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# *Navigating the Legal Aspects of Workplace Health & Safety*

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Canadian Manufacturers & Exporters

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# Agenda

- Drug & Alcohol Testing
  - Balancing competing legal considerations
  - When is testing permitted?
- Accommodation and Return to Work
  - Principles of accommodation
  - Obligations of workplace parties
- Workplace Harassment
  - Bill 132 amendments

# Drug and Alcohol Testing



# Competing Legal Considerations

- Employer has an obligation to protect safety of employees, clients/customers and public
- Policies requiring testing:
  - May breach *Human Rights Code*
    - Concern re: discrimination
  - May violate collective agreement rights
    - Concern re: privacy

# Competing Legal Considerations

## ■ Human Rights Considerations:

- *Code* prohibits discrimination on basis of disability and perceived disability
- Drug and alcohol addiction is a disability
- *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*
  - Now called “Substance Use Disorders”
  - Measured on continuum: mild, moderate, severe

# Competing Legal Considerations

- Privacy Considerations:
  - Highly personal information
  - Bodily integrity
  - Arbitrators' "balancing approach":
    - Privacy vs. safety
  - Tort of intrusion upon seclusion



# Safety Sensitive Workplaces/Positions

- What does ‘safety sensitive’ mean?
  - Generally, risk or harm to self or others (or other serious consequences) if impaired
  - Hazardous environment
  - Remote location
  - Limited direct supervision
- Position can be safety sensitive even if the workplace, as a whole, is not

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# Is Consent Required?

- Employee consent required
- Form of consent
  - Collective agreement
  - Employment contract
  - Workplace policy
- Consent does *not* eliminate liability (e.g. human rights complaint)



# When is Testing Permissible?



# Pre-Employment Testing

- Non-unionized employees:
  - Human rights considerations paramount
  - Is testing *prima facie* discriminatory?
    - Some recognition of connection to managing safety risk in safety sensitive workplace/position
    - Emphasis on effect of policy in each individual case rather than on policy itself
  - Critical to incorporate into policy individual assessment and accommodation

# Pre-Employment Testing

- Unionized employees:
  - Generally, not permissible, even for safety sensitive workplace/position
    - Results only indicate past use
    - Cannot predict future job performance
    - Therefore utility of testing does not outweigh privacy interest

# Pre-Employment Testing

- Testing may be permissible where there is reasonable cause to suspect substance abuse
  - Employer can demonstrate – through direct evidence – existence of substance abuse problem at workplace
- If candidate fails test:
  - Opportunity for further medical assessment
  - Be prepared to accommodate if addiction

# Random Testing

- Typically not permitted for unionized employees
- *Irving Pulp and Paper* (2013 SCC)
  - Employer introduced *random* alcohol testing:
    - Only for “safety sensitive positions”
    - 10% of employees were randomly tested
    - A positive test would result in significant discipline, including discharge
    - Failure to submit = immediate discharge

# Random Testing

- SCC upheld arbitrator's award:
  - Testing was invalid use of management rights
  - Insufficient evidence of a workplace problem of alcohol abuse:
    - 1991-2006: 8 documented incidents re: consumption/impairment; no accidents/injuries
    - Dangerousness of a workplace is not an “automatic justification”

# Random Testing

- Limitations of testing technology present additional hurdles to random drug testing:
  - Urine test does not detect current or future impairment or quantity of drug consumed
  - Saliva test does not yield immediate, reliable results
- Random testing cannot detect imminent safety risk and therefore cannot outweigh privacy interest

# Random Testing

- Non-unionized employees:

- *Entrop v. Imperial Oil* (2000 ONCA)

- Permitted – random alcohol testing for employees in highly safety sensitive positions subject to minimal supervision

- Not permitted – random drug testing due to limitations of testing technology

- Effect of test result including individual assessment and accommodation is critical



# Return to Work Testing

- Typically permitted for safety sensitive position
- May be permitted for non-safety sensitive position
- Rehabilitative testing requires balance between:
  - Privacy/human rights
  - Safety



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# Post-Incident Testing

- Testing is generally permissible as part of a larger investigation into a workplace accident or “near miss”
- Needs to be some reasonable basis upon which the employer believes impairment may have been a factor in the accident

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# Reasonable Cause Testing

- Similarly, where employee's actions or appearance in the workplace suggest impairment (e.g. stumbling, slurred speech, smell of alcohol) testing may be permissible
- For both post-incident and reasonable cause testing, there should be a broader workplace policy in place setting out the circumstances in which testing may occur

# Drug and Alcohol Testing Methods

| Method        | Test Matter       | Current Impairment? | Limitations  |
|---------------|-------------------|---------------------|--|
| Breathalyzer  | Alcohol           | Yes                 | Doesn't test for drugs   |
| Urinalysis    | Drugs and Alcohol | No                  | Tests recent use, false positives, delay                             |
| Hair analysis | Drugs             | No                  | Tests use over longer period, cultural differences, expensive, delay |
| Saliva        | Drugs and Alcohol | <i>Maybe</i>        | Delay, possibility of false positives and false negatives*           |
| Blood         | Drugs and Alcohol | Yes                 | Short detection period, invasive                                     |

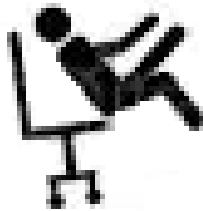
\* *Imperial Oil Ltd. V. CEP, Local 900 Ont. C.A.*

# Accommodation and Return to Work



# Principles of Accommodation

Principles of accommodation are the same if disability is ...



work-related (WSIB)

or

non-work-related



# Principles of Accommodation

## ■ *Human Rights Code:*

Duty to accommodate to the point of undue hardship

■ Workplace and non-workplace disabilities

## ■ *Workplace Safety and Insurance Act:*

Workplace injuries/illnesses/disabilities *only*

Duty to cooperate in work reintegration

Duty to offer re-employment

# Principles of Accommodation

- Duty to cooperate with WSIB lasts until:
  - Loss of earnings benefits can no longer be reviewed by the WSIB (usually 72 months after the date of injury)
  - Employment ceases (resignation or termination for unrelated reasons)
  - WSIB is satisfied no suitable work exists



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# Principles of Accommodation

- Discrimination on the basis of any protected ground is prohibited by the *Human Rights Code* (the “*Code*”)
- Protected grounds include:
  - Religion
  - Family status
  - Gender expression & identity
  - **Disability**
  - Etc.

# Principles of Accommodation

- Direct:

- Differential treatment based on any of the grounds listed in the Code

- Indirect:

- The application of a rule adversely impacts employee

- If *prima facie* discrimination is found, duty to accommodate arises (to point of undue hardship)

# Principles of Accommodation

## ■ Undue hardship:

- Very high standard to meet

  - Employer bears onus

- Case-by-case analysis

- Includes:

  - Intolerable financial costs

  - Serious disruption to business

  - Health & safety risks

- Evidence must be objective, real & direct

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# Principles of Accommodation

- May require changes to workplace or job functions to overcome limitations & allow the performance of job functions
- Highly individualized, tailored to the employee's specific needs
- Duty is substantive and procedural

# Principles of Accommodation

- Examples of accommodation include:
  - Modification of existing job duties
  - Assignment to another job (vacant position)
  - Bundling of tasks to create new job:
    - Grouping tasks employee capable of performing
  - Modification of workplace
  - Provision of equipment & assistive devices

# Principles of Accommodation

- What an employer need not do:
  - ❑ Create a job consisting of duties that were previously non-existent & not required by employer
  - ❑ Ask other employees to assume unacceptable health & safety risks
  - ❑ Accept an employee's failure to participate in his/her own accommodation or improve his/her own abilities, where possible

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# Principles of Accommodation

## ■ Steps:

1. Identify the need for accommodation
2. Consult appropriate workplace parties
3. Make an informed decision
4. Communicate decision
5. Implement & monitor decision closely

# Obligations of Workplace Parties

- All workplace parties have a role to play in the accommodation process, including:
  - The employer
  - The employee
  - Co-workers
  - The union (if applicable)
- Obligation to accommodate ultimately rests with the employer



# Obligations of Workplace Parties

## ■ Employer:

- Determine if employee's own job can be appropriately modified:

- Determine 'core functions' and whether employee can perform, with or without accommodation

- Look for available work, the core functions of which employee can perform with or without accommodation

# Obligations of Workplace Parties

## ■ Employer:

### □ Obligation is ongoing:

- If accommodated work not available now, document ongoing attempts
- Keep in touch with employee to determine changes in restrictions

### □ Process can be as important as outcome:

- Document all steps to satisfy Tribunal

# Obligations of Workplace Parties

## ■ Employee:

- Alert employer to the need for accommodation (in most cases)
- Participate in the accommodation process
  - But not responsible for finding solution
- Attempt modified work except where to do so puts employee at risk

# Obligations of Workplace Parties

## ■ Employee:

- Provide medical information
- Attend at doctor's to have subsequent questions answered
- Accept reasonable accommodation that keeps him/her closest to pre-accommodate rate:
  - Employee does not get to 'pick & choose' work he/she desires

# Obligations of Workplace Parties

## ■ Co-workers:

- May have to carry greater share of the ‘load’ if certain tasks must be removed from employee’s day to day job

## ■ Union (if applicable):

- Participate in accommodation process
  - Potentially including agreement to amend application of certain collective agreement provisions (*e.g.* job posting)

# Additional Considerations for Unionized Employers

- Collective agreement obligations:
  - Seniority rights
  - Shift schedules
  - Job assignments
  - Job postings
- Accommodation duties prevail over the collective agreement (but not to the point of displacing another worker)

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# Medical Information

- Employer is entitled to sufficient medical information, including:
  - Detailed information about limitations and restrictions
  - Prognosis for the future
  - Regular status updates
- Not entitled to diagnosis (not relevant):
  - Exception for cases of mental illness?

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# Medical Information

- If the doctor/employee is unable or unwilling to provide necessary information:
  - ❑ Consider offering access to a more suitable provider
  - ❑ Consider having company/third party doctor evaluate information or discuss situation with employee's doctor
  - ❑ Employee must consent



# Return to Work

- When employee returning from medical leave, employer entitled to sufficient medical information to outline limitations (including expected duration) & confirm ability to safely return to work:
  - “John can return to work on Monday”
    - May not be sufficient
  - Dependent upon duration of & reason for absence

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# Return to Work

- A written return to work plan is required under the *Accessibility for Ontarians with Disabilities Act* for organizations with 50 or more employees
- Should include:
  - Position
  - Modifications and/or restrictions
  - Hours of work

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# Return to Work

- Signed off by all parties
- Frequent ‘check ups’ to ensure compliance or amend accordingly
  - Discipline for non-compliance may be appropriate
- Ensure employee raises any concerns with modified work or compliance with plan
- Should be reviewed regularly following return to work

# Return to Work

- Information regarding accommodation on ‘need to know’ basis:
  - Employee’s supervisor likely needs to know more than co-workers
  - In appropriate situations ask employee what may be shared with co-workers:
    - Duration of modified work? General nature of restrictions?

# Workplace Harassment and Violence



**IT'S NEVER OKAY:**  
AN ACTION PLAN  
TO STOP SEXUAL  
VIOLENCE AND  
HARASSMENT

# Bill 132 – New Employer Obligations

- New obligations following September 8, 2016
- Requires an employer to update ‘Bill 168’ Workplace Violence and Harassment Policies and Programs
- Definition of ‘workplace harassment’ amended to include reference to ‘workplace sexual harassment’ (now also defined)

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# Workplace Sexual Harassment

- ‘workplace sexual harassment’ means,
  - engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

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# Workplace Sexual Harassment

- making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.



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# “Reasonable Manager” Exemption

- A reasonable action taken by an employer or supervisor relating to the management and direction of a worker or the workplace is not ‘workplace harassment’
- Consider incorporating into your policy

# Changes to H&S Policies

- Identify to whom someone complains if alleged perpetrator is their supervisor/manager
- Set out how investigation will be conducted
- Specify that information gathered in investigation will be kept as confidential as possible
- Set out how complainant and respondent will be informed of results and any corrective action

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# In Addition...

- Employer must ensure ‘appropriate’ investigation
  - Who will perform investigation?
  - Must be, and be perceived to be, unbiased
  - Should be trained
  - Needs to reach conclusion and be able to show why
- MOL has ability to order employer to retain appropriate investigator at employer’s expense

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# In Addition...

- Program is to be developed in consultation with JHSC (where applicable)
  - No obligation to report results of harassment investigation to JHSC
- Must review the policy and program at least annually

# Harassment Investigations

- Bill 132 Mandates specific requirements for workplace harassment policy and program
  - Employer must investigate a workplace harassment complaint in a manner “appropriate in the circumstances”





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