



**Northwest Territories
Human Rights Commission**

Alcohol and Drug Testing: A Guide for Employers

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Alcohol and Drug Testing A Guide for Employers

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Introduction

These guidelines are for NWT employers who want to know more about alcohol and drug testing and the NWT *Human Rights Act*. The information in this document is intended to help you:

- Understand the link between alcohol and drug testing and human rights law
- Understand under what circumstances alcohol and drug testing is acceptable
- Consider alternative ways to create and maintain safe workplaces

The situations or case studies in these guidelines are examples. These guidelines do not replace legal advice. Employers should consult with a lawyer about the legal requirements for alcohol and drug testing.

The guidelines do not replace the NWT *Human Rights Act*. The *Act* can be found at www.nwthumanrights.ca.

These guidelines draw on existing materials developed by the Ontario, New Brunswick and Canadian Human Rights Commissions. The NWT Human Rights Commission appreciates the support of these Commissions in developing its own guidelines.

The Connection with Human Rights

Alcohol and drug testing is considered a discriminatory practice under human rights law.

The NWT *Human Rights Act* prohibits discrimination at work on the basis of disability. Alcohol and drug dependency are considered disabilities. People are protected from discrimination if they:

- Have or have had a disability
- Are believed to have or have had a disability
- Have or are believed to have a predisposition to developing a disability

The *Act* prohibits discrimination on the basis of disability in all aspects of employment:

- **Hiring:** Section 8 of the *Act* prohibits pre-employment inquiries that are based on a prohibited ground of discrimination. Pre-employment drug and alcohol testing are prohibited by Section 8 of the *Act*, unless an employer can show that there is a *bona fide occupational requirement* (BFOR) for the testing. BFORs are discussed in more detail, below.
- **Terms and conditions of employment:** Section 7 of the *Act* prohibits discrimination in the terms and conditions of employment. Treating someone negatively or differently because of a perception that they will use drugs or alcohol at work is considered discrimination. There are many examples of non-discriminatory workplace testing for alcohol and drug use, including testing in safety-sensitive positions, random testing, post-incident testing, and reasonable cause testing. Each of these is examined in further detail below.
- **Termination of employment:** Dismissing an employee for testing positive can be considered discrimination under the *Act*, unless the employer can show that it made efforts to accommodate the employee to the point of undue hardship. The duty to accommodate is discussed in more detail below.

A complaint based on a perceived disability might arise if an employer treats an employee as if they have an alcohol or drug dependency. For example, George is an occasional marijuana smoker. After he tests positive, his boss reassigns him to a less risky lower paying job, treating him as a substance abuser.

The issue in this case is not whether George is a dependent or casual drug user, but that George's employer treats him negatively as a result of the test.

Alcohol and drug testing can have serious implications for employees and job candidates. Testing is often used to deny employment, label a person, or impose employment conditions. Even when a testing program includes rehabilitation, it can be considered discriminatory because it could negatively affect employment opportunities.

The legal limits of alcohol and drug testing in the workplace are evolving. Human rights tribunals, courts and other bodies review each case and consider the particular facts. The circumstances of each employer will be influenced by the nature of its operations, the nature of the work being carried out, and on the individual circumstances of the employee affected.

Legal findings about alcohol and drug testing include:

- Alcohol and drug testing is discriminatory
- Firing someone with a positive test does not adequately consider the individual capabilities of the employee and does not meet the legal requirement to accommodate
- There is a critical difference between testing for alcohol and testing for drugs

What is a bona fide occupational requirement?

Employers that choose to test for drugs and alcohol must be able show that alcohol and drug testing is a *bona fide* occupational requirement (BFOR).

Discrimination may be allowed if an employer can show that a job requires a discriminatory standard, policy or rule. Alcohol and drug testing is accepted under certain circumstances as a BFOR where impairment could harm the employee, others or the environment.

Employers are required to show that the testing policy is necessary and that its testing methods are reliable. Drug or alcohol use discovered by the testing must be linked to poor or dangerous job performance.

To prove that alcohol and drug testing is a *BFOR* an employer must be able to answer “yes” to the following three questions:

1. Is there an objective basis for believing that job performance would be impaired by alcohol or drug dependency? In other words, is the testing connected to job performance?
2. Is the testing done in an honest and good faith belief that it is necessary?
3. Is testing the least discriminatory way to ensure that employees are not impaired on the job? Are employees accommodated up to the point of undue hardship if they test positive? To learn more about the duty to accommodate please see the Commission publication, “Duty to Accommodate: A guide for employers.”

Canadian trucking and bus companies that do business in the United States have shown that alcohol and drug testing is a BFOR for their drivers, because American regulations require alcohol and drug testing programs.

Drug and alcohol testing has been accepted as a BFOR for some safety-sensitive positions, such as commercial transportation and heavy equipment operating. More information is provided about criteria for determining “safety-sensitive” below.

Differences between alcohol and drug testing

Drug and alcohol testing should be limited to identifying if an employee is impaired while on the job. It should not be used to simply identify the presence of drugs or alcohol in the body.

Breathalyzers accurately measure both the consumption of alcohol and current impairment. Breathalyzers are minimally intrusive. The same is not true of drug tests. Their legitimate use is more limited.

Drug tests available today can only identify if there are drugs in the body. Drugs can stay in the body as long as seven days after the person has consumed them – long after the effects of the drugs have worn off. Urine tests to determine the presence of drugs are also more invasive than breathalyzers.

Drug tests do not measure impairment, how much was used or when it was used. Drug testing is not a reliable way to determine if a person is able to perform essential job requirements.

Drug testing rarely passes the test for BFOR. Where the absence of drugs is a BFOR, drug testing should be part of a larger drug abuse evaluation process. Drug testing can be used appropriately only in the context of safety sensitive jobs in the following situations:

- When there is reasonable cause
- Immediately following an accident
- When an employee has disclosed a dependency
- When an employee is reintegrating into the workplace after a rehabilitation program

When faced with a human rights complaint, the employer has the burden of proving that there is BFOR for drug alcohol testing.

Pre-employment Testing

Alcohol and drug testing is a form of medical examination. Employers can ensure that job applicants are considered on their merits by keeping the selection process free from unrelated medical questions and testing. A pre-employment evaluation should be limited to determining a person's ability to perform the essential duties of the job.

Since drug testing cannot measure actual impairment, pre-employment drug testing should only be conducted in exceptional circumstances. Testing for alcohol can only assess impairment before the person is actually on the job. A positive test cannot predict if an applicant will be impaired while at work.

Pre-employment testing of employees in non-safety sensitive positions is prohibited. Testing that is a BFOR should only be carried out after an employer has made a written conditional offer of employment. Employers should tell job applicants of the requirement for testing.

Employers recruiting for safety-sensitive positions may ask job candidates to disclose present and past substance abuse problems. It is not acceptable to withdraw job offers without considering the duty to accommodate. If the applicant requests accommodation, the employer is required to provide individual accommodation unless it is impossible without causing undue hardship.

Janice applies for a job classified as safety-sensitive. When asked, she discloses that she has recently recovered from an alcohol abuse problem. The company informs her that there will be a mandatory alcohol test as a condition of employment. The company says the testing is due to the safety-sensitive nature of the job and the applicant's past alcohol abuse problem. Janice agrees and signs the conditional agreement.

Employment Testing

There are limited situations where alcohol and drug testing are acceptable in the workplace. Where it is used, employers should always notify workers that testing is a condition of employment. Testing should be only one part of a broader substance abuse evaluation process.

Safety-sensitive positions

Alcohol and drug testing is generally only permissible for safety-sensitive positions. In a safety sensitive position incapacity due to alcohol or drug impairment could result in direct or significant risk of injury to the employee, to others or to the environment.

There is a difference between a safety-sensitive industry and a safety-sensitive position. Some industries, such as forestry, have been accepted to be safety-sensitive. They have been allowed by courts to implement alcohol and drug testing policies. That does not mean the policy should apply to all employees. There is still a requirement to show that each employee required to submit to testing occupies a safety-sensitive position.

Any drug or alcohol testing policy should clearly identify safety-sensitive positions. Employers could consider the following factors to decide whether to classify a job as safety sensitive:

- The employee's work
- The nature of any equipment operated by the employee
- The nature of any materials handled by the employee
- The presence and role of supervisors
- The industry context

Testing before transferring an employee to a safety-sensitive position may be permissible. The alcohol and drug test should not by itself decide if the employee is transferred but be part of a larger assessment of fitness for the job.

Reasonable cause

Alcohol and drug testing may be acceptable in specific situations where an employer has reasonable grounds to believe an employee is impaired at work. For example, an employer might believe an employee is impaired if an employee reports for work smelling of alcohol and behaving unusually.

Courts have yet to rule on reasonable cause testing of employees who are not in safety-sensitive positions. Employers should keep in mind the need to meet the test for a BFOR.

Here are some situations where courts have agreed that an employer may have reasonable cause to request an alcohol or drug test:

- When an employer believes an employee is using alcohol and drugs during the workday.¹
- When an employer believes an employee is impaired while on duty or on call.²
- When an employee admits nightly use of marijuana to an occupational health and safety nurse.³
- When an employee is charged with possession and cultivation of substantial amounts of marijuana. The employee admits the marijuana was for personal use. The quantity suggests more than casual use causing suspicion of increased risk of impairment.⁴
- When a local newspaper reports narcotics trafficking charges against an employee in a safety-sensitive position.⁵

Post-incident testing

An employer may legitimately want to find out if an employee consumed substances that may have contributed to a workplace accident. Testing may be appropriate if there is reasonable cause or if a preliminary investigation leaves questions about whether impairment may have been a factor. A preliminary investigation might include getting statements from all individuals involved in the incident.

Before asking for an alcohol or drug test, employers might consider:

- Is there a connection between the incident and the employee's job duties?
- Is there a need to investigate whether the employee's actions or omissions contributed to the incident?
- Will the test help in the investigation by ruling out impairment as a possible cause or contributing factor?

Post-incident testing should happen as soon as practical after an incident. Courts have ruled that a demand for a drug test is unreasonable when an employer has not investigated enough to rule out environmental and mechanical causes for an incident. Blanket policies that require alcohol and drug testing for every accident or incident are not acceptable.

Drug testing cannot measure the level of impairment at the time of an accident, but is generally acceptable if it is part of a larger assessment of the incident. Drug testing results

may be relevant information when employers consider discipline, new safety measures or additional caution.

Dave is a heavy-duty equipment operator at a road construction site. One day Dave accidentally backs his loader into a power pole. His supervisor notices that Dave is red-faced and disoriented after the accident. The supervisor performs a breathalyzer almost immediately following the accident. Dave's alcohol levels are above the company's safety standard. Dave is suspended. His employer also offers Dave a paid space in a local alcohol treatment program.

Random testing

Random **alcohol** testing for employees in safety-sensitive positions is generally acceptable. Court decisions have said that random **drug** testing is not acceptable except in exceptional situations or to follow up on rehabilitation. Drug testing will have to show a current state of impairment in order for random drug testing to be considered acceptable for use on workers in safety-sensitive positions.

Employers have a duty to accommodate employees who test positive during a random test.

The focus of testing is determining a person's ability to perform the essential duties of their job. Given that, zero tolerance for alcohol no matter when consumed will generally be considered unnecessarily strict.

In one Canadian case an employer required a bus driver to have a random drug test after he admitted to using small amounts of marijuana from time to time. There was no other reason for the mandatory drug test, such as appearing impaired at work. The ruling said that employers cannot insist that employees never consume drugs on their own time away from work.⁶

Mandatory self-disclosure

Employers are allowed to ask employees in safety-sensitive positions to disclose past and current alcohol and drug problems. Human rights law says that a policy about mandatory disclosure should have a time limit. The period of six years is considered a reasonable time. After six years the risk of relapse is the same as the risk of anyone developing a substance abuse problem.

Generally, an employer must prove that disclosure is a BFOR before insisting on self-disclosure for employees in positions that are not safety-sensitive. Failure to disclose an alcohol or drug problem should not be grounds for dismissal as denial is a symptom of addiction.

Follow-up testing may be acceptable following disclosure of a current alcohol or drug abuse problem. It must be tailored to the individual circumstances and be part of a broader program of monitoring, rehabilitation and support.

On-the-job testing procedures

Employers should consider the following when developing an on-the-job testing policy:

- **Notify employees of testing.** All employees and job candidates should be aware of the circumstances under which testing may be required.
- **Handle test samples competently.** Qualified professionals should perform alcohol and drug testing. Results should be analyzed in a competent laboratory. Samples should be properly labeled and protected at all times.
- **Keep the health records confidential.** Health information should remain with the examining doctor. It should not be kept in employee personnel files.
- **Review results with employee.** Procedures should be in place for the examining doctor to review the results with the employee concerned.
- **Limit scope of testing.** Testing should not be used to reveal anything other than drug and/or alcohol use.
- **Double check positive results.** When a test is positive, it should be evaluated to find out if there is an explanation other than substance abuse. Employers may want to conduct a second test to confirm results before taking action.

What Happens When Someone Tests Positive?

When an employee tests positive, or admits to a drug or alcohol dependency, an employer is required to accommodate that employee to the point of undue hardship.

Dismissal, reassigning employees or other discipline should be based on impairment, not on an employee's use of alcohol or drugs in general. Broad policies about automatic loss of employment, reassignment, or inflexible reinstatement conditions are usually considered discriminatory. The duty to accommodate requires employers to consider the individual employee and circumstances.

The duty to accommodate

The duty to accommodate extends to all areas of employment including hiring, employment testing, on-the-job training, working conditions, transfers and promotions. An example of accommodation is referring an employee to a substance abuse professional or support so an employee can undergo treatment or a rehabilitation program.

An employer may be justified in temporarily removing an employee with an active or recent substance abuse problem from a safety-sensitive position. Automatic firing or reassignment is not acceptable. Follow-up testing may be a condition of continued employment where safety is of fundamental importance. If follow-up testing reveals continued alcohol or drug use, disciplinary action may be justified, including eventual dismissal.

An employee who requests assistance for an alcohol and drug problem cannot be disciplined for seeking help.

For more information on the duty to accommodate, please contact the Commission for a copy of "Duty to Accommodate: A guide for employers."

Undue hardship

The limit to the duty to accommodate is the point of undue hardship. To prove undue hardship an employer needs to show that the accommodation creates unmanageable workplace issues. An employer could argue that an accommodation creates undue hardship if it causes:

- unreasonable financial expense
- extreme interference in the operation of a business
- significant health and safety risk for the employee or others

In most cases, employers will not face undue hardship while supporting an employee to take a rehabilitation program. In some cases, courts have seen it as reasonable to hire a temporary worker to fill in for periods of up to 18 months.

It is not undue hardship if an employee tests positive and refuses treatment. The employer must demonstrate through progressive discipline that the employee has been warned and is unable to perform the essential requirements of their job.

Responsibilities of employees with alcohol or drug-related disabilities

Employees must be able to establish that they have been discriminated against to receive protection under the NWT *Human Rights Act*. In the case of alcohol and drug testing, an employee would have to prove they were discriminated against because of an actual disability or because they were perceived to have a disability.

Employees or job candidates should be willing to ask for accommodation if they have a dependency. They must cooperate in discussions that help an employer respond to an accommodation request. Employees and job candidates are expected to be reasonable in their requests and in considering proposals that effectively address their needs.

Jessica's supervisor speaks with her about alcohol treatment after she appears drunk at work. Jessica does not acknowledge that she has a problem and is unwilling to seek counseling at the employer's expense. The supervisor provides Jessica with a written warning and offer of counseling when she appears drunk again. Jessica refuses these offers. After another written warning, Jessica is fired.

Implications for Remote Work Sites

Human rights laws apply to remote work sites the same as to other employers. For example, an employer at a remote workplace has the same obligation to consider whether employees work in safety-sensitive positions to justify alcohol and drug testing. Employers should confirm that all positions are safety-sensitive before requiring all employees to submit to testing.

There are factors that make remote work sites unique. In some situations employees in safety-sensitive positions may have little or no supervision. Employers are responsible for worker safety 24 hours a day rather than just during work hours. Employees may also be distant from medical services. These factors could prompt company policies against any alcohol or drugs on site. There have not been any legal decisions that directly address such situations.

Employers at remote sites are limited like other employers to using tests to detect impairment on the job, rather than the presence of alcohol and drugs. Discipline, including firing, should be based on impairment, not an employee's general use of alcohol or drugs. Remote site employers are expected to accommodate employees who test positive up to undue hardship.

Alternatives to Alcohol and Drug Testing

Employers should consider less discriminatory and non-punitive alternatives to alcohol and drug testing. Employees should examine whether drug testing programs effectively reduce drug use, work accidents or work performance problems.

Employee impairment can occur from causes other than alcohol and drug use. Stress, fatigue, anxiety and personal problems can also jeopardize workplace safety. The following could be included in a comprehensive workplace health policy:

- **Employee assistance programs (EAPs).** EAPs help employees with substance abuse and other problems. EAPs usually take the form of off-site counseling services or referral services. They can also help employees deal with stress, personal problems, or other issues that can lead to substance dependencies.

- **Performance tests for safety-sensitive positions.** Thoughtful criteria and testing for job performance, particularly in safety-sensitive positions, can identify other risks as well as alcohol and drug issues.
- **Peer monitoring.** Positive peer monitoring encourages employees to come forward when they observe risky or potentially risky behaviour among fellow workers. Employers can emphasize the constructive and confidential nature of peer monitoring.
- **Supervisory reviews.** Employers can provide training and clear expectations to supervisors. Ensure they know the signs of impairment and the corrective actions to take in all situations.
- **Health promotion programs.** Awareness and education programs are a good way to prevent substance abuse issues in the workplace. Activities could include brochures, inserts in pay envelopes, videos, guest speakers and workshops. Employers can strengthen alcohol and drug-free attitudes by sharing accurate information, encouraging drug-free activities and by building life skills and drug refusal techniques. Ensure that interventions are appropriate for the people being addressed.

The administrative staff of a resort hotel found that some employees were suffering varying degrees of drug addiction. In response, the employer began a Drug Prevention Program. It involved contracting lecturers and addictions counsellors to run a compulsory weeklong workshop. The follow-up consisted of group support meetings for addictions offered on a permanent basis at employee request. The company found that the addiction problems decreased. At the same time, employee morale and productivity improved significantly.

Endnotes

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- ¹ *Hamilton Street Railway and A.T.U., Loc. 127 (2002)*
² *Canadian National Railway Co. v. C.A.W. Canada (2000)*
³ *Fluor Constructors Canada Ltd. v. I.B.E.W., Loc. 424 (2001)*
⁴ *Procor Sulphur Services and C.E.P., Loc. 57 (1999)*
⁵ *J.D. Irving v. C.E.P., Locs. 104 & 1309 (2002)*
⁶ *Hamilton Street Railway and A.T.U., Loc. 127 (2002)*

List of Useful Resources

Please note that links to websites referred to in the following list were correct at the time of publication, but may have changed since.

Addictions Foundation of Manitoba. See the section on Workplace Issues under Learn More.

www.afm.mb.ca

Alberta Alcohol and Drug Addictions Commission. Government of Alberta agency operates and funds information, prevention and treatment services to help Albertans with alcohol, other drug and gambling problems. The website has a section on the workplace in its resources section.

www.aadac.com

Canadian Centre for Occupational Health and Safety. This federal government agency is the Canadian Centre of Excellence for work-related injury and illness prevention initiatives and occupational health and safety information.

www.ccohs.ca

Canadian Human Rights Commission. Provides information on the rights and responsibilities of employers and employees, including advice on barrier-free employment practices.

www.chrc.ccdp.ca

Canadian Model for Providing a Safe Workplace. Construction Owners of Alberta. October 2005. Although these guidelines include an independent legal review, employers should consult a lawyer since human rights law on alcohol and drug testing is continually evolving. Document is found under best practices.

www.coaa.ab.ca

Nats'ejée K'éh Treatment Centre. This 30-bed facility for both men and women, located on the K'atl'odeeche First Nation Reserve is the only residential treatment centre in the Northwest Territories.

www.natsejeekeh.org

Community resources. Most communities in the NWT have a community wellness centre, an addictions counselor, or health centre that can provide services. The Tree of Peace Friendship Centre in Yellowknife has an out-patient treatment program.

References

These guidelines draw on documents developed by other human rights commissions in Canada. These documents are listed below.

Policy on Drug and Alcohol Testing. Ontario Human Rights Commission. September, 2000.

Guideline on Drug and Alcohol Testing in the Workplace. New Brunswick Human Rights Commission. October, 2003.

Canadian Human Rights Commission Policy on Alcohol and Drug Testing. Canadian Human Rights Commission, 2002 (under review).



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