

THE MANITOBA  
HUMAN RIGHTS  
COMMISSION



LA COMMISSION DES  
DROITS DE LA PERSONNE  
DU MANITOBA

## Drug and Alcohol Testing in the Workplace

### When you can test What you must consider

Guidelines for Employers under *The  
Human Rights Code* (Manitoba)  
on Drug and Alcohol Testing

## Introduction

This guide is the Manitoba Human Rights Commission's interpretation of provisions of *The Human Rights Code* with respect to drug and alcohol testing in the workplace. It is subject to the specific language of *The Code*, and interpretations by adjudicators and the courts.

### **What is *The Human Rights Code*?**

*The Human Rights Code* ("*The Code*") is Manitoba's provincial human rights law. It protects individuals and groups in Manitoba from discrimination. The Manitoba Human Rights Commission administers *The Code*.

### **What is discrimination in employment?**

Discrimination in employment is treating a person or group differently, to their disadvantage and without reasonable cause, on the basis of a protected characteristic, such as disability. Discrimination includes failing to reasonably accommodate special needs that are based on a protected characteristic.

Discrimination is prohibited in all aspects of employment, including hiring. *The Code* prohibits unreasonable discrimination, whether or not that discrimination is intentional.

### **Is drug or alcohol dependency protected under *The Code*?**

Dependence on drugs or alcohol is a disability within the meaning of *The Code*. *The Code* prohibits unreasonable discrimination on the basis of a physical or mental disability (or perceived disability) in all protected activities, including employment.

### **How does drug and alcohol testing in employment potentially violate *The Code*?**

Drug and alcohol testing in the workplace has the potential for significant, negative impact on those who have a drug or alcohol dependency.

Employers sometimes turn to drug and alcohol testing programs in response to workplace safety issues and performance concerns. Testing is sometimes done on a random basis. In other cases, it is done after a workplace incident raises concerns about an employee's behaviour, or as a pre-employment requirement. **All drug and alcohol testing in the workplace raises significant human rights concerns.**

The objective of preventing employees from possessing, using, or being under the influence of alcohol or illegal drugs while on the job is not discriminatory. However, unreasonable testing or automatic or severe discipline or other job-related consequences for positive test results discriminates against certain employees in a manner prohibited by *The Code*.

### **How can employers address job performance and safety concerns relating to drug and alcohol impairment?**

Drug and alcohol impairment of an employee at work is a matter of legitimate concern for employers. Impairment can negatively affect an employee's skills, performance or judgement, and place that employee or others at risk of serious harm. It may also seriously jeopardize an employer's operations in other ways.

Employers do not have to tolerate unacceptable work performance by an employee. They must, however, take reasonable steps to determine whether the behaviour is due to a dependency disability. Denial or termination of employment because of drug or alcohol dependence is unlawful, unless an employer can establish that its standard is reasonably necessary, and that it has taken reasonable steps to accommodate the employee or applicant.

### **What are my rights as an employer?**

Employers have the right to determine the qualifications necessary for satisfactory job performance, provided that these standards are *bona fide* ("in good faith") and reasonable occupational requirements or qualifications. Practices, policies, rules and standards which, either directly or indirectly, discriminate are prohibited unless there is *bona fide* ("in good faith") and reasonable justification.

To avoid restricting employment opportunities in a manner that contravenes *The Code*, employers need to ensure that any employment standards, policies or rules:

1. are **rationaly connected** to the performance of the job;
2. are adopted in an **honest and good faith belief** that they are necessary to the fulfillment of a legitimate work-related purpose; and
3. are **reasonably necessary** to accomplish the legitimate work-related purpose.

The above 3-part test was set out by the Supreme Court of Canada.\*

Where an employer can rely on an alternative approach to a standard, practice, policy or rule, which does not have a discriminatory effect, the employer is required to do so. Employers must ensure, as well, that reasonable accommodation of special needs, which are based on protected characteristics, has been made.

**How might a random drug or alcohol testing policy be rationally connected to the performance of a job ?**

Workplace safety is the purpose commonly identified in caselaw as having a rational connection to a drug or alcohol testing standard. More than a general concern for safety in the workplace is required. An employer must show that there is a real and significant safety concern arising from the circumstances of that particular workplace.

It is far easier to identify a rational connection between safe performance and random drug or alcohol testing where mistakes by an impaired employee can have disastrous consequences, such as in a refinery situation.\*

**What must an employer show to establish “good faith”?**

An employer must show that it implemented testing because it genuinely believed testing was necessary to meet a given business purpose.

Where an employer has carefully examined the potential problems generated by drug and/or alcohol abuse in the workplace and has consulted appropriately with its employees and experts on how to best address those problems, it is unlikely to have any difficulty showing good faith.

\**Imperial Oil Ltd. v. Entrop* (2000), 37 CHRR D/481 (Ont. C.A.)

**How can the employer show that drug or alcohol testing is reasonably necessary?**

What an employer must show to establish that drug or alcohol testing is reasonably necessary will depend on the facts, including the specific rational business purpose identified for the drug and alcohol testing policy and practice.

The steps taken by the employer to make sure that testing is the least intrusive means of achieving the identified purpose will be considered. Can the purpose be met through enhanced supervision, or is there something about the nature of the job site or employment that means performance or safety concerns cannot be addressed as they arise?

The Commission will also consider what the employer is testing for and who is subject to the tests. If the employer is attempting to identify current impairment, this may be shown by an alcohol test but not a drug test, given available drug-testing procedures. This makes drug-testing as a means of addressing the risk of impairment harder to justify, even in safety-sensitive jobs.\* It is also important for employers to identify who is to be the subject of testing, as not all employees may have duties that are safety-sensitive.

*\*But not impossible-see Milazzo v. Autocar Connaisseur Inc. (No. 2) (2003), 47 CHRR D/468, which upheld random drug testing where charter bus drivers spent extended periods of time in the U.S., with its strict drug/alcohol testing regime. There was still a requirement to accommodate persons with dependency disabilities, however the complainant denied having a dependency.*

The timing of drug and alcohol testing is also significant. If post-incident testing would meet the employer's objective, it will be easier to justify than broader random testing. So might be testing where the smell of alcohol or cannabis smoke raises a reasonable suspicion of alcohol or drug use, or where there are other reasonable grounds to believe that impairment may be present. It is especially difficult for an employer to justify pre-employment alcohol or drug testing.

Drug or alcohol testing may also be justified, in some circumstances, as part of a rehabilitation or return to work program of an employee, who, for example, works in a safety-sensitive job, has been caught several times impaired by drugs in the workplace, admits to a drug dependency, and agrees to participate in a rehabilitation program.\*

An examination of the consequences of testing is also crucial to establishing reasonable necessity. Where a person has a drug or alcohol dependency, an employer is obligated to reasonably accommodate to the point of undue hardship.

#### **What are some examples of accommodation of drug or alcohol dependency?**

Reasonable accommodation of a drug or alcohol dependency depends on the circumstances. Examples of accommodation may include adapting work schedules to allow the employee to participate in a recovery program or to allow for continued treatment, granting a reasonable leave of absence to allow an employee to attend a rehabilitation treatment center and exploring the possibility of transferring the individual to a less safety-sensitive position. The employer must reasonably accommodate to the point of undue hardship.

\**Re City of Winnipeg and CUPE, Local 500* (1991), 23 L.A.C. (4th) 441

#### **What if the employee denies having a dependency disability?**

Employers also need to inform themselves about the facts concerning drug and alcohol dependency. For example, denial is a frequent symptom of people suffering from these dependencies, as is the occasional 'slip' during recovery. Part of the accommodation process is including such considerations in the employer's response.

#### **What about obligations on the employee?**

Reasonable accommodation is a process, which requires cooperation from the employee, as well. Where drug or alcohol dependency is the source of poor work performance, employees may be expected to reasonably participate in employee assistance and rehabilitation programs that are made available.

Employees may also be required to take reasonable steps to communicate their needs to their employer. If an employee refuses to acknowledge the existence of a dependency problem, or to seek appropriate help, he or she may do so at their own risk. However, where the need for reasonable accommodation is evident to the employer, the employer has a duty to reasonably accommodate even where there is no direct request for accommodation. As stated earlier, employers must take reasonable steps to ascertain whether the behaviour is due to a dependency disability.

**Can an employer require that job applicants complete a drug or alcohol test?**

It is very difficult for an employer to justify pre-employment alcohol or drug testing.

If an employment presents real and significant workplace safety concerns, and the nature of the employment does not allow for performance or safety concerns to be addressed as they arise, a rational connection between a necessary qualification or requirement for an employment and the use of pre-employment drug and alcohol testing may be established. Good faith must be shown by the employer, and the testing must be reasonably necessary in the circumstances.

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*Le présent guide est également disponible en français*



**Who can I call?**

For further information on these guidelines of the Human Rights Code, please contact the Manitoba Human Rights Commission in your area.

Winnipeg: 7th Floor - 175 Hargrave Street  
Winnipeg, MB R3C 3R8  
Phone: (204) 945-3007  
Fax: 204-945-1292

Brandon: 340 Ninth Street  
Brandon, MB R7A 6C2  
Phone: (204) 726-6261  
Fax: 204-726-6035

The Pas: 2nd Floor - Otineka Mall  
P.O. Box 2550  
The Pas, MB R9A 1M4  
Phone: (204) 627-8270  
Fax: 204-623-5404

TTY: 1-888-897-2811

Toll Free: 1-888-884-8681