



Drug Testing in the Workplace

Guidance for Workplace Representatives

Introduction

Despite claims from drugs-testing companies, there is no real evidence that drug-testing is becoming common-place in British workplaces. It is mainly used, often with union agreement, in safety critical areas such as transport and energy generation or after an incident. There is also increased usage in the construction industry. However generally where wide-scale drug testing has been considered it has been rejected either because of cost, union objections, or doubts over the effectiveness.

There is nevertheless a very aggressive marketing campaign by a number of US-based drugs-testing companies and many union representatives are going to find themselves confronted with proposals for drug testing in the workplace. This briefing seeks to help union representatives to respond to any such proposals.

Drug usage in the workplace.

The 2008 British Crime Survey showed that 5.3% of the working age population use illegal drugs regularly. However many of them are not at work because they are unemployed or on incapacity benefit. Of these that are at work, the vast majority restrict their use to social use at weekends. Research by the HSE in 2004 was unable to show any link between drug use on its own and workplace accidents, although this may be because of the very low levels of actual drug use while at work. A survey for the Rowntree Foundation and Drugscope charity in the same year also found a lack of evidence for a link between drug use and accidents but added “drug and alcohol-induced intoxication will be a source of risk in such environments.”

Among people who are at work, the use of prescription drugs is much more common. An estimated 1.5 million people are addicted to prescription and over-the-counter drugs in the UK. A large number of others use them occasionally. Many of these drugs can have a significant effect on performance, concentration, or alertness. The most common drugs are legal ones such as alcohol and caffeine (which is often used to combat fatigue at work).

What is drug testing

Most drug-testing methods do not actually test for the presence of drugs. This is because most drugs break down very quickly in the body. Therefore the test looks for the chemicals that remain after the drug breaks down. These are called the metabolites.

The metabolites of drugs can be detected in blood, urine, hair, sweat or saliva. The most common type of testing is urine.

The presence of drugs can be detected in urine, for most drugs, for up to three or four days after use, although in the case of some drugs they can be detected for up to 30 days, especially after heavy use. They can be detected in blood for roughly

the same period or slightly less, and for an even shorter period in saliva. Most drugs can however be detected in hair for up to 90 days.

Different companies will test for different drugs but the most common package is a urine test for cannabis, cocaine, amphetamine, methamphetamine, benzodiazepine and opiates.

Unlike alcohol testing, what drug testing will not tell you is whether a person is either under the influence of a drug or what the level of impairment is. It will simply tell you whether the metabolites of a drug are present.

Anyone who conducts any kind of analysis for drugs should be accredited by the UK Accreditation Service and comply with the International Standard for laboratories (ISO 17025).

There are a considerable number of different types of drug test but they all work in a similar way. In the case of urine and saliva no preparation is needed but if blood is used the plasma has to be separated before testing. Hair is more complex to test because it has to be both washed and broken down.

The sample is then put through a screening test. These have various names such as ELISA and EMIT. They often produce “false positives” so if a sample proves positive it should be subject to a confirmation test which is more precise but also quite expensive.

Even once a positive result is confirmed it should not be acted upon until the person who gave the sample has been interviewed by a medical doctor to find out if anything else could have resulted in the positive result.

Types of drugs testing

Pre-employment: This is when an employer screens all potential employees or applicants prior to them being employed. This is when people are at their most vulnerable because they are not employed and have far fewer employment rights, are not covered by grievance or appeals procedures and do not have the support of a union. Some job applicants have claimed that they have been denied employment because of a prescription drug they were taking but were not given the opportunity to challenge the result. This is the type of testing favoured by many companies because it is cheaper as it only needs to be done once, however it is also considered to be the least effective because, it is usually based on a urine sample. It is often easier to dilute or substitute the sample as it has to be given in private.

Post incident: This is when an employer tests employees after there is an incident that causes an injury, damage or a near miss. Sometimes this is done automatically after an incident, in other cases it is only done if the supervisor suspects that drugs may have played a part. Often this is introduced in an attempt to protect the employer from liability if an employee injures themselves. They will claim that the reason for the injury was that the employee was under the influence of drugs.

Random: Random testing involves selecting a number of employees at random at regular intervals and testing them. Drugs-testing companies claim that it is a major

deterrent, although in the USA, where it is far more common, it has been claimed that users are more likely to switch from cannabis (which remains in the urine for much longer) to harder drugs which disappear from the system much quicker.

Effectiveness

In the past drug-testing was very unreliable. In recent years testing has become more accurate, and if a sample is conducted by an approved laboratory, and the sample is subject to a confirmation test then false positive results are now less common. That does not mean that drug-testing accurately indicates that a person has taken an illegal drug. In some cases, the metabolites of the drugs detected are the same, or similar, to drugs used in prescription or even over the counter medication. That means that a person can be given a positive result simply because they have taken a flu remedy.

Even when it does identify drug use correctly, what the test shows is simply whether the residues of a drug are present. It cannot tell with any certainty when the person took the drug, or whether they were under the influence of the drug.

So the biggest criticism of any form of drug-testing is that it does not tell an employer what they want to know, which is whether someone is, or was, under the influence of drugs while at work. It will, at best, tell you that the person is likely to have consumed a particular drug in the recent past.

The law

Many European countries have banned pre-employment or random screening. While most allow it in safety critical industries, some have introduced safeguards. France, for instance will only allow it to be done if recommended by an occupational physician.

In the UK, the law on drugs-testing is very unclear. Although the possession of banned drugs is illegal, a person cannot be charged simply because they test positive after a drugs test.

Employers do have a duty to protect the safety of their workplace under the Health and Safety at Work Act. That includes ensuring that employees are not working under the influence of drink or drugs.

Public sector employers also have to abide by the 1998 Human Rights Act, which gives a right of privacy. Employment tribunals have also ruled that an employer cannot dismiss someone simply because they have been found in possession of drugs outside the workplace.

No person can be forced to provide a sample of urine, hair, saliva or blood for any purpose. However, if a person has a contractual obligation to provide a sample, and refuses to do it, courts have ruled that, in certain circumstances that can be grounds for dismissal.

A doctor should not take any sample without getting the “informed consent” of the person but nowadays most samples are not taken by doctors, and technicians working for a drugs testing company are not covered by the same ethical framework.

Even then consent should be given before a sample is taken but in practice it is very difficult for a person applying for a job, or if ordered to give a sample by their employer, to refuse so the concept of consent is meaningless.

Workers should also be entitled to privacy when giving a sample. The privacy issue is more commonly an issue when urine samples are used. Some employers have argued that another person should be in the room when a person is giving a sample to make sure it is not substituted or diluted. This is unreasonable, and a breach of human rights. In addition a number of people have an inability to pass urine in front of another person.

People who were interviewed for posts with cabling firm Sanmina were then escorted outside Greenock Jobcentre by staff from Pertemps for mouth swabs to be taken - as cars drove past and pedestrians walked by. The tests were taken outside the Jobcentre because Pertemps did not have permission to conduct them inside during interviews. One jobhunter said: "I had my interview and tests and then the person from Pertemps told me they'd carry out a drugs test. She put her coat on and I followed, then we were outside the building, which I thought was strange. Then she handed me the swab to put in my mouth. I didn't want to do it but went along with it because I needed the job - I was totally embarrassed. People were walking by and it was yards away from the main road."

Privacy and data protection considerations have also been addressed by the Information Commissioner’s Office, whose data protection code on obtaining and handling information about workers’ health puts strict limits on the health information that can be obtained by employers. It concludes that in most instances alcohol and drug testing is an unwarranted intrusion. The fourth part of the Employment Practices Data Protection Code – ‘Information about Workers’ Health’ says: “Very few employers will be justified in testing to detect illegal use rather than on safety grounds,” adding: “even in safety critical businesses such as public transport or heavy industry, workers in different jobs will pose different safety risks. Therefore collecting information though the random testing of all workers will rarely be justified.”

The Code’s good practice recommendations say:

- Only use drug or alcohol testing where it provides significantly better evidence of impairment than other less intrusive means.
- Use the least intrusive forms of testing practicable to deliver the benefits to the business that the testing is intended to bring.
- Tell workers what drugs they are being tested for.
- Base any testing on reliable scientific evidence of the effect of particular substances on workers.

- Limit testing to those substances and the extent of exposure that will have a significant bearing on the purpose(s) for which the testing is conducted.

The 2004 Independent Inquiry into Drug Testing at Work concluded that the legal situation in relation to employment law and drug testing was unclear and called on the Government to introduce regulations to protect workers. It also concluded that attempts by employers to force employees to take drugs tests could potentially be challenged as a violation of privacy under the Human Rights Act, although this would not apply where drug-testing is for genuine safety or security reasons.

If a person were taking a prescribed medicine, including an opiate, which they required for a condition that meant they were disabled under the Disability Discrimination Act and an employer did not employ them, or dismissed them, as a result of a drug test, they may well have a strong case for action against the employer under the Act.

However where an employee is sacked as a result of a positive drugs test, the employer would still have to show that drugs had a detrimental effect on the employee's ability to do the job. So if there is no evidence that there has been any drug use at work, or that performance was influenced by illegal drugs then tribunals may consider the dismissal unfair, however it will also depend on the kind of job the person does.

As the law is unclear, in any situation where a person is facing disciplinary action, or dismissal following a positive drugs result, or if they are threatened with action for refusing to take a drugs test, individuals are advised to contact their union for help.

A former worker with Amazon was awarded £3,453 in compensation after managers at the internet giant falsely told him he had tested positive for amphetamine and fired him. Khalid Elkhader was shocked when a random test was returned positive. He appealed and was asked to take a second test. Amazon claimed the test was also positive, and dismissed him for misconduct. It was only after he took Amazon to a tribunal that he learned the second test had actually been negative. He was awarded with compensation after the Glasgow tribunal ruled his sacking was unfair. Khalid was fired after working with the company for two years. The tribunal heard how he had tried to get the second sample tested by his own doctor, and arranged for it to be sent to the lab. By the time a courier had arrived to collect the sample it was too late and it had been destroyed. He then arranged for his own doctor to take a sample, which was also negative.

Alternatives

Those who oppose drugs-testing are often criticised as undermining the fight against drug use in the workplace. Unions strongly believe that there is no place for drugs in the workplace. Any person who is under the influence of drugs while working can be a danger to both the worker and their colleague. However there is no evidence that introducing drug testing actually reduces injury rates. Instead they simply allow the employer to believe they have the right to involve themselves in

what their workforce do in their own time, and make it more likely that a worker will hide any problem.

More importantly it does not address the real issue, which is the ability of the worker to function safely. Unlike alcohol testing, drug-testing cannot tell you the likely affect of a drug on the person at a particular time. A more relevant test is an impairment test which gives an indication of whether a person's abilities have been impaired by drink or drugs. This is sometimes used by police following a motor accident where a breathalyser test shows a negative result. These tests also do not just tell if a person's abilities have been impaired by illegal drugs, but also by legal ones, which can be a bigger safety concern.

Where drugs are used in the workplace they are often to combat either fatigue or stress. These should be addressed by removing the cause of the problem. In other cases a person will have a physical addiction to a substance – in which case they need help to address this.

The most effective way of ensuring that drugs are not a problem in the workplace is to have a comprehensive drugs and alcohol policy that seeks to support those that need help in a non-judgemental way.

The 2004 Independent Inquiry into Drug Testing at Work said: “For the majority of businesses, investment in management training and systems is likely to have more impact on safety, performance and productivity than the introduction of drug-testing at work. There is a wealth of evidence that good and open management is the most effective method of improving workplace performance and tackling drug and alcohol problems amongst staff.”

Checklist

Drug testing is a costly and time-consuming process that is often used by organisations as a substitute for an effective drugs and alcohol policy. There is no real evidence that regular drug-testing has any effect on production or safety, and branches should resist it. However if an employer does introduce a testing programme branches should ensure that:

- It is done by a laboratory accredited by the UK Accreditation Service.
- It is part of an effective and agreed workplace drug and alcohol policy which aims at supporting any person with a drug or alcohol problem.
- It is only done after impairment testing has been carried out and there is evidence that the person may be impaired as a result of drugs.
- No samples are taken without the informed consent of the person (this cannot be given under duress).
- There is an appeals process, with right to union representation, if anyone tests positive.

Resources/Further information

TUC pages on drugs and alcohol

http://www.tuc.org.uk/h_and_s/index.cfm?mins=348

Hazards magazine – testing times

<http://www.hazards.org/testingtimes/drugtesting.htm>

HSE guidance on drugs misuse at work

<http://www.hse.gov.uk/pubns/indg91.pdf>

Independent inquiry into drug testing at work

<http://www.jrf.org.uk/publications/drug-testing-workplacesummary-conclusions-independent-inquiry-drug-testing-work>

Information Commissioners Advice on information about workers health

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/coi_html/english/supplementary_guidance/information_about_workers_health.html