

Cannabis and Other Drugs in the Workplace: Developing a Fitness for Duty Procedure

Norm Keith, Partner, LL.M., CRSP
Fasken Martineau DuMoulin LLP





Issues and Legal Overview of Alcohol and Drugs in the Workplace

Part 1



Importance of Fitness for Duty Policies



- Employees reporting to work unfit for duty = unsafe work behaviours and unsafe work conditions
- Unfit for duty:
 - Occurs in safety sensitive positions
 - Sunwing Airlines Pilot
 - Can have serious, deadly consequences
 - Metron Construction Accident
 - Is more prevalent than expected
 - 2 TTC Employees caught on first day of testing

Drugs & Accidents: Disturbing Statistics (U.S. and Canadian sources)



- 93% of all businesses are affected by substance abuse
- 70% of the estimated 14.8 million US employed use illegal drugs
- Marijuana is the most commonly used and abused drugs by employees followed by cocaine and prescription drugs
- 38–50% of compensated claims involved substance abuse
- Workers having problems with alcohol abuse 2.7x more likely to have injury-related absences

NCADD – National Council on Alcoholism and Drug Dependencies, Inc. sourced August 2017



Legislative Background



- No comprehensive provincial or federal legislation
- Guidance from various areas of law
 - Privacy, human rights, employment or labour
- Laws vary by jurisdiction but generally:
 - The right to impose A&D testing is limited in Canada
 - Testing is subject to legal challenge

Labour Law Rights and Restrictions



- Depending on collective agreement, A&D testing can be established
 - bilaterally through negotiations with the union, or
 - unilaterally through management rights
- Unilaterally established rules must satisfy the test from *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73

Labour Law Rights and Restrictions (cont.)



- Rule must:
 1. Not be inconsistent with the collective agreement;
 2. Not be unreasonable;
 3. Be clear and unequivocal;

Labour Law Rights and Restrictions (cont.)



- Rule must:
 4. Be brought to attention of employees before the company can act on it;
 5. Employees must have notice that a breach could result in discharge (if the rule is used for discharge); and
 6. Consistently enforced by the company from the time it was introduced.

Labour Law Rights and Restrictions (cont.)



- A unilateral rule with disciplinary consequences must also be proportional under a “balancing of interests” analysis
- Employer safety interests should outweigh employee privacy interests
- This falls under the reasonableness requirement of the KVP Test

Human Rights Law



- Testing must comply with human rights laws that prohibit adverse, differential treatment on protected grounds
- An A&D Policy may discriminate on addiction or perceived addiction
- A Fitness for Duty Policy may discriminate without intention or bath faith to do so

Human Rights Law (cont.)



The employee must show:

1. A disability which is protected under the legislation;
2. Adverse treatment with regard to employment or a term of that employment; and
3. The disability was a factor in the adverse treatment.

Human Rights Law (cont.)



- The employer must prove:
 - It adopted the standard for a purpose rationally connected to job performance
 - It adopted the standard in an honest and good faith belief that it was necessary for a legitimate work-related purpose
 - The standard is reasonably necessary for that work-related purpose
- Known as the *Meiorin* test

Legal Challenges



- *KVP* and *Meiorin* both deal with reasonableness
- Either could be the basis for a legal challenge to implementation of an A&D testing policy
- Satisfying one could satisfy the other to justify implementation of policy
- Human rights issues also arise as a distinct issue in disciplinary or other responses to failed tests

Accepted Types of A&D Testing



- Supreme Court of Canada endorsed three types of testing *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458
- The case involved a unionized and “**dangerous**” workplace and employees in “**safety-sensitive**” positions

Conditions for A&D Testing: Dangerous Workplace



- What is a “dangerous workplace”?
- A “dangerous workplace” includes an “enterprise whose normal operations pose substantial risks for the safety of employees and the public”
- Certain industries are recognized as inherently safety-sensitive without needing to show a history of substance abuse

Conditions for A&D Testing: Safety-Sensitive Position



- Case-by-case determination. Objective test looking at all facts of position:
 - Duties
 - Responsibilities
 - Tools and equipment
 - Materials handled, etc.
- And then asking would impairment risk the safety of employees or persons generally, or the safety of property and equipment

Three Types of A&D Testing: *Irving Pulp & Paper*



1. Reasonable cause
 - Reasonable grounds to believe the employee is impaired while on duty
2. Post-incident
 - Directly involved in a workplace accident or significant incident
3. Return to work testing
 - Conditions imposed following treatment for substance abuse

Testing for Reasonable Cause



- Applies where there are reasonable grounds to believe the employee is impaired while on duty
- Reasonable grounds from conduct, demeanour, or actions of employees:
 - Odour of alcohol or drugs
 - Slurred speech, bloodshot eyes, flushed face
 - Lack of coordination
 - Seen consuming drugs / alcohol, etc.

Post-Incident Testing



- Testing may be imposed where there is a **significant accident** or **near miss** and there is no explanation except the employee's act or omission
 - For a near miss, the proximity of harm must be realistic and the potential harm significant
 - For a significant accident, the accident must be of some substance or materiality, or have significant consequences

Post-Incident Testing (cont.)



- The employer must conduct a reasonable investigation guided by a non-exhaustive list of factors:
 1. There must be a connection between the employee's area of responsibility and the accident;
 2. It is necessary to investigate whether the actions or omissions of the employee contributed to or caused the accident;
 3. The test must assist in the investigation, at a minimum, by negating impairment as a possible cause or contributing factor;

Post-Incident Testing (cont.)



- The employer must conduct a reasonable investigation guided by a non-exhaustive list of factors:
 4. The incident must be a significant event;
 5. The investigation must incorporate the employee's explanation of the incident; and
 6. The decision to test must be based on a connection between the incident and the employee to be tested.

Post-Incident Testing (cont.)



- The employer must also balance:
 - The employee’s privacy interests
 - The employer’s interest in conducting testing
- Ideally, these privacy interests should be explicitly referred to in the A&D testing policy

Return to Work Testing



- An employee returning to work in a safety-sensitive position can be subject to unannounced periodic testing
- If there is **reasonable cause** to believe that their addiction or use of alcohol or drugs has had or could have an impact on the workplace
- This testing should ideally be developed in consultation with the union

Other Testing



- Other types of testing were not specifically sanctioned in *Irving*:
 - Pre-employment
 - Pre-site access
 - Random/proactive

Pre-Employment Testing



- Testing before employment does not establish ability to perform the essential job functions
- It cannot generally be defended under *Meiorin* as a *bona-fide* occupational requirement
- It has been upheld in limited circumstances (e.g., drivers subject to testing under the US Department of Transportation's requirements)

Pre-Employment Testing (cont.)



- More likely defensible where:
 - testing occurs after a conditional offer of employment;
 - a positive test result does not result in an automatic withdrawal of the offer;
 - there is industry evidence of drug or alcohol-related issues;

Pre-Employment Testing (cont.)



- More likely defensible where:
 - there is a recent history of drug or alcohol-related issues or incidents at the company;
 - the safety-sensitive position is truly safety critical and they work under limited supervision;
 - there are no less invasive means to address drug or alcohol related issues;

Pre-Site Access Testing



- Testing as a precondition for access to a worksite
- Subset or hybrid of pre-employment and random testing
- Subject to similar restrictions

Random/Proactive Testing



- Random testing is the most difficult to justify
- Described by Supreme Court as an “unjustified affront to dignity and privacy of employees”
- May, in specific circumstances, be justified as a proportionate response to a legitimate balancing of interests

Random/Proactive Testing (cont.)



- This would likely require the following:
 - A dangerous workplace
 - Evidence of substance abuse in workplace
 - Evidence of enhanced (specific; extraordinary) risks
 - The expected safety gains must be real and more than minimal

Accommodation of Substance Dependence/Addiction



- *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30
- Elk Valley had a policy that employees could seek drug dependency/addiction assistance without fear of discipline prior to a “significant incident”
- Employees were made aware of the EAP, the zero tolerance for being impaired, and the “no free accident” discipline policy (including up to discharge) for failing to disclose an addiction and then testing positive after a “significant incident”

Accommodation of Substance Dependence/Addiction (cont.)



- Stewart was subject to a significant incident testing policy after an accident
- He tested positive for cocaine and marijuana use
- He was terminated
- He filed a human rights complaint

Accommodation of Substance Dependence/Addiction (cont.)



- Three lower level decisions
 - Alberta Human Rights Tribunal found there was no discrimination
 - Alberta Court of Queen’s Bench upheld the Tribunal’s decision of no discrimination, but in the alternative said accommodation was inadequate
 - The Alberta Court of Appeal upheld Stewart’s termination in a split decision, 2 -1, finding there was evidence that Stewart could have complied with the EAP

Accommodation of Substance Dependence/Addiction (cont.)



- At the Supreme Court, the majority found:
 - that it was reasonable for the Tribunal to conclude there was no *prima facie* discrimination against Stewart
 - that Stewart had the capacity to comply with the rules, and was accommodated to the point of undue hardship by having the option to disclose and receive treatment



Elements of a Fitness for Duty Policy

Part 2



6 Elements of a Fitness for Duty Policy



1. Application of the Policy
2. Responsibilities of Workers
3. Workplace Standards
4. Detection and Deterrence
5. Accommodation
6. Discipline

7 Steps to Development & Implement a Fitness for Duty Policy



1. A mandate from the CEO & Leadership
2. Management and Worker collaboration
3. OHS professional engagement (CRSP)
4. Expert legal advisor and legal review
5. JHSC review, comments, & input
6. Broad training and implementation strategy
7. Enforce consistently, including discipline

Contact Particulars



Norm Keith

Partner

+ 1 416-868-7824

nkeith@fasken.com

Second Edition

ALCOHOL & DRUGS IN THE CANADIAN WORKPLACE

Norm Keith

 LexisNexis®

Drug Test Result Form

Contacts



Contact Name	1-800-268-8424	Email
Norm Keith, B.A. J.D., LL.M., CRSP <i>Partner</i>	ext. 47824	<u>nkeith@fasken.com</u>
Shane Todd, B.Mgmt., J.D. <i>Partner</i>	ext. 43424	<u>stodd@fasken.com</u>
Cathy Chandler, B.A.Sc., CRSP, CHSC <i>OHS Consultant/Paralegal</i>	ext. 47812	<u>cchandler@fasken.com</u>
Carla Oliver, B.A., MIBM, CRSP <i>OHS Consultant</i>	ext. 47822	<u>coliver@fasken.com</u>
David Marchione, B.A., CHSC, CRSP <i>OHS Consultant/Paralegal</i>	ext. 43463	<u>dmarchione@fasken.com</u>

**FASKEN
MARTINEAU**

