

EMPLOYMENT MATTERS

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RANDOM ALCOHOL TESTING IN YOUR WORKPLACE

Do employers have the right to impose random alcohol testing in the workplace?

The short answer is no. This month, the Supreme Court of Canada released a much-anticipated decision on the issue of random alcohol testing in the workplace. In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("*Irving*"), the Supreme Court considered a case where the union had challenged the employer's policy that required 10% of its employees, who occupied safety sensitive positions, to be randomly selected for alcohol testing over the course of one year.

What did the Supreme Court have to say?

In a split decision, the Court held that being a dangerous workplace (which the mill was) is not enough to justify a universal policy imposing random alcohol testing at work. The employer must also be able to demonstrate that other factors are present, such as a general problem with substance use in the workplace. In *Irving*, the Court determined that 8 documented incidents of alcohol consumption or impairment over a 15 year period did not constitute a problem justifying the policy.

Ultimately, the analysis requires a balancing of two competing interests, namely, safety and privacy. In *Irving*, the Court held that the policy in question resulted in a loss of liberty and personal autonomy, which are at the heart of the right to privacy. As the Supreme Court said:

Early in the life of the Canadian Charter of Rights and Freedoms, this Court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity".

Having said that, there are circumstances in which employers can impose random alcohol testing. In a dangerous workplace, employers are generally allowed to test individual employees, who occupy safety sensitive positions, if there is reasonable cause to believe:

- the employee was impaired while on duty;
- the employee was directly involved in a workplace accident or significant incident; or
- where the employee is returning to work after treatment for substance abuse.

What does this mean for employers?

The fact your workplace is a dangerous one does not give you an automatic right to impose random alcohol testing. However, your hands are not completely tied. You may be able to impose random testing if you can show that your workplace is highly dangerous and you have a general problem with alcohol use at work. In addition, you can test employees in safety sensitive positions if you have reasonable grounds to do so, such as where the employee was impaired at work or if the employee is returning to work after treatment for substance abuse. If you are unsure of your legal rights on this issue and you would like some assistance navigating the issue, feel free to contact me at 416-365-3703.



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