

Update on Workplace Drug and Alcohol Testing

One area of the law that is ever-evolving is drug and alcohol testing in the workplace. Generally, when determining the appropriateness of such testing and its underlying policies, our courts have to balance issues of health and safety, privacy and human rights. As a recent Alberta Court of Appeal decision has demonstrated, the occurrence of deaths in the workplace, even if partly caused by the influence of drugs and alcohol, will not necessarily result in the court favouring mandatory testing at the expense of employee privacy.

In *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*, the Court of Appeal reviewed a court order (known as an “injunction”) prohibiting Suncor Energy Inc. from imposing a new policy of random drug and alcohol testing on 2,890 Union members in “safety sensitive” or “specified” positions. Based on the data, 85% of Union members worked in such positions. Suncor’s plan was to subject at least 50% of employees to random testing every year. In its judgment, the Court of Appeal held that such non-consensual taking of bodily fluids was a substantial affront to employee privacy. The Court elaborated that, based on the evidence, the policy would only indicate the prior use of drugs and alcohol, and would not have the effect of immediately preventing workplace accidents. Further, the Court held that a wide net would be cast by such a policy to include those employees who do not engage in work that has a real risk of accident. It was noted that *only* (our emphasis) 7 fatalities had taken place over a 12 year period, with just 3 of those employees killed having been under the influence of drugs or alcohol at the time of their deaths. Surprisingly, the Court did not believe those numbers justified lifting the injunction on random drug and alcohol testing.

Given this recent decision, employers should be mindful that the law on alcohol and drug testing in the workplace across all jurisdictions is murky at best. Even though safety sensitive positions typically permit an employer greater leeway in conducting alcohol and drug testing, this decision should cause employers to pause. Even in arguably the most friendly alcohol and drug testing province, the Alberta Court of Appeal was not prepared to permit comprehensive random alcohol and drug testing in connection with employees engaged in dangerous work in the oil sands. Accordingly, we continue to urge employers to exercise great caution with respect to alcohol and drug testing.

Please contact e2r Solutions® should you require assistance in implementing drug and alcohol policies in your workplace.