

Policy on

Drug and alcohol testing



Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

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Ontario Human Rights Commission

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Summary

The Ontario Human Rights Commission (OHRC) recognizes that it is a legitimate goal for employers to have a safe workplace. Safety at work can be negatively affected by many factors, including fatigue, stress, distractions and hazards in the workplace. Drug and alcohol testing is one method employers sometimes use to address safety concerns arising from drug and alcohol use. Drug and alcohol testing has particular human rights implications for people with addictions. Addictions to drugs or alcohol are considered “disabilities” under the Ontario *Human Rights Code (Code)*. The *Code* prohibits discrimination against people with disabilities and perceived disabilities in employment, services, housing and other social areas.

Drug and alcohol testing policies and programs may be discriminatory based on addictions or perceived addictions. They raise human rights concerns where a positive test leads to negative consequences for a person based on an addiction or perceived addiction, such as automatic discipline or inflexible terms and conditions on a person’s job, not accommodating people to the point of undue hardship, or not respecting people’s dignity and confidentiality through the testing process.

If drug and alcohol testing policies and programs discriminate against people based on addictions or perceived addictions, they may be justifiable if an employer can show that testing provisions are *bona fide* (legitimate) requirements of the job. However, employers should take a proactive approach to workplace drug and alcohol testing. Where these policies are necessary to achieve safety, employers should design them to avoid potential discriminatory impacts. Following the test for *bona fide* requirements laid out by the Supreme Court of Canada, policies should be:

1. Adopted for a purpose that is rationally connected to performing the job
2. Adopted in an honest and good faith belief that it is necessary to fulfilling that legitimate work-related purpose
3. 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.

The primary reason for conducting drug and alcohol testing should be to measure impairment, as opposed to deterring drug or alcohol use or monitoring moral values among employees. Even testing that measures impairment can be justified as a *bona fide* requirement only if it is demonstrably connected to performing the job (for example, if an employee occupies a safety-sensitive position and after a significant accident or “near-miss”), and only then as part of a larger assessment of drug and alcohol addiction. By focusing on testing that actually measures impairment, especially in jobs that are safety-sensitive, an appropriate balance can be struck between human rights and safety requirements, both for employees and the public.

Following a positive test, employers should offer a process of individualized assessment of drug or alcohol addiction and must accommodate employees with addictions to the point of undue hardship. If employers or drug and alcohol testing policies treat recreational

(or casual) users as if they are people with addictions and impose consequences on this basis, they may be *prima facie* discriminatory (discrimination on its face) based on “perceived disability.”

A drug and alcohol testing policy that respects human rights and may be justifiable under the *Code* is one that:

- Is based on a rational connection between the purpose of testing (minimizing the risk of impairment to ensure safety) and job performance
- Shows that testing is necessary to achieve workplace safety
- Is put in place after alternative, less intrusive methods for detecting impairment and increasing workplace safety have been explored
- Is used only in limited circumstances, such as for-cause, post-incident or post-reinstatement situations
- Does not apply automatic consequences following positive tests
- Does not conflate substance use with substance addiction
- Is used as part of a larger assessment of drug or alcohol addiction (for example, employee assistance programs, drug education and awareness programs and a broader medical assessment by a professional with expertise in substance use disorders or physician that provides a process for inquiring into possible disability)
- Provides individualized accommodation for people with addictions who test positive, to the point of undue hardship
- Uses testing methods that are highly accurate, able to measure current impairment, are minimally intrusive and provide rapid results
- Uses reputable procedures for analysis, and
- Ensures confidentiality of medical information and the dignity of the person throughout the process.

1. Introduction

The Ontario *Human Rights Code* (*Code*) recognizes the inherent dignity and worth of every person and provides for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.

The Ontario Human Rights Commission (OHRC) recognizes that it is a legitimate goal for employers to have a safe workplace. Employers, employees and other responsible parties have duties under the *Occupational Health and Safety Act*¹ and other legislation to make sure their workplaces are safe. Employers can be held criminally responsible for serious safety violations.² Safety at work can be negatively affected by many factors, including fatigue, stress, distractions and workplace hazards. Drug and alcohol testing is one method employers sometimes use to address safety concerns arising from drug and alcohol use. Drug and alcohol testing in employment is commonplace in the United States³ and is increasing worldwide.⁴ However, such testing is controversial⁵ and has been the subject of several labour arbitration, human rights tribunal and court decisions in recent years. Some types of testing are particularly disputed, such as random testing, drug testing and pre-employment testing.

The controversy surrounding drug and alcohol testing relates to the collision between workplace requirements and employee human and privacy rights. The International Labour Organization has stated, “Testing of bodily samples for alcohol and drugs in the context of employment involves moral, ethical and legal issues of fundamental importance, requiring a determination of when it is fair and appropriate to conduct such testing.”⁶

The Supreme Court of Canada has noted that in both unionized and non-unionized workplaces, employers must pay careful attention to balancing safety and privacy interests when considering drug and alcohol testing.⁷ On the importance of a person’s privacy in the context of drug and alcohol testing, the Court stated:

...Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that “the use of a person’s body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity” (*R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32). And in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the “seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements” (para. 23).⁸

Drug and alcohol testing has particular human rights implications for people with addictions. People who have present, past or perceived addictions to drugs and alcohol are considered people with “disabilities” under the *Code*⁹ and are protected from discrimination in employment and all other social areas.¹⁰ People with addictions are

entitled to the same human rights protection as people with other disabilities.¹¹ Workplace drug and alcohol testing policies and programs may discriminate against people with addictions or perceived addictions, and where they do, may only be justified in limited circumstances.

Drug and alcohol testing is not automatically necessary for employees who appear impaired by drugs or alcohol. Other methods that could address the issue are explained in section 5.2.

This policy can help employers, unions and other responsible parties understand and meet their legal responsibilities under the *Code* relating to drug and alcohol testing. It can be a useful tool for employers who are considering setting up workplace drug and alcohol testing programs as one aspect of broader health and safety policies. Employers can also use this policy to supplement their drug and alcohol policies, workplace training materials and anti-discrimination and harassment policies. See Appendix A for more about the purpose of OHRC policies.

2. Scope of this policy

Drug and alcohol testing is a concern for Ontario employers that have safety-sensitive operations, or that are subject to U.S. regulatory requirements (e.g. the trucking industry)¹² or to the policies of U.S. affiliates with “zero tolerance” for the consumption of drugs or alcohol. For these reasons, this policy focuses on workplaces, especially where safety is a workplace objective.¹³ However, the principles could apply to other social areas.¹⁴

Note that international and interprovincial transportation companies are under federal jurisdiction.¹⁵ Airlines, interprovincial and cross-border trucking and bus services and other federally-regulated employers are subject to the federal *Canadian Human Rights Act*¹⁶ and not provincial human rights laws.

3. Code protections

Section 5(1) of the *Code* prohibits discrimination in employment on 16 grounds including disability. Section 10(1) of the *Code* includes an expansive definition of the term “disability” which encompasses physical, psychological and mental conditions. Drug and alcohol (substance) addictions¹⁷ are disabilities protected by the *Code*. Examples include alcohol addiction and addictions to legal (e.g. prescription) or illegal drugs.¹⁸ The Supreme Court of Canada accepted the following definition of addiction, used by the Canadian Society of Addiction Medicine:

A primary, chronic disease, characterized by impaired control over the use of a psychoactive substance and/or behaviour. Clinically, the manifestations occur along biological, psychological, sociological and spiritual dimensions. Common features are change in mood, relief from negative emotions, provision of pleasure,

pre-occupation with the use of substance(s) or ritualistic behaviour(s); and continued use of the substance(s) and/or engagement in behaviour(s) despite adverse physical, psychological and/or social consequences. Like other chronic diseases, it can be progressive, relapsing and fatal.¹⁹

The following examples are situations where the use or perceived use of drugs or alcohol may fall within the *Code*'s protection:

1. Where a person's use has reached the stage that it constitutes an addiction ("substance use disorder").²⁰
2. Where an individual is perceived as having a drug or alcohol addiction.

Example: An employer refuses to promote an employee because of the belief that the employee has an alcohol addiction. Because of this perception and the employer's consequent action, the person's right to equal treatment under the *Code* may have been infringed.

People who use substances recreationally are not protected by the *Code*, unless they are perceived to have disabilities.²¹

3. Where an individual has had a drug or alcohol addiction in the past, but no longer has an ongoing disability.

Example: A company decided to put a drug and alcohol policy in place. The policy made it mandatory for employees in safety-sensitive positions to disclose a current or past "substance abuse problem." After disclosing an alcohol abuse problem from more than seven years earlier and from which he was in remission, an employee was automatically reassigned to a non-safety-sensitive position. The company required him to complete a two-year rehabilitation program followed by five years of abstinence and abide by other controls before he would be allowed to work in his original position. The policy was found to be discriminatory.²²

4. Establishing discrimination and *Code* defences

Testing for alcohol or drug use is a form of medical examination. Even where they are put in place in good faith, drug and alcohol testing programs and policies may result in adverse effects based on addiction or perceived addiction (called *prima facie* discrimination, or discrimination "on its face"). Drug and alcohol testing policies and programs may adversely affect people based on disability or perceived disability by imposing negative consequences (such as discipline, dismissal or refusal to hire), imposing inflexible extra terms and conditions on someone's job,²³ not accommodating to the point of undue hardship people who test positive, or not respecting people's dignity and confidentiality through the testing process.

Under the *Code*, where drug and alcohol testing policies or programs are found to be *prima facie* discriminatory, the employer may establish a defence by showing that the policy, rule, requirement, standard or test that resulted in the adverse effect is a legitimate or *bona fide* requirement.²⁴ The employer must use the three-step test laid out by the Supreme Court of Canada²⁵ to establish on a balance of probabilities that the policy, rule, requirement, standard or test:

1. Was adopted for a purpose that is rationally connected to performing the job
2. Was adopted in an honest and good faith belief that it was necessary to fulfilling that legitimate work-related purpose
3. Is 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.

Section 17 of the *Code* also provides a defence to discrimination where a person with a disability is unable to perform an essential requirement of their job. However, a person will only be considered incapable of performing the essential duties if their disability-related needs cannot be accommodated without undue hardship.²⁶ In the case of drug and alcohol testing, this defence is only available if the employer can show that testing, or other methods to establish that someone is impaired by drugs or alcohol, are reasonable and *bona fide* requirements.²⁷

By keeping the three-step test in mind when designing drug and alcohol testing policies and programs, employers can avoid potential discriminatory effects on people with addiction or perceived addictions. A well-designed policy that responds to these three steps at the outset can help an employer if it is challenged under the *Code*.

Employers should consider these questions:

- Is there an objective basis for believing that safe performance of the job would be compromised by drug or alcohol impairment? Is there a rational connection between the purpose of testing (e.g. minimizing the risk of impairment to ensure safety) and job performance?
- Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by alcohol or drug impairment will adversely affect the safety of the individual, co-workers, members of the public or the environment?
- Is testing reasonably necessary to identify people who, at the time of the test, cannot perform their jobs safely because they are impaired by alcohol or drugs?²⁸ Is testing reasonably necessary to achieve a work environment free from impairment from alcohol and drugs? For example, is there a demonstrated problem with drug and alcohol use in the workplace?²⁹

- Are there less intrusive ways to accomplish the legitimate work-related purpose (e.g. peer or supervisory reviews)?
- Does the standard or test incorporate individual differences, in that it accommodates people who test positive to the point of undue hardship?

After considering these questions, there may be no objective basis to conclude that an employer should set up workplace drug and alcohol testing policies or programs. It may be that other measures, such as safety checks, health promotion and substance awareness programs, and addiction accommodation policies can meet the employer's goal of addressing safety risks or performance issues due to drug and alcohol impairment.

However, if testing is justified, the following guiding principles should be kept in mind:

- A relationship or rational connection between drug or alcohol testing and job performance is an important component of any lawful drug or alcohol testing policy or program. Drug and alcohol testing that has no demonstrable relationship to job safety and performance, or where there has been no evidence of enhanced safety risks in the workplace, has been found to be a violation of employee rights.³⁰
- The policy or program must not be arbitrary in terms of which groups of employees are subjected to testing. For example, when considering the employer's rationale for testing, testing only new or returning employees but no other employees may not be justifiable. At the same time, testing employees in safety-sensitive positions may be justifiable in some circumstances.
- A safety-sensitive job can be characterized as one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high-risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.
- The primary reason for conducting drug and alcohol testing should be to measure impairment, rather than deterring drug or alcohol use³¹ or monitoring moral values among employees. Drug and alcohol testing should be limited to determining actual impairment of an employee's ability to perform or fulfil the essential duties or requirements of the job at the time of the test. It should not be directed towards simply identifying the presence of drugs or alcohol in the body.
- Employers should use the least intrusive means of assessing impairment or fitness for work.

- Drug and alcohol testing policies are part of workplace rules and standards. Therefore, standards governing the performance of work should be inclusive. Employers must build conceptions of equality into workplace policies.
- Company-wide policies such as drug and alcohol testing policies must accommodate employees on an individual basis. Individualization is central to the notion of dignity for persons with disabilities and to the concept of accommodation.³² “Blanket” rules that make no allowances for individual circumstances are likely to be found to be discriminatory.³³

Example: An employer in a highly dangerous workplace is concerned about fairness and decides to extend an existing random alcohol testing policy originally designed for employees in safety-sensitive positions to cover all other employees. The purpose of the policy is to ensure workplace safety through an environment free from impairment from alcohol. Employees are automatically suspended for three days when they test positive. Even though the policy provides for generous rehabilitation programs for people with addictions who test positive, the employer may not be able to justify the policy as a *bona fide* requirement. This is because the automatic suspension does not reflect the individual circumstances of employees with addictions. In addition, there are very few risks associated with these particular non-safety-sensitive jobs. This makes it difficult to show a “rational connection” between the purpose of alcohol testing (safety) and job performance. Also, because less intrusive methods are available to detect when people in non-safety-sensitive jobs are impaired, the employer may find it difficult to justify testing as “reasonably necessary” to achieve the purpose of keeping the workplace free from impairment from alcohol.

Any drug and alcohol testing program should be one piece of a broader health and safety policy. Steps taken to reduce risk in the workplace due to impairment from drug and alcohol use should happen alongside other measures to increase workplace safety, such as making sure employees are properly trained, and reducing workplace hazards and distractions.

Sometimes third parties, such as clients, will ask that an employer put a drug and alcohol testing policy or program in place. However, where it has an adverse impact on people with disabilities or perceived disabilities, the employer must still show that the policy or program is a *bona fide* requirement using the three-step test.³⁴

Overall, a well-designed drug and alcohol testing program or policy that respects human rights may be justifiable under the *Code*. However, employers still have a responsibility to make sure that these are not applied in a way that leads to a specific situation of discrimination. The elements of a program or policy that respect human rights are laid out in the summary section of this policy.

5. Drug and alcohol testing situations

5.1. Testing before the job

Testing for drug or alcohol use sometimes takes place before a person is hired, transferred or promoted into a position (“pre-employment” or “certification” testing) or is allowed, as a contractor, to start work on a client’s job site (“pre-access” testing).³⁵ The principles around these types of testing are similar.

The OHRC takes the position that drug and alcohol testing as part of the initial applicant screening process is prohibited under subsection 23(2) of the *Code*.

While the case law has not ruled out the possibility of testing for alcohol or drugs after a person receives a conditional offer of employment for a safety-sensitive position, the OHRC recommends against this practice.

If testing leads to refusing to hire someone based on an addiction or perceived addiction, it may be *prima facie* discriminatory. Negative consequences flowing from a positive test result may contribute to a finding that a job applicant has a “perceived” disability – even if he or she does not have an addiction.³⁶

If employers do put in place before-the-job drug and alcohol testing for safety-sensitive positions, they should make sure that a positive test result does not lead to automatically revoking the offer of employment or other negative consequences. The testing should be one part of a larger qualifying process, which could include examining the required licencing or other legitimate qualifications. The employer also must meet their duty to accommodate people with addictions.

Any medical testing should provide an effective assessment of the applicant’s ability to do the essential job duties. Pre-employment and pre-access drug and alcohol tests have been found to be insufficient to show that an employee has or will attend work impaired by alcohol or drugs.³⁷ Because of this, if testing leads to negative consequences based on someone’s addiction or perceived addiction, it may be difficult to justify as a *bona fide* requirement.³⁸

5.2. Reasonable grounds and post-incident testing

“Reasonable grounds” (“for cause” or “reasonable cause”) and “post-incident” testing for either alcohol or drugs may be acceptable in specific circumstances,³⁹ such as where there has been a link established between impairment and performing safety-sensitive job duties. “Reasonable grounds” should be informed by objective evidence, such as specific observed behaviours or other indicators, including:

- Seeing someone use alcohol or drugs at work
- An employee appearing or acting in a way that is consistent with someone impaired by alcohol or drugs (such as the person smelling like alcohol or drugs)

- Substances or substance paraphernalia in the vicinity of the employee or the area where the employee works (e.g. empty bottles).⁴⁰

Drug and alcohol testing is not automatically necessary for employees who appear impaired by drugs or alcohol. Other methods, such as allowing the person a chance to explain their behaviour, temporarily removing them from safety-sensitive job duties to ensure immediate safety, offering accommodation to the point of undue hardship (such as referral to an employee assistance program or the support needed to attend a rehabilitative program), progressive performance management, and where there is objective evidence that there are legitimate reasons to be concerned, asking the person to attend a medical assessment, could address the issue. The OHRC's *Policy on preventing discrimination based on mental health disabilities and addictions* has more information about these approaches.⁴¹

An employer will have a legitimate interest in post-incident testing following accidents or reports of dangerous behaviour that have resulted in “near-misses,” and where looking at the condition of the employee is a reasonable part of the investigation.⁴² This may involve assessing if the employee consumed mind- or behaviour-altering substances that could have contributed to the incident. The inquiry could also include looking at other factors that may have contributed to the incident, such as lack of training, fatigue, or other factors that can increase risk.

Where a workplace accident or incident appears to result from external factors such as mechanical or structural failure or environmental factors, post-incident testing should not be conducted.

Both reasonable grounds and post-incident testing should only be conducted if they are necessary as part of a larger process of assessing drug or alcohol addiction. This process includes a broader medical assessment by a substance use disorder expert or under the care of a physician. Additional components of a larger assessment may include employee assistance programs (EAPs), peer reviews and supervisory reviews.

5.3. Random testing

Random on-the-job testing should be done only where a link has been established between impairment and performing job duties, such as in the case of employees who are in safety-sensitive positions where the employer is able to demonstrate risk in the workplace.⁴³

As stated earlier, the focus of drug and alcohol testing should be on determining actual impairment of an employee's ability to perform or fulfil the essential duties or requirements of the job at the time of the test.⁴⁴ In random alcohol testing, the use of breathalyzers has been found to be permissible under the *Code*.⁴⁵ Alcohol testing by breathalyzer is seen to be minimally intrusive (compared to blood tests, for example)

and a highly accurate measure of both levels of consumption and actual impairment. Consequently, random alcohol testing is acceptable in safety-sensitive positions, but only where staff supervision is minimal or non-existent, there is evidence of risk in the particular workplace, and the employer meets its duty to accommodate the needs of people with addictions who test positive.⁴⁶

Although many technological advances have been made, the scientific research has not yet confirmed that a method of drug testing exists that is analogous to the breathalyzer for alcohol⁴⁷ in terms of its:

- Ability to measure current impairment⁴⁸
- High level of accuracy
- Minimal level of intrusion, and
- Rapid response time.⁴⁹

Drug testing methods that incorporate these criteria may help employers justify random testing of employees in safety-sensitive positions as a *bona fide* requirement, but only where staff supervision is minimal or non-existent, there is demonstrated risk in the particular workplace, and the employer meets its duty to accommodate the needs of people with addictions who test positive.⁵⁰

However, even drug and alcohol testing policies that may meet the requirements of the *Code* are vulnerable to challenge based on employee privacy.

In *Irving*,⁵¹ the Supreme Court of Canada considered the legal issue of whether implementing a random alcohol testing policy in a safety-sensitive workplace was a valid exercise of the employer's management rights under the collective agreement.

The Court affirmed that random testing is not automatically justified on the basis that the workplace is dangerous and employees are in safety-sensitive positions. The Supreme Court held that while the dangerousness of a workplace is highly relevant, evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace, is also required.⁵²

In that case, the majority held that implementing a random alcohol testing policy was not a valid exercise of the employer's rights.⁵³ The testing policy was not justified because the risks to safety in the workplace did not outweigh the severe impacts on employees' privacy.

The case pertained to employees' rights under a collective agreement. However, the Supreme Court stated that even in a non-unionized workplace, "an employer must justify the intrusion on privacy resulting from random testing by reference to the particular risks in a particular workplace. There are different analytic steps involved, but both essentially require attentive consideration and balancing of the safety and privacy interests."⁵⁴

5.4. Testing as part of a rehabilitation plan

Where an employee is returning to a safety-sensitive job after treatment for alcohol or drug addiction, post-reinstatement testing may be justified.⁵⁵ An employee may be expected to meet certain conditions when they return to work, which may include unannounced testing. Any conditions should be tailored to the person's individual circumstances to meet the employer's duty to accommodate. In such cases, the drug or alcohol testing period set should be reasonable and the testing frequency should not be overly onerous or intrusive.

Post-reinstatement testing may be part of a back-to-work agreement (e.g. a last-chance agreement or contingency behaviour contract), where breaching the agreement could result in terminating a person's job. However, similar to people with other chronic disabilities, people with addictions may experience relapse after treatment.⁵⁶ Having an agreement in place does not negate the employer's duty to accommodate an employee if they have a relapse.⁵⁷

Example: A mill worker in a safety-sensitive position discloses a drug addiction after a work-related incident and attends treatment. One of the conditions of returning to work is that she has to undergo random drug testing. The employee passes her first drug test. Soon after, she has a car accident and starts using substances again. She fails a second drug test. Looking at all of the circumstances, including her prognosis, her accommodation plan and her recovery to date, the employer accommodates the relapse by giving the employee time off for further treatment while initiating another return-to-work plan.

At the same time, the employer's obligation to accommodate is not limitless.⁵⁸ An employer has a duty to accommodate a person with an addiction to the point of undue hardship. There may also be limited circumstances where an accommodation that otherwise would not amount to undue hardship is not required because it would fundamentally alter the nature of the employment, or it would still not allow the person to "fulfill the essential duties attending the exercise of the right."⁵⁹

Example: An employee who is employed in a safety-sensitive position has a drug addiction and has repeatedly gone to rehabilitation. Despite multiple attempts to return him to work, he is not able to pass a post-reinstatement drug test. His doctor says that the employee is unable to work in the foreseeable future, and needs to take an undetermined leave of absence to attend rehabilitation. It would not cause undue hardship based on either cost or health and safety for the employer to continue to accommodate him. However, based on these unique circumstances, and after the employer has made repeated attempts to accommodate, the individual still cannot perform the essential duties of the job or perform alternative work and the employer's duty to accommodate may end.

Or, after accommodation has been tried and exhausted, there may be no further accommodation available that will help the person complete the essential requirements of the job. There may also be situations where someone is continually unable or unwilling to take part in the accommodation process, despite the employer's attempts. In these cases, the employer's duty to accommodate may end.

6. Handling of tests and results

When developing a testing program or policy, employers should also consider:

- Notifying applicants and employees: Where drug or alcohol testing will be a valid requirement on the job, the employer should notify job applicants of the requirement when an offer of employment is made. Employers should make clear the reasons why such medical testing is needed and obtain prior, informed consent. Employers must explain what will happen to the person's biological specimen after testing.
- Competent handling of test samples: Qualified professionals must perform drug and alcohol testing, reputable procedures for analysis should be used, and laboratory results must be analyzed in a competent facility. Further, the employer is responsible for making sure that the samples taken are properly labelled and protected at all times.
- Confidentiality: Although the employer will be advised of the test results, confidentiality of the employee's medical information should be protected. All health assessment information should remain exclusively with the examining physician and away from the employee's personnel file. Employees should be advised about how their medical information will be kept confidential.
- An employer is entitled to know that an employee has a disability or medical condition, the person's restrictions or needs, whether they are able to do the essential duties, and the types of accommodation that may be needed. However, it is not generally entitled to know the person's confidential medical information, including their diagnosis,⁶⁰ unless it clearly relates to the accommodation being sought, or the person's needs are complex, challenging or unclear and more information is needed.⁶¹ In these cases, the person may be asked to co-operate by providing more information, up to and including a diagnosis. The employer should be able to clearly justify why this information is necessary. For more information, see section 13.7 of the OHRC's *Policy on preventing discrimination based on mental health disabilities and addictions*.
- Drug and alcohol testing can reveal information about a person's health other than drug or alcohol use.⁶² Because of the potential for intrusion into people's dignity and privacy, it is particularly important that test results are handled in a way that maximizes confidentiality. Drug and alcohol testing must not be used for purposes other than testing for the substances explicitly laid out in the employer's drug and alcohol policy.

- Review of results with the employee: Procedures should be instituted for a physician with expertise in substance use disorders to review the test results with the employee concerned. The employee should be allowed the opportunity to explain if there are other medical reasons that may have caused a positive result.

7. Consequences of a positive test

7.1. Duty to accommodate

Although the emphasis in the *Code* is on making sure that people with disabilities are not treated in a discriminatory way, in some circumstances, the nature and/or degree of a person's disability may prevent them from performing the essential duties of a job. Under section 17(1) of the *Code*, it is not discriminatory to refuse a job or treat someone differently at work because they are incapable of performing or fulfilling the essential duties of the position because of a disability. However, people cannot be presumed to be unable to fulfill the essential duties or requirements of a job based on disability. Instead, there must be objective evaluation of this fact. Assessment of incapacity must be both fair and accurate.

Section 17(2) says that an employee shall not be found incapable of performing the essential duties of a job unless it would cause undue hardship to accommodate the individual employee's needs, taking into account the cost of the accommodation and health and safety concerns.⁶³

After a person tests positive on a drug or alcohol test, they should be advised of the availability of accommodation. Employees are entitled to an individualized assessment conducted by someone with expertise in substance use disorders to inquire into possible disability and assess any support needed. Accommodation must be offered unless it causes undue hardship, and any addiction disability will be a mitigating factor in considering if discipline is appropriate.⁶⁴ The *Code* requires individualized or personalized accommodation measures. Therefore, policies that result in the automatic loss of a job, reassignment or inflexible reinstatement conditions, without regard for a person's individual circumstances, are unlikely to meet this requirement.

7.1.1. Responsibilities of the employee and employer

The accommodation process is a shared responsibility. Everyone involved should co-operatively engage in the process, share information and consider potential accommodation solutions.

The person with a disability is required to:

- Advise the accommodation provider of the disability (although the accommodation provider does not generally have the right to know what the disability is)
- Make accommodation needs known to the best of their ability, preferably in writing, so that the person responsible for accommodation can make the requested accommodation
- Answer questions or provide information about relevant restrictions or limitations, including information from health care professionals, where appropriate and as needed.⁶⁵ However, accommodation seekers are not required to discuss their disability or their accommodation needs with anyone other than those individuals directly involved in the accommodation process.⁶⁶
- Take part in discussions about possible accommodation solutions
- Co-operate with any experts whose help is needed to manage the accommodation process or when information is needed that is unavailable to the person with a disability
- Meet agreed-upon performance standards and requirements, such as job standards, once accommodation is provided
- Work with the accommodation provider on an ongoing basis to manage the accommodation process.

The accommodation provider is required to:

- Be alert to the possibility that a person may need an accommodation even if they have not made a specific or formal request
- Accept the person's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- Get expert opinions or advice where needed (but not as a routine matter)
- Take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated,⁶⁷ and canvass various forms of possible accommodation and alternative solutions⁶⁸
- Keep a record of the accommodation request and action taken
- Communicate regularly and effectively with the person, providing updates on the status of the accommodation and planned next steps⁶⁹
- Maintain confidentiality
- Limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- Implement accommodations in a timely way,⁷⁰ to the point of undue hardship
- Bear the cost of any required medical information or documentation (for example, the accommodation provider should pay for doctors' notes, assessments, letters setting out accommodation needs, *etc.*)
- Bear the cost of the required accommodation.

Generally, people are expected to make their accommodation needs known to their employers. However, due to the nature of drug and alcohol addictions, people may not realize or be able to admit that they have a disability, or recognize the impact of their addiction on their job.⁷¹ Employers have a duty to inquire if a person has addiction-related needs where someone is clearly unwell or perceived to have needs related to an

addiction.⁷² An employer should offer assistance and accommodation before imposing discipline and other consequences.⁷³ When someone tests positive on a drug or alcohol test, this will trigger the “duty to inquire.” This should be done respectfully, and in a way that protects the employee’s confidentiality.

Unions and professional associations are required to take an active role as partners in the accommodation process, share joint responsibility with the employer to facilitate accommodation, and support accommodation measures regardless of collective agreements, unless to do so would create undue hardship.⁷⁴

If an employee's drug or alcohol addiction is interfering with their ability to perform the essential duties of their job, the employer must first provide the support necessary to enable that person to undertake a rehabilitation program unless it can be shown that such accommodation would cause undue hardship.

Generally, if an accommodation is required to allow the person to be able to take part in the organization without impediment due to disability, the organization must arrange and cover the cost of the accommodation needed,⁷⁵ unless this would cause undue hardship. However, human rights case law has not yet determined whether this would include the cost of treatment such as therapy, medication, *etc.*

In circumstances where people are not able to recognize that they have an addiction, policies that discipline people for not coming forward and disclosing a drug or alcohol addiction may be found to be discriminatory.⁷⁶

Even if a person with an addiction or perceived addiction refuses accommodation, this does not justify immediate dismissal. The employer has to show, through progressive discipline, that the employee has been warned and is unable to perform the essential duties of the position. If the employee refuses offered accommodation and if progressive discipline and performance management have been implemented, dismissal may occur.

This approach applies to workplaces where testing takes place, and those where testing does not take place.

Example: An employee in a clerical position appears to be inebriated often during work hours, and the employer has a conversation to address the problem. The employee refuses to acknowledge the problem or seek counselling at the employer's expense. Shortly after, the employee is fired without formal warning. This may be a violation of the employee’s rights under the *Code*.

See section 13.6.1 of the *Policy on preventing discrimination based on mental health disabilities and addictions* for more details.

Refusing to take a drug or alcohol test should not automatically lead to the conclusion that the employee would test positive. A refusal should not lead to consequences that treat the person as if they have an addiction (e.g. being suspended from his or her position and not being allowed to return to work unless he or she attends counselling for substance use). Instead, the circumstances should be examined on a case-by-case basis, considering the reasons for refusing the test and other relevant factors, such as the employee's service record. Otherwise, such actions may amount to discrimination based on perceived disability.⁷⁷

7.1.2. Undue hardship

The employer will be relieved of the duty to accommodate the needs of the employee with an alcohol or drug addiction if it can show that the accommodation would cause undue hardship, that is, that:

1. The cost of the accommodation is so high that it would alter the nature or affect the viability of the enterprise. This analysis must take into account outside sources of funding and other attempts to offset costs
or
2. The health or safety risks to workers, members of the public or the environment are so serious that they outweigh the benefits of the requested accommodation. This analysis must take place after accommodations and precautions to reduce any risks have been made.

The employer is responsible for proving that an accommodation would cause undue hardship, using evidence that is direct, real and objective and in the case of costs, quantifiable. A mere claim without supporting evidence that the risk or cost is "too high" based on impressionistic views or stereotypes will not be enough.

The test for undue hardship is set out fully in the OHRC's *Policy on preventing discrimination based on mental health disabilities and addictions*.

7.2. Recreational users of alcohol or drugs

Using substances does not necessarily mean someone has an addiction (substance use disorder). Because of the nature of addictions, some people who claim to be recreational users may have an addiction.⁷⁸ The *Code* protects these individuals based on disability. Otherwise, the *Code* only protects people who are casual or recreational users of substances if they are perceived to have an addiction.⁷⁹

If an employer believes a casual user has an addiction or a drug and alcohol testing policy treats a casual user as if they have an addiction, human rights concerns may arise based on "perceived disability."⁸⁰

Example: During a site visit, a manager in a safety-sensitive work environment notices that one of her employees appears to be under the influence of alcohol when he returns from lunch. The company has a drug and alcohol testing policy in place. Before he goes back to his job, the employee has to take an alcohol test. The result is positive, and the employee admits to being a social drinker. In response, the employer automatically fires him. He is also barred from working at the company in the future unless he provides medical documentation that he is fit to work. This documentation is not expected of other job applicants. These actions may raise human rights concerns based on “perceived disability.”

Employers should be aware of their duty to inquire into the possibility that a disability may exist, but should not act based on stereotypes. They should also design policies in a way that does not conflate substance use with substance addiction.

Following a positive alcohol or drug test, an employee may be individually assessed and found to be a casual user, as opposed to a person with an addiction. As a preferred approach in these situations, employers should consider tailoring any sanctions to the circumstances.

8. Alternative methods

There are ways to address health and safety in the workplace other than drug and alcohol testing. Several other factors, including fatigue and stress, can cause workplace accidents. Many organizations safely carry out high-risk work without drug and alcohol testing policies.⁸¹ As stated earlier, employers should use the least intrusive means of assessing impairment or fitness for work.

When considering how best to address safety, employers should consider developing alternative approaches that do not have a discriminatory effect.⁸² For example, EAPs can help people with a drug or alcohol addiction, and can also help employees deal with the stress that may lead to an addiction. Health promotion and drug education programs can also prevent problems before they start by getting at the root causes.

Other alternatives to testing may include:

- Using or developing performance tests, which can test for cognitive or psychomotor impairment related to the integral parts of the job
- Training supervisors or others to assess behaviour that can affect workplace safety, including signs of someone being under the influence of alcohol or drugs
- Random checks
- Planned observations and audits
- Peer monitoring.

Appendix A: Purpose of OHRC policies

Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to comply with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.⁸³ Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (HRTO) may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervenor in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject matter of a human rights application, parties and intervenors are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the HRTO to have the HRTO "state a case" to the Divisional Court to address the inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,⁸⁴ applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.⁸⁵

Appendix B: Summary of drug and alcohol testing situations and the Ontario *Human Rights Code*

Where drug and alcohol testing policies or programs lead to negative consequences based on addiction or perceived addiction, they may be *prima facie* discriminatory (discrimination on its face). In these cases, employers can only justify drug and alcohol testing where it is a reasonable and *bona fide* (legitimate) requirement (BFR). If it cannot be justified, such testing will violate the Ontario *Human Rights Code*. Drug and alcohol testing policies should be designed to meet the Supreme Court of Canada’s test for *bona fide* requirements (see section 4).

| Drug and alcohol testing situations | Summary | Considerations |
|-------------------------------------|----------------------------------|---|
| Drug testing before the job | OHRC recommends against testing. | <ul style="list-style-type: none"> ▪ Testing cannot establish or predict that a person will come to work impaired ▪ At the time of writing, there are still limits to establishing current impairment through rapid results from the least invasive methods of drug testing ▪ If it causes adverse impacts based on addiction or perceived addiction, the employer may have difficulty establishing testing as a BFR |
| Alcohol testing before the job | OHRC recommends against testing. | <ul style="list-style-type: none"> ▪ Testing cannot establish or predict that a person will come to work impaired ▪ If it causes adverse impacts based on addiction or perceived addiction, the employer may have difficulty establishing it as a BFR |

| Drug and alcohol testing situations | Summary | Considerations |
|-------------------------------------|--|---|
| Random drug testing | <p>Testing may be permissible if:</p> <ul style="list-style-type: none"> ▪ The technique used is highly accurate, can measure impairment at the time of the test, is minimally intrusive and provides rapid results ▪ Employees are in safety-sensitive positions ▪ Staff supervision is minimal or non-existent ▪ There is evidence of risk in the particular workplace ▪ The employer meets its duty to accommodate the needs of people with addictions who test positive | <ul style="list-style-type: none"> ▪ At the time of writing, there are still limits to establishing current impairment through rapid results from the least invasive methods of drug testing ▪ Therefore, it may be difficult for an employer to establish testing as a BFR ▪ Random testing that meets the requirements under the <i>Code</i> may still be vulnerable to legal challenges based on employees' privacy |
| Random alcohol testing | <p>Testing may be permissible if:</p> <ul style="list-style-type: none"> ▪ Alcohol breathalyzer used ▪ Employees are in safety-sensitive positions ▪ Staff supervision is minimal or non-existent ▪ There is evidence of risk in the particular workplace ▪ The employer meets its duty to accommodate the needs of people with addictions who test positive | <ul style="list-style-type: none"> ▪ Alcohol breathalyzer is highly accurate, can measure current impairment, is minimally intrusive and provides rapid results ▪ Random testing that meets the requirements under the <i>Code</i> may still be vulnerable to legal challenges based on employees' privacy |

| Drug and alcohol testing situations | Summary | Considerations |
|--|--|---|
| <p>Reasonable grounds and post-incident testing (drug and alcohol)</p> | <p>Testing may be permissible if:</p> <ul style="list-style-type: none"> ▪ In specific circumstances, such as where 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 ▪ In the case of post-incident testing, looking at the condition of the employee is a reasonable part of the investigation | <ul style="list-style-type: none"> ▪ The decision to test an employee on reasonable grounds should be based on specific observed behaviours or other indicators (see section 5.2) ▪ Post-incident testing can follow accidents or reports of dangerous behaviour that has resulted in “near-misses” |
| <p>Testing as part of a rehabilitation plan (drug and alcohol)</p> | <p>Testing may be permissible if:</p> <ul style="list-style-type: none"> ▪ An employee is returning to a safety-sensitive position ▪ Return-to-work conditions are tailored to the person’s individual circumstances ▪ Any testing periods set are reasonable and not overly onerous or intrusive | <ul style="list-style-type: none"> ▪ An employee may be expected to meet certain conditions when they return to work following treatment, including unannounced testing ▪ Even after a relapse, an employer still has a duty to accommodate; however, the duty to accommodate is not limitless (see section 5.4 for more information) |

| Drug and alcohol testing situations | Summary | Considerations |
|--|---|--|
| Testing positive: people with addictions | <p>If an individualized assessment determines that someone has an addiction:</p> <ul style="list-style-type: none"> ▪ Individualized accommodation must be made to the point of undue hardship <i>E.g.</i> support must be provided to help the person take a rehabilitation program, unless it causes undue hardship ▪ Disability must be taken into account as a mitigating factor when considering discipline ▪ Automatic termination, reassignment or inflexible reinstatement conditions are not acceptable responses | <ul style="list-style-type: none"> ▪ Under the <i>Code</i>, people with disabilities must be accommodated at work to the point of undue hardship |
| Testing positive: casual or recreational users | <p>The <i>Code</i> may apply where a person is:</p> <ul style="list-style-type: none"> ▪ Subjectively perceived by the employer to have a disability, or ▪ Treated, through the consequences of the drug and alcohol testing policy, as if they have an addiction <p>If an individualized assessment determines that someone does not have an addiction:</p> <ul style="list-style-type: none"> ▪ A preferred approach is to tailor any sanctions to the person's individual circumstances | <ul style="list-style-type: none"> ▪ Casual or recreational users of drugs or alcohol (as opposed to people with addictions) are protected by the <i>Code</i> only if they are perceived to have a disability ▪ Policies and programs that treat casual substance users as if they have substance addictions may contribute to a person being found to have a "perceived disability" |

Endnotes

¹ *Occupational Health and Safety Act*, RSO 1990, c O1.

² Under subsection 217.1 of the *Criminal Code*, RSC, 1985, c C-46, employers must take steps to make sure their workplaces are safe for their employees. Employers who fail to do so may be held criminally liable for negligence (subsection 22.1).

³ For example, in 2004, 62% of American Management Association member companies used some form of testing for illicit drugs. Michael R. Frone, *Alcohol and Illicit Drug Use in the Workforce and Workplace* (Washington, DC: American Psychological Association, 2013) at 147.

⁴ International Labour Organization, “Coming Clean: Drug and Alcohol Testing in the Workplace,” *World of Work Magazine*, 57 (September 2006) online: International Labour Organization www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/articles/WCMS_082253/lang--en/index.htm (retrieved February 21, 2015). For a review of the drug and alcohol testing laws and practices in the European Union, see European Monitoring Centre for Drugs and Drug Addiction, “Legal status of drug testing in the workplace,” online: European Monitoring Centre for Drugs and Drug Addiction www.emcdda.europa.eu/html.cfm/index16901EN.html (Retrieved August 21, 2014); and Anya Pierce, “Regulatory Aspects of Workplace Drug Testing in Europe” (2012) 4 *Drug Test. Analysis* 62.

⁵ For example, the effectiveness of drug and alcohol testing in the workplace is disputed. Although several studies have found that drug and alcohol testing reduces workplace injuries and accidents, reviews of the literature have identified many methodological flaws in these studies, including the existence of other uncontrolled variables that may have explained the results. This has led some researchers to conclude that there is sparse evidence that drug and alcohol testing lowers the incidence of occupational accidents and injuries. Ken Pidd & Ann Roche, “How effective is Drug Testing as a Workplace Safety Strategy? A Systematic Review of the Evidence” (2014) 71 *Accident Analysis and Prevention*, 154; Frone, *supra* note 3; Scott Macdonald *et al.*, “Testing for Cannabis in the Work-place: A Review of the Evidence,” (2010) 105 *Addiction*, 408. One strong study noted by researchers is J.E. Brady, *et al.*, “Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes,” (2009) 170(6) *Am. J. Epidemiol.*, 775, which found that alcohol testing programs had a substantial effect on reducing accidents among truck drivers.

⁶ International Labour Organization, *Management of Alcohol- and Drug-Related Issues in the Workplace*. An ILO code of practice (Geneva: International Labour Office, 1996) at 16.

⁷ *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at paras 19-20, [2013] 2 SCR 458 [“*Irving*”].

⁸ *Ibid.*, at para 50.

⁹ In *Entrop v Imperial Oil* 50 OR (3d) 18 at para 89, 2000 CanLII 16800 (CA) [“*Entrop*”], the Ontario Court of Appeal accepted a Board of Inquiry finding that drug abuse and alcohol abuse are “each a handicap” (now referred to as “disability”) and that each is “an illness or disease creating physical disability or mental impairment and interfering with physical, psychological and social functioning.” The Court also accepted that drug dependence and alcohol dependence are each “handicaps” entitled to protection under the *Code*.

¹⁰ The *Code* covers five social areas: employment, accommodation (housing), goods, services and facilities, membership in vocational associations and contracts.

¹¹ *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 (CanLII).

¹² Most employers that are subject to U.S. commercial motor vehicle regulations are likely to be under federal jurisdiction, which would be covered under the *Canadian Human Rights Act*. However, even provincially regulated companies that may have only the occasional driver seeking to enter the U.S. are also subject to regulatory requirements for drug and alcohol testing to enter the U.S.

¹³ Alcohol and drug testing in non-safety-sensitive workplaces may be difficult to justify under the *Code*. Policies that focus on purposes other than safety (such as productivity) would be difficult to justify as *bona fide* requirements, if these policies lead to negative consequences for people with addictions or perceived addictions. See section 4 for more information.

¹⁴ For example, drug and alcohol testing is often used in competitive sports to ensure fair competition. In another example, the OHRC has taken the position that drug or alcohol testing as a prerequisite to eligibility for basic income support programs is *prima facie* discriminatory. Letter from Chief Commissioner Keith C. Norton to the Hon. John Baird, Minister of Community and Social Services (unpublished, July 1999). The OHRC expressed concern about the Government's announced plans to test welfare recipients for drugs or alcohol.

¹⁵ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985 at sections 91 and 92.

¹⁶ *Canadian Human Rights Act*, RSC 1985, c H-6.

¹⁷ The OHRC uses "addiction" as an all-encompassing term to refer to people who in the past would have been referred to as having substance "abuse" or substance "dependency" disorders. In the newest version of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, addictions are no longer divided into the categories of the less severe substance "abuse" and the more severe substance "dependency." Instead, these are combined into the same category of "substance use disorders." American Psychiatric Association, "Substance-related and addictive disorders," *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (Arlington, VA: American Psychiatric Association, 2013) online: Psychiatryonline dsm.psychiatryonline.org/content.aspx?bookid=556§ionid=41101782 (Retrieved August 21, 2014). Many legal cases referred to in this policy use the terms "substance abuse" and "substance dependency" because these decisions were issued before the publication of the *DSM-5*.

¹⁸ Drug and alcohol programs typically test for six substances: marijuana, cocaine, opioids and opiates, amphetamine (including methamphetamine), phencyclidine (PCP) and alcohol. Frone, *supra* note 3.

¹⁹ *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 101, 3 SCR 134. See endnote 20 for a more specific diagnostic definition and diagnostic criteria.

²⁰ According to the *DSM-5*, a "substance use disorder" is a pattern of substance use leading to clinically significant impairment or distress, as manifested by at least two of 11 patterns of behaviour, or criteria, occurring within a 12-month period. These patterns of behaviour relate to a person's impaired control over their substance use, social impairment due to using the substance, risky use of the substance and pharmacological criteria (that is, tolerance and withdrawal symptoms). Severity of the substance use disorder is "mild," "moderate" or "severe," depending on the number of criteria the person meets. American Psychiatric Association, *supra* note 17. Note that not all disorders that meet this definition are necessarily protected as disabilities under the *Code*. For example, the case law on whether addiction to nicotine or tobacco constitutes a disability is still inconclusive. See *McNeill v Ontario (Ministry of the Solicitor General and Correctional Services)*, 1996 CanLII 14947 (Ont Sup Ct); *Cominco Ltd v United Steelworkers of America, Local 9705*, [2000] BCCA 62 (QL); *Club Pro Adult Entertainment Inc v Ontario (Attorney General)*, 2006 CanLII 42254 (Ont Sup Ct).

²¹ See section 7.2. for more information.

²² *Entrop*, *supra* note 9.

²³ In *Entrop*, *supra* note 9, Imperial Oil's drug and alcohol testing policy was found to be *prima facie* discriminatory in part because it subjected the claimant, a person with a past disability, to automatic reassignment to a less desirable, non-safety-sensitive job. In addition, he was reinstated to his original position only after agreeing to a "rigorous medical evaluation and ongoing controls" (at para. 118), including two years of rehabilitation, five years of abstinence, attending a self-help group (apparently indefinitely), committing to reporting to the employer any changes to his circumstances that could increase the risk of relapse, periodic reporting to the employer compliance with the conditions and committing to annual medical examinations including screening for alcohol and drug abuse. The employer could not show that these requirements were reasonably necessary under the *bona fide* requirement test (paras. 118-127).

²⁴ Section 11 of the *Code* prohibits discrimination that results from requirements, qualifications or factors that may appear neutral but which have a negative effect on people identified by the *Code*. This is often called "adverse effect discrimination." In these cases, the *Code* allows the person or organization responsible for creating the adverse effect to show that the requirement, qualification or factor is reasonable and *bona fide* by showing that the needs of the group the person belongs to cannot be accommodated without undue hardship.

²⁵ *British Columbia (Public Services Employee Relations Commission) v British Columbia Government and Services Employees Union (BCGSEU)(Meiorin Grievance)* [1999] 3 SCR 3 ["*Meiorin*"], at para 54.

²⁶ See section 7.1. on the duty to accommodate for more information. See also *Meiorin*, *ibid*.

²⁷ In *Entrop*, *supra* note 9, the Ontario Court of Appeal said that if an employer cannot show that testing, or other methods to establish impairment such as mandatory disclosure and automatic reassignment, are themselves *bona fide* requirements, then its defence under section 17 will fail (at para. 83).

²⁸ See *Entrop*, *supra* note 9, at para 96. At para. 97, the Ontario Court of Appeal stated:
An employer's workplace rule may fail to satisfy the third step in the *Meiorin* test in several ways. For example the rule may be arbitrary in the sense that it is not linked to or does not further the employer's legitimate purpose; the rule may be too broad or stricter than reasonably necessary to achieve the employer's purpose; the rule may unreasonably not provide for individual assessment; or the rule may not be reasonably necessary because other means, less intrusive of individual human rights, are available to achieve the employer's purpose.

²⁹ This analysis must be based on persuasive evidence. In *Mechanical Contractors Association Sarnia v United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2013 CanLII 54951 (ON LA) ["*Mechanical Contractors Assn Sarnia, 2013*"], the adjudicator examined whether there was a health and safety problem at the workplace due the use of drugs or alcohol. The adjudicator concluded there was no such problem in the workplace, which formed part of the reason why the pre-access drug and alcohol testing could not be justified as a *bona fide* requirement. The collective agreement issues in the decision were upheld on appeal in *Mechanical Contractors Association Sarnia v United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 663* 2014 ONSC 6909 (CanLII) ["*Mechanical Contractors Assn Sarnia, 2014*"]. Because the collective agreement issues were upheld, the Divisional Court said that it did not need to consider the human rights issues.

³⁰ See *Irving*, *supra* note 7, at para 31; *Entrop*, *supra* note 9. See also *Mechanical Contractors Assn Sarnia, 2013*, *supra* note 29, upheld in *Mechanical Contractors Assn Sarnia, 2014*; *Canada (Human Rights Commission) v Toronto-Dominion Bank*, [1998] 4 FCR 205, CanLII 8112 (FCA).

³¹ Researchers have noted that there are few methodologically strong research studies that confirm that workplace drug and alcohol testing deters alcohol or drug use. For a review of the literature, see Frone, *supra* note 3.

³² For more information, see Ontario Human Rights Commission, *Policy and guidelines on disability and the duty to accommodate* (Toronto: Queen's Printer for Ontario, 2000), online: Ontario Human Rights Commission www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate.

³³ See section 7.1 on the duty to accommodate for more information.

³⁴ Third-party requirements will not always constitute a *bona fide* requirement. See *International Union Of Operating Engineers, Local 793, v Sarnia Cranes Limited* [1999] OLRD No 1282 [QL]; *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 v Mechanical Contractors Association of Sarnia* (Drug and Alcohol Policy Grievance), [2008] OLAA No 621 (QL) at para 136; *Mechanical Contractors Assn Sarnia*, 2013, *supra* note 29. The latter decision was upheld on appeal in *Mechanical Contractors Assn Sarnia*, 2014, *supra* note 29. Drug and alcohol testing policies may be justifiable to meet U.S. Department of Transportation regulations for bus or truck drivers who do cross-border driving, but people who test positive must still be accommodated to the point of undue hardship. See *Milazzo v Autocar Connaisseur Inc et al*, 2003 CHRT 37 (CanLII) ["*Milazzo*"].

³⁵ *Mechanical Contractors Assn Sarnia*, 2013, *supra* note 29.

³⁶ In *Weyerhaeuser Company Limited v Ontario (Human Rights Commission) ex rel Chornyj*, 2007 CanLII 65618 (Ont Div Ct) ["*Chornyj*"], a pre-employment drug testing policy was found not to be *prima facie* discriminatory based on perceived disability. The claimant, who admitted to using drugs recreationally, did not experience automatic dismissal or revocation of his employment and the company did not perceive him to be disabled. Therefore, his claim under the ground of "perceived disability" was not tenable.

³⁷ In *Entrop*, *supra* note 9, pre-employment drug testing by urinalysis was found to be a violation of the *Code* because, in the words of the Court, "...a positive test does not show future or even likely future impairment on the job, yet an applicant who tests positive only once is not hired" (at para 103). The Ontario Court of Appeal did not make a finding on pre-employment alcohol testing, as it was not included in Imperial Oil's drug and alcohol policy. See also *Mechanical Contractors Assn Sarnia*, 2013, *supra* note 29 at paras 183, 217 and 218. In *Mechanical Contractors Assn Sarnia*, 2014, *supra* note 29, the Ontario Divisional Court upheld the arbitrator's analysis of the collective agreement issue, but did not find it necessary to address the *Human Rights Code* issue.

³⁸ Employers may also be expected to show the particular safety risks that exist in the workplace. See *Mechanical Contractors Assn Sarnia*, 2014, *supra* note 29; *Irving*, *supra* note 7 at para 20.

³⁹ *Irving*, *supra* note 7 at paras 30, 45.

⁴⁰ Adapted from ENFORM, "Alcohol and Drug Policy Model for the Canadian Upstream Petroleum Industry" Ed. 1.0. (2007), online: ENFORM The Safety Association for Canada's Upstream Oil and Gas Industry www.enform.ca/resources/detail/70/alcohol-and-drugs-policy-model-for-the-upstream-petroleum-industry at 18 (retrieved August 4, 2016).

⁴¹ Ontario Human Rights Commission, *Policy on preventing discrimination based on mental health disabilities and addictions*, (Toronto: Queen's Printer for Ontario, 2014) online: Ontario Human Rights Commission www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions.

⁴² *Entrop*, *supra* note 9 at para 114. See also *Sterling Crane*, [2009] OLRD No 4623 (QL) ["*Sterling Crane*"], in which the Ontario Labour Relations Board noted: "It is apparent that the jurisprudence now accepts the authority of an employer to conduct post incident urinalysis testing in a safety-sensitive

workplace both as a legitimate exercise of management rights and as a BFOR under human rights legislation, where that testing is conducted as part of an investigation to determine the cause of the incident in question. I agree that a policy providing for such testing constitutes a legitimate exercise of management's authority so long as the testing does not become random" (at para. 74).

⁴³ *Irving*, *supra* note 7 at paras 20, 45.

⁴⁴ See *Entrop*, *supra* note 9 at para 99; *Imperial Oil Ltd v Communications, Energy and Paperworkers Union of Canada, Local 900* [2006] OLAA No. 721 (QL) at para 124, [*Imperial Oil Ltd, 2006*"]; *Imperial Oil Limited v Communications, Energy & Paperworkers Union of Canada, Local 900*, 2008 CanLII 6874 (Ont Div Ct), [*Imperial Oil Ltd, 2008*"], and *Imperial Oil Ltd. v Communications, Energy & Paperworkers Union of Canada, Local 900*, 2009 ONCA 420 (CanLII) [*Imperial Oil Ltd, 2009*"].

⁴⁵ *Entrop*, *supra* note 9.

⁴⁶ See section 7.1. on the duty to accommodate for more information.

⁴⁷ Urinalysis, for example, can detect past use, but it cannot detect how much of the drug was used, or whether the person is currently impaired. See Frone, *supra* note 3; Leo J. Kadehjian, "Specimens for Drugs-of-Abuse Testing" In *Forensic Science and Medicine: Drugs of Abuse: Body Fluid Testing*, ed by R.C.Wong & H.Y. Tse (Totawa, NJ: Humana Press, 2005). See also *Entrop*, *supra* note 9. Oral fluid testing techniques are rapidly improving [see, for example, Nathalie A. Desrosiers *et al.*, "On-Site Test for Cannabinoids in Oral Fluid" (2012) 58:10 *Clinical Chemistry* 1418]. There are still limits to establishing impairment through oral fluid at the time of testing, due to a variety of factors. See Marilyn A. Huestis, *et al.*, "Oral Fluid Testing: Promises and Pitfalls," (2011) 57:6 *Clinical Chemistry* 805; V. Vindenes, *et al.*, "Detection of Drugs of Abuse in Simultaneously Collected Oral Fluid, Urine and Blood from Norwegian Drug Drivers" (2012) 219 *Forensic Science International* 165; Frone, *supra* note 3; Alain Verstraete, "Detection Times of Drugs of Abuse in Blood, Urine, and Oral Fluid" (2004) 26:2 *The Drug Monit* 200; Australian National Council on Drugs, *ANCD Position Paper: Drug Testing* (2013) online: ATODA www.atoda.org.au/archived-ancd-website/ at 4-5; Scott Macdonald, "Submission to the Society of Energy Professionals and the Power Workers' Union Comment on the Canadian Nuclear Safety Commission Discussion Paper *Fitness for Duty: Proposals for Strengthening Alcohol and Drug Policy, Programs and Testing*" (2012), online: www.suretenucleaire.gc.ca/eng/pdfs/Discussion-Papers/12-03/20120919-DIS-12-03-Scott_Macdonald.pdf. Blood testing may be better than other methods at detecting levels of drugs associated with impairment but it is highly intrusive. See Leo J. Kadehjian, *ibid.*; Macdonald, 2010, *supra* note 5. A breathalyzer for drugs is being developed. See Olof Beck, "Exhaled Breath for Drugs of Abuse Testing – Evaluation in Criminal Justice Settings" (2014) 54 *Science and Justice* 57; Sarah K. Himes *et al.*, "Cannabinoids in Exhaled Breath following Controlled Administration of Smoked Cannabis" (2013) 59:12 *Clinical Chemistry* 1780. However, there is not a large body of scientific literature validating its use.

⁴⁸ In *Imperial Oil Ltd, 2008*, *supra* note 44, the Ontario Divisional Court stated, "There is no dispute that the current drug test [oral fluid] does disclose impairment by cannabis, although the result of the test is not available at the time it is administered" (at para. 10). However, in the scientific literature, limitations are still evident (see footnote 47, above).

⁴⁹ In *Imperial Oil Ltd, 2006* *supra* note 44, testing for drugs in oral fluid using a cheek swab was found not to be justifiable under the collective agreement partly because the results could not be immediately determined – the test had to be sent to a laboratory for analysis. Employees who would eventually receive a positive result were sent back to their safety-sensitive jobs right after being tested. As such, this method could not ensure immediate safety in the workplace, and was not analogous to the alcohol breathalyzer, which was allowed by the Ontario Court of Appeal in *Entrop* (at paras. 112-113). This finding was upheld in *Imperial Oil Ltd, 2008*, *supra* note 44 and *Imperial Oil Ltd, 2009*, *supra* note 44. Drug testing guidelines advise that initial screening tests for oral fluid be analysed in a laboratory, confirmed using high standard laboratory techniques, and verified by a trained medical review officer. See European Workplace Drug Testing Society, *European Guidelines for Workplace Drug Testing in Oral*

Fluid (2011) online: EWDTs www.ewdts.org/ewdts-guidelines.html (retrieved July 21, 2015) at 6; and Substance Abuse and Mental Health Services Administration, “Mandatory Guidelines for Federal Workplace Drug Testing Programs – Oral Fluid” (proposed) (2015) 80:94 *Federal Register* online: Department of Health and Human Services www.samhsa.gov/workplace/drug-testing#proposed-mandatory-guidelines (retrieved July 22, 2015) at 28086.

⁵⁰ There is some disagreement about the permissibility of pre-employment and random drug testing in human rights case law across jurisdictions. For example, despite the CHRT’s finding that urinalysis drug testing for cannabis did not indicate impairment on the job, in *Milazzo*, *supra* note 34, it was found to be “reasonably necessary” to meet the legitimate work-related purpose. This was because bus drivers were unsupervised most of the time, and a positive test result, although not conclusive, was a “red flag” that helped to identify drivers who were more likely to have accidents. Drug and alcohol testing served as a deterrent to employees who had control over their drug and alcohol use, but there was insufficient evidence to conclude that individuals with substance abuse problems would be deterred. The policy also reflected requirements to comply with U.S. legislation. However, the CHRT found that the employer’s policy failed to accommodate people who tested positive to the point of undue hardship. See also *Chornyj*, *supra* note 36; *Dennis v Eskasoni Band Council* [2008] CHR D No 38 (QL); *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426, (leave to appeal to SCC denied).

⁵¹ *Irving*, *supra* note 7.

⁵² *Irving*, *supra* note 7, at para 31.

⁵³ In *Irving*, *supra* note 7, the dissenting minority noted in footnote 2 (para 86):
“While *Entrop* was decided in the context of a non-unionized workplace under human rights legislation, it remains relevant to any analysis concerning the reasonableness of drug and alcohol testing policies. Indeed, the board here relied on *Entrop* in assessing the invasiveness of the breathalyser test (para. 116). Whether an arbitrator applies the test developed by this Court for the human rights context in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 (“*Meiorin*”), or traditional labour relations law and the *KVP* test, at bottom, the inquiry in both cases is concerned with the reasonableness of the company policy. In some provinces, arbitrators may adjudicate grievances challenging these policies under both *KVP* and *Meiorin* and we have difficulty accepting that a policy would fail under one test but pass muster under the other. See, e.g., [Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 48\(12\)\(j\)](#).”

⁵⁴ *Irving*, *supra* note 7, at para 20.

⁵⁵ *Entrop*, *supra* note 9. The Ontario Court of Appeal did not find it necessary to interfere with the Board of Inquiry’s conclusion that post-reinstatement testing did not contravene the *Code*, as long as it was necessary as part of a larger assessment to determine whether an employee was not merely using but abusing alcohol or drugs (at para. 129).

⁵⁶ In a review of the literature, McLellan, *et al.* found that the relapse rates for substance dependence (which includes alcohol and drugs) were between 40-60% in the first year after discharge from treatment, which was similar to the relapse rates for type 1 diabetes (30-50%), hypertension (50-70%) and asthma (50-70%). McLellan, *et al.*, “Comparison of Relapse Rates Between Drug Addiction and Other Chronic Illnesses” (2000) 284 *JAMA* 1689 at 1693.

⁵⁷ *Colonial Cookies Corp v United Food and Commercial Workers Canada, Local 175* (Grant Grievance), [2010] OLAA No. 468 (QL). In *Milazzo*, *supra* note 34 at para 34, the CHRT stated:
“Accordingly, the ‘last chance agreement’ is in the Tribunal’s opinion unenforceable in regards to the [Canadian Human Rights] Act. As the case law indicates, an analysis must be made in each case to determine whether or not it is impossible for the employer to accommodate the needs of the

employee to the point of undue hardship. While it is certainly open to the Respondent to warn employees returning to work after rehabilitation that any relapse could result in termination of their [sic] employment, the imposition of a last chance agreement cannot serve to nullify the duty of accommodation established under human rights legislation.”

⁵⁸ *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, [2008] 2 SCR 561; *Hall v Chief of Police, Ottawa Police Service*, 2008 CanLII 65766 (Ont Div Ct).

⁵⁹ Section 17 of the Ontario *Human Rights Code*.

⁶⁰ *Simpson v Commissionaires (Great Lakes)*, 2009 HRTO 1362 (CanLII), at para 35; *Cristiano v Grand National Apparel Inc*, 2012 HRTO 991, at para 20; *Wall v The Lippé Group*, 2008 HRTO 50 (CanLII), [“Wall”]; *Mellon v Canada (Human Resources Development)*, [2006] CHRD No 2; *Leong v Ontario (Attorney General)*, 2012 HRTO 1685 (CanLII); *Noe v Rane Management*, 2014 HRTO 746 (CanLII).

⁶¹ A person may have more rigorous obligations with regard to disclosing medical information in the context of litigation. In *Hicks v Hamilton-Wentworth Catholic District School Board*, 2015 HRTO 1285 (CanLII), the HRTO stated at paragraph 17: “Where there is a dispute about the medical status of an employee further medical information may be required and where, as in these circumstances, there is litigation with respect to the dispute the parties will be entitled to much more fulsome disclosure of the medical documentation than might be the case in other circumstances.” See also *Fay v Independent Living Services*, 2014 HRTO 720 (CanLII).

⁶² For example, urinalysis can detect pregnancy, whether the person is using legitimate prescription medications, and/or is being treated for heart disease, bipolar disorder, diabetes, epilepsy or schizophrenia. Nancy Holmes & Karine Richer, *Drug Testing in the Workplace* (2008) online: Parliament of Canada www.parl.gc.ca/content/lop/researchpublications/prb0751-e.htm (retrieved March 10, 2015) at 2.

⁶³ See section 7.1.2. on undue hardship.

⁶⁴ See *Krieger v Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) [“Krieger”] at para 157; *Kemess Mines Ltd v International Union of Operating Engineers, Local 115*, 2006 BCCA 58 (CanLII) (leave to appeal to SCC denied) [“Kemess Mines Ltd”]; *Bowden v Yellow Cab and others (No 2)*, 2011 BCHRT 14 (CanLII). In cases of misconduct, a person with a psychosocial disability would have to show a causal relationship between the misconduct and a psychosocial disability to engage the Code’s protection. See *Fleming v North Bay (City)*, 2010 HRTO 355 (CanLII); *Walton Enterprises v Lombardi*, 2013 ONSC 4218 (CanLII); *McLean v Riverside Health Care Facilities Inc*, 2014 HRTO 1621 (CanLII) at para 27.

⁶⁵ In *Baber v York Region Dist. School Board (No 3)* (2011), 2011 HRTO 213 (CanLII), the HRTO found that even if the duty to accommodate was triggered, the employer had fulfilled its duty to accommodate because the claimant failed to co-operate in the accommodation process by refusing reasonable requests for information that would confirm her needs. She consistently refused to provide the necessary medical information. The HRTO found that the employer did not breach its duty to accommodate her when it terminated her employment.

⁶⁶ In *Ravi DeSouza v 1469328 Ontario Inc*, 2008 HRTO 23 (CanLII), the HRTO found that a tennis club discriminated against a tennis instructor based on disability when it imposed requirements on the instructor that he tell all private clients about his epilepsy and instruct all staff how to deal with a seizure.

⁶⁷ *Meiorin*, *supra* note 25 at paras 65-66.

⁶⁸ *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34 (CanLII) ["Lane"]; *ADGA Group Consultants Inc v Lane*, 2008 CanLII 39605 (Ont Div Ct) ["ADGA"]; *Krieger*, *supra* note 64; *MacLeod v Lambton (County)*, 2014 HRTO 1330 (CanLII).

⁶⁹ *Hodkin v SCM Supply Chain Management Inc*, 2013 HRTO 923 (CanLII).

⁷⁰ In *Turnbull v Famous Players Inc*, 2001 CanLII 26228 (ON HRT), the HRTO upheld a discrimination complaint finding that although Famous Players had taken steps to comply with the *Code* by providing equal access to its movie theatres for people with disabilities, it had not done so quickly enough, and had failed to act with "due diligence and dispatch" (para. 216).

⁷¹ See *Kemess Mines Ltd*, *supra* note 64; Primary Care Addiction Toolkit: Fundamentals of Addiction, 2010, *What is addiction?* Online: CAMH and St. Joseph's Health Centre. www.porticonetwork.ca/web/fundamentals-addiction-toolkit/introduction (retrieved June 24, 2015). People with addictions may also be reluctant to disclose their disability due to the considerable stigma that surrounds addictions. See Centre for Addiction and Mental Health, *The Stigma of Substance Abuse: A Review of the Literature* (18 August 1999), online: CAMH www.camh.ca/en/education/Documents/www.camh.net/education/Resources_communities_organizations/stigma_subabuse_litreview99.pdf (retrieved January 22, 2016) at 6-7.

⁷² *Wall*, *supra* note 60 at para 80; *Krieger*, *supra* note 64.

⁷³ See *Lane*, *supra* note 68; *ADGA*, *supra* note 68; *Krieger*, *supra* note 68; *Wall*, *supra* note 60; *Mellon v Human Resources Development Canada*, 2006 CHRT 3 (CanLII) at paras 97-98; *Willems-Wilson v Allbright Drycleaners Ltd* [1997] BCHRTD No 26 (QL).

⁷⁴ The Supreme Court of Canada's decision in *Central Okanagan School Dist. No 23 v Renaud*, ["Renaud"], [1992] 2 SCR 970 sets out the obligations of unions. See also *Bubb-Clarke v Toronto Transit Commission*, 2002 CanLII 46503 (HRTO).

⁷⁵ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

⁷⁶ But see *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225 (CanLII), in which a majority of the Alberta Court of Appeal found that the dismissal of an employee with an addiction who did not self-disclose did not amount to discrimination. The majority found that based on the evidence, the employee did not have sufficient loss of control and could have complied with the self-disclosure requirements. Leave to appeal has been granted by the Supreme Court of Canada.

⁷⁷ *Sterling Crane*, *supra* note 42.

⁷⁸ See CAMH and St. Joseph's Health Centre, *supra* note 71.

⁷⁹ *Entrop*, *supra* note 9, at para 92. Note that in several cases, decision-makers have dismissed the discrimination claims of people who experienced sanctions (such as termination or failure to hire) after failing a drug or alcohol test, because they could not show they had a disability or perceived disability. See for example, *Chornyj*, *supra* note 36.

⁸⁰ *Chornyj*, *supra* note 36. At para 29, the Ontario Divisional Court stated:

The decisions in *Entrop* and *Kellogg* do not stand for the proposition that the mere existence of a drug testing policy is *prima facie* discriminatory on the ground of perceived disability. The effect of the drug testing policy must be examined in each particular case to determine if a claim of perceived disability is supportable.

Severe or harsh consequences, such as automatic dismissal, may be seen as evidence that the employer's policy treats the employee as if they have a disability. In *Entrop*, *supra* note 9, the Ontario Court of Appeal examined Imperial Oil's drug and alcohol testing policy, which characterized substance

abuse as often beginning with experimental use. It found that Imperial Oil applied sanctions to any person testing positive, on the assumption that the person is likely to be impaired at work currently or in the future, and therefore not “fit for duty.” On this basis it concluded that the pre-employment and random testing provisions of the policy were *prima facie* discriminatory against perceived or actual substance abusers (at paras. 90-92). See also *Greater Toronto Airports Authority v Public Service Alliance of Canada, Local 0004* [2007] CLAD No 243 (QL) at para 297.

⁸¹ *Mechanical Contractors Assn Sarnia*, 2013, *supra* note 29 at para 141.

⁸² As part of the three-step BFR test, the following non-exhaustive factors should be considered: whether the organization investigated alternative approaches that do not have a discriminatory effect; reasons why viable alternatives were not put in place; whether the organization can meet its legitimate objectives in a less discriminatory way; whether the standard is properly designed to make sure the desired qualification is met without placing undue burden on the people it applies to; *etc. Meiorin*, *supra* note 25, at para 65.

⁸³ Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that take place after a document's publication date will not be reflected in that document. For more information, contact the Ontario Human Rights Commission.

⁸⁴ In *Quesnel v London Educational Health Centre* (1995), 28 CHRR D/474 at para 53 (Ont Bd Inq), the Board of Inquiry applied the United States Supreme Court's decision in *Griggs v Duke Power Co*, 401 US 424 (4th Cir 1971) to conclude that OHRC policy statements should be given “great deference” if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

⁸⁵ For example, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a “sea change” in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn of Justices of the Peace of Ontario v Ontario (Attorney General)* (2008), 92 OR (3d) 16 at para 45 CanLII 26258 (SupCt). See also *Krieger*, *supra* note 68 and *Eagleson Co-Operative Homes, Inc v Théberge*, 2006 CanLII 29987 (Ont Div Ct) 9 in which both the HRTO and the Court applied the OHRC's *Policy and guidelines on disability and the duty to accommodate*, *supra* note 32.