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LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI



NATA AGM 2018

**Fitness to Fly:
Drugs and Alcohol in the Aviation
Industry**



Our people worked in the aviation industry. We understand the unique challenges and opportunities facing your industry. As a service industry your people make or break your organization.

We have over twenty years of experience working with union and non-union aviation clients identifying and mitigating employee and union risk in all areas of labour and employment law.



Marijuana and Aviation



Why Discuss this Now?

Safety Sensitive Workplace
+
Recent Incidents
+
Pending Legalization of Recreational Cannabis
=
Increased Use and Increased Risk



- Currently before the Senate for approval:
 - Bill C-45 (*Cannabis Act*), to legalize and regulate the possession of small amounts of cannabis by individuals over age 18
 - Bill C-46 (*An Act to amend the Criminal Code*), to create new offences regarding driving while having a “blood drug concentration” (BDC)
- To take effect this summer



Who is Using Marijuana and Why?

- Employees may be using marijuana:
 - To treat a mental or physical condition (e.g., anxiety, sleep disorder, chronic pain, arthritis, cancer, etc.)
 - Because they are addicted
 - Recreationally
- Therefore, employers must avoid making assumptions about a) who uses marijuana, b) why and c) how it may impact the individual's ability to work safely



- Lessons from other jurisdictions where marijuana is already legalized:
 - Recreational use will likely increase dramatically, at least in the short term
 - The ability to isolate and test for current impairment by drugs is limited (e.g., nothing comparable to a breathalyser for alcohol)
 - Results for drug tests can take longer to be returned



Fitness to Fly



When is there a Duty to Inquire?

- Train all staff to identify the indicia of substance abuse:
 - Behaviour changes
 - Frequent lateness
 - Physical symptoms (e.g., glassy eyes, slurring speech, smell of alcohol/cannabis, etc.)



What to do if you Suspect an Employee is Unfit?

- Immediately:
 - Ground them until medically cleared
 - Request written confirmation from their physician, e.g., updated Functional Abilities Form (employer to cover cost)
 - If necessary, order and pay for a full medical evaluation



Why Implement a Drug and Alcohol Testing Policy?

- Aviation workplaces are safety sensitive
- Workplace culture of substance abuse?
- Past instances of employee impairment at work?
- Accidents in the workplace?
- Employers may have client-mandated policy



The Canadian Landscape

- There is no general law permitting workplace testing
- A “balancing of interests” approach is used
 - An employer’s right to a safe workplace
 - An employee’s right to privacy
- Highest threshold is for random workplace testing



Human Rights Considerations

- Human rights legislation plays a significant role
- Does an employee have a disability? Does the duty to accommodate arise?



Guiding Principles

- No employee is to be subject to random alcohol or drug testing unless part of rehabilitation or there is evidence of drug/alcohol use
 - Testing a legitimate part of employment contract for employees with a drug/alcohol problem
- Employer may require testing where reasonable cause
- Testing generally permitted in post-incident/accident situations



Stewart v. Elk Valley Coal Corp.

- 2017 decision of the Supreme Court of Canada
- Employee in safety-sensitive position tested positive for cocaine
- Terminated in accordance with employer's policy
- Alleged he was addicted to cocaine
- Termination upheld
 - Court found he was terminated, not because of his addiction, but because he breached the employer's drug and alcohol policy, which required him to have disclosed his addiction **before** an incident



Policy Contents

Introduction

Guiding Principles

Policy Standards

Training

Searches

Substance Abuse Testing

- Pre-Access
- Reasonable Cause
- Post-Incident
- Random

Confidentiality

Testing Standards

Definitions

Appendix A – Alcohol and Drug Testing Procedures



How to Test for Alcohol and Drugs?

Two options:

- In-house
 - e.g., breathalyzer
- External testing facility



- Until Transport Canada provides further guidance or implements additional safety measures:
 - If you already have a policy of random testing, continue mindful of the legal risk
 - If you are not already doing random testing, consider starting (with or without union support)



Support Employees

- Courts and tribunals are much more likely to uphold a policy of random drug and alcohol testing if the employer can demonstrate that it offers a robust and comprehensive accommodation policy
- For employees who fail a random test, consider a policy of:
 - Offering job-protected leaves for the employees to seek treatment
 - Providing income support during treatment



FLYING HIGH: The Aviation Industry and Cannabis

<http://myeh.ca/flying-high>



Echo Hotel Aviation Law Briefing series is your weekly scan of the aviation industry

For more information and to receive the weekly briefing, go to:
<http://aviation.ehlaw.ca/>





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ABOUT

Steve is a partner of Emond Harnden LLP having joined the firm in 1994. He has a considerable depth of experience in the areas of employee and labour relations as well as privacy and access to information compliance matters. Steve has the pleasure of working with a diverse private and public sector clientele across Canada, with a particular focus on meeting the needs of Canada's aviation community. Secondments to two national aviation organizations gave Steve an insider's perspective on the importance of providing his clients with timely, cost effective solutions. Steve also represents a number of global firms with operations in Canada. Whether litigating, negotiating or drafting for his clients, he always brings a pragmatic business-focused approach to the matter at hand.

As a member of the Board of Directors of the Helicopter Association of Canada (HAC), a Board Member of the Northern Air Transport Association (NATA) and an active member of the Air Transport Association of Canada (ATAC), Steve is heavily involved in advancing the interests of Canada's aviation industry.





ABOUT

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joined Emond Harnden LLP as an Associate after completing her
and a term as a summer student with the firm. Larissa practices in all
labour and employment law, including human rights matters. Larissa
experience in the unique human resources issues arising in the aviation
and is a member of Emond Harnden's Aviation Practice Group.

Larissa has been involved in litigation preparation, including for human rights
matters, termination actions, and arbitration hearings, and in collective
bargaining. She drafts and reviews employment contracts and employment

policies.



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