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Drug & Alcohol Testing in the Marine Workplace – Part 1

Employer Responsibilities v. Worker Rights

Although the effects of drug and alcohol use on workplace safety was a topic before the Exxon *Valdez* accident in 1989, the 500,000 or so barrels of oil that spilled into Prince William Sound spread the flames of this debate across all sectors of the transportation industry. While the connection between the master's alcohol use and the cause of the *Valdez's* grounding on Bligh Reef was debated, the enormous cost of the accident shocked many employers into implementing drug and alcohol testing programs. Since this accident, employees' rights to privacy have often clashed with employers' demands for safety and accountability. Some drug and alcohol testing programs have withstood legal challenge, and some have not. In this two-part Legal Net we will summarize the types of testing and in what circumstances such testing is lawful.

Union v. Non-Union Workplaces

Before summarizing the law on drug and alcohol testing, it is important to note there are two primary employment contexts in which the legality of such testing arises. These are unionized and non-unionized workplaces. The difference between these two contexts does not determine what law applies, but does affect what course a mariner takes if a dispute about testing arises.

In a union workplace the *collective bargaining agreement* between the union and the employer may contain drug and alcohol testing requirements. If an employee refuses testing and the employer takes disciplinary action, such as suspending or firing the employee, the employee may challenge (or "grieve") the discipline with the help of the union. If the employee is successful in their grievance the discipline may be set aside, and in some rare cases, the testing policy itself may be deemed unlawful (I say "rare" because the legality of the policy would usually have been considered by both the union and the employer when the policy was first negotiated into the collective bargaining agreement).

In a non-union workplace, where employees have less protection from employer discipline, an employee is often terminated for refusing drug or alcohol testing. If the employee is not terminated, they may be suspended, in which case the employee might allege they have been constructively dismissed. Because there is no union process in which to bring a grievance, the

employee is left to sue (such as through Employment Standards, the Human Right Tribunal, or in the courts).

Although the employee's means of addressing the issue of testing are different in these two contexts, the issue is the same: is the employer's demand for testing lawful? If it is unlawful, discipline resulting from refusing to be tested is also unlawful.

Public Sector v. Private Sector

A second important distinction to be considered in drug and alcohol testing is whether the employment occurs in the public sector, or the private sector. A public sector employee is a person employed by the government, such as a Coast Guard employee. A private sector employee is a person employed by a private company, such as a towing, shipping or fishing company. The distinction between public or private sector employees (and either may be unionized or non-unionized) is important because it determines the sources of law that protects their rights.

The rights of public sector employees are protected by two laws: *Charter of Rights and Freedoms*, and the *Human Rights Act* (or for B.C. employees, the *Human Rights Code*).
The *Charter of Rights and Freedoms* (the "*Charter*") is part of the *Constitution* of Canada, and guarantees citizens they will be free from certain interference by government (their employer), particularly, the right to life, liberty and security of person, the right against unreasonable search, and protection from discrimination on the basis of physical or mental disability (such as drug or alcohol dependency). In addition, public sector employees have the protection of the *Human Rights Act,* which protects employees against discriminatory action by employers on the basis of race, colour, ethnicity, sex, family, status, religion, and importantly, *physical and mental disability* (such as drug or alcohol dependency).

The rights of those in the private sector, that is, those employed by non-government employers, are protected by the *Human Rights Act*, but not the *Charter*. This means a private sector employee might challenge a drug testing policy on the basis it discriminates against a physical or mental disability (such as alcohol dependency), but the employee cannot rely on the *Charter* to say the policy is an unreasonable search (because the *Charter* only applies to limit the government's acts and not the private employer's acts).

Is Mandatory Testing Legal?

A worker who is objectively impaired while at work can be required to submit to drug or alcohol testing. The employee may refuse, but the employer has the right to demand. If the employee refuses to be tested the employer may take disciplinary action. The employee may accept the disciplinary action, or challenge it on the basis the demand was unreasonable or contrary to human rights. As simple as it sounds, these cases of obvious impairment are relatively rare. Employees (who want to keep their job) do not typically show up for work objectively impaired.

More commonly, the employer has a suspicion the employee is sometimes impaired at work, and wishes to confirm this so the employer can avoid minimize risk or avoid lost productivity. These employees (who have raised the suspicion of the employer) often have a dependency on drugs or alcohol. Because drug and alcohol dependency is, medically and legally, viewed as a "mental or physical disability", employees with dependencies are protected by human rights law against discriminatory acts (such as drug testing) by employer. The Supreme court of Canada has determined drug testing where there is no objective impairment is unlawful (it constitutes discrimination) because it involves a preconceived perception that a disability (the dependency) exists.

The important exception to this rule (that an employer cannot have mandatory drug testing unless there is objective impairment) is where safety or risk is a serious issue in the workplace. The marine industry, or at least portions of it, is obviously such a workplace. The question then becomes, when is drug and alcohol testing legal in the marine workplace?

Types of Testing: Non-Random and Random

The primary types of testing are non-random and random. There are several types of non-random testing. "For cause" testing occurs when an employee demonstrates some objective measure of impairment, such as smelling of alcohol. "Post-incident testing" occurs when an accident occurs at the workplace and the employees involved in the accident are subject to testing immediately after. "Post-treatment" testing occurs when an employee has sought treatment for a drug or alcohol dependency and returns to work and is tested periodically to confirm their sobriety. Non-random testing is far more common in Canada than random testing because it is easier for the employer to defend. In 2008, for example, BC Ferries introduced for cause, post-incident and post-treatment testing after the sinking of the Queen of the North.

Random testing is most controversial, and is significantly more common in the United States, particularly in the transportation industry where legislation makes drug testing mandatory (there

is no such legislation in Canada). Random testing is usually done in larger workforces where a computer generates an employee name to be tested – this technology avoids an allegation the employer has, for some reason, targeted the selected employee for testing. Random testing in Canada is permissible where the employer can show that substance abuse is a problem in the workplace. This is typically done by showing a history of accidents where drugs or alcohol are involved. If the employer cannot demonstrate substance abuse is a problem in the workplace, a testing policy may be lawful if the employer can show the workplace is "inherently dangerous". In the next edition of this series we will review cases where random testing in an "inherently dangerous" workplace was permitted.

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