



white paper

DRUG AND ALCOHOL TESTING IN CANADA

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implementing drug testing policies.

Employers within Canada must exercise caution when implementing drug testing policies. An employer may appropriately institute drug or alcohol testing for safety-sensitive jobs in 4 circumstances: (1) pre-employment; (2) reasonable cause; (3) post-incident; or (4) random. However, several requirements and restrictions exist that limit drug and alcohol testing in these given scenarios.

WHAT IS A SAFETY-SENSITIVE POSITION?

The Canada Human Rights Commission defines a safety-sensitive position as one where the “employee has a direct role, with limited supervision, in a workplace operation where impaired performance could result in a catastrophic incident affecting the health and safety of the employee.” A safety-sensitive position may also be one where incapacity due to drug or alcohol impairment could directly injure employees or others in the work environment.

Employers may only institute drug testing policies for employees in safety-sensitive positions.

PRE-EMPLOYMENT DRUG TESTING

To justify pre-employment drug testing, the employer must be able to show risks, inherent in the workplace, that (1) make the work highly dangerous or (2) result in workplace accidents or mistakes. This information should be noted in the company drug and alcohol policy.

Employers must note that an employee’s failure or refusal to submit to a pre-employment drug test cannot necessarily result in a withdrawn offer of employment.¹

REASONABLE CAUSE DRUG TESTING

Employers may conduct drug testing when there is **reasonable cause to suspect impairment** on the job, constituting a company policy breach. For example, when an employee exhibits signs that “sufficiently arouse the employer’s suspicion of impairment,” a drug test would be reasonable.² The suspicion should arise from an objective measure of the employer’s subjective view of the employee. Suspicion may manifest in the form actions, behavior, or physical characteristics that give rise to impairment.



¹ Canadian Human Rights Commission’s Policy on Alcohol and Drug Testing (Revised October 2009).

² *Mechanical Contractors Association Sarnia v. United Association of Journeymen and Apprentices Of The Plumbing & Pipefitting Industry of the United States and Canada*, Local 663, 2013 CanLII 54951.

Employers should determine what constitutes a policy breach in the company Drug and Alcohol Policy. Additionally, the policy should specify if an additional drug test is required for the employee to return to work after a breach.

POST-INCIDENT DRUG TESTING

In certain circumstances, employers are permitted to drug test an employee after an incident occurs within the workplace. Post-incident drug testing should be conducted as soon as reasonably possible.

To conduct a post-incident drug test, the employer **must have reason to believe that the employee's acts or omissions could have been a contributing factor to the incident AND that the employee was likely impaired at the time of the incident.**³ The Alberta Court of Queen's Bench further clarifies that the employee must be the root cause of the accident; an accident alone without a nexus that links the employee is an insufficient basis to require post-incident drug testing.

The Canadian Arbitration board adopted three considerations to determine when post-incident testing is appropriate:

1. The threshold level the incident requires to justify testing;
2. The degree of inquiry necessary before the decision to test is made;
3. The necessary link between the incident and the employee's situation to justify testing.

An employer should specify the various scenarios that require mandatory post-incident drug testing. For example, one Canadian company stated very specific scenarios that required mandatory drug testing under the company policy. The scenarios included: Incidents that would cause lost time; Incidents reportable under the Occupational Health and Safety Act; Incidents resulting in damage over \$10,000; or Compelling evidence that the acts or omissions of employees contributed to the incident.⁴ The Court determined that a mandatory drug test after a collision occurred in the workplace was appropriate under the company policy.

Company drug testing policies should highlight if an employee may be subject to post-incident drug testing if there is a reason to believe the employee's acts or omissions caused the accident.⁵

³ *Weyerhaeuser Co. v. Communications, Energy and Paperworker's Union, Local 447*, 154 LAC (4th) 3. (In this case, the Court found that requiring a drug test after an accident in the workplace was justified because the employee's poor judgement and mistaken assumptions were the root cause of the accident. Specifically, the employees should have known that they needed a spotter when moving a large object with limited visibility.)

⁴ *Canadian Energy Workers' Association v. ATCO Electric Ltd.*, 2018 ABQB 258, (CEWA).

⁵ *Canadian National Railway Co. and C.A.W.-Canada (Re)* (2000), 95 L.A.C. (4th) 341.

RANDOM DRUG TESTING

Random drug testing should be implemented in very limited circumstances. For example, the dangerous nature of the workplace does **not** stand as an automatic justification for random drug testing. Random drug testing policies must be narrowly targeted, using the least intrusive or most accurate testing measures available.

Generally, any random drug testing policy must balance the employer's interest in job safety and performance against the employee's right to privacy and bodily integrity. The employer's interest must be **proportional** to any limit on an employee's privacy interest.⁶

One potential justification for random drug testing may be if the **employer provides evidence of a significant substance abuse problem in the workplace**. However, the substance abuse must be significant. For example, over a 15-year period, one company documented eight incidents of substance abuse in the workplace⁷; another company documented 14 positive alcohol tests over a nine-year period⁸. However, in both cases, the Court held that this did not reflect a significant substance abuse problem in the workplace, warranting random drug testing.

If an employer believes there is a significant substance abuse issue in the workplace, the employer should gather specific evidence to support this claim. This evidence might include:

- Observing employees with alcohol on their breath
- Obtaining evidence of alcohol present on the worksite
- Documenting any instances of drug and alcohol abuse

TRANSPORTATION-RELATED DRUG TESTING

Employers must note that Canada does not have legislation mandating alcohol and drug testing policies for transportation workers. Employers are recommended

to consult the Canadian Motor Carrier Industry before implementing a testing policy that targets transportation employees.

If an employer determines that company transportation is a safety-sensitive position, the employer may be able to implement a drug testing policy according to the standards specified above. We recommend employers to consult with counsel before making this determination.

DRUG AND ALCOHOL POLICY

An employer must have a **Drug and Alcohol Policy** implemented within the workplace to implement employee drug testing appropriately. It is best for employers to discuss specific requirements when drafting a policy such as:

- Who falls within the policy
- What is prohibited under the policy
- What is a safety sensitive position
- What is considered a policy breach
- When does the policy take effect
- How will consequences for a violation be determined

Additionally, employers are recommended to address accommodations for disabilities within the workplace. In Canada, drugs and alcohol dependence is considered a disability. The employer should use a Substance Abuse Professional to determine whether a problem exists and accommodate such employees with solutions.

Even if employers chose not to implement employee drug testing, the facility should still have a Drug and Alcohol Policy that outlines employee expectations and standards of the work environment. Employers should remain up to date with any developing case law and update drug and alcohol policies accordingly.

⁶ *Unifor, Local 707A v. Suncor Energy Inc.*, 2014 CanLII 23034 (AB GAA)

⁷ *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458.

⁸ *Unifor, Local 707A v. Suncor Energy Inc.*