safety obligation in the particular case – and only for alcohol (so far, courts and arbitrators have not been satisfied that mandatory random drug testing is reasonable). At a minimum, employers must prove the following to justify mandatory random alcohol testing:

- A "dangerous" workplace.
- A "safety-sensitive position".
- "Reasonable cause" or "enhanced safety risks", such as a general problem with alcohol or drugs in that workplace. The court has suggested that such evidence may be unnecessary in "extreme circumstances", adjudicators haven't recognized such an "extreme circumstance" to date. Employers contemplating random alcohol testing are therefore wise to compile such evidence first.

2. ARE DRUG AND ALCOHOL TESTING TREATED DIFFERENTLY?

Historically, courts and arbitrators have treated drug and alcohol testing differently for two key reasons:

- Unlike alcohol, for which there's an established metric for alcohol intoxication (blood alcohol concentration), there's no similar established metric for some types of drug impairment (like cannabis).
- Also unlike alcohol, for which there's an established testing method to immediately determine current impairment (breathalyzer), there's no similar established testing method for some types of drugs (again, like cannabis) that can deliver immediate results and distinguish recent from chronic or earlier use.

However, the gap might be narrowing with improvements in testing methodology and technology, such as an oral fluid (or "buccal" or "cheek) swab test

or retinal scan. The emphasis is also shifting away from tests revealing current impairment and toward presenting the investigation evidence, including more conventional test results (e.g., urinalysis) to demonstrate the performance deficits of the employee who's working in a safety sensitive position.

1. What qualifies a workplace as "dangerous"?

It's decided on a case-by-case basis. The assessment is limited to the site in issue, not the employer's complete operations, so an employer's business can and often does include some workplaces that are "dangerous" and some that aren't. Here are three examples of workplaces that courts and arbitrators have decided are "dangerous":

- A pulp and paper mill.
- A public transit company (subways, buses and streetcars travelling through a city).
- An oil sands operation.

2. What qualifies as a "safety-sensitive position"?

Any one in which the employee has a key and direct role in an operation where performance affected by substance use could result in: a significant incident, near-miss or failure to adequately respond to a significant incident; and detrimentally affects any of the health, safety or security of the employee, other people, property, the environment or the employer's reputation. Key relevant considerations include the industry context, the particular workplace and the role of properly trained supervisors and workplace checks and balances.

3. What amounts to a "general problem with alcohol or drugs in the workplace" sufficient to justify random testing?

This is also decided on a case-by-case basis. Courts and arbitrators have been willing to consider a variety of evidence in assessing this, including evidence of: testing results from other (non-random) circumstances; drug paraphernalia and empty alcohol containers found on the employer's site or parking lot, in vehicles, a parking garage, lockers or lunch pails; seizure of drugs and/or alcohol, even if not linked to a particular employee or worksite area; the broader community and/or similar worksites; off-duty conduct, like employee alcohol consumption at nearby bars during breaks; employees' reluctance to report fellow employees who consumed impairing substances; employee disclosure of substance abuse problems; employees identified in media addressing substance use in communities; and law enforcement of an ongoing substance problem in surrounding communities. The scope of any such problem is assessed based on the "workplace", not the employer's entire "workforce" nor a single bargaining unit, department or business unit. Finally, the threshold is high, though there's no "test" for what evidence is sufficient to meet it. It could be one or a combination of qualitative and quantitative analysis; examples from a quantitative perspective are:

- One court found it sufficient where the employer of 11,000 employees demonstrated: 116 instances of either positive tests or employee refusals over six years; 27 incidents in one year; positive tests by 2.4 per cent of new applicants (who knew they'd be tested) for safety-sensitive positions; and unchallenged evidence from "internal police" of a "culture of drug and alcohol abuse".
- But another found this evidence wasn't enough: eight alcohol-related incidents over 15 years but without evidence of accidents, injuries or near misses connected to alcohol use, not a single positive test during the 22 months the random alcohol testing policy was in place, and "dated" and "not persuasive" evidence from a single employee about workplace alcohol use. ♦

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