

Key Topic #1: Labour and Employment Issues in Franchising



What you need to know about Joint Employer Status:

The question of whether a franchisor is a joint employer with their franchisees in Ontario has traditionally been decided on a case by case basis, with varied results, and depended on the franchisor's control of its franchisee's day to day operations.

A recent government review considered whether a franchisor should be deemed to be a joint employer. However, the review's final report and the legislation the government ultimately introduced in June 2017 (the Fair Workplaces, Better Jobs Act, 2017) did not contain this deeming provision, leaving in place the case-by-case approach.

The legislation did include provisions that may increase the number of union drives and successful applications for certification; introduced new shift scheduling rules; seeks to achieve equal pay for equal part-time work; and increased the minimum wage to \$15 an hour by January 1, 2019.

What are the potential liabilities for a franchisor associated with Joint Employer Status:

Increased exposure to employees' claims under employment and labour laws, collective agreements, wrongful dismissal suits, wage and overtime class actions, and human rights claims

Increased liability in respect of their franchisees' commitments to their employees, including liability for:

- wages, salaries, overtime, vacation pay and benefits
- termination notice and pay in lieu of notice
- severance pay and employment-related premiums
- payroll taxes

Increased costs and operational burden to ensure a franchisor's business is compliant with statutory labour and employment obligations, and internal policies and practices

To avoid Joint Employer Status a Franchisor should:



Think carefully about the extent to which they control the day to day operations of their franchisees



Afford franchisees a significant level of independence and discretion when it comes to employee hiring/firing, scheduling, wages, and personnel files



Strike a careful balance between controlling the brand (and ensuring brand recognition and integrity) and controlling a franchisee's relationship with its employees



Focus on practices that impact the consumer's experience with the franchisor's brand such as product/service quality standards, uniforms, hours of operation, and authorized suppliers



Eliminate controls in franchise agreement and operations manual that aren't necessary to protect or enhance franchisor's brand or system

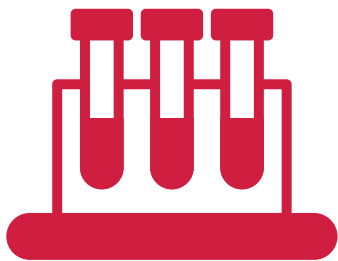


Ensure the franchisee's name, and not the franchisor's, appears on store level receipts, stationery, employment application, paystubs, accounts, websites, advertising and social media

Key Topic #2: Random Drug and Alcohol Testing

There is no legislative regime in Canada that specifically governs drug and alcohol testing in the workplace, but rather case law and arbitral jurisprudence.

Balance between an employer’s legitimate interest and obligation to provide a safe work environment and an employee’s privacy and human rights.



Testing Method	Permissibility
Pre-Employment Testing	Possibly.
Universal Random Testing	Possibly, in a dangerous workplace with enhanced safety risks such as demonstrated problems with drug and alcohol abuse. However, the Supreme Court of Canada has noted that such safety risks would have to outweigh the “unassailable conclusion” of the “significant inroads” that random testing would have on employee privacy.
Reasonable Cause/Post-Incident	Yes.
Post-Reinstatement Testing	Yes, as a necessary facet of a broader assessment process (for a stipulated term only, most commonly 2 years).
Mandatory Disclosure of Current Problem	Yes.
Mandatory Disclosure of Past Problem	Limited to a 5 to 6 year period after successful remission for alcohol, 6 year period for drugs.

Best Practices & Practical Suggestions

1. Have a D&A policy and protocols/procedures in place
2. Have a strong OHS policy and protocols in place
3. Train front-line managers/supervisors on policies and protocols every 1-2 years
4. Keep records of workplace safety incidents.
5. Keep records of drug and alcohol “incidents”/ employees, whether safety or operationally related or not
6. Complement D&A testing regime with management observation (this is just as important as testing), i.e. slurred speech, unsteadiness, red eyes, etc.
7. Decision-makers will be more likely to uphold drug and alcohol testing policies that are tailored to address legitimate workplace safety hazards which can be demonstrated with concrete evidence of workplace drug or alcohol problems
8. An employer that wants to implement random drug and alcohol testing will need to lead evidence of a general workplace problem with drugs or alcohol, as well as evidence of the inherent dangers in its workplace if such problem is not addressed