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>> Good afternoon and welcome to today's Webcast, drug and alcohol testing and human rights, delivered by the Ontario Human Rights Commission. My name is Nancy and I am part of the professional development team at HRPA. Before we begin the presentation and to provide additional time for individuals to log in, I'd like to alert you to a few of our PD programs. Next week, on Thursday, November 10th, we will deliver building success with succession planning. Succession planning needs to be considered at every stage of your businesses development. Join HRPA in succession planning expert Alan for a one day workshop to learn everything you need to prepare your organizations talent needs now and in the future. Learn the difference between replacement planning on and succession planning. The purpose and value of systemic, sorry, succession planning and key steps and process to lead succession and change. On that day, Thursday, November 10th, we will also deliver empower performance, transform your culture and increase autonomy. How can HR executives, professionals and managers get employees to be present, responsible and productive? The secret is to build a culture of empowerment based on book from McGraw collaborate, innovate and engage to beat the competition, Shawn will walk attendees through the proven strategies to conform a culture into highly motivated, productive and engaged community. Learn tactics on how to introduce empowerment, how it will increase engagement and directive managers to facilitated leaders. On Tuesday, November 15th over the lunch hour will deliver employment law year in review. Employment law is constantly evolving. This Webinar will focus on the latest trends in the case law and help HR professionals keep abreast of any major developments that will impact a workplace. For further details on these and other PD programs please visit our website [www.hrpa.ca/professional development](http://www.hrpa.ca/professional-development). Now for a few quick housekeeping remarks. If any time you experience technical difficulties, please send an e-mail to pdwebinars or indicate the issue to us by the Q and A panel on your screen. Throughout this Webcast we encourage you to ask questions and we will try to get to as many as we can in the time that we have. You can also download today's presentation by selecting the link that can be found in the resources panel on your screen. And finally, your feedback is very important to us. Please take a few minutes to complete the survey that will be sent. The recertification code for those individuals who require it will be provided on the last question of the survey. Now I'm pleased to welcome today's facilitator, Anya Kater, works as senior policy analyst at over, adapts public policy on a range of human rights and social justice issues.

She also delivers public education and undertakes consultation with stakeholder groups and the broader public. Anya is joined today by Dora, human rights and change specialist. Welcome.

>> Thank you Nancy, today's presentation will take about a half an hour let's get started right away.

>>Anya: Hello everyone, thank you for having us today. Today we're going to give you an overview of OHRC policy on drug and alcohol testing. There will be time at the end for questions and answers, but first let's get started with a poll question. In what sector do you work? Manufacturing, construction or resource extraction, for example mining, with the Union or the government, health care or social services. Trucking or transportation, and hospitality or tourism, law enforcement, law or advocacy, education or other. So please click the appropriate response.

>> And we will just wait a few seconds and just give you a chance to indicate your response. Let's see what pops up. Okay so Anya you got quite a cross-sectional, manufacturing, construction --

>>Anya: Okay, that's good to know, great. All right let's get started. It is not always easy for employers or employees to know rights and responsibilities about this issue. The law and science in the area is constantly evolving.

>>Anya: That's right Dora, here is some situations we thought of that might sound familiar to you.

>> I'm just going to forward it.

>>Anya: You want to start up mining company you want to put in place random drug and alcohol safety as a safety measure, is this allowed?

>>Anya: You provide for a job as forklift operator, what are your human rights in this situation? I'm going to help you figure out the answers to these questions by taking you through Ontario human rights commission or OHRC policy on drug and alcohol testing.

>> So okay, so Anya what does the policy cover?

>>Anya: Well it covers the following. The OHRC interpretation of the current state of the law in Ontario relating to human rights and drug and alcohol testing, it also covers the code rights of employees or job applicants, the employer's obligations under the code, and some of the current controversies around drug and alcohol testing. The policy also has examples to help you navigate situations, summary section with general advice and tip sheets at the end for quick information on the different types of testing. We selected some of the sections of the policy to talk about today, by reading the policy itself will give you more information. Drug and alcohol testing is one way some employers try to ensure safety at work. While some Canadian industries carry out testing it is far more common in the United States. Testing is controversial because it reflects a collision between workplace requirements and employee's human rights and privacy rights. Testing can raise particular human rights concerns for people with addictions to drugs or alcohol. Addictions to drugs or alcohol are forms of disability. People with addictions to drugs or alcohol are entitled to the same protection, under the Human Rights Code, as people with other disabilities. The OHRC recognizes the distinct disadvantages that many people with addictions face. Which include extreme stigma, lack of societal understanding, stereotyping and criminalization of their addictions. If drug and alcohol testing policies don't respect human rights they can limit people's job opportunities. This can contribute to the stigma and exclusion that many people with addictions face. Overall drug and alcohol testing may discriminate based on addictions or perceived addictions. If

it has a negative impact, based on disability or perceived disability, testing may only be justified in certain circumstances. Let's begin with the scope of the policy. This policy focuses on Ontario workplaces where safety as a workplace is an objective. Keep in mind under the code it may be hard to justify drug and alcohol testing for jobs that involve few safety risks.

>>Dora: So, Anya, what doesn't the code cover?

>>Anya: Code only applies to organizations covered by Provincial law, doesn't apply to airlines, trucking that crosses borders and others regulated by federal law, these have to comply with Canadian human rights act. The code prohibits discrimination at work based on 16 grounds, including disability. People may be protected by the code when drug or alcohol use becomes an addiction. In medical terms this is substance use disorder. They may be protected when they may not actually have an addiction but perceived to have one. For example, if an employee is denied a promotion because her manager thinks she has a drug addiction, this could be discriminatory. Finally, people may be protected if they had a drug or alcohol addiction in the past, but they no longer have an ongoing disability.

>> I think some examples would be helpful.

>>Anya: Okay, here is an example that might be familiar to some. On oil refinery introduced a drug and alcohol policy that required all employees in safety sensitive positions to tell their employer about a current or past substance abuse problem. One employee disclosed he had an alcohol abuse problem over seven years earlier. Although he was in remission, this employee was automatically reassigned to a non-safety sensitive position. The employer also required him to complete two years of rehabilitation and abstain from drinking for five years among other things, before he would be allowed to return to his original job.

>> What do you think about the policy?

>>Anya: Well the policy was found to be discriminatory, decision to automatically reassign the employee and put these restrictions on him were based on past addiction, didn't take individual circumstances into account and couldn't be justified by the employer. Drug and alcohol testing is a form of medical examination, even when it is introduced in good faith it can negatively affect people based on addiction or perceived addiction, this is called *prima facie* discrimination or discrimination on its face.

>> Can you provide some examples of how drug and alcohol testing could negatively affect people based on disability?

>>Anya: Sure. Testing can raise human rights concerns if it leads to discipline, dismissal or refusing to hire somebody based on an addiction or perceived addiction, imposing inflexible extra job conditions on somebody, as we saw on the last example. Not accommodating people with addictions to the point of undue hardship or not respecting somebody's dignity or confidentiality during the testing process. Under the code drug or alcohol testing that leads to these negative effects, based on addiction or perceived addiction, can only be justified if the employer can show testing policy is a legitimate or bona fide requirement called BFR for short.

>> What's the test for bona fide requirement?

>> The Supreme Court of Canada has designed three step test; they are listed here on this slide. This involves a little language, please bear with me. So, say an employee with an alcohol addiction gets

automatically dismissed for testing positive for alcohol, because he has violated his employer's alcohol policy. He files a human rights claim and he is able to show that adverse treatment is connected to his disability. So, to justify the termination the employer would have to show that testing policy was 1, adopted for a purpose that's rationally connected to performing the job. The purpose of drug and alcohol testing should be safety and this needs to relate to the duties of the job. That's partly why when we see drug and alcohol testing policies they're mostly in workplaces where they are safety sensitive positions. For jobs that involve fewer safety risks it would be hard to show this rationale connection. So, in this case, can the employer show that there is a rationale connection between the purpose of the testing policy and the employs job duties? For the second step of the test, the employer would have to show that the testing policy or program was adopted in an honest and good faith belief that it was necessary to fulfilling that legitimate work-related purpose. Can the employer show there is a genuine belief that testing is necessary to achieve workplace safety? Finally, the employer would have to show that testing is reasonably necessary to accomplish the purpose and that it is impossible to accommodate the person without imposing undue hardship on the employer. Undue hardship means excessive costs or significant health and safety risks. So, is testing really necessary to identify people who can't do their job safely because they are impaired? Looking at the method of testing, including the ability to measure current impairment, are important here. Also, has the employer explored other way that is may be less discriminatory or intrusive to achieve safety? This step of the test also looks at whether the needs of the person with the addiction have been accommodated to the point of undue hardship. If testing causes negative effects on people based on disability or perceived disabilities, employers are unable to meet any one of these three steps the testing policy is discriminatory. Our policy emphasizes that employers should design testing program with these BFR steps in mind, so the policy has a series of questions to help employers apply the BFR test.

>> And I think those questions might be helpful.

>>Anya: Yes, and these key considerations lay out more principles and guidance. So the objective of doing testing should be to measure current impairment. Whether the employee can perform essential job duties at the time of the test. It shouldn't be just on, shouldn't be to just detect the presence of drugs or alcohol in the body. As we have said testing should relate to safely performing the job. Employers should use the least intrusive way of assessing impairment or fitness for work. The program or policy must not be arbitrary, in terms of which employees are tested. However, as we talked about, testing employees in safety sensitive positions may be permissible in some circumstances. And the policy gives a description of what safety sensitive means. Finally, employers must provide individualized accommodation, that is accommodation that responds to specific needs of the person with the addiction. Blanket rules that don't consider a person's individual circumstances are likely discriminatory.

>> Well, Anya, that's a lot to take in. How about a quick review.

>>Anya: Okay so to recap employers shouldn't wait until there is a complaint about their policy. They should design drug and alcohol testing policies or programs with the BFR test in mind. They should ask themselves the key questions laid out in the policy, taking into account key principles, incorporate elements of well-designed testing program. These are in a summary section of our policy. We will review these at the end of our Webinar. Well-designed drug and alcohol testing policy that respects human rights may be justifiable under the code.

>> And that actually takes us to our next poll question. Does your organization have a drug and alcohol testing program? You can answer yes, no, no but it's being considered. Let's see what we have here. Uh-huh so I think we have a number of people responding no. So, I think the next section, oh there is more coming. So, the next section, yep, should be very helpful. I'm going to flip it. Just give us a moment here. Okay. So, let's hear about the various drug and alcohol testing situations. I understand that different approaches will apply to different types of situations.

>>Anya: That's right and before I go any further there is actually a chart at the end of the policy, so if you do have the policy in front of you or if you have it online, you can always follow along with the chart and then we will go through these situations. So, let's think about that example of the applicant who has asked to do an alcohol test before getting the forklift driver job. Testing for alcohol or drug use sometimes takes place before a person is hired, transferred or promoted. It also might happen before contractors are allowed to start work on a client's job site. The OHRC takes position that drug and alcohol testing is part of the initial applicant screening process, such as application process or the interview is not allowed under the code.

>> And what about the person, if the person receives a conditional offer for a safety sensitive job?

>> The OHRC recommends testing in these situations, here is why. If a person isn't hired because they test positive it may lead to perceived to have a disability, even if they don't have an addiction. That's because even if a person fails a test once they are considered unfit for work in the future. And refusing someone a job because of a perceived disability is discriminatory, unless the employer can justify it as a BFR. Also, any medical testing should be able to assess whether a person can do the essential job duties. A drug or alcohol test done before the person starts working can't show that they're going to go to work impaired and if an employer can't show this it is going to be difficult for them to justify this type of testing as bona fide.

>> So Anya, using drug or alcohol testing as a form of job screening, may that be a violation of the code?

>>Anya: Yes.

>> So other than testing, are there ways to address a situation where someone looks impaired by drugs or alcohol, well on the job?

>>Anya: Yes, keep in mind testing isn't automatically needed for employees that appear impaired at work, may be other methods to address this, such as giving people a chance to explain what's happening, explain their behaviour, what's happening with them? Temporary removing them for immediate safety if they do truly appear impaired. Offering accommodation to the point of undue hardship, we'll talk more about this later, so this could be referral to AEP or support to attend treatment. Progressive employment management, and asking the person to get a medical assessment where there are valid reasons to be concerned.

>> Anya, can you talk a bit more about reasonable grounds and post-incident testing?

>>Anya: Sure. Reasonable grounds and post-incident testing for either alcohol or drugs may be acceptable where there is a link between impairment and doing a safety sensitive job. Reasonable grounds testing should rely on objective evidence, for example, somebody appearing to be impaired by

alcohol or drugs. And an employer may also do testing after workplace accidents or near misses, where looking at the condition is a reasonable part of the investigation.

>> but the test should be just one part of a larger program, right?

>>Anya: That's right, both of these should only be used if necessary as part of a larger process of assessing drug or alcohol addiction. This process includes a broader medical assessment, can include referrals to EAPs, drug and alcohol education and other measures. The employer must meet duty to accommodate with employees who test positive.

>> Let's think about that example you gave at the beginning where the mining operation wants to start a program of random testing. Would this be allowed under the code?

>>Anya: Random alcohol testing, the answer is it depends, right, with a lot of drug and alcohol testing, it depends. Random alcohol testing may be allowed in some circumstances, because it can measure current impairment and meets standard, by Breathalyzer it may be allowed in specific situations. These include employees being in safety sensitive positions, only where they are not supervised or minimal supervision. Also, evidence of risk in that particular workplace the employer meets duty to accommodate people with addictions who test positive. Random drug testing may be allowed if it could be shown to measure currently employment as opposed to detecting recent use and meet other criteria, however, right now still no drug test comparable to the alcohol Breathalyzer in the sense it is able to measure current impairment, give fast results, high level of accuracy and is minimally intrusive. Employers who put in place random drug testing make themselves vulnerable to human rights challenges, if random drug testing was shown to meet these it may be allowed in certain situations as random alcohol testing.

>> It can be justified when an employee is returning to safety sensitive job after treatment for alcohol and addiction?

>>Anya: Yes, in some circumstances, employee might be expected to meet certain conditions when they come back to work following treatment, including unannounced testing. But any conditions should be tailored to individual circumstances, the testing period should be, the testing period set should be reasonable and the frequency of testing shouldn't be overall intrusive. The employer still needs to meet duty to accommodate.

>> Let's talk more about the duty to accommodate. What should happen after a positive test?

>>Anya: The OHRC takes a position that positive test triggers duty to require into possible disability, this must be done respectively and in a way, that respects employee confidentiality. After they test positive employees should be offered to attend individualized assessment. This should be done by somebody who has an expertise in substance abuse disorders. The person would address whether they have a disability, if a person is assessed and has a disability, employer must offer accommodation unless it causes undue hardship.

>> What kinds of accommodation might an employee need?

>>Anya: If a rehabilitation program is what is needed employer must provide support necessary for the person to go, unless this would cause undue hardship. Other types of accommodation include a referral to EAP, modifying a person's duties or providing them with alternative non-safety sensitive work, really

would depend on their individual needs. As well as disability should be mitigated factor in considering if discipline is at all appropriate.

>> So the process is a shared responsibilities, shared responsibility, where can our participants find more information about these responsibilities?

>>Anya: The policy has a section that describes the responsibilities of employees, employers, Unions and others.

We don't have time to cover these today in the presentation, but I'd be happy to take any questions about these at the end. So about undue hardship. The employers is not required to accommodate the needs of an employee with an alcohol or drug addiction if it can be shown that accommodation would cause undue hardship. This means that the cost to the accommodation is so high that it would change the nature or effect liability of the organization. When determining this employers must take into account any outside sources of funding that they can use or other ways they can reduce the costs. The other way that an accommodation might cause undue hardship is if it causes significant health and safety risks of the the health or safety risks to workers, members of the public or environment must be so serious that they outweigh the benefits of accommodation. This can only be determined after accommodations and precautions to reduce the risks have been made. So employers can't just claim undue hardship based on their own impressions or stereotypes, they have to use objective evidence to prove it and this can be difficult. In a case of undue hardship based on costs this evidence has to be quantifiable.

>> Now we often get questions about recreational users.

>>Anya: Right the policy also includes a section on recreational or casual users of drugs or alcohol, there has been a lot of controversially and legal cases around this issue, that is in what circumstances is -- courts and tribunals in different jurisdictions across Canada have come to different conclusions.

>> When our recreational uses protected by the code?

>>Anya: In two situations, one where they perceive the person to have an addiction. So, for example, a manager who suspends somebody because she thinks she has an alcohol addiction. But they may also be protected if the testing policy or program treats the person as if they have an addiction. So, this could happen if an employer imposes harsh consequences on a person. Such as automatically firing them for testing positive.

>>Anya: What ways are there to address health and safety in the workplace other than drug and alcohol testing?

>> As I mentioned, employers should use the least intrusive way to assess impairment or fitness for work. Some of these alternatives could include performance tests that can test for cognitive or psychomotor impairment, substance abuse education and awareness programs, Employee Assistance Programs that gets at the root causes of addiction, training supervisors or others to assess behaviour that can address this, including signs of someone being under influence of alcohol or drugs, unplanned cheques and peer monitoring. To sum up, a well-designed drug or alcohol testing policy that respects human rights may be justifiable under the code. This can happen if it is based on a rationale connection between the purpose of testing, which should be safety, and performing the job. Shows that testing is

necessary to achieve workplace safety. Is put in place after less intrusive methods for detecting impairment and increasing workplace safety have been explored. Is used only in limited circumstances, such as reasonable grounds, 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. So, aspects of this could be EAPs, drug education and awareness program and medical assessment to measure into possible disability related needs. Provides individualized accommodation for people with addictions who test positive to the point of undue hardship. Uses testing measures highly accurate, able to measure current impairment, are minimally intrusive and offer fast results. Uses reputable procedures for analysis and ensures confidentiality of person's medical information and dignity of the person throughout the process.

>> Okay, thank you Anya. Now we're going to start the question and answer segment of the Webinar and you can ask your questions in the Q and A pod, please remember that we cannot provide legal advice if you have a human rights complaint you may want to consult with human rights legal support centre, if you have a complaint filed against you and you are an employer or service provider, you may wish to consult with own legal counsel council, we will pause and there will be silence at our end, this is because we may need a few moments to consider the question. Okay and we're getting a number of questions coming up here. Let's start with a question that has come up fairly often and that is can you fire an employee for failing a drug or alcohol test?

>>Anya: No, that's a good question. So, employers that automatically dismiss employees for testing positive for drugs or alcohol make themselves vulnerable to human rights complaints. A response that would better respect human rights is to inquire into possible disability and people's related needs, disability related needs and offer individualized accommodation to the point of undue hardship and again like a person with disability would be considered mitigating factor in considering if any discipline is appropriate at all. So even if an individualized assessment finds that somebody is a casual user or recreational user, this may be evidence the drug and alcohol policy treats the person partially and as if they have a disability. This type of action can be found to be discriminatory based on perceived disability. In this these situations we recommend the employer considers discipline tailored to circumstances and what has happened to participate the drug or alcohol test.

>> Okay, thanks Anya. Let's take a look at some other questions here. Just bear with me for one moment here. The common question that we often receive is about drug and alcohol testing is whether or not there is a difference in unionized versus non-unionized environments. Can you talk a bit more about that Anya?

>>Anya: Uh-huh. Sure. So, the Human Rights Code and our policy will apply to both unionized and non-unionized requirements. The requirement of the code are the same whether the environment is unionized or non-unionized, principles around duty to accommodate are the same regardless of the environment and Unions also have a particular role to play to facilitate accommodation and to make sure that collective agreements can't act as a bar to providing accommodation. So a lot of the legal decisions around drug and alcohol testing have come out of a grievance and unionized environment. There are grievances, they make way to labour arbitrators and go sometimes to the courts. So many of these cases are analyzed both from the perspective of human rights law and also from the perspective of whether employee's privacy rights under the collective agreement are being appropriately balanced with health risks to health and safety. So, privacy for, is a key consideration for all employees and

employers, but it appears to be a key consideration for a lot of the claims that have come up under the collective agreement. And also with respect to random testing, from the perspective of our policy to justify ran random testing under the code both unionized and non-unionized have to show there is evidence of risk that exists in a particular workplace. For example, that the work is highly dangerous, for example. However, in claims that relate to employee's rights under collective agreement there could be additional obligations under the collective agreement.

>> Thank you. Now we have several questions pertaining to medical marijuana. So, I'll just frame one, does the policy deal with how to accommodate employees who use medical marijuana?

>>Anya: Okay, so yeah, so this is kind of a hot topic, whenever we start talking about drug and alcohol testing we hear questions about medical marijuana. So, the burning issue for many employers and employees too. So, the policy itself doesn't specifically speak to employees who use medical marijuana, however, it does include the general principles around the duty to accommodate.

So, and these principles are elaborated on and you can find more about them in our recent released policy on ableism and discrimination based on disability, so that's our updated policy. Medical marijuana is a legal form of treatment and it has been since around 2001. People may use to help with disability related symptoms, so employers might receive accommodation requests from people who want to use medical or require to use medical marijuana. So, it is good to keep in mind not all types or dosages of medical marijuana will cause impairment. So, for safety sensitive positions, looking at whether medical marijuana use will cause impairment that will create health and safety risks, will be a consideration and if it does then employers have to see if they can take steps to reduce the risk somehow, so the person can perform the essential job duties. If the risk can't be reduced it may constitute undue hardship based on health and safety to accommodate somebody in their original position. That's not the end of duty to accommodate, other next best solutions would need to be explored such as the person doing alternative work.

>> Okay just scrolling down to the questions here. Here is one yes, how much information can the employer know about a person's addiction?

>>Anya: Okay so what we have said is that a positive test will trigger the duty to inquire and to whether the person has a possible disability and see what their related restrictions and limitations are and what accommodations they might need. So, the employer would know the results, the test results, right. So, if somebody has tested positive for a substance that's banned under their policy. If an employee agrees to be assessed then the employer would know that the person has a disability and they'll also know their restrictions and their limitations and any potential accommodation they might need. However, an employers generally not entitled to know a person's private information, such as cause of disability, symptoms or diagnosis. And limited circumstances more information may be needed because it related specifics to the accommodation that's being requested or that's needed or the person needs are complex, challenging or unclear. These cases employers can request more information from the person up to and including diagnosis. But the employer would have to clearly show why this information is necessary and to only ask for information that's reasonably related to the accommodation request and the person's restrictions and limitations. At the end of the day, even if the employer knows the person has tested positive at a certain threshold for something that's been banned under the policy and they need time off to attend, you know, to attend treatment for example they are generally not entitled to

know, for example, the person has a cocaine addiction and attends narcotics anonymous meetings. Any medical information of a private nature should be kept away from the person's personnel file.

>> Okay let's just scroll down and here is a question on an employee's fluids, collecting of fluids. Why isn't it an obvious violation of human rights to do mandatory collection of an employee's fluids or breath that could reveal disability.

>>Anya: Uh-huh, yeah, so you know for many people it may sound intrusive to do these kinds of tests, et cetera. And certainly, there is lots of claims around, around where does that line fall between health and safety and protecting employee's privacy so it is not automatically discriminatory based on employee's disability to collect bodily fluids or breath. It does raise privacy concerns for employees with disabilities and also people without disabilities. So, the reason for these kinds of programs is generally to detect people who pose a health and safety risk. And safety sensitive jobs because they are impaired by drugs or alcohol. It could be that both people with addictions and people without addictions may fall into that category. Testing positive for any kind of substance doesn't constitute proof that if the person has an addiction. One can't assume just because a drug and alcohol testing policy is in place it infringes people's right to be free from discrimination based on person's disability or perceived disability. The case law has told us the effect of the policy has to be examined in each case.

>> Okay we have a question here, on refusing to be assessed. How do employers deal with refusals by an employee to be assessed by a substance use disorder expert or refusing offers of accommodation or refusing to comply with conditions when returning to work after treatment.

>> So this is a really good question and actually if you take a look at our website we have a question and answer, an FAQ section, this is dealt with there so you might find that to be very helpful. What happens if somebody does refuse? So maybe what I'll do is I'll just start with the refusal to be assessed by a substance abuse disorder expert. So, if somebody tested positive and there has been an offer of the assessment but the person doesn't want to be assessed so what does the employer do under those circumstances? In our policy we have been very clear that nobody can be made to attend medical examination, failing to respond to reasonable requests may delay accommodation until the information is provided. And it may ultimately frustrate the accommodation process, so an employer may not know how they can potentially accommodate somebody who they may believe has an addiction, that's preventing them from doing their work without, without further information. If there are legitimate reasons to be concerned that somebody may have an addiction and it is preventing them from doing their job duties they refuse to attend an assessment to determine what their needs are, employees would probably have to use progressive performance management and aside repeated offers of accommodations that need to take place to acknowledge that. It may be very difficult for somebody to come forward and identify they have an addiction or have a disability and need support. But at the same time there is also an obligation on the part of the employer to be able to manage that performance.

>> Yeah we have a question on paying for treatment. So, does an organization have a responsibility to pay for someone's treatment?

>>Anya: Well employers are required to provide the support that the person needs to attend treatment, if that's what they need. And generally employers are required to bear the costs of accommodation unless it causes undue hardship. However, human rights law hasn't really decided whether this would

include the cost of treatment such as therapy, medication that a person needs to be able to do their essential job duties. So many organizations, as part of the benefits they offer to employees will provide access to an Employee Assistance Program and some partial funding for treatment programs.

>> Okay a question on continuing accommodation. Does the employer have to continue to accommodate someone with a drug or alcohol addiction if they relapse over and over again?

>> Anya: That's a really good question and I think that a lot of employers out there who are wondering, okay, what are the limits here on duty to accommodate. And I think that it is important to recognise that many people have disabilities, including people potentially with addictions that may be chronic in nature and that many people will need time off or accommodation at some point in their careers when they experience symptoms of disability and there may be periods of wellness and then periods of disability again. People have with drugs, addiction to drugs or alcohol the same right to be accommodated as people with other disabilities. The limit to accommodation is undue hardship, which the code tells us amounts to really two things. Excessive costs or significant health and safety risks. However, the policy does recognise that there are other very limited circumstances where an accommodation that wouldn't cause undue hardship would still not be required because either we would, either fundamentally change the nature of the job for the employment or still didn't allow the person to fulfill duties or requirements of the job. So, this, this could apply to situations where the employer has tried many times to accommodate the person, but even after these attempts and the person has long absences, the person can't come back to work in the foreseeable future. So, at some point employer's duty to accommodate will come to an end. I do want to emphasize that these are likely rare circumstances and the employers should not jump to this conclusion right away. It still has an obligation to meet procedural duty to accommodate. That is looking at issues and solutions on a case by case basis and seeking out next best solutions, et cetera.

>> Yeah you are just hearing some silence right now because we are just going through the questions and we have a lot of them. So just bear with us, thank you, just hold on.

>> Okay we have a question from Art, if Ontario based employee who travels to US is requested to take a drug test there as a result of motor, I guess motor vehicle accident or act, is it discriminatory in Ontario?

>> Anya: Well, Art that's a great question, actually art of the jurisdiction of our policy because truck drivers that go to the US or across Provinces would fall under the Canadian human rights act, has been case law that went to Canadian Human rights Tribunal, Department of Transportation requirements for drug testing, et cetera, that were imposed on Canadian truck drivers or bus drivers were thought to be a modified requirement. However, the employer still had a duty to accommodate that person if the person has an addiction in Ontario. So hopefully that responds to your question, also a related question that sometimes there are third party requests like client requests, et cetera, to do drug and alcohol testing. So, a customer request to put drug and alcohol testing in place and just because there is a third-party requirement to put it in place doesn't mean it is an automatically modified requirement. So, the organization would still have to show that it would have to go through that three-step test to determine, to illustrate it is a bona fide requirement. So just having somebody else telling you have to put testing in place, that's a requirement, doesn't automatically make it non-discriminatory.

>> Okay another question, can employers in non-safety sensitive workplaces set up drug and alcohol testing policies?

>>Anya: So, I imagine that maybe a lot of people who are listening are potentially not employers in safety sensitive environments or don't have safety sensitive positions, good question, could you set up a drug and alcohol testing policy, if purpose was productivity or wellness or reducing absenteeism, that kind of thing. We had said it is not likely so the case law that exists in Ontario and in Canada, the Human Rights and Arbitration case law deals really with drug and alcohol testing in the context of safety sensitive positions and dangerous environments. So, employers of course need to consider the code but they also have to consider employer's rights to privacy. Because of the potential to intrude on privacy to it can, drug and alcohol testing can only be justified in very narrow circumstances where there is health and safety concerns, it is dangerous work environments which people are doing safety sensitive work. So, drug and alcohol testing that has no demonstrated relationship to safety, job safety and performance, where there has been no evidence of enhanced safety risks in a workplace has found to violate employee's rights. And that focusing on these other kinds of things, other requirements such as performance, et cetera, or productivity, et cetera, it would be difficult to justify as bona fide requirements. If these policies lead to people being fired or dismissed, et cetera, lead to negative consequences. Because they may be actually used to single out people who are thought to have addictions and that in itself can be *prima facie* discriminatory. There may be lots of other ways to be able to justify or lots of other ways to be able to determine somebody's performance or increase performance as opposed to method of drug and alcohol testing.

>> Okay a question on safety sensitive positions. Can employers ask employees in safety sensitive positions to disclose if they are impaired and can't do their essential duties.

>>Anya: This is a really good question as well, I think this also comes up in terms of medical marijuana. We don't have a lot of, we don't have a position on medical marijuana, but this is a good question because there could be lots of things that are impairing people in safety sensitive positions where they may be unsafe to work in that position. They may be, such as extreme fatigue, for example, or stress, extreme stress or other kinds of, other kinds of issues, other disabled related symptoms not only just drug and alcohol use, right. So, for people in safety sensitive position it is, I would say it is reasonable for employers to know if employees are not fit to do their essential duties and also reasonable for them to expect their employees to do it in a safe manner. So, they may have, they may have policies in place to ask people to disclose, disclose whether or not they are impaired to inform them if they are impaired. That is they can't do their job safely because there is some kind of loss in body function, et cetera. So, where these kinds of things are preventing somebody from doing essential job duties of the job they can ask the person whether they are impaired or have particular restrictions or et cetera. Where these impairments and restrictions relate to a disability, of course the employer has a duty to accommodate these by finding solutions such as modified duties. But again, the employer is not generally entitled to the person agencies private medical information. One thing an employer should really keep in mind if they do have these disclosure policies in place, there is real potential negative effects that these policies can have on people with disabilities. So, somebody with an addiction may not be able to recognise that they have an addiction. They may not be able to disclose their disability because of denial that's associated with it, with the disability. There may be severe stigma that is surrounding addiction that is also making it very difficult to recognise that they even have a disability. So, our policy on drug and alcohol testing says that in these circumstances, where people are not able to recognise that they have

an addiction, policies that would discipline them for not coming forward and disclosing that they have an addiction may be found to be discriminatory.

>> Okay question on the OHRC policy, does the OHRC policy take a position on type of treatment a person with a substance addiction should receive?

>>Anya: No. Seeking treatment is a very, very personal issue and what's required is, will be based on a person's needs. So, one approach that might work for one person will not work for somebody else and it is really up to the person and their own support, medical support and personal professionals. Two types of approaches that I'm aware of are harm reduction approaches. And the employers are really, their duty is to provide the support necessary such as time off for the person to go to treatment. So, or whether it is a rehabilitation program or not, if treatment is what the person needs, there could be other things that the person needs. Unless these things were to cause undue hardship for the employer.

>> We got several more questions on random testing. Let's see, what does the additional requirement of, were the employers able to demonstrate risk in the workplace mean for employer that wants to do random testing. What might an employer have to know beyond essential duties of the position of the position involving safety sensitive work to justify random testing.

>> All right so um as part of showing that random testing is justified as a bona fide requirement the employer may be expected to show that there are the kinds of risks inherent in the workplace. So, like that work is highly dangerous. Or the kinds of consequences that may happen as a result of accidents or mistakes. And the employer may also be required to show there is a problem with drugs or alcohol addiction in the workplace to justify random testing or other types of testing. I can tell you this was the case in one arbitration case, a case about pre-access testing and because the organization couldn't show there was a general problem with drug or alcohol use in the workplace, this kind of testing, the pre-access testing was found not to be a bona fide requirement. This requirement comes out of I guess a relatively recent in 2013 Supreme Court case involving urban ban paper, the court held that while the dangerousness of the workplace is highly relevant, really there is evidence of enhanced safety risk such as evidence of general problem of substance abuse in the workplace is also required. This case was decided in context of unionized environment but it did state, the court did state even a non-unionized workplace an employer must justify intrusion on policy resulting from random testing by reference to the particular risks in the particular workplace. So, we have taken the position that this requirement then applies to non-unionized settings.

>> We have a question on measuring impairment. Can drug and alcohol test measure impairment?

>>Anya: So, the focus of drug and alcohol testing should be determined the actual impairment of an employee's ability to perform or fulfill the essential duties of the job at the time of the test. So, alcohol testing by Breathalyzer is, seems to be barely minimally intrusive compared to say blood tests. Also, highly accurate measure of both the levels of what people are consuming and actual impairment. So, the use of Breathalyzers, alcohol Breathalyzers has found to be permissible under the code and narrow circumstances. So, for drug testing it is more difficult to measure impairment through drug testing. So even though there's methods that are better than others, some are better than others, nothing exactly can map on to impairment and there is also some issues around what constitutes impairment, what level are people, what's the threshold and level where people are impaired? So, those issues are still

being worked out although the science in this area is rapidly improving. So, your analysis can detect past use but it can't detect how much of the drug was used or whether the person is currently impaired and there is still limits to detecting impairment through other kinds of testing, drug testing as well. So, what we have done in our policy, instead of saying this kind of drug testing is in or out or whatever in terms of random testing, what we have done is take a criteria-based approach and you can see that if a drug test is able to meet certain criteria it is more likely to be defencable more likely to be defencable under the code as part of the justification for random testing.

>> Okay we have time for just one last short question. How many employers do drug and alcohol testing?

>>Anya: So, I don't have the recent stats but there is a 2003 survey of 100 employers in Canada and the figures varied wildly between the Provinces. So, it looked like, at that time, 25% of organizations of this, 25% I guess 25 of these 100 employers were doing testing in Alberta and 4.6 were doing in Ontario. Overall the range was about 10.3%.

>> Okay, well I guess that's it, all we have time for today. Thanks Anya, thank you Dora for presenting this topic today, very timely and quite interesting to hear what the rules are. So, thanks again. For those of you who attended today, thank you for joining us. Your feedback is important to us, please take a few minutes to complete this survey that will be sent today. Recertification code for those individuals who require it will be provided as the last question of the survey. And finally, if you have any PD questions don't hesitate to measure hrpa.ca, thanks everyone, have a wonderful day and take care of yourselves. Bye-bye.

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