

Workplace testing - genetics, alcohol and drugs

Medical testing on company workers throws up a number of privacy issues for employers. But, says **Eugene Oscapella**, the benefits of carrying out such practices do not necessarily outweigh the risks.

Workplace testing - genetic, alcohol and drugs - imports a range of ethical, legal, economic and social issues. Among the most significant are the impact on privacy of such testing, and the potential for unwarranted discrimination because of test results.

Employment drug testing, the practice of demanding urine or hair samples from employees or job applicants, has become very much a feature of the American employment landscape. The European Commission also recently noted that drug testing is becoming a commonplace practice in some member states. Many countries, to a much lesser extent than the United States, also

Employers have advanced many arguments for workplace drug or genetic testing:

- To assess suitability for employment now (including workplace efficiency and the discharge of the employer's responsibility to provide a safe workplace).
- To assess employees' suitability for the long term.
- (With genetic testing alone) to assess the consequences of exposure to workplace or environmental materials or contaminants (chemicals, radiation).

On the other hand, employees also

Because of the intrusive nature of both drug and genetic testing, and their interference with individual autonomy, employers have at least an ethical obligation to justify testing. They may also face practical legislative hurdles ranging from human rights and data protection legislation to statutory and common law privacy torts. The prohibition against discrimination on the basis of disability (which includes real or perceived drug dependency) in some human rights legislation, such as the Canadian Human Rights Act, is but one example of legislative barriers to testing.

Above all, morality is not an appropriate basis for testing. Yet morality is sometimes used to justify testing. Some employers may see it as a moral duty to do their part in the "war on drugs".

Employers should also know that the testing often provides little relevant information. Alcohol testing provides at least a rough approximation of current impairment. The results of a breathalyser test given to a worker at work can be used to determine broadly whether the worker was impaired by alcohol at the time of the test.

However, current urinalysis testing procedures for drugs such as marijuana, amphetamines, cocaine and heroin cannot indicate whether the worker was impaired at the time of the test. Urinalysis identifies only past use (with marijuana, for example, use sometime within weeks before the test). Even then, testing cannot indicate precisely when the worker used the drug, how much was used or whether the worker became impaired at that time.

In short, drug testing other than alcohol testing cannot provide the answer to the question that the employer is (quite appropriately) asking: Is the worker impaired while on the job? At best, it can exclude drug-

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permit or require drug testing - typically of those in "safety sensitive" positions. One oft-stated object of such surveillance is to enhance workplace safety - the argument being in part that people who use drugs pose a risk to workplace safety. Another is to increase workplace productivity. In both cases, drug testing has not achieved its objectives. Observers of the drug testing phenomenon are therefore left with the suspicion that there are other, hidden motives for testing - to take a moral stance on drug issues, and to enhance the profits of companies that offer testing services.

Is there a legitimate employer interest in testing? Is there a legitimate employee interest in not being tested?

advance compelling arguments for not being tested:

- Privacy; testing can be physically intrusive and can involve intimate surveillance (a particular problem with urinalysis, where workers may be directly observed urinating by the person collecting the urine sample).
- Fear of discrimination in employment, insurance and access to services flowing from the disclosure of test results.
- With genetic testing, familial privacy and discrimination issues, since genetic information about one person may identify characteristics of biological relatives.

related impairment as a possible cause of an accident or incident. Perhaps drug testing technology will evolve to the point where it can measure impairment. Until then, however, it fails to shed light on that issue.

Worse yet, drug testing may discourage the consumption of drugs that may actually prevent worker performance from deteriorating. This problem is inadvertently highlighted by a manual entitled *Performance Maintenance During Continuous Flight Operations: a Guide for Flight Surgeons*, published by the US Naval Strike and Air Warfare Center in January 2000. The manual reminds us that both British and German soldiers used amphetamines during the Second World War. During the Vietnam and the Gulf wars, US pilots were given amphetamines to maintain their performance, as they are now in Afghanistan. But commercial drivers are often banned from using these same substances to maintain their alertness.

Toronto's *Globe and Mail* newspaper reported on August 5th 2002 that Canada would allow truck and bus companies to have their drivers work a "mind-numbing" 84 hours per week. According to the newspaper, this represents a 35 per cent workload increase for many drivers, and positions the Canadian regime as the most dangerous in the regulated world. Yet in these appalling working conditions, drivers

are banned from using substances such as amphetamines to stay awake.

The solution, many will wisely argue, should be to avoid situations where drivers are likely to fall asleep - in other words, shorten their maximum working hours. However, given that economic pressures are forcing drivers to work longer hours, might our insistence on "drug-free" drivers actually increase the danger on the roads? Is it better to have a "drug-free" driver who falls asleep at the wheel because governments are too lax in regulating hours of work, or a driver who manages, through drugs, to stay awake until the trip is completed? Ask yourself that question next time you stop for coffee (which contains an amphetamine-like stimulant called caffeine) during a late-night road trip.

Testing can also mask the real threats to workplace efficiency and safety. Workers who test "clean" may still be impaired by far more common sources of impairment such as lack of sleep.

As with drug testing, genetic testing is intrusive and may have little value for the workplace. Genetic testing rarely yields information that is relevant to the current employability of a worker. It is likely to yield information that at best indicates a risk - of unknown magnitude - of future (but exactly when is not known) disability.

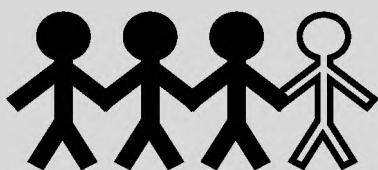
The debate over drug testing in the workplace has already spanned decades without being resolved. The debate over

workplace genetic testing is somewhat more recent, but will no doubt span the decades as well, particularly as the science of genetics continues to unlock mysteries about us. The Australian Law Reform Commission just recently released what it described as "the most comprehensive consideration of the ethical, legal and social implications of the 'New Genetics' ever undertaken." Like others before it, the report, *Essentially Yours: The Protection of Human Genetic Information in Australia*, weighs in on the debate over genetic testing in employment. "Employers," it states, "should not collect or use genetic information in relation to job applicants or employees, except in the limited circumstances where this is consistent with privacy, anti-discrimination, and occupational health and safety legislation..."

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AUTHOR: This article is based on the presentation by Eugene Oscanella, associate editor, at PL&B's 16th International Conference, July 2003.

FURTHER INFORMATION: A copy of the Australian Law Commission's report can be found at:
<http://bar.austlii.edu.au/au/other/alrc/publications/reports/96/>



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