

A checklist for employers

A drug and alcohol testing policy that respects human rights and may be justifiable under the Code is one that:

- ✓ Is based on a clear connection between the purpose of testing (safety) and performing the job
- ✓ Is shown to be necessary to achieve workplace safety
- ✓ Is set up only after exploring less intrusive ways to detect impairment
- ✓ Is used only in limited circumstances – such as for-cause, post-incident or post-reinstatement situations
- ✓ Does not apply automatic consequences following positive tests
- ✓ Does not confuse substance use with substance addiction
- ✓ Is used as part of a larger assessment of drug or alcohol addiction. This could include employee assistance programs and drug education and awareness programs. It also includes a medical assessment that can inquire into possible disability
- ✓ Provides individualized accommodation for people with addictions who test positive, to the point of undue hardship
- ✓ Uses testing methods that accurately measure current impairment, are minimally intrusive and give fast results (such as alcohol testing by breathalyzer)

- ✓ Uses reputable procedures for analysis
- ✓ Ensures confidentiality of medical information and the dignity of the person throughout the process.

For more information

The Ontario Human Rights Commission's *Policy on drug and alcohol testing* and other publications are available at www.ohrc.on.ca.

To file a complaint – called an application – contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY Toll Free: 1-866-607-1240

Website: www.hrto.ca

If you need legal help, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

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Drug and alcohol testing



Ontario
Human Rights Commission
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droits de la personne

Drug and alcohol testing

The Ontario Human Rights Code

The Ontario *Human Rights Code* (*Code*) provides for equal rights and opportunities and freedom from discrimination. The *Code* recognizes the dignity and worth of every person in Ontario.

The *Code* prohibits discrimination against people with disabilities and perceived disabilities in employment, services, housing and other social areas. Under the *Code*, disabilities include addictions to drugs and alcohol.

When might testing discriminate?

Drug and alcohol testing is one method employers sometimes use to address workplace safety concerns arising from drug and alcohol use.

Testing for alcohol or drugs can lead to negative impacts on people based on addictions or perceived addictions. Testing that creates a negative impact can only be justified if the employer can show that testing is a *bona fide* (legitimate) requirement.

Testing policies or programs may be discriminatory if they lead to:

- » Automatic discipline, refusing to hire someone, or inflexible job conditions for someone with an addiction or perceived addiction
- » Not accommodating someone with an addiction to the point of undue hardship

- » Not respecting the dignity or confidentiality of someone with an addiction or perceived addiction during the testing process.

If an employer or a drug and alcohol testing policy treats a recreational substance user as if they have an addiction and this leads to the person being negatively affected, this may be discriminatory based on “perceived disability.”

Designing testing policies and programs

Where testing policies are necessary to achieve workplace safety, employers should design them to avoid discriminatory effects. Following the test for *bona fide* (legitimate) requirements laid out by the Supreme Court of Canada, policies should be:

1. Adopted for a purpose that is rationally connected to performing the job
2. Adopted in an honest and good faith belief that it is necessary to fulfill that legitimate work-related purpose
3. Reasonably necessary to accomplish that legitimate work-related purpose. To show this, the employer must demonstrate that it is impossible to accommodate the person without causing undue hardship (excessive costs or significant health and safety risks).

The primary reason for conducting drug and alcohol testing should be to measure impairment to ensure safety. It should not be used to deter drug or alcohol use, or to monitor employee lifestyles.

Even testing that measures impairment can be justified as a *bona fide* requirement only if it can be shown to be connected to performing the job (for example, if an employee occupies a safety-sensitive position and after a significant accident or “near-miss”), and only then as part of a larger assessment of drug and alcohol addiction.

What happens after a positive test?

Employers have a legal duty to accommodate employees with addiction disabilities unless it causes undue hardship. If an employee tests positive, employers should advise them of the availability of accommodation and offer an individualized assessment of drug and alcohol addiction. If an employee has an addiction, employers must explore accommodation options. This will include the support needed for the person to attend a rehabilitation program. A person’s disability should also be a mitigating factor in considering if any discipline is appropriate.

