

DRUG & ALCOHOL TESTING IN THE WORKPLACE: IS IMPAIRMENT TESTING AN ALTERNATIVE?

By: Gabe Somjen

Borden Ladner Gervais



Why do Employers sometimes do drug and alcohol testing?

- **Work performance issues such as lateness, absenteeism, poor work performance or morale.**
- **Drug and alcohol testing may not be appropriate for these issues but managing the employee's drug and alcohol problems is still appropriate if it affects the workplace.**

Safety Issues

- **Most Employers who implement drug and alcohol testing do it in order to prevent accidents and improve safety.**
- **Some types of drug and alcohol testing in order to achieve this goal may be appropriate.**

Safety-sensitive Work

- **Employers sometimes perform drug and alcohol tests on employees in the following circumstances:**
 - Pre-employment or pre-shift testing, including pre-appointment testing (i.e., prior to promotion or transfer);
 - Random or “unannounced” testing;
 - “Reasonable grounds” or post-accident/incident; and
 - Testing where an employee has disclosed a drug or alcohol dependency.

Practical problems with drug and alcohol testing

- **Some alcohol testing (breathalyzer) can actually test for current impairment;**
- **Other types of testing (urine, blood) take time for the test results and therefore cannot measure current impairment; and**
- **Drug tests generally do not test for current levels of a drug but rather for metabolites of the drug. This does not lead to an accurate measurement of current impairment.**

- **There are experimental techniques for measuring current marijuana impairment but they have not yet been accepted as breathalyzers have (e.g. “Cannabix” – prototype cannabis health test)**

Legal Issues

- **Human rights issues;**
- **Accommodation issues;**
- **Privacy issues.**

Legal Issues, cont'd.

- **Drug and alcohol testing can be seen as discrimination against addicts or perceived addicts (a disability) – Human Rights Issue.**
- **The tests themselves are a significant invasion of a person's privacy – (*PIPA, PIPEDA, Privacy Act, FOIPPA*)**

Legal Issues, cont'd.

- **Therefore Tribunals (Arbitrations, Human Rights Tribunals, Courts) balance employers' legitimate interests in providing a safe workplace with employees' privacy rights and the need to recognize addictions or perceived addictions as protected by human rights law.**

Tribunal Decisions

- **There are many cases involving drug and alcohol testing. Some support the Employers' policies or the actual testing, others strike them down.**
- **There have been some conflicting cases.**

Examples

- *Entrop v. Imperial Oil Ontario*
- Drug and Alcohol Testing Policy at two oil refineries.
- Entrop was a recovering alcoholic who had been sober for over 7 years. He disclosed previous alcohol abuse in accordance with the policy and he was reassigned to another position.

Entrop v. Imperial Oil

- **Ontario Court of Appeal found parts of the policy were discriminatory.**
- **The Court allowed random breathalyzer testing of employees in safety-sensitive positions but noted that blood tests for drugs (other than alcohol) did not indicate actual impairment and were, therefore, inappropriate.**

Kellogg, Brown & Root

- **Pre-employment drug testing. Employee terminated several days after he started work because he had a positive marijuana test. Even though he was not an addict, the Alberta Court of Appeal upheld the termination on the basis that “persons who use drugs at all are a safety-risk in an already dangerous workplace.”**

Irving Pulp

- **Supreme Court of Canada rejected random alcohol testing even though the workplace was found to be safety-sensitive, on the basis that there was insufficient evidence of an enhanced safety risk.**

There are many cases going either way depending on the circumstances

- **What is an Employer to do?**

Some rules of thumb

- 1. For employees in safety-sensitive positions, testing “post incident” or “suspicion-base” testing may be justifiable provided appropriate policies are in place.**
- 2. Random testing for drugs is more difficult to enforce. Random testing for alcohol, using breathalyzer, may be supportable, depending on the experience of the Employer with alcohol and drug related accidents.**

Some rules of thumb, cont'd.

3. Random testing pursuant to back to work agreements or last chance agreements for known addicts may be supportable.
 4. Pre-employment testing is difficult to support but may be allowed in certain industries (for example: trucking).
- Note in all these circumstances the employee may not be immediately subject to termination but may have to be accommodated with treatment, work in less safety-sensitive occupations, etc.

Drug and alcohol testing policies in a unionized workplace

- **The introduction and administration of a drug and alcohol testing policy in a unionized workplace requires at least consultation with the Union.**
- **Agreement with the Union as to the policy and when and how it is used is preferable.**

Remember the *K.V.P.* case

- If a policy is introduced unilaterally, remember the *K.V.P.* case which requires:
 1. It must not be inconsistent with the collective agreement;
 2. It must not be unreasonable;
 3. It must be clear and unequivocal;

K.V.P. Requirements, cont'd.

- 4. It must be brought to the attention of the employee affected before the company can act on it;**
- 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge; and**
- 6. Such rule should have been consistently enforced by the company from the time it was introduced.**

Medical Marijuana

- **The increased use of lawfully prescribed medical marijuana will complicate issues for Employers, particularly the duty to accommodate.**

Summary of drug and alcohol testing advantages and disadvantages

Advantages of Traditional Drug and/or Alcohol Testing Programs	Disadvantages of Traditional Drug and/or Alcohol Testing Programs
Increased acceptance due to long history of use in workplaces	Most testing methods do not measure current impairment
May detect some employees with drug and/or alcohol dependency problems	Most tests take several days to be processed
May detect some employees who are impaired at work	Impairment due to fatigue, stress, illness and medications is not detected
Complies with industry requirements, particularly in cross-border operations (trucking)	Lack of connection between testing programs and improved organization performance measures
Legal threshold for alcohol testing has been largely established	Legal threshold for testing is very high

Impairment testing – Is it a better solution?

- Impairment testing tests for actual current impairment not specifically for drugs or alcohol

Advantages of impairment testing

- **Because it measures current impairment, impairment testing may be more acceptable in terms of privacy, human rights and other legal challenges, although not free from such challenges.**
- **Impairment testing is directly linked to the safety concerns of the Employer.**
- **Impairment testing can be the first step in determining various causes of impairment (drugs, alcohol, but also fatigue, mental illness, etc.)**

What can impairment testing show?

- **Impairment testing can show impairment that can later be attributed to such factors as:**
 - Drugs or alcohol use;
 - Fatigue;
 - Prescription or legitimate drug use;
 - Stress or mental illness;
 - Use of medically-prescribed marijuana.

- **Appropriate treatment or conditions of work can be determined depending on the reason for impairment.**
- **Examples:**
 - drug or alcohol treatment;
 - fatigue assessment and treatment;
 - change in shifts; etc.

What are impairment tests?

- **Can be simple job-specific tasks such as driving a fork lift through pylons;**
- **A work simulator;**
- **Skill test;**
- **Observations of the employee's performance, behaviour and physical symptoms by supervisors (erratic work behaviour, smell of alcohol or cannabis, slurred speech, slow performance, etc.) as compared to employee's normal behaviour.**

Other Tests

- **Other tests can be more sophisticated:**
 - Vehicle lock-out mechanism that requires the operator to solve a mathematical puzzle before starting the engine;
 - Tests based on employee's eye response or iris configuration;
 - Tests based on computer (games); speed with which the employee can solve them;
 - Rhomberg clock test.

What if an employee fails an impairment test?

- **Employers are concerned in some cases that a large number of employees will be impaired on a particular day and therefore they will not have enough workers.**

What if an employee fails an impairment test?

- **A failed test does not necessarily mean that the employee cannot work. He/she may have to be reassigned to non-safety-sensitive work, require further supervision for that day, or be sent for medical testing**

What if an employee fails an impairment test?

- If an employee fails an impairment test on several occasions, the Employer is then justified in seeking alcohol and drug testing, if appropriate, or having the employee referred to an employee assistance program, obtain counselling, possibly treatment for some other conditions; for example, sleep deprivation.

Why is impairment testing possibly a better solution?

- Impairment testing tests for actual current impairment and may be better able to prevent accidents than drug and alcohol testing, which is not very effective at avoiding current impairment (except for breathalyzer).
- Drug and alcohol testing, of course, overlooks the key source of impairment, which is fatigue as well as other sources of impairment such as stress, mental illness, sleep deprivation due to shift work, etc.

Summary of impairment testing advantages and disadvantages

Advantages of Impairment Testing	Disadvantages of Impairment Testing
Increased support for suspicion-based drug and alcohol testing based on repeated failures of impairment test	Uncharted territory – impairment testing has not been subject to decades of legal challenges and resulting guidelines for use
Provides immediate results which increases legal supportability and effectiveness in preventing impaired employees from working in safety-sensitive positions	Employee and union suspicion regarding new testing methods
Measures current impairment	Employees could 'cheat' on the tests
Detects impairment from multiple sources, including fatigue, illness, stress, drugs and alcohol	Testing does not show cause of impairment so employer may not be able to provide support