

TTC drives changes to drug, alcohol testing

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Toronto residents will be familiar with a recent, high profile news story involving the possible drug impairment of a public transit driver while on the job. A Toronto Transit Commission (TTC) driver was involved in a motor vehicle accident resulting in the death of one of his passengers.

When police arrived at the scene they noticed a small bag of marijuana in the driver's belongings. According to police reports, the driver did not appear to be under the influence of drugs or alcohol at the time of the accident. Yet, the public outcry following the accident may have triggered the TTC to re-examine its current policy on drug and alcohol testing.

In October 2011, the TTC approved a staff recommendation calling for random alcohol and drug testing for certain positions within the transit organization.

A policy of 'random' testing will be a marked departure from the TTC's current "fitness for duty" policy, implemented just over a year ago. The fitness for duty policy restricts drug and alcohol testing to employees in safety-sensitive positions, specified management positions, and designated executive positions, and only in three discrete circumstances: pre-employment screening, reasonable cause to suspect substance use after treatment, and following an incident involving alcohol or drugs. Random testing is, by definition, less predictable.

Drug and alcohol testing — what's the big deal?

Random or not random, what's the big deal? Why is drug and alcohol testing controversial? Why shouldn't an employer have the right to know if its workers are at the workplace under the influence of drugs or alcohol?

The answer is employers do have the right, indeed the duty, to ensure a safe workplace for workers. They also have the right to know if a worker at the workplace is under the influence. The difficulty is that some testing methods can lead to a positive result for the existence of a drug or alcohol; but not for current impairment. For example, the previous night's beer, or a prescribed narcotic, may lead to a positive result, even if the individual is not impaired.

Employee advocates argue any test that can lead to a positive result for the presence of a drug or alcohol, but not for impairment, is an infringement on a worker's privacy. Further, they say,

where a positive test result leads to discipline or termination, this could constitute discrimination on the basis of substance dependency, which is a recognized disability under human rights legislation.

The U.S. experience

Historically, our neighbours to the south have embraced a more aggressive approach to drug and alcohol testing. Particularly within the transportation industry, random drug and alcohol testing is mandatory and statistically supported. According to the U.S. Federal Transit Administration, between 1995 and 2008, positive random alcohol tests declined from 25 per cent to .15 per cent. So too did positive alcohol tests: from 1.76 per cent to .82 per cent. The mere fact a test can be administered at any time therefore appears to have had a strong deterrent effect on drug and alcohol use in the American transit industry.

The Canadian experience

The Canadian experience has been significantly less aggressive than its American counterpart. Generally speaking, a drug and alcohol policy must satisfy the following three-part test:

1. There must be a rational connection between the performance of the job and the goal or purpose of the policy (i.e. health and safety);
2. The policy must be implemented in good faith to accomplish the policy's goal; and,
3. The policy's standards must be "reasonably necessary" to achieve its goals. In other words, the policy must not overreach; and, in the case of a drug or alcohol related disability, the policy must include consideration of whether the worker can be accommodated.

Are alcohol and drug testing treated the same?

Historically, courts have taken different approaches to drug and alcohol testing primarily because of their different testing methods. Alcohol testing tends to rely on the results of a breathalyzer which identifies impairment at the time of the test (i.e. current impairment). However, drug testing has traditionally relied on urinalysis, which indicates only whether a drug has been in the individual's system at some recent (and in some cases not so recent) time. Urinalysis, therefore, does not necessarily indicate current impairment.

Ontario courts have acknowledged the distinction between the different testing regimes, resulting in a greater willingness to accept the implementation of random alcohol testing for safety sensitive positions or where the employee is under minimal or no direct supervision while on the job. However, the same approach has not been adopted with respect to random drug testing due to the limitations on measuring current impairment.

There has been some acceptance of drug testing where the "lingering effects" of drug use have been demonstrated to pose a safety risk. In *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada)*, the testing policy required all potential workers to undergo a drug test prior to commencing employment. The employer, a construction company, had instituted the policy to reduce accidents by prohibiting workplace impairment including impairment that might be caused by any lingering effects of earlier recreational drug use. The applicant/worker, described as a "casual" user of marijuana, had smoked pot approximately five days prior to the test. He tested positive and, despite having already commenced employment, was terminated. He filed a complaint with the Alberta Human Rights Commission alleging discrimination on the basis of a perceived disability.

The case made its way to the Alberta Court of Appeal, which dismissed the worker's claim. The Court of Appeal held the employer's policy did not discriminate against the worker on the basis of a perceived disability. The evidence, the court held, demonstrated the effects of marijuana

could remain in a person's system for days, posing an ongoing risk in a safety-sensitive environment.

Recent advancements in testing

More than a decade has passed since the early decisions in which urinalysis was distinguished from breathalyzer results. Today, a number of "oral fluid" drug tests are available which use saliva as a testing method for current drug impairment. According to the TTC, this is precisely the type of testing it intends to employ.

Final thoughts

Random drug testing remains, and is likely to always remain, problematic in the eyes of those who consider the practice overly intrusive and an invasion of privacy. However, as testing methods evolve and the identification of current impairment becomes more accurate, courts and arbitrators are likely to become more accepting of the practice in safety-sensitive positions.

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