

## ***Random Drug and Alcohol Testing Policies Come Under Fire in Alberta***

Last summer, we told you about the Supreme Court of Canada's decision in the case of *Communications, Energy and Paperworkers Union of Canada v. Irving Pulp & Paper* ([click here](#)), which is the latest and most authoritative case on the topic of drug testing in the workplace.

An Alberta arbitration board (the "Board") recently applied the principles set forth in *Irving* in the highly-anticipated decision of *Unifor, Local 707A (the "Union") v. Suncor Energy Inc.* ("Suncor"). In that case, the Union challenged Suncor's random drug and alcohol testing policy, which provided that unionized employees in safety-sensitive positions could be randomly tested for alcohol through breath tests, and for drugs through urinalysis.

Suncor's evidence was that the policy was necessary because of an "out-of-control" drug and alcohol culture at its worksites that it needed to curb in order to meet its obligations under Alberta's health and safety legislation. To this end, Suncor noted several facts about drug and alcohol use at its Alberta sites, including the following:

- Between October 1, 2003 and December 2012, there were 224 positive alcohol and drug tests, with 216 positive tests belonging to Union employees;
- Between 2004 and August 2013, Suncor recorded 2,276 security incidents involving alcohol and drugs; and
- Between 2009 and 2012, there were 115 positive employee alcohol and drug tests at the Alberta worksites as compared to only five positive alcohol tests and no positive drug tests in all of its other operations in Canada.

In considering the permissibility of Suncor's random drug and alcohol testing policy, the Board's central question was whether the policy's safety benefits outweighed the infringement on employees' privacy rights.

It was hoped by some that the *Suncor* decision would be distinguished from *Irving*, given that Alberta's courts and arbitrators have historically been more tolerant of drug and alcohol testing as compared to other Canadian jurisdictions. However, in *Suncor* the Board ultimately struck down the policy, finding the policy was an unreasonable infringement of employees' privacy rights. It made this finding on the basis that the testing was not targeted as narrowly as possible, did not use accurate or un-intrusive testing measures,

and did not contain provisions for communicating false positive results to employees. The Board also pointed out that Suncor's evidence was not specific enough to justify the random testing policy and that it included positive test results from non-random tests.

Suncor has indicated that it will be appealing the decision through judicial review, and we will continue to follow this case closely. In the meantime, employers should exercise great caution in implementing drug and alcohol testing programs, especially those that are random in nature and that occur in a unionized environment. Please contact e2r Solutions® to discuss any questions that you have regarding the *Suncor* decision, or about drug and alcohol use in the workplace more generally.

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