

Workplace Drug Testing

June 2024 - The limitations of current testing approaches

Because it is difficult to measure the impairment of drugs compared with alcohol, most workplaces deploy a presence-based (as opposed to “level”-based) approach to drug testing. Workplace drug testing regimes therefore raise important human rights issues because they allow workers to be dismissed if traces of specific substances, such as cannabis, are detected at any level. There is no need, in other words, to establish whether the worker was impaired while working, or to establish the presence of a substance over a specific threshold, as is the case with blood alcohol concentration tests. Specifically in relation to medical cannabis, research has found that ‘medical cannabis may have minimal acute impact on cognitive function when prescribed and used as directed.’ These features have led some to question whether workplace drug testing regimes are proportionate and justifiable, and if they in fact violate human rights.

As such, workplaces should consider the strengths and limitations, costs, and potential unintended consequences of a workplace drug testing program, including that positive drug tests are not always linked to impairment and there is a possibility of inaccurate results.

The problem of certain workplaces unnecessarily applying testing regimes universally

Statutory workplace drug-testing regimes (that is, laws that govern workplace drug testing) only cover certain workers in certain industries, such as integrity officers, police, bus drivers, commercial passenger vehicle drivers, and boat operators. For workers outside these industries, there is no legislative scheme in place to govern the reasons for testing, the use of test information, the tests that may be conducted, the method of collection of samples, the consequences of failure to undergo testing, and confidentiality provisions.

There is also limited legislation in place to ensure that workers’ privacy is appropriately protected, including in activities such as workplace drug testing. It is common for legislation and case law to afford variable protections and sometimes no protections for workers’ privacy. As other scholars have found, ‘while the traditional sources of law have provided some normative framework for WDT [workplace drug testing] practice, they are insufficient to ensure that WDT respect employee privacy while achieving its legitimate goals.’

The potential for current policies to perpetuate stigma and discrimination

Workplace drug testing has the potential to generate stigma and discrimination in a range of ways. This might happen where:

- there are insufficient protections for people’s private information;
- the methods of workplace drug testing do not contain adequate safeguards to ensure that workplace drug testing takes place in ways that are respectful and dignified;
- those with the power to order a test have broad, imprecise powers or excessive discretion;
- workplaces order drug tests based on problematic, stereotypical, or discriminatory assumptions about people who use drugs; and
- those tasked with making decisions, managing workplace drug tests, collecting samples and handling information do so without any or any adequate training on stigma and discrimination.

The need for more nuanced, evidence-based testing frameworks

Consensus is that workplace drug testing should be part of a comprehensive alcohol and other drugs program and supported by appropriate safeguards, clear policy and procedures, and provision of information, instruction, education, and support, and that the policy and procedures for workplace drug testing should be developed in consultation – and, preferably, agreement and written consent – with employees. In addition, the National Centre for Education and Training on Addiction recommends that workplace drug testing programs need to:

- result in counselling, treatment, and rehabilitation rather than punitive outcomes;
- target safety-sensitive rather than non-safety-sensitive work roles;
- allow for employee input into the development and implementation of the program;
- allow for a right of appeal; and
- incorporate appropriate education and training.

When considering statutory guidance, guides from workplace health and safety regulators, and relevant case law, there are some key elements for evidence-based workplace drug testing, including:

- **What kind of tests should be used:** Workplace drug testing should be conducted through oral fluid, done in accordance with *AS 4760-2019: Procedures for specimen detection and the detection and quantitation of drugs in oral fluid*.
- **What kind of testing should occur:**
 - **Post-incident** and **causal/suspicion** workplace drug testing should only occur where the line manager has reasonable grounds for suspecting that drugs have been a contributory factor to the relevant incident or pattern of behaviour.
 - **Random workplace drug testing** should not occur until six weeks have elapsed since an education program has been rolled out in the workplace and there should be no discrimination in the employees selected for testing.
- **How tests should be conducted:** Appropriate safeguards should be put in place that ensure:
 - the personnel who conduct the tests are appropriately qualified;
 - any samples taken are securely stored and handled;
 - cut-off points for a positive result are selected and clear;
 - there are procedures indicating who the results are communicated to, who has access to the results, who will interpret them, how the results will be stored, and for how long;
 - there is a grievance and complaints process, including accepted procedures to challenge the outcome of a workplace drug test;
 - confirmatory workplace drug testing and analysis occurs in an accredited laboratory consistent with AS4760; and
 - procedures govern the situation where an employee refuses to be tested for drugs, acknowledging that an employee may have a valid reason to refuse to be tested and noting it cannot be presumed that the employee is impaired because they refuse.

In addition to the above, issues relating to privacy and confidentiality of employees need to be considered, given that workplace drug testing may be intrusive and raises confidentiality and privacy issues. Furthermore, employees should not have to disclose personal information about prescription medication unless and until they have returned a confirmed positive workplace drug test or if they have reason to believe they are suffering or may suffer side effects from taking prescription medicine.

***** For brevity, this paper does not cite any references. References can be provided *****