

# Drug and alcohol dependencies in Alberta workplaces



Alberta Human Rights  
and Citizenship Commission

## INFORMATION SHEET

### Introduction

The Alberta Human Rights and Citizenship Commission receives many inquiries from employers, employees, job applicants and unions about drug and alcohol testing and about the employer's duty to accommodate drug and alcohol dependencies in the workplace. The Commission has developed this publication to provide current information about how human rights law impacts drug and alcohol dependencies in the workplace. This information is for educational purposes and is not intended to be legal advice.

Courts and human rights tribunals have acknowledged that drug and alcohol dependencies are medically recognized disabilities under human rights law.<sup>1</sup> Therefore, drug and alcohol dependencies are protected under the grounds of mental and physical disability under the *Alberta Human Rights, Citizenship and Multiculturalism Act (HRCM Act)*. For more information about protected grounds, see the Commission's information sheet *Protected areas and grounds under the Human Rights, Citizenship and Multiculturalism Act*.

Recreational use of drugs or alcohol is not protected under the *HRCM Act*. A "recreational user" is a person who uses drugs or alcohol, but is not dependent on or addicted to drugs or alcohol. A recreational user does not have a dependency and therefore does not have a disability.

The purpose of this information sheet is to:

- clarify the Commission's role in preventing discrimination against employees who have drug and alcohol dependencies;
- outline the situations in which an employee may have the basis to make a human rights complaint related to drug and alcohol dependencies in the workplace;
- provide information about when an individual may make a complaint about a potentially discriminatory drug and alcohol policy;
- provide information about the responsibilities of the employer and employee in the accommodation process;
- inform the public that the Commission does not have jurisdiction to tell an employer when or whether they can require a drug or alcohol test; and
- define the difference between *recreational* drug and alcohol use and drug and alcohol *dependencies*.

In this publication, the term "employee" or "employees" includes individuals who have made pre-employment applications to a potential employer.

<sup>1</sup> See for instance *Entrop v. Imperial Oil Ltd.*, [2000] O.J. 2689; 50 O.R. (3d) 18; *Canada (Human Rights Commission) v. Toronto-Dominion Bank*, [1998] 4 F.C. 205; *Les Halter v. Ceda-Reactor Limited* (2005) Alta. HRP (Bryant).

# Making a human rights complaint

**NOTE:** A complaint must be made to the Alberta Human Rights and Citizenship Commission within one year after the alleged incident of discrimination. The Commission reviews all complaints on a case-by-case basis to determine whether there are the grounds for a complaint under the *HRCM Act*.

There may be a basis for a human rights complaint if:

- an employee has a drug or alcohol dependency and the employer and/or union refuses to accommodate this disability to the point of undue hardship;
- an employer or union takes adverse action against an employee or union member based on a perception that the employee or union member has a drug or alcohol dependency;
- an individual believes that the employer's drug and alcohol policy is discriminatory; or
- an employee has a drug or alcohol dependency and fails testing for drugs or alcohol.

These situations, as they relate to making a human rights complaint, are discussed below.

## Accommodation of employees who have a drug or alcohol dependency

An employer must examine options to accommodate an employee's disability up to the point of undue hardship. (See the section on accommodation to the point of undue hardship on page 4 in this information sheet.) If the employer terminates the employee without exploring and assessing the accommodation options, then the employee may have the basis for a human rights complaint. A trade union also has an obligation to cooperate in the employer's accommodation of a disabled employee.

## Perceived drug and alcohol dependencies

A perceived disability is one that an employer presumes the employee to have. For example, a job applicant might fail a drug and alcohol test and the employer might state, "We do not hire drug addicts like you." In this case, the employer has expressed a *perception* that the employee is dependent on drugs. Perception of drug or alcohol dependency is protected under the *HRCM Act*. In this case, even an employee who does not have a drug or alcohol dependency (that is, one who is a recreational user or a non-user) may make a complaint if there is discrimination resulting from the employer's *perception* that they have a disability. A trade union's actions based on its perception of a member's disability may also give rise to a human rights complaint.

## Discriminatory drug and alcohol policy

Any person, including an employee who does not have a drug or alcohol dependency, may make a complaint against a potentially discriminatory drug and alcohol policy on behalf of other employees who have drug and alcohol dependencies. A potentially discriminatory drug and alcohol policy includes one that requires the automatic termination of employees who fail drug and alcohol tests without the opportunity for assessment or accommodation of an employee's disability.

## Failing a drug or alcohol test

A failed drug or alcohol test may arise from a variety of situations. For example, if a test shows evidence of drug use or more than a specified level of alcohol in the body, the employee will fail the test. If an employee refuses to take the test and this is a condition of the employer's drug and alcohol policy, the employee is considered to have failed the test.

If, as a result of an employee failing a drug or alcohol test, the employer *automatically* terminates the employment or imposes disciplinary action, an employee who has a drug or alcohol dependency may have the basis to make a human rights complaint. However, there may be no basis for a human rights complaint if the employer:

- offers to send the employee to a qualified professional for an assessment of the employee's drug or alcohol use; and/or
- provides accommodation to the point of undue hardship.

Please note that if a job applicant fails a drug and alcohol test, the employer should invite the applicant to establish whether or not they have a disability, or send the applicant to a qualified professional for an assessment. If there is a disability, they should explore potential accommodations.

## Can an employer require a drug and alcohol test?

The Commission does not have jurisdiction to tell an employer when or whether they can require a drug or alcohol test. The Commission's focus is on the treatment of employees who are disabled through drug or alcohol dependency. Several human rights decisions have found that drug and alcohol testing could not be justified in all circumstances.<sup>2</sup> However, it is not the testing that triggers the protection of human right law. It is the treatment by the employer of employees who are dependent on drugs or alcohol. The Commission's involvement in drug and alcohol testing in the workplace is limited to complaints of discrimination

<sup>2</sup> *Entrop v. Imperial Oil Ltd.*; *Milazzo v. Autocar Connaisseur Inc.* (2003) 47 C.H.R.R. D/468; *Merrick v. Ipsco and United Steel, Local 5890* (2008) C.H.R.R. Doc 08-954 Sask. H.R.T.

based on a disability, a perceived disability, an accommodation issue, or a testing policy that may discriminate against individuals who have a drug or alcohol dependency.

For information about an employee's privacy rights in drug and alcohol testing, contact the Office of the Information and Privacy Commissioner ([www.oipc.ab.ca/home](http://www.oipc.ab.ca/home)).

## Addressing drug and alcohol dependencies in the workplace

### Workplace drug and alcohol policies

If an employer chooses to develop and administer a drug and alcohol policy, the policy should:

- provide for assessment of individuals to determine whether they have a drug or alcohol dependency;
- address the employer's and employee's responsibilities regarding accommodation of an employee's disability to the point of undue hardship;
- safeguard against automatic termination of an employee with a drug or alcohol dependency;
- define the difference between *recreational use* of drugs or alcohol and *dependency* on drugs or alcohol; and
- refer initial complaints about the policy or its application to a particular department within the organization that is trained in accommodating disabilities.

### Recreational use versus dependent use

Human rights protection extends to situations in the workplace where there is:

- a drug or alcohol dependency;
- an accommodation needed for an employee who has a drug or alcohol dependency;

- discrimination based on a perception of a drug or alcohol dependency; or
- a potentially discriminatory drug and alcohol policy.

Human rights protection does not apply to recreational use of drugs or alcohol. In 2007, the Alberta Court of Appeal<sup>3</sup> addressed whether a casual drug user who failed a pre-employment drug test could be automatically terminated from his employment. The employee made a human rights complaint alleging that he was discriminated against on the ground of perceived disability because his employment was terminated after he failed a drug test. The employee was a recreational drug user and asserted that he did not have a drug or alcohol dependency. The Court stated that “although there is no doubt overlap between effects of casual use and use by addicts, that does not mean there is a mistaken perception that the casual user is an addict.” The employee was not protected by human rights legislation because he did not have a disability and therefore did not fall under the protection of the *HRCM Act*.

### **Accommodation to the point of undue hardship: Rights and responsibilities of employers and employees**

Employers are expected to accommodate an employee’s disability, including drug and alcohol dependencies, to the point of undue hardship. Undue hardship occurs if accommodation would create onerous conditions for an employer, for example, intolerable financial costs or serious disruption to business. For more information on the duty to accommodate and undue hardship, see the Commission’s interpretive bulletin *Duty to accommodate*.

<sup>3</sup> *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426 at para 33.

In the accommodation process, the employer should respect the dignity and privacy of the person who is requesting accommodation. It is also the responsibility of the employer to explore options such as:

- offering the employee a leave of absence from work to seek assessment and rehabilitation treatment for a drug or alcohol dependency;
- allowing the rehabilitated employee to return to work after treatment;
- addressing issues such as lateness and absenteeism without strictly applying an absenteeism policy; and
- accommodating some relapses prior to, during and following treatment if such accommodation does not create an undue hardship.

In the accommodation process, it is the responsibility of the employee to:

- disclose their status to the employer<sup>4</sup> if the employee is currently experiencing problems with a drug or alcohol dependency;
- disclose their status to the employer<sup>5</sup> if the employee has had past problems with a drug or alcohol dependency, and it is relevant to their current job duties;
- provide medical information to their employer to support the fact that they have a drug or alcohol dependency;
- cooperate with the recommendations of any required professional assessments; and/or
- meet reasonable expectations such as follow-up drug and alcohol tests once they are fit to return to work.

<sup>4</sup> An employee should check the employer’s drug and alcohol policy to see who has been designated as the appropriate person to whom the employee should disclose their health information. If the employer does not have a policy, then disclose this information to the person in your workplace who has been designated by the employer to receive health information of employees.

<sup>5</sup> See footnote 4.

An employee who is currently experiencing problems with a drug or alcohol dependency should be prepared to share medical information about their dependency. However, an employee who has experienced past problems with a drug or alcohol dependency need only disclose this information to the employer if it is relevant to their current job duties.

Open communication is the first step to ensure that the employee's rights are protected if an assessment or accommodation is necessary. However, an employer should also be aware that employees who have drug or alcohol dependencies may not readily admit it. An employer who knows or ought to have known that an employee has a drug or alcohol dependency is nonetheless responsible for assessing and accommodating the employee's disability to the point of undue hardship. Sometimes an employer may need to make repeated requests for information. At the same time, an employee who insists they do not have a drug or alcohol dependency may be closing off the ability of the employer to accommodate their disability.

There may be circumstances where it is impossible to accommodate an employee because of the nature of their job. For instance, an employer may not be able to accommodate an employee who has a drug or alcohol dependency and works in a safety-sensitive position. However, the employer must still explore whether:

- there are creative ways to allow the employee to fulfill the duties of their position without putting the workplace under a safety risk, or
- there is another position that the employee could fill within the workplace.

## Assessing an employee's misconduct

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If an employer suspects that drug or alcohol dependencies are a factor in an employee's misconduct, the employer should investigate further. If the misconduct is connected to the employee's drug or alcohol dependency, then it is usually considered to be involuntary and innocent (non-culpable). If the misconduct is not connected to the employee's drug or alcohol dependency, then it is usually considered voluntary and blameworthy (culpable).

In a case of non-culpable behaviour, the employer will need to assess the employee's disability and accommodate their drug or alcohol dependency to the point of undue hardship. The duty to accommodate does not apply to culpable behaviour; however, in a case where there is both culpable and non-culpable behaviour, the individual facts of each situation have to be considered.

## Frequently Asked Questions

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### **1. Can I be fired if I fail a drug or alcohol test?**


If you fail a drug or alcohol test because you have a drug or alcohol dependency, then human rights law requires your employer to accommodate you to the point of undue hardship. This may take the form of requiring you to be assessed by a medical expert and follow recommended rehabilitation treatment before you can return to the worksite. However, if you have a drug or alcohol dependency and an assessment is not offered to you, you should request one or obtain a note from your doctor. If you do not have a drug or alcohol dependency, then human rights protection does not apply to a failed drug or alcohol test unless

you can provide substantial evidence that your employer acted on a perception that you have a drug or alcohol dependency. In the situation where it appears there is no human rights protection, you may wish to contact your union or a lawyer to determine if there are other legal methods to resolve the situation.

## **2. Can an employer require drug and alcohol testing such as mandatory random testing, pre-access testing, post-incident testing or testing before an employee returns to work after a rehabilitative leave?**

The Commission does not have jurisdiction over whether or not an employer conducts drug and alcohol testing or what type of drug and alcohol testing an employer implements. The Commission can, however, become involved if there is discrimination based on a real or perceived disability, an accommodation issue when there is a drug or alcohol dependency, or a policy that may discriminate against an employee who has a drug or alcohol dependency.

## **3. Can I be forced to collect my urine for a drug and alcohol test in front of others?**

How a drug and alcohol test is conducted is generally not within the jurisdiction of the Commission. This question likely relates to issues addressed by the Office of the Information and Privacy Commissioner. You can contact the OIPC for more information on your privacy rights. (Visit [www.oipc.ab.ca](http://www.oipc.ab.ca) for contact information.) However, if such a requirement is imposed on male employees only and not on female employees (or vice versa), then there may be gender discrimination. Also, if derogatory comments based on any of the grounds protected under the *HRCM Act* are made to you during the testing process, there may be a human rights issue. 

## Contact the Commission

For more information, please contact the **Alberta Human Rights and Citizenship Commission**. We are an independent commission of the Government of Alberta. Our mandate is to foster equality and reduce discrimination. We provide public information and education programs, and help Albertans resolve human rights complaints.

### **Northern Regional Office**

800 Standard Life Centre

10405 Jasper Avenue

Edmonton, Alberta T5J 4R7

**780-427-7661 Confidential Inquiry Line**

780-427-6013 Fax

### **Southern Regional Office**

Suite 310, 525 – 11 Avenue SW

Calgary, Alberta T2R 0C9

**403-297-6571 Confidential Inquiry Line**

403-297-6567 Fax

To call toll-free within Alberta, dial 780-310-0000 and then enter the area code and phone number.

For province-wide free access from a cellular phone, enter \*310 (for Rogers Wireless) or #310 (for Telus and Bell), followed by the area code and phone number. Public and government callers can phone without paying long distance or airtime charges.

### **TTY service for persons who are deaf or hard of hearing**

780-427-1597 Edmonton

403-297-5639 Calgary

1-800-232-7215 Toll-free within Alberta

**E-mail** [humanrights@gov.ab.ca](mailto:humanrights@gov.ab.ca)

**Website** [www.albertahumanrights.ab.ca](http://www.albertahumanrights.ab.ca)

***Please note:** A complaint must be made to the Alberta Human Rights and Citizenship Commission within one year after the alleged incident of discrimination. The one-year period starts the day after the date on which the incident occurred. For help calculating the one-year period, contact the Commission.*

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