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May 27, 2003

Re: Drug and Alcohol Testing

Workplace safety is an important issue for employers. Many employers are implementing Drug and Alcohol testing programs as a part of an overall approach to help address concerns where the risk of impairment on the job could place employees, co workers and the public at risk. Testing policies are highly contentious and generate strong feelings both for and against.

The various provincial Human Rights Commissions and the Canadian Human Rights Commission all publish position papers on their interpretation of the human rights limits on drug and alcohol testing programs. There are various court decisions speaking on Drug and Alcohol Testing. It should be noted that none of the cases actually involved testing, however the courts took the opportunity to look at testing issues.

The Canadian Human Rights Commission released a new position on Drug and Alcohol Testing on July 10, 2002. Its objectives are to set out the Commission's interpretation of the human rights limits on workplace drug and alcohol testing programs, as well as providing practical guidance on compliance with the Canadian Human Rights Act. Canadian Human Rights law takes a different approach than the U.S. on the issue of drug testing – not because protecting the right of those who abuse drugs or alcohol is considered more important than public safety, but because they feel that drug testing has not been shown to be effective in reducing drug use, work place accident or work performance problems. (I personally disagree with this statement).

Any questions about the policy, concerns or issues should be addressed to:

**Policy and International Program Branch
Canadian Human Rights Commission
344 Slater Street, 10th Floor
Ottawa, Ontario K1A 1E1
Phone 613-943-9095
Fax 613-995-1035
E-mail policy-politiques@chrc-ccdp.ca**

I will comment briefly on my interpretation of the CHRC position paper:

NOT ACCEPTABLE:

- pre employment testing – also it should not be an automatic part of a medical as this would contravene the spirit of the Canadian Human Rights Act.
- pre employment alcohol testing
- random drug testing
- random alcohol testing of employees in non-safety sensitive positions

ACCEPTABLE – if an employer can demonstrate that they are bona fide occupational requirements

- Random alcohol testing of employees in safety sensitive positions.
- Drug or alcohol testing for “Reasonable Cause” and “Post Accident” e.g. where there are reasonable grounds to believe there is an underlying problem of substance abuse or where an accident has occurred due to impairment from drugs or alcohol, provided that testing is a part of a broader program of medical assessment, monitoring and support.
- Periodic or random testing following disclosure of a current drug or alcohol dependency or abuse problem may be acceptable if tailored to individual circumstances and as part of a broader program of monitoring and support. Usually, a designated rehabilitation provider will determine whether follow up testing is necessary for a particular individual.

In 1999 in what has become known as the Meiorin Case the Supreme Court of Canada established a three part test which employers must meet to justify employment practices which would otherwise be found to discriminate. These criteria were not formulated specifically in relation to disabilities or drug and alcohol dependency however the Ontario Court of Appeal decided in the Entrop Case that this three part test establishes when drug and alcohol testing can be justified. The decision outlined a three part test commonly referred to as the Meiorin test. If a complainant has shown that the standard or requirement is prima facia discriminatory, the employer must prove that, on a balance of probabilities, the standard:

- was adopted for a purpose that is rationally connected to job performance
- was adopted in an honest and good faith belief that the standard is necessary for the fulfilment of that legitimate purpose
- the practice is reasonable necessary for the fulfilment of the work related purpose. In order to meet this last requirement the employer must show;
 - a. That the employment practise which has the discriminatory effect does, in fact, achieve the purpose
 - b. That the practice does not go farther than necessary to achieve the purpose

- c. That, to the point of undue hardship, the employer has attempted to accommodate individuals who suffer a discriminatory effect because of the employment practise.

The test requires employers to accommodate or consider the capability of different members of society before adopting a bona fide occupational requirement i.e. drug and alcohol testing.

In general, inquiring about, or testing for, a condition that is a physical and or mental disability or perceived disability is allowed only where it is a legitimate occupational requirement of a particular job. The Human Rights Commissions consider alcohol or drug addiction as a physical or mental disability. A perceived disability may include an employer's perception that a person's use of alcohol or drugs make him or her unfit to work.

Employers are responding to issues of substance abuse that occur at their worksites that create a dangerous safety risk to workers, the general public and the environment. In the event that they introduce a Drug and Alcohol Testing policy they must be prepared to defend their position if required. They may be required to satisfy that they have met the Meiorin requirements in that:

1. You believe that Drug and Alcohol testing is necessary in safety sensitive positions.
2. You hold an honest and good faith belief that testing is necessary to enhance safety and reduce risk.
3. a. You believe that drug and alcohol testing combined with education and access to assistance does provide a safer work environment and reduces accidents and injuries. A statistical data base will be maintained and you will identify which positions are considered safety sensitive.
b. You are only testing pre employment when an offer for employment in a safety sensitive position has been made. .
c. The employer will accommodate employees who are positive on a drug or alcohol test. The employer will also encourage candidates who failed a pre employment drug test to reapply for available positions when they are able to meet requirements.

It is important to remember that the CHRC policy is federal therefore it affects companies that are federally mandated. Companies that are provincially mandated follow the guidelines of their respective provincial Human Rights Commission. However it is to be expected that the CHRC guidelines may set the standard for the provinces to follow.

The CHRC have closed the door on any attempt to conduct pre employment drug testing unless you are prepared to establish that it is a Bona Fide Occupational Requirement as per the Supreme Court of Canada Meiorin case. The onus is on the employer to provide evidence of each of the elements of the test set out by the court.

CONSIDERATIONS:

1. Companies have to clarify if they are bound by the CHRC guidelines. Generally transportation companies are federally mandated while Oil Companies as an example, fall under provincial Human Rights Legislation.

2. Implementation of your program should include the following:

- Develop a policy that clearly states why you are testing, what positions you are testing, when you are testing, how you are testing, what you are testing for, standards for testing, prohibitions, consequences and how you will meet your duty to accommodate
- All current employees should receive a copy of your policy and acknowledge receipt of same
- Identify the positions that will be considered safety sensitive
- Introduce the policy with a Drug Education and Awareness presentation
- Conduct management training on your policy
- Conduct Supervisor “Reasonable Cause” training
- Ensure that if pre employment testing is a part of your policy conduct testing after an applicant has been offered employment in a safety sensitive position and ensure that they are aware of the testing requirement
- Allow a minimum of 90 days notice prior to implementing a testing program on current employees
- Ensure employees are aware of your Employee Assistance Program and or government agencies that provide assistance if required ie: AADAC

The U.S. Substance Abuse and Mental Health Services Administration (SAMHSA) is the certifying agency for forensic urine drug testing laboratories in Canada and the United States. The drugs tested for and levels are as follows:

Drug or metabolite	Screening Level	Confirmation Level
1. Marihuana metabolites	50	
(i) Delta-9-tetrahydrocannabinol -9-carboxylic acid (THC)		15

2. Cocaine metabolites (Benzoyllecgonine)	300	150
3. Phencyclidine (PCP)	25	25
4. Amphetamines	1000	
(i) Amphetamine		500
(ii) Methamphetamine		500 (Specimen must also contain amphetamine at a concentration of greater than or equal to 200 ng/mL.)
5. Opiate Metabolites	2000	
(i) Codeine		2000
(ii) Morphine		2000
(iii) 6-acetylmorphine (6-am)		10 (Test for 6-AM in the specimen. Conduct this test only when specimen contains morphine at a concentration greater than or equal to 2000 ng.mL.)

The laboratory will use the cutoff concentration displayed in the above table for initial and confirmation drug tests. All cutoff concentrations are expressed in nanograms per milliliter (ng/mL).

The testing options that you may consider are: Pre employment, Post Accident, Reasonable Cause, Pre Access, Random, Return to Duty and Follow up. The options may be described as follows:

(a) Pre-employment – (Drug Only) for all successful applicants in safety sensitive positions who are offered employment with certain exceptions, i.e. returning employees with no periods of absence exceeding six weeks.

(b) Post-Accident – Drug and alcohol testing of an employee in a safety sensitive position within a designated time period after an accident that involves a fatality, disabling injury or significant incident/near miss. Drug testing within 32 hours of accident. Alcohol testing within 2 hours of accident with attempts to test for up to 8 hours. If unable to test reasons will be documented.

(c) Reasonable Cause Testing – An employee in a safety sensitive position will be tested for alcohol and or drug use where a company supervisor or other official, who is trained to identify drug and alcohol use by an employee, makes observations which form a reasonable basis for suspecting that the employee is in breach of this policy. Such observations must be

documented, specific, clearly stated observations concerning the appearance, speech or body odors of the employee. The observations may include indications of the chronic and withdrawal effects of drug and alcohol use.

(i) Observations which may lead to reasonable cause testing are not limited to, but include:

- (a) odor of alcoholic beverage on breath
- (b) slurred speech
- (c) glassy eyes
- (d) unsteadiness in walking, standing, etc.
- (e) flushed face
- (f) disoriented and or drowsy
- (g) accidents or injuries
- (h) repeated errors in job performance
- (i) excessive absenteeism or lateness

(d) Random – Alcohol testing of employees in safety sensitive positions. Testing is with no advance notice with frequency and percentage to be determined by senior management based on requirements.

(e) Pre Access – Drug and Alcohol testing of employees in safety sensitive positions to gain and or maintain access to company or client sites where safety is a bona fide occupational requirement.

(f) Return to duty – Drug and or Alcohol testing of an employee who has engaged in prohibited conduct and is returning to work after an assessment by a Substance Abuse Professional (SAP).

(g) Follow up - on an unannounced basis for at least one year on return after a Substance Abuse Professional (SAP) assessment identifies the need to resolve a problem with alcohol or drug abuse.

Where testing is justified employees who test positive must be accommodated to the point of undue hardship. Automatic loss of employment or inflexible reinstatement conditions without regard for personal circumstances are not acceptable. Employees who test positive should be referred to a Substance Abuse Professional to determine if he or she is drug or alcohol dependent. If the employee is found not to be dependant, the employee should be returned to work on a negative return to duty test, follow up testing and appropriate disciplinary action may be taken. A person who is dependent will be referred to rehabilitation, negative return to duty testing and follow up testing. It should be noted that an employee who

requests assistance for a drug or alcohol problem cannot be disciplined for seeking help.

The Canadian Human Rights Act Section 15 states:

(1) It is not a discriminatory practice if

(2) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on bona fide occupational requirement

Section 15.2

For any practice mentioned in paragraph (1)(a) to be considered a BFOR it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

You will note that when I speak of random testing I refer to random alcohol testing not random drug testing. The CHRC may find random alcohol testing acceptable in safety sensitive positions as the testing measures impairment however they do not condone random drug testing. My preference is to conduct Pre Access drug and alcohol testing as an alternative. With random testing some people are tested repeatedly and some people are never tested. Pre Access testing can be site specific or apply to all safety sensitive positions. I believe that the CHRC would not support Pre Access testing however you probably would be judged on what you do with test results vs actual testing.

You must have a clear understanding that drug testing can not measure impairment and that a positive drug test is evidence that a person has a particular drug(s) in their body at or above the SMASHA guidelines. The positive drug test creates a response whereby you remove the person from safety sensitive duties and direct them to a Substance Abuse Professional for assessment. The action you take and return to work conditions will be based on the assessment and treatment if required. Breath alcohol testing can measure levels of impairment however your response will be the same as in a positive drug test.

Workplace drug and alcohol testing is not used for or intended to be used to “get rid” of employees. Properly administered broad based programs are designed to maintain or enhance safety and to provide assistance for employees who may have substance abuse issues. An employer has the right to manage their workplace. They are entitled to prohibit drugs and alcohol in the workplace, set reasonable performance expectations, and to expect employees to not be impaired while working.

The above information is not complete and is intended to stimulate discussion and awareness of the various issues.

Sincerely,

**E.J. (Ed) Secondiak, C.D.,CPCT
President/General Manager
ECS Safety Services Ltd.**