

A-Z Guide

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 concern for health and safety. In the Health and Safety at Work Act 2015, a hazard includes a person's behaviour (in this case resulting from drug use) that has the potential to cause death, injury, or illness to a person.
3. There are different techniques of drug testing, some of which are more intrusive than others.
4. The circumstances and times that testing is permitted may vary with the technique.
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

The advent of workplace drug testing gave employers another tool with which to uphold their health and safety duty. A lot of drug testing occurs in safety-sensitive workplaces and occupations.

Managing performance impairment is the ultimate rationale behind drug testing. Performance impairment can be attributed to a multitude of causes, and drug testing may be only one of a number of options to deal with performance issues. 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 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 in a workplace or not 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 understanding the extent of the problem. Drug testing is intrusive and in the workplace is commonly connected with disciplinary action; introduction of workplace drug testing will always be met with some employee suspicion and concern. So, before communicating consideration of the option to drug test, you should be sure 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 can establish your employees may be impaired by drug use.

An analysis will better your understanding of the problem, and help you to determine the type of drug testing required 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 decided to proceed with its implementation, you will need to consult with your employees about the proposal to introduce a drug testing policy. If your workforce is unionised, you will need to involve their union representatives in the consultation process.

The amount of consultation will depend on the size of the workplace, 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 the decision to introduce drug testing in a workplace for the first time will involve substantial 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 *NZ Amalgamated Engineering Printing & Manufacturing Union Inc and Others v Air New Zealand* (AC 22/04) and *Electrical Union 2001 Inc v Mighty River Power Ltd* [2013] NZEmpC 197, for a policy to be lawful and reasonable, it must not be contrary to the employee's employment agreement terms.

In contrast, if workplace drug testing has been properly implemented - and its existence 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 follow basic contractual law. Here you can point back to the clauses in your documentation that employees agreed to.

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) stated that the Employment Relations Authority will strictly interpret drug policies.

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 having a draft policy was not evidence that the employer had a "closed mind" entering into consultation. The employer was entitled to start the consultation process with a drug testing policy already drafted.

## 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.

## Law enforcement

Drug testing 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 the sale and distribution of illegal substances is also occurring in the workplace.

Illegal activity presents you with a number of concerns; not only might the workplace potentially be disrupted by a Police investigation, but your property may be confiscated, temporarily or permanently, as a result. There is also the inherent risk to people and property that comes with criminal activity.

## Security

Illegal drug usage affects the trust and confidence between employers and employees, and employers and their customers. This can cause a legitimate concern with security, particularly if the workplace relationships require that confidence. Activities usually associated with illegal drug use also pose a security threat to real or intellectual property.

## Reputation

This reason is likely to be one of the last you would think of. However, the reputation of your organisation is at stake within your industry standards, as is your appeal to skilled and talented employment candidates in a competitive labour market.

# 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 (differing from devices used by the Police).

Common alcohol levels for the workplace include the legal driving limit, or 'Zero Tolerance', often considered to be 100 micrograms of alcohol per litre of breath (100 µg/L).



## 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 in a person's body.

Urinalysis usually involves 2-stage testing. First, the urine is screened for a negative or positive result; if a positive result occurs, the second stage looks for significant residues rather than minute traces of the drug(s).

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 and can withstand legal challenge. These procedures are about collection, handling, specialised equipment and skilled scientific personnel.

Most drugs are undetectable by urinalysis more than 3-6 days after use. Cannabis may be detected for a slightly longer time.

## Oral fluid screening

Oral fluid (saliva) drug screening is relatively new technology. A printed result of positive or 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.

On-site oral fluid testing devices have been reported to 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. 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.

Compared to the more traditional forms of testing like 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. The only time limitation for detecting drug usage comes from the length of the donor's hair.

## Timing

By the time you come to implement a drug testing policy you will have an understanding of when drug testing should be undertaken (see above) 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 next steps of the decision to drug test in the workplace can be affected by when the drug testing is to occur.



## Drug Testing

The following circumstances from *NZ Amalgamated Engineering Printing & Manufacturing Union Inc and Others v Air New Zealand* (AC 22/04) were found to be appropriate for drug testing:

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

The Court found Air New Zealand's proposed policy was valid overall, but not where it proposed random testing for unsuspecting employees employed outside safety-sensitive areas.

## 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 that the offer of employment letter, and drug testing policy, deal 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:

- 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 the beneficiary accepts 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 can be carried out after incidents and accidents in the workplace to establish whether drug use was a factor.

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



## 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, testing days after your suspicion will not provide evidence that the employee was under the influence on that day.

## 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 for a highly safety-sensitive workplace. **You can only randomly drug test employees working in safety-sensitive areas and a definition of these areas must be made after consultation with employees and unions.** Random drug testing cannot be done freely. 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 of being 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 can have attended a drug rehabilitation programme, and either as a condition of their return to 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

This information is general advice on the legal implications of drug testing. If you and your organisation are considering implementing workplace drug testing, you should seek personalised legal advice for that purpose and your unique circumstances.

## Health and Safety at Work Act 2015

The Health and Safety at Work Act 2015 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.

For impairment caused by drugs, a PCBU may need to consider its responsibilities under the categories of employer, principal, self-employed person, and controller of a place of work.





## Drug Testing

The duty of PCBU's of ensuring 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 or a significant hazard in the workplace.

PCBU's have a duty to identify all new and existing hazards. Where a worker's drug use becomes known to the PCBU, it must assess whether that worker presents a hazard in the workplace. This assessment may be based on the worker's performance.

However, where there is no doubt that the worker is a potential hazard - because of what is known about the impact of the drugs on reaction times, concentration levels, ability to perceive danger and 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 **Principle 1**, personal information collected by an employer must be 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 and other people at 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 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 rejected an application for an employee's interim reinstatement to the company's cargo operation, where he had been removed while required to undergo a drug test. The Court found the employer's argument of safety to be the stronger concern. The legality and necessity of the drug testing did not come up.

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

Under **Principle 2**, personal information should be directly collected from the individual, unless there are compelling reasons (provided for in the Act) why it should not.





Under **Principle 3**, the collector of personal information should take steps, that are reasonable in the circumstances, to ensure the individual has given informed consent before the collection is made.

Under **Principle 4**, personal information shall not be collected for unlawful means, or done by means that in the circumstances are unfair, or intrude to an unreasonable extent, on the individual's personal affairs.

An instance of breathalyser or urinalysis drug testing could be carried out unlawfully, unfairly, or constitute an unreasonable intrusion. This depends on the employer's reason for the drug testing, and whether the testing is reasonably necessary for that purpose. For example, if drug testing in a post-incident/accident context is used to apportion blame, but the incident was in fact caused by a mechanical defect or a communication breakdown, the testing would be unfair even if it was lawful.

**Principle 10** places limits on the use of personal information. It may only be used for the purpose in connection to how it was obtained, unless there are reasons (outlined by the Act) why it should be used for another purpose. The usual relevance is where an employer obtains bodily samples from employees 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, without the employees' knowledge or consent. The second use is not in connection to the health-monitoring that the samples were originally obtained for.

Where drug testing is not a feature of a comprehensive drug testing policy, the Information Privacy Principles could mean it is 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 legally extends to drug dependency is unclear. 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, is when the issue of unlawful discrimination is likely to arise. This particularly applies if the drug testing that identifies the employee as a drug-user occurs pre-employment or post-incident/accident.

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. Whether it applies to private-sector employers has yet to be tested. Due to this, this information can be forgotten by most employers and considered only academic.

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 the Act applies to workplace drug testing, then so may its provisions protecting certain civil and political rights.

Section 11 provides that everyone has the right to refuse to undergo medical treatment. In New Zealand it is unclear whether drug testing is medical treatment. (Section 6 of the Accident Compensation Act 2001 defines treatment, which does not include testing; its definition of treatment provider does include a medical laboratory technologist.)

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

Therefore, if drug testing by an employer in New Zealand was held to be the performance of a public function; and drug testing was held to be medical treatment; then employees would have a right to refuse drug testing. Limiting this right would have to be demonstrably justified on some ground, possibly public safety.

## The Code of Health and Disability Services Consumers' Rights 1996

This Code also has limited application. It only applies where an employer employs one or more registered health professionals, maybe conducting aspects of the drug testing process in-house, or providing an in-house Employee Assistance Programme.

A health care provider is defined by the Health and Disability Commissioner Act 1994 as a person who is a registered health professional. Health care providers are bound by the Code. A person who provides disability services is also bound by the Code, even if they do not qualify as a registered health professional. The definition of disability services is very wide, so it could include services to those who are drug-users or those who are drug dependent.

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, regarding health or disability services (including health care procedures).

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 amount of New Zealand 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 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 the importance of particularised advice – that of 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 for 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.

Employment Relations Consultants and Occupational Health and Safety Consultants are able to assist you with any of the issues raised in this guide.

## Remember

- Always call AdviceLine to check you have the latest guide
- 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.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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