

## FTR Now

# Ontario Human Rights Commission Releases New Policies on Drug and Alcohol Testing and Ableism and Discrimination Based on Disability

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The Ontario Human Rights Commission has published updated guidelines on these critical issues – and what it thinks your organization should be doing.

Following on the recent release of policies on sexualized and gender-specific dress codes and the prevention of creed-based discrimination, the Ontario Human Rights Commission (Commission) issued two new policies in October 2016, the *Policy on drug and alcohol testing* and the *Policy on ableism and discrimination based on disability*. These Policies represent the Commission's latest word on drug and alcohol testing in the workplace as well as the prevention of disability-based discrimination in employment and the provision of services.

In this *FTR Now*, we highlight features of the Commission's new Policies which may be of particular interest to employers and service providers.

## Background – the Role of Commission Policies

Policies published by the Commission reflect its interpretation of what the Ontario *Human Rights Code* (*Code*) requires at the time they are published. While Commission policies are not legally binding, human rights decision-makers refer to Commission policies from time-to-time in adjudicating human rights disputes. In addition, section 45.5 of the *Code* requires the Human Rights Tribunal of Ontario (Tribunal) to consider Commission policies if one of the parties or an intervenor (including the Commission itself) requests it to do so. Further, where the Commission participates in a human rights proceeding as a party or intervenor and believes that the final Tribunal decision or order is not consistent with one of its policies, the Commission may ask the Tribunal to refer the case to the Divisional Court to rule on which interpretation should prevail.

Thus, while not legally binding, Commission policies provide insight into the Commission's position which employers and service-providers can consider in developing and implementing their own human rights policies and addressing any human rights disputes which may arise.

## The New Policy on Drug and Alcohol Testing

The [Policy on drug and alcohol testing](#) replaces a [prior policy released in 2000](#). Intended to provide employers, unions, employees and other responsible parties with guidance on the legal requirements relating to drug and alcohol testing, the new Policy contains:

- considerations for employers around the implementation and design of a testing program
- a more detailed breakdown of drug and alcohol testing situations and related “considerations,” as well as a summary in chart form
- an expanded discussion on random alcohol testing
- an expanded discussion with respect to the handling of tests and results
- a new section dealing with recreational alcohol or drug users.

We highlight these and other noteworthy features of the new Policy below.

## Overview of a “Justifiable” Drug and Alcohol Testing Policy

The new Policy states that 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 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
- 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
- ensures confidentiality of medical information and the dignity of the person throughout the process.

## Drug and Alcohol Testing Situations – Considerations for Employers

The new Policy provides a more detailed outline of the Commission’s current recommendations in respect of different drug and alcohol testing situations, including pre-employment testing, reasonable grounds and post-incident testing, random testing and testing as part of a rehabilitation plan.

### Pre-Employment Testing

The Commission remains of the view that pre-employment testing is prohibited by section 23(2) of the *Code*. In the new Policy, it notes that 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 Commission itself “recommends against this practice.”

The new Policy further states that if employers do put in place pre-employment drug and alcohol testing for safety-sensitive positions, they should make sure that a positive test result does not automatically result in 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 licensing or other legitimate qualifications.

### Reasonable Grounds and Post-Incident Testing

The Policy also provides that “reasonable grounds” (“for cause” or “reasonable cause”) and “post-incident” testing for either alcohol or drugs may be acceptable in certain situations where:

- there is 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.

### Random Testing

The Policy states that random alcohol testing is permissible if:

- an alcohol breathalyzer is 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.

Random drug testing is also permissible in the Commission's view if:

- 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.

Citing the 2013 [Supreme Court of Canada's decision in \*Irving\*](#), the updated Policy indicates that, even if the above requirements are met, privacy considerations may still arise, with the result that drug and alcohol testing policies that are consistent with the *Code* may still be "vulnerable to challenge."

## Testing as Part of Rehabilitation Plan

The Policy states that post-reinstatement testing may be justified if:

- 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.

It is important to note that the Policy states that having an agreement in place (e.g. a last chance agreement or "contingency behaviour contract") does not negate the employer's duty to accommodate an employee should a relapse occur. However, the Policy is clear that the employer's obligations to accommodate is not without limit.

## Handling of Tests and Results

The Policy emphasizes that in developing a testing program or policy and determining how to handle drug and alcohol tests and results, employers should consider the following:

- notification of applicants and employees regarding testing requirements when an offer of employment is made
- explanation of reasons for testing and adopting of a protocol for obtaining informed consent
- competent handling of test samples by qualified professionals
- employers are not entitled to know an employee's medical diagnosis
- confidentiality of the employee's medical information at all times
- appropriate use of test results
- review of test results with the employee by a qualified physician
- providing the employee with an opportunity to explain if there are other medical reasons that may have caused a positive result.

## Consequences of a Positive Test and the Duty to Accommodate

Following a positive test, the Policy states that employers should offer a process of individualized assessment of whether the employee is addicted to drugs or alcohol and must accommodate employees with addictions to the point of undue hardship.

Furthermore, employers are to ensure that the individual's disability is taken into account as a mitigating factor when considering the appropriate disciplinary response. According to the Policy, an employer's drug and alcohol policy is unlikely to meet these requirements if it results in:

- automatic loss of a job
- reassignment
- inflexible reinstatement conditions, without regard for a person's individual circumstances.

The new Policy also provides that casual or recreational users of drugs or alcohol (as opposed to people with addictions) may be protected under the *Code* if they are subjectively perceived by the employer to have a disability or if they are treated, through the consequences of the drug and alcohol testing policy, as if they have an addiction.

A positive test will trigger the "duty to inquire" – that is, employers will have a duty to inquire if a person has addiction-related needs or where the person is perceived to have needs related to an addiction. If, following an individualized assessment, the employer determines that the person does not have an addiction, the Policy recommends the employer modify any sanctions to reflect the person's individual circumstances.

Applied appropriately, a well-designed policy and program tailored to the needs of your organization that reflects the nuances of your industry and business can minimize the risk of liability for discrimination. To understand how the foregoing principles and Commission guidelines may apply to your organization, please contact your [Hicks Morley lawyer](#).

## The New Policy on Ableism and Discrimination Based on Disability

### General

[This new Policy](#) replaces the Commission's [Policy and guidelines on disability and the duty to accommodate](#), which was released in 2001.

The new Policy adopts what is often referred to as the "social approach" to disability, which recognizes that the concept of what constitutes a disability evolves as social attitudes and perceptions evolve and that the term "disability" covers a broad range and degree of conditions, including both present and past conditions as well as perception of disability. The new Policy expressly references various conditions that were not previously recognized as disabilities but are now, including multiple chemical sensitivities, food-related anaphylaxis and [miscarriage](#).

"Ableism," a more recent term that did not appear in the prior Policy, is defined by the Law Commission of Ontario as:

a belief system, analogous to racism, sexism or ageism, that sees persons with disabilities as being less worthy of respect and consideration, less able to contribute and participate, or of less inherent value than others. Ableism may be conscious or unconscious, and may be embedded in institutions, systems or the broader culture of a society. It can limit the opportunities of persons with disabilities and reduce their inclusion in the life of their communities.

Ableist attitudes are often premised on the view that disability is an "anomaly to normalcy," rather than an inherent and expected variation in the human condition.

The Commission's new Policy states that anticipated as well as existing disabilities are covered under the *Code*. Thus, the protections of the *Code* would apply where the individual does not currently have a disability but is treated adversely because of a perception that they will eventually develop a disability, become a burden to the employer, pose a risk, or eventually require accommodation.

The Policy states that organizations have a legal obligation under the *Code* not to discriminate against people with disabilities

that are either evident or non-evident, and to take steps to eliminate discrimination when it occurs. These obligations apply in situations where discrimination is direct and the result of a person's internal stereotypes or prejudices. They also apply when discrimination is indirect and may exist within and across institutions because of laws, policies and systemic practices. Overall, organizations are required to take steps to make sure that negative attitudes, stereotypes and stigma do not result in discriminatory behaviour toward or treatment of people with disabilities.

## Harassment

The new Policy identifies a number of behaviours that could be considered harassment of individuals with disabilities, including:

- slurs, name-calling or pejorative nicknames based on disability
- graffiti, images or cartoons depicting people with disabilities in a negative light
- comments ridiculing people because of disability-related characteristics
- intrusive questioning or remarks about someone's disability, medication, treatment or accommodation needs
- singling out a person for teasing or jokes related to disability
- inappropriately disclosing someone's disability to people who do not need to know
- repeatedly excluding people from the social environment, or "shunning"
- circulating offensive material about people with disabilities at an organization by email, text, the Internet, etc.

## The Duty to Accommodate

The approach to the duty to accommodate reflected in the Commission's new Policy reflects an evolution in the Commission's position regarding the scope of the obligation to provide accommodation. The Commission has traditionally taken a very strict approach to the duty to accommodate, which places very high standards on employers and service providers with respect to accommodation. This aspect of the Commission's previous policies has not found favour with many human rights decision-makers, many of whom have taken the view that the Commission's approach placed a higher burden on employers and service providers than the *Code* requires. While the Commission's traditional approach to the duty to accommodate is still referenced in the Policy, there are also signs in the new Policy that the Commission now recognizes that the case law trends support a broader view of the duty to accommodate. This is a positive development for employers and service providers, given the role Commission policies may play in human rights proceedings.

## Key Elements of the Duty to Accommodate

The new Policy emphasizes that the duty to accommodate involves both a proactive and a reactive component. The proactive component is the obligation to take proactive steps to achieve integration and full participation by removing existing barriers and engaging in barrier-free and inclusive design. The reactive component is the obligation to respond to individual requests for accommodation. In the discussion below, we focus primarily on the latter of these two obligations – the obligation to respond to individual accommodation requests.

Although the case law generally adopts the principle of "reasonable" accommodation to the point of undue hardship, the Commission's policy uses the concept of "appropriate accommodation." The new Policy states that the *Code* requires "that the most appropriate accommodation be determined and provided, unless that causes undue hardship." The Policy defines "the most appropriate accommodation" as the one that most:

- respects dignity (including autonomy, comfort and confidentiality)
- responds to a person's individualized needs
- allows for integration and full participation.

The Policy also states that, "The highest point on the continuum of accommodation must be achieved, short of undue

hardship.” However, the Policy expressly recognizes that, “If there is a choice between two accommodations that equally respond to the individual’s needs in a dignified way, then the accommodation provider is entitled to select the one that is less expensive or less disruptive to the organization.”

## **Duties of the Parties**

The new Policy states that accommodation providers, such as employers and service providers, have the following duties and responsibilities in the accommodation process:

- be alert to the possibility that a person may need an accommodation even if the person has 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 opinion 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, and canvass various forms of possible accommodation and alternative solutions
- keep a record of the accommodation request and action taken
- 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, to the point of undue hardship
- bear the cost of any required medical information or documentation (e.g. doctors’ notes, psychological assessments, letters setting out accommodation needs).

With respect to the last of these “requirements,” it is noted that the case law does not generally establish an expectation that employers or service providers pay for the initial documentation required to establish a need for accommodation, although they may be expected to pay for any supplementary medical information or documentation they request an individual to provide.

The new Policy addresses in greater detail the type of medical information an individual may generally be expected to provide in support of an accommodation request, namely:

- that the person has a disability or a medical condition
- the limitations or needs associated with the disability
- whether the person can perform the essential duties or requirements of the job or of being a service user, with or without accommodation
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job or of being a service user.

The Commission’s new Policy recognizes that there may be situations in which there is a reasonable basis to request additional information to establish the legitimacy of or better understand an accommodation request. The Commission states that an organization “must not ask for more confidential medical information than necessary because it doubts the person’s disclosure of their disability based on its own impressionistic view of what a specific disability should ‘look like’.” The Policy also states that, generally, an employer or service provider does not have a right to information about the cause of an individual’s disability, the diagnosis, the symptoms or the treatment. However, the Commission recognizes that, where the person’s needs are complex, challenging or unclear, more information may be required. It also recognizes that, in some cases, a person may be asked to cooperate by providing more information, including a diagnosis, but the accommodation provider must be able to clearly justify why this information is needed.

The new Policy notes that, since everyone experiences disabilities differently, employers and service providers have an obligation to educate themselves about the nature of an individual’s disability through the accommodation process, take steps to resolve any tension or conflict with others whose cooperation is required to implement an accommodation, and dispel



any misperceptions or stereotypes that others may have about persons with disabilities.

Should you have any questions or require further information about these Policies or would like assistance in implementing policies at your workplace or organization, please contact any member of the [Hicks Morley Human Rights practice group](#) or your regular [Hicks Morley lawyer](#).

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