

Deconstructing random drug, alcohol testing

The Toronto Transit Commission (TTC) recently decided it would randomly test employees for drug and alcohol use in the wake of a fatal bus accident in which the driver had drugs in his possession. Predictably, the decision was met with swift and severe criticism from the city's transit union.

The media debate that followed holds some valuable lessons for HR professionals who want the safety benefits of testing without employee backlash or expensive legal challenges.

When it comes to formulating an alcohol and drug test policy, the law does not take kindly to treating employees in an invasive or discriminatory fashion, and random testing for alcohol use is more legally defensible than drug tests.

Breathalyzer tests more conclusive than drug tests

Breathalyzer tests are scientifically proven to measure if a person is impaired at the moment of the test. Oral fluid or blood tests to determine drug use are less conclusive. A positive test result indicates past drug use but does not prove impairment. In fact, drug tests are often irrelevant to determining if an employee is unable to perform a job safely, which is why the courts tend to rule random drug tests are too invasive.

The harshest criticism levelled by the TTC employee union was saved for the intrusive and potentially misleading nature of random drug testing. Tests are so sensitive that the drug use could have occurred days, weeks or even months before, noted the union.

The TTC had no legal right to put the private lives of employees under such scrutiny, it said. It is instructive to note the union did not mount serious opposition to random breathalyzer tests.

The legal problems associated with random drug testing are such that HR professionals should consider kicking them to the curb in favour of less contentious cognitive tests, such as walking in a straight line or



LEGAL VIEW

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testing reaction times.

Policy of termination for failed test a bad idea

Another key consideration is the sanctions imposed on those who fail a test. Alcohol and drug addiction is a disability that must be accommodated under human rights legislation. This is why the Ontario Court of Appeal has expressly rejected drug and alcohol test policies that call for immediate termination.

This duty to accommodate is rooted in the legal principle employers cannot wantonly discriminate against those who suffer from real or perceived substance abuse problems. This means, from an HR best practices perspective, zero tolerance is not the best option. The appropriate first response is counselling and treatment. Termination is the last resort when all other avenues have been exhausted.

The foundation for best practices in random drug testing was established in 2000 by the Ontario Court of Appeal in *Entrop v. Imperial Oil*. The court concluded random and pre-employment drug testing was not a reasonable condition of employment. Random drug tests do not measure actual impairment of the ability to perform work

safely, ruled the court.

Another reason why this landmark decision went against the employer was the random drug testing policy in question made no provision for accommodation. The sanction imposed was immediate termination.

Entrop established that employers that implement random alcohol and drug testing must make a direct connection between the policy and workplace safety. The legality of random testing is limited to workplaces where impairment poses a significant safety risk.

Being intoxicated or high in an office setting may hamper performance but there is no safety risk.

The most defensible random alcohol and drug test policies are those applied in workplaces involving manual labour, use of heavy equipment or, as in the case of the TTC, where absolute sobriety is required to protect the public. Organizations that impose random tests on office workers or others who do not hold safety-sensitive positions will face strong legal headwinds if challenged.

Perhaps the best advice for employers struggling with the contentious issue of random alcohol and drug tests is to abide by the golden rule. Treating employees with the same degree of dignity and respect you would like to be treated with in similar circumstances is sound thinking.

Viewing substance abuse as a disability and offering employees a second chance in the form of a temporary transfer to a non-safety-sensitive position or providing counselling and treatment are effective legal strategies and good HR policy.

A compassionate approach to employees caught in a web of substance abuse or addiction will be noticed and appreciated throughout the organization.

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