

Random Drug Testing FAQs

HSE professionals agree that compliance with safety programs is one of the strongest lead indicators of safety outcomes. Random drug and alcohol testing has emerged in Canada as the most effective safety compliance tool in ensuring employee fitness in safety sensitive roles. Despite compelling reasons to implement compliance measures, some employers remain hesitant about considering random testing due to uncertainty and misinformation on the topic. This FAQ addresses the most common issues to guide employers in making well informed decisions.

Can you walk me through a standard drug testing procedure? (Which drugs are being tested for? What are the different methods? Do they test for specific levels or is it simply a pass/fail? etc.)

For an employer to take action on a test result, the result needs to be reliable. For workplace testing, this means that the result must be forensic—in other words, legally defensible. Establishing legal defensibility is no small task; in fact, in the United States, where drug testing is federally regulated, there are over 140 pages of procedures to ensure that a result is defensible. These procedures are issued under the authority of the Department of Transportation and guidance of the Department of Health and Human Services (DHHS) and outlined in the Code of Federal Regulations 49 CFR Part 40.^[11] They have been accepted by Canada and throughout North America as the only North American standard, as a consequence of the conditions set in the North American Free Trade Agreement, January 1, 1994.

The testing procedure for a forensic test at the highest level involves five major steps:

1. Sample collection
2. Shipment/courier to the laboratory
3. Laboratory testing and reporting to the medical review officer
4. Review of the result by the medical review officer
5. Reporting to the designated employer representative

The drugs tested are marijuana metabolites; cocaine metabolites; 6-acetylmorphine (morphine metabolite); phencyclidine (PCP or street name “Angel Dust”); and amphetamines, including methamphetamines and ecstasy (MDMA, MDA, MDEA—related methylenedioxyphenethylamines).

Forensic methods of testing that apply for occupational safety purposes are urine and oral fluid. In order to test positive at the laboratory, the concentration of the drug metabolite must be above a set cut-off level.

The cut-off level is never set at zero, because passive or unintentional exposure may occur and not pose a risk to safety. This cut-off level is key to maintaining the integrity of the laboratory test results and ensuring that risks are adequately identified. These cut-off levels are set by the DHHS.

The testing process accounts for valid prescription medications. A physician reviews all positive laboratory results before they are released to the designated employer representative to verify any valid prescription medications. The final release is a negative result or negative with a safety advisory if the prescription use is deemed to pose a safety risk on the job. This process ensures the utmost confidentiality around prescription details and addresses the risks that even valid prescriptions pose in safety-sensitive environments.

From your perspective, what are some of the challenges in implementing a random drug or alcohol test?

It is easy to demonstrate that an individual with a positive test working in a safety-sensitive position is too great a risk to personal and public safety to be left unmanaged. This conclusion is reasonably acceptable and well supported in the findings of related case law, where it forms the premise of the arguments,^{[2][3][10][12]} correlation studies,^{[7][8][9]} Canadian Labour Code,^[8] and criminal implications of failing to address a known hazard.^[5]

The main challenge in implementing random drug or alcohol testing for employers is managing the misinformation and the lack of concise, trustworthy advice needed to provide a framework for a successful program. Employers performing drug testing in Canada need to be aware that there are standard program requirements for doing so successfully.^[1]

1. Establishing an occupation to be safety-sensitive, thereby legitimizing testing as a bona fide occupational requirement
2. Ensuring the written policy that guides all testing applications does not discriminate, as per Canadian human rights legislation
3. Providing professional training to supervisory staff responsible for the policy application
4. Ensuring that all testing produces fair and reliable results^[4]

The bottom line is always the same: safety. Effective risk management is primarily limited by accurate risk identification. Actionable and accurate risk identification is the primary measure of testing methods.

Once an employer has all of the basics in place, the progression to a random testing program is relatively seamless. It simply entails a documented and verifiable reason to increase the scope of the program, a policy update including sufficient notice to staff, an objective selection mechanism to ensure fairness, and an annual review against the safety objectives.

Employers who are misinformed, who do not educate their supervisors, or who do not establish or adhere to proper processes can make a number of missteps. Often, they:

- Do not make risk reduction their first priority
- Follow a written policy or practice that automatically terminates an employee based on a test that is positive for any reason, without having a qualified substance abuse professional evaluate the employee for an underlying substance abuse disorder (which qualifies as a medical disability)
- Introduce random testing as their first step to mitigating the risk of the effects of drugs and alcohol on the job
- Select random tests without an arm's-length objective random selection tool (an unbiased selection method)
- Rely too heavily on random testing and do not fully use trained supervisors to determine reasonable cause for testing when there are signs and symptoms of use on the job
- Use non-forensic test methods

In terms of accuracy, how accurate are these tests? (One of the common complaints is that some of these tests only test for the presence of drugs, which may linger in the system for a while.)

Concerns about test accuracy are due to misinformation, and they prevent many employers from taking reasonable steps toward addressing substance use in a safety-sensitive environment. A forensic test following the process outlined in the 49 CFR Part 40^[11] is irrefutable; a lab-based test is incredibly accurate. Cut-off levels account for passive inhalation, and they are all set at a point that gives the employee the benefit of the doubt. A verified positive test indicates a risk that must be managed.

Police officers testing drivers for impairment do not consider explanations for blowing over the limit such as that you drank at home on your own time, that it's your right to choose to drink, or that it was hours since your last drink. What they care about is protecting the public; when someone blows over the limit, that person poses a serious risk to public safety and is relieved of his or her driving privileges. Just as the time of substance use and the freedom to choose lawful behaviours at home are not relevant to roadside impairment testing, they are not relevant in workplace testing.

Because tests typically revolve around safety-sensitive positions, is there an industry-accepted definition of safety-sensitive jobs?

There are slight variations on what constitutes a safety-sensitive position or job, but the definitions are all similar in principle.

Here are a few examples:

CannAmm Written Policy Definition

A safety-sensitive position is one in which a state of incapacity due to drug impairment could result in direct and significant risk of injury to the incapacitated individual, others, company property, and/or the environment. These positions depend on alertness, quickness of response, soundness of judgment, and accuracy of coordination of multiple muscle functions and have a direct role in an operation where inappropriate performance of the task could result in harm

to oneself, coworkers, invitees, property, or the environment. This definition includes all individuals who are required to rotate through or within a safety-sensitive area.

Human Rights Definition

A safety-sensitive position is 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. When determining whether a job is safety-sensitive, one must consider 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.

Case Law

The Court of Appeal decisions in *Entrop* and *Toronto Dominion Bank* remain the leading cases. In *Imperial Oil v. Entrop* 2002, 37 CHHR, D/481 at paragraph 6, the court distinguished between safety-sensitive positions and other positions:

"Safety-sensitive positions have a key and direct role in an operation where impaired performance could result in a catastrophic incident affecting the health or safety of employees, sales associates, contractors, customers, the public or the environment; and have no direct or very limited supervision available to provide frequent operational checks."

How do you manage the privacy/human rights aspect when it arises? (I know courts have found the tests minimally invasive, but concerns still persist.)

Privacy is something that both the employer and the testing administrator need to treat very seriously. The forensic testing process itself is inherently confidential; however, the employer is still responsible for ensuring that the information they have access to is managed carefully. As an administrator, we provide tools for online access that use various levels of access and built-in security features to mitigate the risk of privacy breaches. When privacy issues arise, our privacy officer initiates an incident report and manages each case according to our privacy policy, which is practised to the highest standard. We have never had a serious breach.

Human rights complaints are not common; none of our clients has been successfully challenged on a human rights complaint. We deal with potential human rights complaints by ensuring our clients have all the information and tools to test in a non-discriminatory manner—we would rather it be done right and avoid any potential pitfalls.

You had mentioned that you'd like to help clear up some of the misinformation out there about this topic. Can you elaborate on that?

There is a lot of misinformation about testing programs in Canada. The most common misconceptions that deter employers from considering random testing are addressed below.

- 1. Misconception:** It is illegal to drug test in Canada.
Truth: There are no laws that explicitly allow or disallow drug testing in Canada. The case law that is available relates to discriminatory practices and breaches of contract (collective agreements).
- 2. Misconception:** Methods of testing are not accurate.
Truth: Forensic testing methods are reliable, accurate, reproducible, and legally defensible.
- 3. Misconception:** You will test positive if you are around others who are using.
Truth: You will not test above the concentration limits as a consequence of passive, unknowing exposure to second-hand smoke.
- 4. Misconception:** It is against my human rights to be tested at all (or randomly).
Truth: According to the website of the Alberta Human Rights Commission: "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. However, it is not the testing that triggers the protection of human right law. It is how the employer treats 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 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."^[12]

5. Misconception: You will test positive if you are around others who are using.

Truth: You will not test above the concentration limits as a consequence of passive, unknowing exposure to second-hand smoke.

6. Misconception: You will test positive if you are around others who are using.

Truth: You will not test above the concentration limits as a consequence of passive, unknowing exposure to second-hand smoke.

Overall, we feel it is important for readers to understand that these programs are aimed at removing the risk of the effects of drugs and alcohol in the workplace and to the public. The programs are built with a high degree of integrity, and with accommodation and return to work as the standard practice. Employers who introduce programs are trying to protect their workforce. They are not on a witch hunt; they want to keep their people but remove the effects of drugs and alcohol from the job. Seeing the many examples of families who have been positively changed by employers requiring that an employee be rehabilitated really takes the wind out of counter-arguments.

I suspect someone is going to have a different position on this. But fundamentally, what argument is there against an employer implementing a program that legitimately addresses a known hazard, as long as it does so with integrity, the right intentions, and a valid means to execute, and doesn't require anyone to lose his or her job to provide a safer workplace (a core principle of union representation)? Given all of the safeguards—ensuring a legally defensible result, accommodation, privacy, and dignity in the process—what valid argument remains to prevent an employer from taking steps toward keeping all our families safer? Everyone deserves to be free from the tragedy of workplace incidents caused by substance abuse.

The misinformation is costing lives.

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