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EMERGING TRENDS IN THE WORKPLACE

- **Drug & Alcohol Testing: Random Testing Update**
- **Family Status Accommodation Update**

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Drug & Alcohol Testing: Random Testing Update



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Drug & Alcohol Testing: The Guidelines

Legislation

- *Criminal Code of Canada*: employers may be held criminally liable for failing to take all reasonable steps to ensure safety of workers
- Ontario's *Occupational Health and Safety Act*: legal obligation to protect safety of employees in the workplace means employers have a responsibility to respond to drug and alcohol use in the workplace.
- Ontario's *Human Rights Code*: legal obligation in respect of duty not to discriminate on the basis of disability, and duty to accommodate

Random Drug & Alcohol Testing

CEP, Local 30 v Irving Pulp & Paper Ltd., [2013]

SCC 34

Facts:

- Irving, which operates a large pulp and paper mill in New Brunswick, unilaterally implemented a mandatory drug and alcohol testing policy.
- The policy required 10% of employees employed in safety sensitive positions be randomly selected for testing each year.
- The Supreme Court considered:
 - 1) The dangerousness of the workplace;
 - 2) Any evidence of enhanced safety risks; and
 - 3) Evidence of improvement in workplace safety.

Result:

- Irving's policy was struck down as unreasonable.

The Dissent:

- Two Supreme Court judges rejected the majority's position.
- The “balancing of interests” requires consideration for the needs of:
 - 1) employers,
 - 2) employees; and
 - 3) the public.
- Legislatures have the power to take out drug and alcohol testing outside of collective bargaining and should do so on the basis of the public interest.

Communications, Energy and Paperworkers Union, Local 707 v Suncor Energy Inc., 2012 ABCA 307

The Facts:

- In June, 2012 Suncor announced a new drug and alcohol policy to be implemented for employees at its Fort McMurray operations.
- The policy required random testing for employees in 'safety sensitive' positions (more than 80% of Suncor's unionized employees).
- Union grieved random testing and obtained an injunction to prevent Suncor from implementing testing regime until the grievance was resolved.

Unifor, Local 707A and Suncor Energy Inc., Oil Sands (2014)

The Arbitration Decision (the Majority)

- On a “balancing of interests” approach, the Policy was an unreasonable exercise of management rights.
 - Any benefit of reduced safety risk outweighed the harm to employee privacy.
 - The policy was not proportional (50% of bargaining unit members were tested each year).
- Drug Testing
 - The testing method was unreasonable and failed to distinguish between current and recent impairment.
 - There was no time limit for review.
 - The policy was not targeted as narrowly as possible.
 - There were no provisions to account for false positives.

- What evidence is required to establish “a problem sufficient” to justify randomized testing?
 - Little guidance provided
 - What was **not** enough?
 - Evidence of positive testing results.
 - Evidence of alcohol and drug problems in the community.
 - Evidence of alcohol and drug problems relating to non bargaining unit members.
 - Evidence of three fatalities linked to drugs or alcohol which did not involve bargaining unit members.

The Take-Away

- Has the Employer mustered sufficient evidence that random testing increases safety?
 - Survey of employees' experiences?
 - Actual number of accidents attributed to alcohol and/or drugs?
 - Evidence a drug culture within the bargaining unit, and not the general employee population?
- Is there a demonstrable problem with drug and/or alcohol abuse in the workplace?

Family Status Accommodation Update

Overview

- What is family status discrimination?
- When does an employer face a duty to accommodate family status?
- New case law developments
- Advice for Employers

Leaves Pertaining to Family Care in Ontario's *Employment Standards Act*

Ontario	
<u>List of Ontario Leaves</u>	<u>Duration of Leaves</u>
Parental Leave	Up to 37 weeks (or 35 weeks if maternity leave is taken)
Family Medical Leave	Up to 8 weeks
Personal Emergency Leave	Up to 10 unpaid days per year Only applies to employers with 50 or more employees
Coming Soon	Note that on October 29, 2014, the following leaves will be added to the ESA: (1) family caregiver leave (up to 8 weeks); (2) critically ill child care leave (up to 37 weeks); and (3) crime-related child death or disappearance leave (52 weeks for disappearance; 104 weeks for death)

Defining Family Status

“Family Status”

- Human rights legislation guarantees equal treatment without discrimination on the basis of family status
- In Ontario, family status is defined as “the status of being in a parent and child relationship” including adoptive, foster, non-biological and gay and lesbian parents

When Does the Duty to Accommodate Arise for Family Obligations?

Evolution of Approaches

1. **Narrow approach**: Only where condition of employment results in “serious interference” with a “substantial” parental or other family duty
 - Ontario and Federal cases have endorsed this approach, but it has been challenged repeatedly
 - Recent case law from the Federal Court of Appeal provides a new test that overtakes this approach – but draws from the narrow approach

When Does the Duty to Accommodate Arise for Family Obligations?

Three Approaches

2. **Broad approach**: Whenever there is a conflict between parental obligations and a work requirement that prevents an employee from participating fully and equally in employment

- Preferred approach of the (Federal) Canadian Human Rights Tribunal – But Federal Court of Appeal has recently narrowed the test, which will affect future litigation before the Tribunal

When Does the Duty to Accommodate Arise for Family Obligations?

Three Approaches

3. **Hybrid approach**: Where the employee demonstrates that he or she has made all reasonable efforts to fulfill both family and work obligations, but is unable to do so without accommodation

- Most labour arbitrators have used this approach
- Test has been clarified in two recent decisions of the Federal Court of Appeal – (1) *Johnstone*; (2) *Seeley*.

When Does the Duty to Accommodate Arise for Family Obligations?

The most recent approach

- In *Johnstone v. Canada (Attorney General)* and *Seeley v. Canadian National Railway Co*, the Federal Court of Appeal clarified the test for when the duty to accommodate arises
- In *Johnstone*, the Federal Court held “the childcare obligations arising in discrimination claim[s] based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations”
- Similarly, in *Seeley*, the Federal Court held that the duty arises for “substantial obligation[s]” where the complainant lacks “realistic alternatives” for meeting his or her obligations
- Similar to approach used by OHRT in *Devaney v. ZRV Holdings Limited*: no duty to accommodate parental preferences, only actual requirements

When Does the Duty to Accommodate Arise for Family Obligations?

The most recent approach

- A four part test was established in these cases by the Federal Court of Appeal for *prima facie* discrimination:
 - (i) that a child is under the employee’s care and supervision;
 - (ii) that the childcare at issue relates to legal responsibility for the child, as opposed to a personal choice;
 - (iii) that the employee has attempted but failed to meet those childcare obligations through reasonable alternative solutions; and
 - (iv) that the resulting interference is not trivial or insubstantial
- Absent these elements, no *prima facie* discrimination will be found

When Does the Duty to Accommodate Arise for Family Obligations?

The most recent approach

- In essence, the Federal Court of Appeal adopted a test that limits claims to those where:
 - the complainant is unable to fulfill “substantial family obligations” involving legal obligations rather than voluntary choices, and
 - the complainant has sought but failed to find alternative arrangements
- These decisions, although in favour of the complainants on the facts, now set out a more clear test with a relatively high threshold for when the duty arises to accommodate family status.
 - Reminiscent of “narrow” approach in some ways (though somewhat broader).
- Positive development for employers

Practical Advice for Employers

- When in doubt, apply the same accommodation process you would for an employee with a disability or a religious obligation:
 - Meet the employee, and if applicable, the union
 - Find out what the employee's family status is
 - Find out what the employee's family obligations are
 - Find out what the employee has done to meet those obligations
 - Consider whether the obligations can be accommodated without undue hardship
- Employer can likely insist that the employee make efforts to find childcare or eldercare, before employer must accommodate

Practical Advice for Employers

Undue Hardship

- “Floodgates” arguments are not useful
- Evidence must be objective and real as opposed to speculative
- Objective evidence includes:
 - Financial statements and budgets
 - Expert opinion
 - Data from empirical studies

Practical Advice for Employers

Employer Obligations

- Be aware of any workplace requirements that might interfere with family obligations, such as unexpected overtime, shift changes or relocations
- Deal with accommodation requests in good faith and in a manner consistent with the accommodation policies in place
- Deal with each request individually
- Engage in discussions with the employee about their obligations and their needs
- Take an active role to ensure that all accommodation possibilities are explored
- Keep records of accommodation requests and requirements

Practical Advice for Employers

Accommodation Measures should be Collaborative, Tailored and Flexible

- Explore collaborative and flexible options
 - Examples of such options include:
 - Having flexible rules for shift exchanges
 - Allowing employee to vary the work schedule – start and end times
 - Allowing for compressed weeks or different shift lengths
 - Providing teleworking options
 - Permitting leave time

Conclusion

- The protection against discrimination on the grounds of family status includes the obligations from parental and other family-related responsibilities
- The challenge is in determining when the employer's duty to accommodate family obligations arises
- The best practice is to treat all requests seriously and consider them in good faith
- Have a process in place addressing accommodation of parental and family obligations, and assess each request on an individual basis
- Involve the employee in the process and engage in discussions
- Document all requests and efforts made

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