



A-Z OF EMPLOYING

Drug Testing

Our guide for Employers and Managers

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Drug Testing

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Overview

- 1 Workplace drug testing is a complex issue that should be part of a comprehensive policy formulated after consultation between the employer and employees.
- 2 The most common reason behind workplace drug testing policies is the concern with health and safety; the Health and Safety at Work Act 2015 provides that a hazard includes a person's behaviour where that behaviour has the potential to cause death, injury, or illness to a person where that behaviour results from drugs.
- 3 There are different techniques of drug testing, some of which are more intrusive than others.
- 4 Depending on the technique(s) of drug testing used by an employer, drug testing may be done in a variety of circumstances and at different times.
- 5 Each technique of drug testing, and each drug testing regime, has a different set of implications that employers need to consider before deciding to introduce it.
- 6 Employers should seek expert professional advice on what impact drug testing may have on their workplace and the best way to go about introducing it.

Introduction

This chapter should be read with the case of *NZ Amalgamated Engineering Printing & Manufacturing Union Inc and Others v Air New Zealand* (AC 22/04) in mind. This case essentially concerned a challenge to Air New Zealand's proposed policy on alcohol and drugs.

The Employment Court examined the law pertaining to drug testing in detail and found that Air New Zealand's policy was valid except to the extent that it proposed to introduce random unsuspecting testing for employees employed outside safety sensitive areas. The Court has indicated that it is permissible to randomly drug test in safety sensitive areas. This is subject to a consultation process with employees or unions, particularly in respect of defining 'safety sensitive areas'.

The Court found that in this case drug testing was appropriate in the following circumstances:

- ▶ on reasonable cause to suspect that an employee's behaviour is an actual or potential cause or source of harm to others as a result of being affected by alcohol or drugs or both;
- ▶ on internal transfer to safety sensitive occupations (by analogy with pre-employment testing which is not attacked);
- ▶ in post-accident/incident or near miss situations;
- ▶ in random testing in safety sensitive areas only, not across the board.

In the context of the legislative environment in New Zealand at the time when workplace drug testing became possible, it was a new method available to employers to assist them in the taking of all practicable steps, as required by the then applicable Health and Safety in Employment Act 1992. While a generalisation, most workplace drug testing occurs predominantly in safety sensitive workplaces and occupations.

It is now well understood that performance impairment can be attributed to a multitude of causes therefore drug testing may be only one of a number of options available to you to deal with employee performance issues. Managing performance impairment is ultimately what is required in a workplace

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where drug testing is done, or being considered. The decision to introduce drug testing in the workplace requires the development of a comprehensive workplace drug policy that should include a self-reporting and employee assistance programme.

Drug testing should not be a “knee-jerk” reaction to an event; such a response would be inappropriate and depending on the circumstances, could be a legal minefield. Drug testing by its very nature involves a significant invasion of privacy and depending on how the decision to drug test is arrived at, could be discriminatory. Whether to drug test or not, in a workplace, therefore necessitates a case-by-case evaluation of the employer’s objectives, and the risks, costs, and legal implications involved.

In this **A-Z Guide** the term “Drugs” includes alcohol.

Analysis of the Problem

The starting point for any employer considering introducing workplace drug testing, should be an understanding of the extent of the problem of drug use in the workplace. Drug testing is intrusive, and in the workplace is commonly connected with disciplinary action; the plan to introduce workplace drug testing will always be met with some employee suspicion and concern. So, before indicating an intention to consider the option to drug test, you should be assured that drug testing will achieve your desired objectives.

The first stage is to analyse the workplace and the extent of the problem. This is not a simple task. You will need to gather information about your workplace for the accident records, equipment maintenance records, attendance records, output or productivity records, and customer service records; any data that assists you in establishing whether your employees may be impaired by drug use.

When the workplace analysis stage has been completed you may have a better understanding of the problem so that you can determine the type of drug testing required in the workplace, and, when it should be undertaken to have the most impact on the problem.

Consultation and Policy Development

When you have investigated the implications of drug testing, and have decided that you should proceed with its implementation, you will then need to consult with your employees about the proposal to introduce a drug testing policy. If your workforce is unionised, then you will need to involve their union representatives in the consultation process.

The amount of consultation involved in introducing workplace drug testing will depend not only the size of the workplace, but also other factors such as the culture, the level of support for health and safety initiatives, the variety and the complexity of the work, industry norms, workplace relations and so on. Generally speaking, the decision to introduce drug testing in a workplace for the first time will involve a substantial amount of effort and consultation.

Introduction of a new drug testing policy should be undertaken carefully and must not impose duties that extend, vary or contradict the employment agreement without the employees’ consent. In both the *Air New Zealand* case and *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197 the Courts have made it clear that, for a policy to be lawful and reasonable, it must not be contrary to the terms of the employee’s employment agreement.

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In contrast, if workplace drug testing has been implemented, and the fact of it incorporated into every aspect of your employment documentation from the policies and procedures manuals, to the application for employment forms, then the closely related issues of agreement, consent and compulsion are contractual issues.

Any proposed policy should be clear in its terms and should be applied strictly according to those terms. *Le Gros v PPCS Ltd (CA89/07)* made it clear that such policies will be strictly interpreted by the Employment Relations Authority.

In *NZ Steel Ltd v New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (2007) 8 NZELC 98,941* the Employment Relations Authority found that the employer was entitled to start the consultation process with a draft drug testing policy and that having a draft policy was not evidence that the employer had a closed mind when entering consultation.

A comprehensive drug testing policy should address:

- ▶ Your position on drug and/or alcohol use in the workplace
- ▶ Your position on the presence of employees under the influence of drugs and/or alcohol in the workplace
- ▶ Your position on the presence of drugs in the workplace (even if there has been no proof of use)
- ▶ Disciplinary processes, actions, and the potential consequences of an unsatisfactory drug or alcohol test
- ▶ Employee assistance programmes
- ▶ Self-reporting
- ▶ Confidentiality
- ▶ Criteria for drug testing
- ▶ Procedures and timing of drug testing
- ▶ Informed consent
- ▶ Post testing support
- ▶ Rehabilitation options and post-rehabilitation testing
- ▶ Suspension from employment
- ▶ Legal support
- ▶ Consequences for employees of refusing to give necessary samples and the consequences of a positive test.

*Employers should consider reviewing their drug and alcohol policies to allow for testing of synthetic cannabis as the Government has banned several of these substances.

Reasons for Drug Testing

Health and safety

Employers have an obligation under the Health and Safety at Work Act 2015 to ensure the health and safety of workers at work. This obligation extends to other people in the workplace and to the public in a variety of ways.

Workplace drug testing is capable of assisting you to manage these obligations, depending on when and how the testing is done.

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Law enforcement

Drugs in this context may include legal and illegal substances. If you believe that illegal substances are being consumed in the workplace, and/or that employees are under the influence of illegal substances, then you may have reason to believe that the sale and distribution of illegal substances is also occurring in the workplace.

Illegal activity presents you with a number of concerns; not only is the workplace potentially subject to the disruption of a Police investigation, but also your property may be confiscated, temporarily or permanently, as a result. And there is the inherent risk to people and property that coincides with criminal activity.

Reputation

This reason to drug test is likely to be one of the last you would think of; however not only is the reputation of your organisation in respect of any relevant industry standards potentially at stake, but also your reputation as an employer of choice, to skilled and talented employment candidates in a competitive labour market.

Security

The reasons why you may consider drug testing for security purposes are twofold: firstly, illegal drug usage affects the trust and confidence between employers and employees, and employers and their customers. Employers have a legitimate concern with security, particularly if there is an additional requirement for confidence in workplace relationships. Secondly, activities usually associated with illegal drug use pose a security threat to real or intellectual property.

Drug Testing Techniques

Breathalysers

This is the preferred method for detecting alcohol. Breathalysers provide a fast and accurate reading of the blood-alcohol level at the time of testing.

There is no New Zealand standard for breathalysers but there is an Australian standard, AS 3547:1997, which specifies requirements for the performance, testing and marking of disposable and re-useable breath alcohol testing devices for personal use, other than those devices used by the Police.

Common alcohol levels for the workplace include:

- ▶ The legal driving limit
- ▶ Zero Tolerance which is often considered to be 100 micrograms of alcohol per litre of breath (100 µg/L)

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Urinalysis

Urinalysis involves the testing of a urine sample for drugs; cannabis, heroin, morphine, cocaine, amphetamines, antihistamines and benzodiazepines are examples of drugs capable of detection in urine. It can confirm not only the presence of a drug or its metabolite (the products of breakdown by metabolism of the drug by the body) but also the level of the drug in a person's body.

Urinalysis usually involves 2-stage testing; first the urine is screened for a negative or positive result, and if a positive result occurs the second stage is to confirm whether there are significant residues rather than minute traces of the drug(s) detected.

Urinalysis that complies with the Australian/New Zealand Standard AS/NS 4308-2008 "*Procedures for the collection, detection and quantitation of drugs of abuse in urine*" provides accurate results where the strict protocols are followed and can withstand legal challenge. The strict protocols relate to the procedures around collection and handling, specialised equipment and skilled scientific personnel for the testing, of samples.

Most drugs are undetectable if urinalysis is done more than 3-6 days after use, with the exception of cannabis, which may be detected for a slightly longer period of time.

Oral fluid screening

Oral fluid (saliva) drug screening is relatively new technology. A printed result in either the positive or the negative is available within minutes of the sample being inserted in the Cozart Rapiscan. This process screens five drug groups, cannabis (THC), Opiates (Codeine, Heroin), Amphetamines (stimulants), Cocaine, and Benzodiazepines. Should a positive for any drug group be determined during the screening process, the original test sample is forwarded to a NATA approved laboratory for confirmation of the screening result.

It has been reported that on-site oral fluid testing devices do have sensitivity and inaccuracy issues particularly around THC and Benzodiazepines.

Hair follicle testing

Hair follicle testing can occur either on-site or at a laboratory however results take one week to receive. Using a small sample of hair cut at the scalp, the testing agent can evaluate the amount of drug metabolites that are embedded inside the hair.

When compared to the more traditional forms of testing, i.e. urine testing, hair samples can detect a longer period of drug use. Each 15mm of head hair provides a 30-day history of drug use.

With hair samples, the only time limitation for detecting drug usage is imposed by the length of the donor's hair.

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Timing

As discussed above, by the time you come to implement a drug testing policy you will have an understanding of when drug testing should be undertaken, in order to combat the problem of drug use in your workplace. There are a number of options, one or more of which can be used as part of a comprehensive policy.

The ramifications of the decision to drug test in the workplace can be affected by when the drug testing is to occur.

Pre-employment screening

Testing job applicants for drug use, as part of a medical screening process, is usually undertaken only after a conditional offer of employment has been made because of the cost associated with the testing.

If the employee has commenced work while the testing results are received, it is important to ensure that the offer of employment letter and drug testing policy deals with the possible outcomes of an unsatisfactory result.

Where Work and Income New Zealand (“WINZ”) refers a beneficiary to a job vacancy and a pre-employment drug test is part of the application process, the beneficiary must take and pass that test. Employers will be able to claim reimbursement of the cost of the drug test from WINZ if certain criteria are met:

- ▶ the vacancy was listed with WINZ;
- ▶ the employer told WINZ when listing the vacancy that the job required a pre-employment drug test;
- ▶ the test meets the New Zealand standard AS/NZ 4308:2008 *Procedures for the collection and detection and quantitation of drugs of abuse in urine*;
- ▶ the beneficiary fails the drug test;
- ▶ the employer confirms with the beneficiary that they accept the result of the failed test;
- ▶ the beneficiary signs a results confirmation form; and
- ▶ the employer makes a claim for reimbursement within 30 working days of the drug test being taken.

Refer to the **A-Z Guides on Medical Examinations and Pre-Employment Checks** for further explanation.

Post-incident/accident

Drug tests could be carried out after incidents and accidents in the workplace to establish whether drug use has been a factor in the accident or incident.

Post incident or accident testing should be done as soon after the incident as possible. Testing conducted days after the incident will not prove that the employee was under the influence when the accident or incident actually occurred.

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Reasonable suspicion

Drug testing in this instance is carried out when you have a “*reasonable cause to suspect*” drug use because of an employee’s actions, behaviour and/or appearance.

Again, to test days after the suspicion arose will not provide you with evidence that the employee was under the influence on the day that you became suspicious.

Random drug testing

Employees are tested on a random basis, with or without cause and with or without notice. Random testing is usually a feature of a drug testing policy that is implemented in a highly safety sensitive workplace. The key case authority is the Air New Zealand case mentioned above. **You can only randomly drug test employees working in safety sensitive areas and a definition of these areas must be finalised after consultation with employees and unions.** It cannot be done *carte blanche*. Random drug testing should be part of an employer’s workplace policy or provided for in their employment agreement (whether individual or collective).

In *Raddock v Air New Zealand Ltd (AA79/07)* the Employment Relations Authority dismissed the employee’s personal grievance on the ground that he was disadvantaged by being selected for random drug testing. The Authority stated that the employer had a right to define safety-sensitive areas and to carry out random testing within those areas. The Authority also noted that the employer acted in good faith by consulting with the union and with all employees before defining safety sensitive areas.

Periodic

Periodic testing is drug testing that is carried out at specified times between specified periods. Your employees know in advance when and how the drug testing will be undertaken.

Follow-up

Employees who have attended a drug rehabilitation programme, either as a condition of their return to the workplace, or in response to a self-reporting initiative, are tested on a follow-up basis to monitor their compliance with the programme.

Legal Implications

It is important to understand that the information provided under this heading is general advice on the legal implications of drug testing. If you and your organisation are considering implementing workplace drug testing then you should seek particularised legal advice for that purpose and your unique circumstances.

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Health and Safety at Work Act 2015

The Health and Safety at Work Act 2015 (“the Act”) requires Persons Conducting a Business or Undertaking (“PCBU”) to take all reasonably practicable steps to ensure workers and individuals are free from harm in the workplace.

In respect of impairment caused by drugs, you as a PCBU may need to take into account your responsibilities as an employer, principal, self-employed person, and controller of a place of work.

The duty of PCBU’s under the Act to ensure the safety of workers while at work involves the identification and management of hazards.

Workers who come to work affected by alcohol or drugs, and whose performance is impaired as a result, may constitute a hazard, and even a significant hazard, in the workplace.

The duty on PCBU’s is to identify all new and existing hazards; where an worker’s drug use becomes known to the PCBU then the PCBU is obliged to assess whether that worker presents as a hazard in the workplace. This assessment may be based on the worker’s performance.

However, where there can be no doubt that the worker presents as a potential hazard, because of what is known about the impact of drugs on reaction times, concentration levels, the ability to perceive danger, and the ability to follow instructions, then you have a duty to manage that hazard, particularly if your workplace is a safety sensitive workplace.

The taking of all reasonably practicable steps could require the employer to consider an appropriate drug testing policy.

Refer to the **A-Z Guide on Health and Safety in Employment** for more information on your obligations under this legislation.

Privacy Act 2020

This Act places some constraints on how workplace drug testing is conducted because drug testing involves the collection of personal information about identifiable individuals.

Under **Principal 1** the collection of personal information by an employer must be collected for a lawful purpose connected with a function or activity of the employer and be necessary for that purpose. A lawful purpose may be the protection of the employer’s property and/or the taking of a practicable step to ensure the health and safety of employees at work and other people in places of work.

Workplace drug testing must be reasonably necessary for a lawful purpose but that can only be evaluated on a case by case basis.

Pre-employment drug testing that occurs as part of a conditional offer of employment may be reasonably necessary where it occurs in a procedurally fair manner and in a safety sensitive context.

In *Philson v Air New Zealand Limited* (Unreported) AEC 35/96; 3/7/96; the Employment Court refused to grant an application for interim reinstatement of an employee to the company’s cargo operation because the balance of convenience favoured the employer because of the safety issue. The case did not progress further to test the legality and necessity of the drug testing.

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The timing, and type, of drug testing adopted in any circumstance must be justifiable at the time of the collection. Usually only high safety sensitive workplaces and occupations will find it necessary to, and therefore justify, drug test randomly, periodically, and pre-employment. The threshold for justification may be lower in the instance of reasonable suspicion and post-incident / accident drug testing if the employer can point to evidence that indicates an employee's impairment and there is no other reasonable explanation for that impairment.

Under **Principle 2** the collection of personal information should be directly from the individual concerned unless there are compelling reasons (provided for in the Act) why it should not, and under **Principle 3**, in collecting that information from the individual concerned the collector should take such steps as are, in the circumstances, reasonable to ensure that the individual concerned [has given informed consent] before the collection is made.

Principle 4 states that personal information shall not be collected for unlawful means or by means (referring to the manner of collection) that, in the circumstances of the case, are unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned.

Whether drug testing that occurs by breathalyser or urinalysis is carried out unlawfully, unfairly, or constitutes an unreasonable intrusion, will depend on the employer's reason for the drug testing and whether the testing is reasonably necessary for that purpose. If drug testing in a post incident / accident context is used to apportion blame for a mishap that was in fact caused by a mechanical defect or a communication breakdown quite separate from the event, then clearly the means would be unfair, even if it was lawful.

Principle 10 places limits on the use of personal information so that it may only be used for the purpose in connection with which it was obtained, unless there are reasons (outlined by the Act) why it should be used for other another purpose.

The immediate relevance of this principle to workplace drug testing is where an employer obtains bodily samples from employees so as to monitor their health in relation to an identified hazard, but then uses those samples to test for the presence of alcohol and or drugs, with neither the knowledge nor consent of the employees' concerned.

Where drug testing is not a feature of a comprehensive drug testing policy it is not difficult to imagine how the Information Privacy Principles could result in an unreasonable interference with an individual's privacy. Employers considering workplace drug testing should seek formal advice on the impact of the Privacy Act 2020 on their proposed policy.

Refer to the **A-Z Guide on Privacy** for an in-depth discussion of this Act.

Human Rights Act 1993

Section 21(1) (h) of this Act makes it unlawful for employers to discriminate on the basis of disability. Whether the definition of disability extends to drug dependency is unclear from a legal perspective, and medical opinion as to whether the use of drugs constitutes an illness is unclear and unsettled.

Where private drug use occurs but it is the employee's actual or potential impairment that is the issue, then this is when the issue of unlawful discrimination is likely to arise, particularly if the drug testing that identifies the employee as a drug-user occurs pre-employment or post incident / accident.

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In these circumstances you need to understand how a complaint of unlawful discrimination could occur so that you can build practical steps into your drug testing policy that either justify discrimination on the basis of drug use, or show that your knowledge of an employee's drug use was not a factor in any decisions made that affected that employee's employment.

New Zealand Bill of Rights Act 1990

This Act applies to the activities of the State and any person or body in the performance of public functions; its relevance to private sector employers has yet to be tested.

Some circumstances to people who are not employees and to the public, employers may be performing a public function within the meaning of the New Zealand Bill of Rights Act 1990 when they drug test their employees on health and safety grounds.

If this is the case, and the New Zealand Bill of Rights Act 1990 applies to workplace drug testing, then the provisions of that Act that protect the civil and political rights of every person where the Act applies, may apply also.

Section 11 provides that everyone has the right to refuse to undergo medical treatment. It is still unclear in New Zealand whether drug testing is medical treatment.

Section 6 of the Accident Compensation Act 2001 defines treatment; that definition does not include testing although the definition of treatment provider includes a medical laboratory technologist.

Drug testing in some overseas jurisdictions has been viewed as a means of search and seizure (of personal information); in those places the law has developed in respect of the legality of searches and seizures. The tests for justification are largely the same.

If drug testing by an employer in New Zealand was held to be the performance of a public function, then the limitation on an employee's right to refuse to undergo medical treatment posed by drug testing would have to be demonstrably justified on some ground, possibly that of public safety.

This debate can be put to one side by most employers and considered purely academic.

The Code of Health and Disability Services Consumers' Rights 1996

As with the New Zealand Bill of Rights Act 1990, this Code has limited application. Unless an employer has the ability to conduct some aspect of the drug testing process in-house or provides an in-house Employee Assistance Programme, because the employer employs one or more registered health professionals, then this Code will not apply.

A person, who is a registered health professional within the meaning provided in the Health and Disability Commissioner Act 1994, is a health care provider; health care providers are bound by the Code. Any person, whether or not they are a registered health professional within the meaning of this Act, who provides disability services (and this definition is very wide so it could include services to those who are drug-users or those who are drug dependent) is bound by the Code.

Where the Code applies, it states that consumers have, among other rights, the right to be fully informed, and the right to make an informed choice and give informed consent in respect of health or disability services, which includes health care procedures.

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Refer to the **A-Z Guide** on the **Health and Disability Commissioner Act 1994** for further information on this Code.

Conclusion

Whether to drug test or not, is an enormously complex issue. The New Zealand experience with drug testing is relatively limited; generally speaking only large companies in safety sensitive industries and with significant economic resources have seriously pursued workplace drug testing.

This comment should not deter you from considering drug testing if you believe that you have a significant problem with drug use and/or abuse in your workplace that may be addressed with a drug testing policy. It should reinforce to you the importance of particularised advice: legal, scientific, and human resources.

This **A-Z Guide** was designed to give you an overview of the subject so that you are able to make an initial assessment of it in respect of your organisation; from that point you should be able to explore some of the issues with your employees, union delegates, health and safety representatives, and industry advisors.

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
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