



# HIGH-LIGHT



## ALCOHOL AND DRUG NEWS BRIEF FOR EMPLOYERS

April 2002

### Implementing drug testing in the workplace

*In the previous edition of HIGHLIGHT we gave an overview of the various types of alcohol and drug tests available. However, the available technology poses much less of a problem than the actual implementation of drug testing procedures. The HIV/AIDS hype has unquestionably raised an acute awareness of employees constitutional rights and given the varied ways of instituting drug testing an employer can easily cause more labour relations problems than he had hope to solve by this exercise.*

*In this edition we take a look at some of the issues which have to be considered in implementing alcohol and drug testing strategies*

### Why test for alcohol and drugs ?

This question may appear to be deceptively simple, especially if perceived from a Management perspective alone: occupational safety, absenteeism, low productivity, company image and customer relationships may all be fair and legitimate, but of course, that which is legal may not necessarily be a sound labor relations maneuver.

Let me say from the outset that I remain extremely skeptical about the likelihood of successfully introducing alcohol and drug testing in isolation. **In my modest experience, substance abuse testing has a far better chance of operating smoothly if introduced as a part of a wider, comprehensive company substance abuse policy which had been properly negotiated with employee representatives.** Or putting it another way :Start talking with labor about alcohol and drug abuse in general terms without presenting testing as a panacea for an ill defined problem ! Let us, for the sake of the topic at hand, assume that a policy already exists (without testing) or that the company , for reasons of its own, chooses not to opt for this route.

The provisos of the *Employment Equity Act ( No 55 of 1998 )* clearly requires the employer to do thorough homework when introducing any form of medical testing, particularly in the case of random testing. Section 7 , subsection 1 of the Act states that “*medical testing of an employee is prohibited unless ... (b) it is justifiable in the light of medical facts, employment*

*conditions, social policy, the fair distribution of employment benefits or the inherent requirements of the job.”*

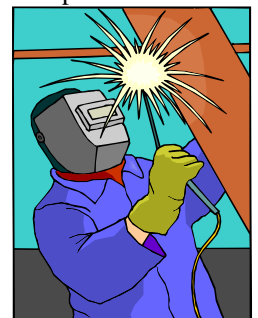
If one assumes that such an exercise is usually initiated by Management the company should firstly do **an audit of the specific reasons why testing should be introduced and these would invariably rely to a large extent on the risk profile of the company.** Here, the following issues should be considered:

**a) the number of disciplinary incidents involving alcohol and drugs,** circumstantial evidence that substances are being used , eg empty bottles, drugs and drug paraphernalia found on the premises

**b) the present permissible evidence at disciplinary enquiries** may be another consideration. Usually , in the absence of any firm agreement which permits breath or urine tests, subjective evidence ( slurred speech, poor motor coordination, loss of balance, verbal aggression ) are used to substantiate the charge. This crude method of detection may not be a problem in cases of gross intoxication, but can cause disputes in instances of sub-acute intoxication. Its very subjective nature may in itself cause conflict and in the interest of fairness it may be in all parties interests to consider a testing device.

**c) Certain occupations carry too high a potential risk** to accept the argument that “ there had been no prior incidents “.

Employees working with automotive equipment, eg crane/truck drivers, sawing mill operators, or those working in dangerous environments , eg fishermen, maintenance personnel working on power-lines or on scaffolding constitute a considerable safety risk and an employer may seek to institute alcohol and drug testing as a preventative measure.



**d) Employee health and well-being** should never be ignored – if testing is simply perceived as a ploy to cut down on productivity losses and as a punitive tool it will never survive the negotiation process.



Where testing is coupled with the reasonable offer of company assistance for a drinking or drugging problem or used as a means to assess compliancy this represents a much more constructive option.

Here, the observations of the occupational health nurse or doctor can be of inestimable value – not to “sell” the notion of testing per se, but to report on alcohol related conditions, eg hypertension, gastro-intestinal problems.

The responses to these queries will largely determine what kind of testing the company should consider :

### 1) **For cause testing**

This type of testing refers to instances where the employer has reasonable cause to suspect that an employee is under the influence, whether visually observed or following accidents or injuries under suspicious circumstances.

The rationale here is either to remove the intoxicated worker from the workplace or to prevent him from entering. The employer may also wish to substantiate a charge of being under the influence. Here the employer will be best advised to opt for a reliable, on-site, SABS approved breathalyzer administered by trained personnel. For suspected drug intoxication, the employee should where possible, be escorted to a pathologist where laboratory tests can be performed – on site rapid urine tests should preferably only be used as screening tests.

In the face of real and compelling safety reasons companies can afford to take a firm stance on this issue. Visual observation is a poor indicator of the extent of intoxication – heavily inebriated people could easily mask these symptoms to avoid detection. An employer can not be expected to maintain a safe working environment if he is forced to solely rely on highly subjective and unreliable visual evidence

### 2) **Random testing**

Random testing may be an option where detection of intoxication at access points may be difficult and /or where inebriated employees may reach safety sensitive areas or operate dangerous machinery.

This is perhaps the most reasonable justification on the part of Management to introduce random testing given the explicit proviso's of the OHSACT : Section 8 ( 1) states that

*“ every employer shall provide and maintain a working environment that is safe and without risk to the health of his employees “*

Whilst random testing has shown to be an effective deterrent for employees reporting for work under the influence, the beneficial effect should not be overestimated. It is quite possible for employees who are hung over to take a days sick leave rather than risk detection. Naturally, a clear protocol for administration should be introduced to ensure that selection procedures are fair, consistent and non discriminatory.

### 3) **Voluntary testing**

As an integral part of it's policy an employer may make provision for employees who feel that they may be under the influence, to submit to an alcohol test ( for this purpose, rapid screening tests will do ). If positive, the employee will be sent

home without being paid for the shift but without any disciplinary sanction. The frequency of such incidents should naturally be limited through a policy.

Whilst this may demonstrate goodwill and an proactive approach on the part of Management I do not know of company's in Western Cape where this had been successfully introduced : Managements usually fear that the system may be abused whilst employees may feel stigmatized and fear indirect discrimination.

### 4) **Scheduled Testing**

As part of a joint Management/Union agreement, the company could provide for substance abuse testing to be introduced in routine medical check-ups to ascertain fitness for duty. Such tests should not be aimed at detecting acute intoxication but rather to show whether the employee is taking mind altering drugs or abuse alcohol to the extent that it may compromise workplace or public safety.

There are indeed sound statutory grounds for companies to introduce this form of testing The New National Road Traffic Act ( 93 of 1996 ) stipulates a blood alcohol limit for professional drivers of 0.02mg and has introduced the Professional Drivers Permit ( PrDP) which can only issued upon submission of a prescribed medical certificate. Whilst screening for alcohol and drugs of abuse is not a prerequisite for obtaining a PrDP in S.A, this may soon be the case as in many other countries.

Engen launched their Driver Health Policy in the early nineties and proceeded, despite initial antagonism and employee objections, to test drivers for elevated GGT and Cannabis. The results of these tests clearly showed that the company was justified in introducing these measures.

### 5) **Pre – Employment testing**

The Labour Relations Act ( 66 of 1995 ) , the constitutionally enshrined Bill of Rights and the Employment Equity Act ( No 55 of 1998 ) all contain some element of protection against unfair discrimination which means that any form of pre – placement examination is fraught with pitfalls. One significant change from pre 1995 labour legislation is that job applicants are also deemed to be employees and thus qualifies for the same protection against unfair discrimination as existing employees.

The Employment Equity Act does not regard medical testing on the grounds of the inherent requirements of a particular job as unfair discrimination. Hence , for an employer to screen out a job applicant based on his drugging status or on elevated liver tests, the employer has to show that the mere use of drugs or the applicants alcohol intake conflicts with an “ inherent requirement for the job “. This may indeed be a tall order !! The fact that someone uses Cannabis for instance, does not imply that this significantly diminishes his capacity to perform his duties. Furthermore, GGT tests are notoriously unspecific indicators of alcohol abuse , ie an elevated GGT may be the result of other medical conditions totally unrelated to alcohol intake. But perhaps the most compelling reason why an employer should thoroughly weigh up the implications of such

testing is the fact that even an allegation of unfair practice ( wrongfully or not ) could drag him into costly litigation where the burden of proof is on the company to show that the discrimination ( not appointing the drug or alcohol user ) had not been unfair.

may not theoretically be illegal, the potential legal pitfalls appear to outweigh the anticipated advantages.

**Should you require further information about this subject, please contact Tertius Cronje at 945-4080 or 0824124547**

Whilst pre- employment screening for alcohol or drug abuse

## AND THEN... THERE'S ALWAYS THE FUNNY SIDE !

My Doctor said "Only 1 glass of alcohol a day". I can live with that.

