MANAGEMENT
COUNSEL
Employment and Labour Law Update

TTC *Drives* Changes to Drug and Alcohol Testing

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 right to know if a worker is at the workplace 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.

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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% to .15%. So too did positive alcohol tests: from 1.76% to .82%. 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 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 over-reach; 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 acknowledge 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.

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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.

For assistance considering, designing and implementing a drug and alcohol testing protocol in your workplace, please contact a member of our team.

DID YOU KNOW?

Ontario's *Freedom of Information and Protection of Privacy Act*, the statute which provides a right of access to records held by a public body, will apply to hospitals as of January 1, 2012.

Court of Appeal to Clarify Reporting Requirements for Accident Involving Non-Worker

The Ontario Court of Appeal has granted leave to appeal to Blue Mountain Resorts Ltd. in its bid to overturn a recent decision of the Divisional Court.

As we reported in the August 2010 edition of *Management Counsel*, the Ontario Labour Relations Board had upheld a Ministry of Labour Order against Blue Mountain for failing to report the drowning of a guest at an unsupervised swimming pool. The OLRB held the obligation to report arose under section 51 of the *Ontario Occupational Health and Safety Act* (OHSA) which states:

> Where a **person** is killed or critically injured from any cause at a **workplace**, the constructor, if any, and the employer shall notify an inspector … and … within forty-eight hours after the occurrence, send to a director a written report of the circumstances of the occurrence containing such information and particulars as the regulations prescribe.

Blue Mountain had not reported the death to the Ministry for three reasons: (i) It believed the reporting obligation did not apply to an injury (or the death) of a non-worker; (ii) It believed the incident occurred in the course of a *recreational activity* and not in the course of *work*; and (iii) It did not consider its swimming pool to be a *workplace*.

The Ministry disagreed with Blue Mountain on every point, issuing an Order against the resort for failing to notify an Inspector of the drowning and failing to provide first aid and other reports following the incident. The OLRB's decision, upheld by the Divisional Court, significantly expanded the reporting requirements of Ontario workplaces.

In its motion for leave to appeal before the Court of Appeal, Blue Mountain argued the OLRB's interpretation of the OHSA reporting provision lead to "an absurd result." The reporting requirement, Blue Mountain said, could not be so broad as to include the fatality or critical injury of guests using recreational facilities. In addition, such a broad reporting requirement would also seriously disrupt business operations because of the requirement to preserve the scene for a Ministry Inspector.

An appeal date has not yet been set. Once decided and released we will update our readers together with an analysis of what the decision means for Ontario workplaces.

Until then, if you would like to learn more about any matter related to occupational health and safety, please give us a call.

Ontario's provincial election: What's in store for Ontario workplaces?

On October 6, 2011, Ontarians again elected the Liberal Party of Ontario led by Premier Dalton McGuinty. One seat short of a majority government, the Ontario Liberals are therefore back in power, although perhaps not quite as *powerful*.

The election promises - what were they?

Prior to the provincial election each of the three largest parties – Liberal, Conservative and New Democratic – set out a platform to address Ontario's employment and labour landscape.

The Liberals, pointing to the province's comparatively stable economic performance throughout the past eight years, focussed less on new initiatives and more on the *status quo*.

The opposition Conservative and New Democratic parties took relatively bolder positions.

The Conservatives offered a new "transparency" scheme requiring unions to file financial information detailing for union members exactly how their dues are being spent. Currently, unions are not required to publish or file such information.

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The New Democratic Party proposed to beef up enforcement of the *Employment Standards Act*, increase the minimum wage and index the minimum wage to the cost of living. Currently, the minimum wage is determined by regulation and is not attached to a fixed formula.

In addition, the three parties made promises specific to certain industries which would affect employment and labour outcomes. Most notable were proposals in the health care and manufacturing sectors. For example, the Conservative and New Democrat parties proposed to scrap the Local Health Integration Networks (LHINS) which have become the central point of community health care procurement. The Liberals intend to keep the LHINS, but propose to redesign Ontario's primary care and homecare system. To do so, they have promised to add three million hours of personal support worker care to the health system.

The challenges facing Ontario's manufacturing sector were also evident in each party's *jobs plan*. While the plans were different in substance, there was a shared objective to create quality jobs. To achieve this, Ontario voters were pitched different mixtures of tax policy and hiring / training incentives.

What's in Store?

With a *minority* government it is difficult to predict what may be in store for Ontario workplaces. One seat shy of a majority government, Premier McGuinty's team will be required to compromise on a variety of issues. The question is: which issues and how will they affect Ontario workplaces?

The team at Sherrard Kuzz LLP will closely follow legislative initiatives coming out of Queen's Park and keep our readers up to date.

DID YOU KNOW?

An employee who has won an award as a result of an employer-sponsored contest may be considered by the Canada Revenue Agency to have been paid a taxable benefit.

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