

Are You Prepared? New Ontario Human Rights Commission Policies Suggest Employers Review Internal Practices

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On Thursday, September 29, 2016, the Ontario Human Rights Commission ("OHRC") launched the OHRC's [Policy on Ableism and Discrimination based on Disability](#). This was an update to a policy that was first introduced in 2001. Shortly after, on October 13, 2016 the OHRC released the new OHRC [Policy on Drug and Alcohol Testing](#).

Employers should be aware that while these documents are not binding law in Ontario or other jurisdictions, they are persuasive support if complaints proceed before provincial human rights adjudicators. These policies offer useful guidance to employers about the evolving legal definition of disability, medical information an employer can or cannot request during the accommodation process, and the features of an appropriate drug or alcohol testing program in the workplace.

Policy on Ableism and Discrimination based on Disability

The updated Policy on Ableism and Discrimination based on Disability establishes that "disability" is a broad and constantly evolving term under section 10 of the Ontario *Human Rights Code* ("Code"). The definition applies to past and present disabilities, as well as any adverse treatment which results from a perceived disability. Conditions such as multiple chemical sensitivities and food-related anaphylaxis can meet the definition of "disability". This represents a significant evolution since the Policy's first introduction in 2001.

The Policy reminds employers that ableism is an underlying attitude which must be remedied in the workplace. Ableist attitudes can be conscious or subconscious and are often based on the antiquated view that disability is an "anomaly to normalcy". As explained by the OHRC's Chief Commissioner, Renu Mandhane, these attitudes significantly limit opportunities for people with disabilities and reduce their inclusion in the workplace.

The Policy also canvasses the thorny issue of medical information and what type, scope and to whom it should be provided during the accommodation process. The Policy provides useful example scenarios and states that medical information should generally include:

- that the person has a disability;
- the limitations or needs associated with the disability;
- whether the person can perform the essential duties or requirements of the job with or without accommodation;
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job; and
- regular updates about when the person expects to come back to work, if they are on leave.

The above list is a general framework that will be dependent on the facts of each case. However, it serves as a useful reminder of the information sharing responsibilities for employees seeking disability accommodations.

Policy on Drug and Alcohol Testing

The updated Policy on Drug and Alcohol Testing is welcome guidance in an evolving area of law that incorporates health and safety, human rights and privacy issues. The Policy is structured to explain where testing policies and programs may be unlawfully discriminatory and where they may be justified. It also gives guidance on how to design testing policies and programs to respect human rights, while also ensuring workplace safety.

The Policy explains that drug and alcohol testing policies and programs may be unlawfully discriminatory based on addictions or perceived addictions. An addiction to drugs or alcohol is considered a "disability" under the Code. Discrimination will be established where a positive test result leads to negative consequences for a person based on their addiction or perceived addiction. Examples of negative consequences can include: imposing automatic discipline, failing to accommodate up to the point of undue hardship, or breaching employee confidentiality during the testing process.

Even if drug and alcohol testing policies and programs discriminate based on addictions or perceived addictions, the Policy states that policies and programs may be justifiable if an employer can show that the testing provisions are *bona fide* (legitimate) requirements of the job. Following the test for *bona fide* requirements laid out by the Supreme Court of Canada, employer policies should be:

- adopted for a purpose that is rationally connected to performing the job;
- adopted in an honest and good faith belief that it is necessary to fulfilling that legitimate work-related purpose; and
- reasonably necessary to accomplish that legitimate work-related purpose. To show this, the employer must demonstrate that it is impossible to accommodate the person without imposing undue hardship upon the employer.

An extremely helpful aspect of the updated Policy is the [situation chart](#) produced by the OHRC. This detailed chart highlights eight different drug or alcohol testing scenarios including testing before a job offer, random testing and reasonable grounds / post-incident testing.

In each scenario the OHRC summarizes their position on whether testing is permissible and what human rights or privacy considerations will be at play. For example, for pre-employment drug or alcohol testing, the OHRC recommends against testing in part because it cannot establish or predict that a person will be impaired whilst at work. This scenario contrasts with reasonable grounds and post-incident testing (drug and alcohol), which may be permissible if:

- there has been a link established between impairment and performing safety-sensitive job duties;
- it is part of a larger assessment of drug or alcohol addiction;
- the employer meets its duty to accommodate the needs of people with addictions who test positive; and
- looking at the condition of the employee is a reasonable part of the investigation.

Take Aways

Both the Policy on Ableism and Discrimination based on Disability and the Policy on Drug and Alcohol Testing provide timely guidance for employers facing a range of human rights obligations in the workplace. While these documents are not binding in Ontario or other jurisdictions, they are persuasive before provincial human rights adjudicators and tribunals.

Employers should also be aware that disability accommodation and drug or alcohol testing complaints are almost always determined in a fact-specific, case-by-case manner. Employers would be well-advised to consult with a legal professional in their jurisdiction should they have any specific concerns in either of these areas.

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