Employee Drug Testing in Canada:  
Motor Carrier Industry

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ABSTRACT

Employee drug testing will continue to be a controversial issue for many years. Unlike the United States, where testing programs for transportation workers have been supported by federal government, other governments have not seen this same need to date. Therefore, employers must make their own decisions on whether to begin to test their employees for alcohol and other drug use.

The Canadian government has finally clarified that it will not enact legislation requiring alcohol and drug policies and testing programs for transportation workers, leaving the private sector to respond as they see fit. U.S. government regulations will impact Canadian and Mexican truck and bus drivers entering the United States; a final decision on the exact nature of the required programs has not been made, but it is expected at a minimum that drivers will need to be subject to testing programs.

There are no Canadian laws that would prohibit workplace testing, but a number of legal challenges are underway which focus on human rights, wrongful dismissal and privacy issues, so the parameters within which employers can operate may become clearer. There is limited information on the effectiveness of testing programs, although studies have found random testing does act as a deterrent and that pre-employment testing has merit. The majority of employees have not objected to testing in Canadian surveys, but labour unions and human rights and privacy commissions, among others, have taken a strong anti-testing stance.

This does not leave employers with easy decisions. Added to this, if they decide to include employee testing under their alcohol and drug policy, they must make further decisions regarding who is subject to testing, under what circumstances, for what substances, using what technology, and they must confirm the consequences for testing positive. All of these issues are explored in more detail.

INTRODUCTION

Employee drug testing will continue to be a controversial issue for many years. Unlike the United States, where testing programs for transportation workers have been supported by the federal government, other governments have not seen this same need to regulate their industry. Therefore, in most cases employers must make their own decisions on whether to begin to test their employees for alcohol and other drug use. This issue is currently of major concern to the Canadian motor carrier industry.
Since 1989, the Canadian Government has been indicating to the transportation industry that, in the name of public safety, legislation and regulations would be introduced to require all federally-regulated companies (including motor carrier operations) to implement comprehensive alcohol and drug policies that included testing. Although there was some degree of consultation with industry, there was insufficient detail on program requirements for companies to move forward with their own policies in advance of being regulated. Despite this, some companies in the trucking industry did implement alcohol and drug policies and testing programs for their drivers, but most did not. The industry suffered financially through the recession and most companies were not prepared to take on this added expense without knowing the specific regulatory requirements.

In December 1994, responding to pressure from the Canadian Trucking industry for a final decision on the issue, the federal Minister of Transport finally confirmed that the Canadian government will not be introducing federal substance use legislation at this time. In other words, there would be no legislative requirement to have drug testing, or any of the prevention components (education, training, employee assistance programs) in the transportation sector. Companies were advised to develop programs to address their own problems and meet public safety requirements in the absence of government direction - and regulatory backing.

In the motor carrier industry, many private truck and bus companies, as well as companies in other industry sectors with their own private fleets have operating licenses into the United States. Therefore, their flexibility in policy development and program design will be limited by regulations expected to be issued by the Secretary of Transport for foreign operators during 1995. There is an official proposal to cover foreign drivers by January 1996, therefore, the Canadian industry is already organizing to develop policies and programs to meet these expected requirements.

The regulations set a number of standards and program requirements around fitness for duty, use and possession of banned substances, administrative sanctions for policy violation, supervisor training and medical assessments. For Canadian companies, the most controversial component is the alcohol and drug testing requirement. Testing for alcohol must be done using evidential breath testing devices by a trained technician, and in association with a “duty period”; testing for other drugs (marijuana, cocaine, amphetamines, opiates and PCP) must be done through urine specimen collection (split samples) and analysis by a certified laboratory with qualified medical review of results. As proposed under the regulations, testing would be required:

- Pre-employment - with certain exceptions based on past participation in a testing program;
- with Reasonable Suspicion - of a rule violation, based on specific and documented observations of a trained supervisor concerning appearance, behaviour, speech or body odours, and/or indicators of chronic and withdrawal effects of drugs;
• *After an Accident* that involves a fatality, or an accident in which either medical assistance is required away from the scene or the commercial motor vehicle is disabled and must be towed and the driver has received a citation for a moving violation;
• on a *Random* basis, at a minimum annual rate of 25% for alcohol and 50% for drugs;
• on *Return to Duty* after a driver has engaged in prohibited conduct; and
• on an unannounced *Follow-up* basis for at least a year on return after a substance abuse professional identifies the need to resolve a problem with alcohol or drug use/misuse.

Although many Canadian companies feel testing can play an important part in a comprehensive approach to eliminating substance abuse, particularly given the safety-sensitivity of driving positions, lack of supervision and justification for strong deterrent programs, they face a different operational and legal environment in Canada, and will have much more difficulty implementing these programs. Many companies will need to meet the U.S. regulations when implementing testing programs if they want to continue to do business in the States, but all companies will have to abide by Canadian law first, and are very likely to face direct challenges in this area.

**LEGAL FRAMEWORK IN CANADA**

Under *The Criminal Code* (R.S.C. 1985, c. C-46, s. 253) it is an offence to operate a motor vehicle while impaired by alcohol or a drug, or to have a blood alcohol concentration level greater than .08%; penalties, including fines and/or imprisonment, are prescribed for offences. Scientific studies have confirmed that in terms of operational safety, this ‘cut-off’ level may be too high to identify impairment; U.S. regulatory standards will be set cut-offs at .02 and .04 BAC. Canadian companies are not bound by Criminal Code requirements when setting their own standards.

In terms of drug testing, neither the federal government nor the provinces have enacted any legislation at all that would require - or prohibit - alcohol and drug testing programs. It is not expected that any will take action in the near future. However, there are a number of routes through which programs can be challenged, the most likely ones being through a human rights complaint, or a grievance in a unionized environment.

**Human Rights Issues**

The Canadian Human Rights Act would govern extra-provincial motor carrier operations, and comes into effect if there is a question of discrimination in employment (e.g., hiring, development or firing) on the grounds of a disability; the Act specifically provides that ‘disability’ includes a current or former dependency on alcohol or a drug. The scope and protection of human rights legislation appears to be limited to those individuals that have a *dependence* on alcohol or drugs; it is arguable whether *casual users* of drugs are protected. However, if an individual is “perceived” by an employer as having an illness due to drug use and if the employer were to act upon an inaccurate perception, the individual may be able to make a successful complaint.
Although employers can not limit employment opportunities for any individual on a prohibited ground of discrimination, an action is not considered discriminatory if it is based on a *bona fide* occupational requirement (BFOR). The concept concerns the actual ability of employees to perform their duties without risk to themselves or others. Employers must honestly believe that a restriction is necessary because of the nature of the job and not for any other reason, for the safe, economical and efficient performance of the job. However, implementation of a valid BFOR policy in and of itself may not be sufficient to defend a complaint of discrimination, as the employer must also ensure that the policy is properly instituted and followed.

Therefore, establishing a properly written and implemented alcohol and drug policy, which is explicit regarding alcohol or drug use in relationship to the job, and in stating the consequences for policy violation, could constitute a *bona fide* occupational requirement exemption provided the employer has a sincere belief that performance would be significantly affected by drug use. Given the considerable scientific data on alcohol and drug use and performance, and the weight of the evidence on drug use and driving ability, along with the relevant Canadian employee survey results, it should be possible to argue a case for strong policy measures and deterrence programs for drivers, particularly those that drive heavy trucks, buses and/or carry hazardous materials; they are significantly unsupervised and may not be identified by other means (e.g., performance management).

The Commission has issued a policy on drug testing (Canadian Human Rights Commission, Policy 88-1: Drug Testing, Ottawa: 1988) which states that employers would have to:

- establish that drug testing is relevant to determining whether the individual has the capacity to perform the essential components of the job safely, efficiently and reliably;
- identify a drug free workplace as a *bona fide* occupational requirement, most likely through a link to safety;
- demonstrate that testing is needed as an identification mechanism; and
- make all efforts to provide reasonable accommodation for someone that tests positive, for example, by referring them to an assistance program or for counselling or rehabilitation.

Testing must be done in a manner which is valid, reliable and accurate. The policy suggests that testing would normally occur only when on-the-job deficiencies are noted, however an exception may be made where there is minimal supervision and a significant safety risk, and no less discriminatory ways of assessing the individual’s capacity to perform the job. To this end, argument in recent cases has stressed that Canadian programs must be based on prevention initiatives first (access to assistance, education, supervisor monitoring), and testing should only be used where these approaches do not meet the overall needs. Although certain forms of testing may be acceptable in certain circumstances, the Commission has stated that across-the-board (e.g., random) testing programs are unacceptable, and from its recent actions, it is clear they are prepared to defend this position in the courts; it should be noted this is Commission policy and not law. In addition, the Commission has stated that compliance with U.S. regulations would *not* be automatically considered a *bona fide* occupational requirement. Because each case is decided on individual merits, it will be the
responsibility of each employer to demonstrate that their testing program is based on genuine occupational requirements.

Case Law/Arbitration Decisions

Canadian case law on this issue is only now developing and there appears to be insufficient experience to provide any clear guidance for companies one way or another as to whether testing would be legally acceptable as a component of a drug and alcohol policy. The most likely route of complaint in a unionized environment will be through arbitration, as it is potentially much faster to get a decision than through the human rights approach. Trends find arbitrators attempting to achieve a reasonable balance between public safety issues and the employees' privacy rights when looking at medical examinations and drug testing, and the issues are often discussed within the context of human rights guidelines and principles.

In general, arbitrators for cases involving employees who have been under the influence of drugs or alcohol while driving or subject to driving have come down quite heavily in favour of dismissal, as impaired driving is seen as a serious misconduct. In the area of testing, however, the decisions seem to indicate it is not within the legitimate business purposes of an employer to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. Where good and sufficient grounds for administering a drug test do exist, and the policy in question is applied with reasonable grounds and serves only to protect company interests without imposing undue limitations on employees' privacy rights, testing may be acceptable. The requirement of "reasonable grounds," which usually involves substantial evidence of substance abuse, has limited employers' ability to implement wholesale drug testing programs. One recent comprehensive decision in the oil industry did uphold all forms of testing of safety-sensitive positions - except random. That decision is under appeal by the company.

OPPOSITION TO TESTING IN CANADA

Independent of the question of whether alcohol and drug testing is legal in Canada, the question of whether it is an acceptable practice in our workplaces must be addressed. Arguments in favour of drug testing tend to focus on employer concerns about safety and liabilities, and the need to ensure employees are fit to perform the particular tasks that make up their job responsibilities. In these situations, testing is seen as a tool to identify those that may be contravening company policy, or those that may be in denial of a dependency problem. When coupled with disciplinary action, it is also seen as a strong deterrent against drug and alcohol use in the workplace.

A wide spectrum of Canadian organizations representing industry and labour, as well as those with related interests (legal, medical, human rights, privacy, civil liberties) have repeatedly made their views known in opposition to alcohol and drug testing, and have challenged a number of Canadian workplace programs in the courts. Generally, they express full support for education, awareness, training, and employee assistance programs, wide opposition to random testing, and somewhat less opposition to testing tied to reasonable cause or after an accident. Although by no means in favour of drug use but fully
in support of the highest safety standards, most Canadian labour unions have expressed strong objections to drug testing programs, suggesting they will damage management/labour relations, that there are many less intrusive ways to improve and ensure safety, and that testing draws attention away from other causes of productivity declines and accidents. With all of this opposition, it is interesting to note that when employees themselves are asked their views about drug testing through confidential surveys, there is a substantially different response in support of many forms of testing, even by those that will be tested themselves.

Those opposed to employee drug testing suggest that there is no good reason for an employer to request this type and extent of information, specifically because drug tests are not tied to an impairment standard. They continue to express concerns about accuracy of the techniques used and the potential for dissemination of confidential information, invasiveness, the suggestion of mistrust on the part of management, an infringement on activities that employees have pursued in their private time, and the potential that it may be used to single out particular employees for discipline or termination of employment (through less than well-meaning supervisor referrals).

**POLICY CONSIDERATIONS**

This environment does not leave the motor carrier industry with easy decisions, either in including alcohol and drug testing as part of a company policy, and/or in meeting U.S. regulations should they apply. Added to this, if they decide to include employee testing under their alcohol and drug policy, they must make further decisions regarding: who is subject to testing (just DOT regulated? other drivers? other employees?); under what circumstances (each will have to be justified); for what substances (DOT list or broader drug slate?); using what technology; and the consequences for testing positive (not hire? fire? return with conditions?).

And any testing program introduced in Canada must reflect a balance between health and safety (due diligence) and individual privacy, between the needs of all stakeholders in their operations, and between measures to control or deter use and commitment-based approaches. To this end, Canadian employers are being advised to develop strong prevention programs consisting of clear policies laying out the rules around alcohol and drug use, and based on four platforms: employee education and awareness programs; training for supervisors; access to counselling or assistance services; and methods to identify employees with a problem or who are in violation of company policy, including alcohol and drug testing. In this way, the more controversial testing component can be placed in context of a broader prevention approach.

Supporting this, the Canadian motor carrier industry is examining all of the program components necessary to develop comprehensive policies to meet industry needs within our own legislative framework. While some companies will choose to develop their own policies and programs, with the support of information and materials from the industry, many will have the opportunity to join a consortia of services that will be provided nationally through the industry associations, and will be up and running well before the end of the year. In this way, companies implementing testing programs and other policy components can receive the highest standards of services while minimizing the costs.
involved. They can also place a priority on due diligence for public safety in Canada while meeting any operational standards set across the border.