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# Employment and labour matters for mining leaders

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Grow | Protect | Operate | Finance

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# Drug and alcohol testing

April Kosten

# Agenda

- Statutory obligations to ensure safe workplace
- Types of Alcohol & drug testing
- Human rights obligations



# Statutory obligations to ensure safe workplace

April Kosten

# Statutory obligations to ensure safe workplace

- Occupational health legislation imposes duties to assess & identify existing & potential workplace hazards.
- Alcohol and drugs may constitute workplace hazard.
- If hazard identified, employers have legal obligation to take corrective steps to eliminate, or if not reasonably practicable, control hazard.

# Statutory obligations to ensure safe workplace

- *Criminal Code s. 217.1: Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.*
- *R v Metron Construction Corp:*
  - Employer pled guilty to criminal negligence causing death;
  - 6 workers boarded swing stages; only 2 harnesses;
  - Swing stage collapsed; 4 workers died;
  - Toxicological analysis determined 3 of deceased recently ingested cannabis, including site supervisor;
  - Plea included statement that permitting person under influence of drugs to work on project can be factor in establishing criminal negligence;
  - Employer received fine of \$200,000; ONCA increased fine to \$750,000.

# Employer obligations

***Employers must take all reasonable steps to ensure safe workplace:***

- Employers are not obligated to allow employees to use A&D.
- Legalization of cannabis does not give employees right to use in close temporal proximity to work given performance deficits associated with use.

***Employers should use risk-management approach to manage cannabis risk in workplace:***

- Focus on managing risks known to impact safe performance, including cannabis use. Not about whether substance is legal or illegal.
- Employers must manage safety risk given performance deficits associated with cannabis use
- Similar approach to alcohol.



# Alcohol & drug testing types

- Reasonable cause
- Post-incident
- Return to work
- Unannounced follow-up (post-treatment)
- Pre-employment & pre-access
- Certification
- Random

# Reasonable cause

- Justified when employee exhibits, or other evidence points to, performance deficits sufficient to give employer reasonable belief to suspect employee may be under influence of A&D:
  - Strange behavior;
  - Odours (ensure odour coming from individual not environment);
  - Slurred speech.
- No need for incident to trigger test.
- Assess whether both alcohol & drug test required.

# Post-incident

- Employee directly involved in workplace incident or near miss
- 3 main factors to consider:
  - Seriousness of incident;
  - Level of inquiry carried out before test:
    - Dependent on facts;
    - Investigation will be time constrained;
    - Always seek explanation from employee;
    - Cannot call test just because injury.
  - Nexus between incident & employee.
- Evidence of “impairment” not required.

# Post-incident: *Quong v Lafarge Canada Inc.* (2024 ABKB)

## Facts

- Quong required to take A&D test after hitting mobile compactor with company vehicle.
- Tested positive for THC & refused to participate in company's Substance Abuse Program (SAP).
- Despite no prior disciplinary issues, his refusal led to termination for cause.
- Claimed wrongful dismissal, arguing:
  - (1) A&D policy was not condition of employment contract.
  - (2) SAP invaded privacy.
  - (3) Employer's actions unreasonable.
  - (4) Employer lacked cause for termination.

# Post-incident: *Quong v Lafarge Canada Inc.* (2024 ABKB) (Cont'd)

## Findings

- Justice Feasby rejected Quong's arguments, finding Policy "*reasonable, unambiguous, well published, consistently enforced, and the employee... kn[e]w or ought to have known of the policy including consequences of breach*".
- By continuing his employment without objection, Quong accepted Policy as implied term of contract :
  - Received annual training on Policy since 2012.
  - Trained employees on Policy.
- SAP was justified measure to assess need for treatment or accommodation.
- Though Quong used cannabis off-site, employer acted reasonably to ensure safety.
- His refusal to comply with Policy was considered repudiation of contract.

# Pre-employment: *Chiasson v KBR*, AHRC (2005), rev'd QB (2006), aff'd CA (2007), leave to SCC ref'd (2008)

- Pre-employment A&D testing policy.
- Chiasson tested positive for marijuana & terminated.
- Argued termination discriminatory.
- Casual user so human rights not engaged.
- Policy perceives persons who use A&D are safety risk, clear connection between policy & purpose, not breach of *Act*:
  - *“Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face to logic”.*

## Pre-access: *Luka v Lockerbie*, AHRC (2008), rev'd QB (2009), rev'd CA (2011)

- Site owner requirement that contractors implement pre-access testing.
- Luka tested positive for marijuana & denied access to site.
- Alleged discrimination.
- AHRC found no *prima facie* discrimination.
- AHRC found both site owner & contractor employers under *Act*.
- ABCA found site owner not employer & obligations under *Act* were contractor's.

## **Pre-access: *Mechanical Contractors v UA, Local 663 (Sarnia)*, Ont Arb (2013), aff'd ONSC (2014)**

- Pre-access A&D testing required for contractors.
- Found pre-access testing may be justified if demonstrated A&D problem at safety-sensitive workplace.
- Onus on employer to demonstrate with evidence that testing reasonably necessary (not merely desirable) & likely to have desired effect.
- No demonstrable need for pre-access A&D testing sufficient to justify invasion of privacy.
- Upheld on judicial review.



# Random: *Irving*, SCC (2013)

- First SCC decision regarding random testing.
- Obligation to balance privacy vs. safety.
- Finding workplace is dangerous is first step in determining if random testing reasonable – begins proportionality exercise:
  - *[a] unilaterally imposed policy of mandatory random testing for employees in a dangerous workplace has been overwhelmingly rejected as an unjustified affront to the dignity and privacy of employees unless there is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.*

# Random: *Phillips v Westcan* (2020 ABQB)

## Facts

- Employer carried out random A&D tests as per policy.
- As part of employment application, employee signed agreement subjecting him to random A&D testing as condition of employment if application successful.
- Employee was hired & signed offer letter – employment terms included agreeing to be bound by A&D testing policy.
- Employee sought permanent injunction to prevent employer from carrying out random testing.
- Employee claimed random testing was unconscionable & therefore unenforceable.

# Random: *Phillips v Westcan* (2020 ABQB) (Continued)

## ABQB

- Application for injunction dismissed; random testing enforceable.
- Employee expressly agreed to random testing as term of employment.
- To be unconscionable, term would need to be “*sufficiently divergent from community standards of commercial mortality*”.
- Court held no divergence from community standards & enforceable.
- Court concluded that even if no enforceable contractual term, unilaterally imposed random testing regime would be upheld as proportionate response.
- Significant rate of positive testing in random tests, physical evidence of alcohol at work, vast workplace & inherently dangerous work.



# Human rights obligations

April Kosten

# Accommodation obligations

- Disabilities must be accommodated to point of undue hardship.
- Human rights not engaged absent actual addiction or subjective perception of disability (*Chiasson, Luka*).
- Past human rights decisions have confirmed:
  - Terminating employee for policy violation provided they previously had opportunity to refer is not generally *prima facie* discrimination (*Elk Valley*).
  - A&D testing constitutes BFOR in dangerous work environment.
- Human rights do not prevent employers from prohibiting cannabis use (subject to duty to accommodate).
- Don't forget duty to inquire.



# Recommendations

April Kosten

# Recommendations

- Employers implementing A&D testing should consider following:
  - Incremental measures in place;
  - Robust education & training;
  - Evidence of ongoing problem;
  - Ensure policy reviewed & updated with reasonable frequency;
  - Ensure justification in context of own work environment.
- If evidence of enhanced safety risk such as general workplace problem with A&D, random testing may be justified:
- Review & update existing A&D policies for gap closures:
  - Employers should not build policies around signs of impairment, rather, focus should be on elevated risks associated with alcohol or drug use:
    - Positive test shows performance deficits incompatible with safety-sensitive work environment.
- Ensure compliance with human rights obligations when managing dependencies.



# Union organizing in the mining sector

Russ Groves



# Union organizing in the mining sector

## Topics

- **Update** on union activity.
- Overview of the **legal process** to certify.
- Union **organizing techniques**.
- Union proofing - **key do's and don'ts**.

# Union organizing in the mining sector

## Union activity

- **Increased union activity** and focus on mining sector – targeting both owners and contractors.
- **Pressure for new members** due to aging memberships, loss of industrial sector, and saturation of public service.
- Union's who are highly **active** in mining include:
  - USW
  - IBEW
  - OE
  - Unifor
  - Carpenters
- **No longer trade/industry specific** (outside of construction).

# Union organizing in the mining sector

## Overview of legal process for certification

- To obtain the right to bargain on behalf of a group of workers a union must first become “**certified**”.
- In **Ontario** – there are **two regimes for certification**: (i) construction; and (ii) industrial.
- Mines are often a **mix** of both depending on the stage of development.
- For construction, a union must obtain **signed membership cards for 55%** of the employees in the bargaining unit who were performing bargaining unit work on the date of application.
- For industrial, a union must obtain **signed membership cards from 40%** of the employees in the bargaining unit to get a vote, and then votes from **50% plus 1**.
- Decertification is **rare**.

# Union organizing in the mining sector

## Common organizing techniques

- Organizing a remote mine can be a challenge but once a union has an onsite presence it will have extraordinary access due to the nature of mining operations (i.e. camp, crews, transport, etc.).
- Union's will attempt to obtain access to a site by:
  - Seeking an access order from the Labour Relations Board.
  - Piggybacking unionized contractors who are on site - particularly construction contractors.
  - Using “salts” with contractors or directly.
  - Using internal supporters – both management and non-management.
- Once onsite unions typically seek to understand workplace issues that they can use as a lever, and then present themselves as the only solution.

# Union organizing in the mining sector

## Common organizing techniques

- Offsite unions will:
  - Set up on the roadside to and from the site.
  - Approach employees at transport hubs (bus depot, airport, etc.).
  - Visit employee homes.
  - Use social media and text messages (“Hey, I am a friend of.....”).
- Unions may also make threats or otherwise act dishonestly when seeking support. Using **threats and intimidation** to obtain support is illegal but very hard to prove.

# Union organizing in the mining sector

## Union proofing – Do's

- Best practice is to be **proactive** – it is easier to make changes before an organizing drive crystalizes.
- **Do's** responding to Union organizing:
  - **Do** provide training for manager and supervisors on how to respond to union activity.
  - **Do** remove levers that drive support (camp and food quality, transportation quality and frequency, wages and benefits, perceived unfair treatment by managers and supervisors, lack of voice, etc.).
  - **Do** introduce a non-solicitation policy and enforce it fairly.
  - **Do** have your ear to ground.
  - **Do** be vigilant for the sneaky service of a certification application.
  - **Do** ensure contractors are also prepared.

# Union organizing in the mining sector

## Union proofing – Don'ts

- **Don'ts** for responding to Union organizing:
  - **Don't** send panicked or aggressive message to employees.
  - **Don't** fire supporters or site ban contractors because of union activity.
  - **Don't** make employee contact info easily accessible.
  - **Don't** interrogate workers or spy on them.
  - **Don't** be complacent – there is very little time to react when a campaign starts.
- Crossing the line can give life to a union campaign, and also result in **remedial certification**.



# Five common issues with employment contracts (and how to fix them)

Andy Pushalik



# Does my company need an employment contract?

- **Yes!**
- #1 defence against wrongful dismissal claims.
- Sets the tone for the employment relationship and clearly describes expectations:
  - Use the contract to underscore company's commitment to safety, code of conduct and other important company policies – basis for discipline.
- Build in flexibility to allow company to make changes to employee's job or schedule.

## Issue #1:

# "You can just sign the contract after you start work"

- Employers should present offer letter to employees at the time offer of employment is made.
- Employees should have sufficient time to review the contract and seek legal advice (if they choose) before starting work – up to 7 days is reasonable.
- Employees MUST sign the contract before they start work.
- If the employee signs the contract after they start work, the contract is unenforceable.
  - In those circumstances, the employer must provide something of value to the employee (e.g. signing bonus, new or enhanced bonus or benefit, etc.) to make the contract enforceable.

## Issue #2:

# "Fixed-term contracts are always a good way to minimize termination costs"

- If the fixed-term exceeds 12 months than the employee is entitled to statutory termination entitlements.
- In the absence of a properly drafted termination provision, if the employer terminates the contract early, the employer will have to pay out to the end of the contractual term without mitigation:
  - *Tarras v. The Municipal Infrastructure Group Ltd.*, 2022 ONSC 4522 – contract was for a fixed-term of 3 years; employer dismissed employee after 1 year; termination provision unenforceable; employee received 2 years' worth of salary, vacation pay, benefits.
- Series of fixed term contracts may lead judge to determine that employee is actually employed on an indefinite term and therefore entitled to reasonable notice.
- If employee continues working for company after fixed-term expires, employee automatically becomes an indefinite term employee.

## Issue #3:

# "There is an implied probationary period in every contract"

- No presumption of probationary period.
- Every provincial employment standards legislation allows for a period of time when an employee is not entitled to termination notice.
  - **Ontario/British Columbia** – notice must be given to employees that have been continuously employed for three months or more.
  - **Alberta** – notice must be given to employees that have been employed for more than 90 days.

## **Issue #4:**

**"Our company laid off employees once a few years ago so I can rely on that as past practice to justify future layoffs"**

- Past practice must be "notorious " and "well known" to support a layoff.
- If there is no past practice and there is no contractual provision, an unpaid layoff will constitute a constructive dismissal – even if the layoff is implemented in accordance with the applicable employment standards legislation.

## **Issue #5:**

# **"I can rely on the termination provision from our contract template from a few years ago"**

- The law on the enforceability of employment termination provisions is among the most difficult areas of law to navigate.
- Termination provision must meet or exceed the applicable employment standards legislation
- Must account for benefits continuance during the statutory notice period and provide for statutory severance pay.
- Savings provisions don't save anything.
- *Wilds v. 1959612 Ontario Inc.*, 2024 ONSC 3452.

**Termination Without Cause:** We may terminate your employment at any time and in our sole discretion by providing you with written notice and/or pay in lieu of notice. The notice / pay in lieu to be provided will be two (2) weeks plus any applicable notice and severance requirements in accordance with the Employment Standards Act, 2000 (the “Severance Period”).

***If pay in lieu of notice is provided, you will receive only your base salary and employment-related health and dental benefits for the applicable period, save and except for short-term disability, long-term disability, and which will not continue beyond the statutory notice period or as required by applicable employment standards legislation.***

You have an obligation to take all reasonable steps to mitigate the loss of your employment. Your obligation includes an obligation to accept reasonable alternate work offered to you if your position with the Organization ends.

If you obtain alternative employment (or otherwise commence earning income in lieu of working for the Organization) before the expiry of the Severance Period, the payments will end immediately and the Organization will pay you the equivalent of 50% of the amount owed from the date you commence alternative employment (or otherwise commence earning income in lieu of working for the Organization) and the expiry of the Severance Period, provided that you will never receive less pay in lieu of notice (and severance pay, as applicable) than you are entitled to under the employment standards legislation applicable to your employment.

You agree to immediately advise the Organization when you receive an offer of employment, commence alternative employment (or otherwise commence earning income in lieu of working for the Organization).

***You agree that in exchange for the notice and/or pay set out herein, you will execute a Full and Final Release, in a form acceptable to the Organization, pursuant to which you will agree to waive any and all claims relating to your employment with the Organization or the termination thereof.***

**Termination With Cause:** We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, other than any notice, pay in lieu of notice or severance required pursuant to the applicable employment standards legislation. ***For the purposes of this Agreement, just cause includes, but is not limited to:***

- i. a material breach of this Agreement or our employment policies;*
- ii. unacceptable performance standards;*
- iii. theft, dishonesty or falsifying records, including providing false information as part of your application for employment;*
- iv. intentional destruction, improper use or abuse of Organization property;*
- v. violence in the workplace;*
- vi. obscene conduct at our premises, property or during Organization-related functions at other locations;*
- vii. harassment of your co-workers, supervisors, managers, customers, suppliers or other individuals associated with the Organization;*
- viii. insubordination or willful refusal to take directions;*
- ix. intoxication or impairment in the workplace;*
- x. repeated, unwarranted lateness, absenteeism or failure to report for work;*
- xi. personal or off-duty conduct (including online conduct) that prejudices the Organization's reputation, services or morale; or*
- xii. any conduct that would constitute just cause pursuant to common law.*



# Your most prudent course of action

- Update your onboarding checklists to ensure employees are required to sign employment contracts before they start work.
- Avoid fixed-term contracts.
- Take an inventory of the types of clauses you want/need in your employment contracts.
- Review and update your offer letter template.
- Have a system that reminds you to review the enforceability of your termination provisions each year – keep those clauses simple.

# Thank you



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*Thank you for attending!*

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