

The 8 Things OHS Directors Need to Know About Drug Testing



It's a pretty good bet that at least some of your workers will consume recreational cannabis once the stuff becomes legal on October 17. The challenge for OHS directors is to ensure they don't do it at or before work. So, the most important thing you can do to prepare is ensure that your drug use and testing policies are in order. Here are the 8 things you need to know to make that assessment.

The Key Principles to Keep in Mind

Drug testing laws are complex but the basic principle behind them is simple. It comes down to a balance between the worker's privacy and the employer's interest in ensuring workplace safety. As an OHS director, you should recognize that the balance tips in the favour of safety when 3 things are true:

- The safety interest is real and compelling;
- Testing promotes the safety interest; and
- The testing policy is as narrow and minimally invasive as possible to achieve the purpose.

With that in mind, here are 8 key points about the law of drug testing.

- 1. Drug testing is harder to justify than alcohol testing.**

Explanation: Unlike alcohol, marijuana and other drugs may remain in your system long after the buzz is gone. As a result, the fact that workers test positive for drugs doesn't necessarily prove they were impaired when they took the test the way a positive test for alcohol does. That partially negates the effectiveness of drug testing as a safety measure.

2. Testing Is Easier to Justify for Safety-Sensitive Workers.

Explanation: In general, testing as a safety measure is justified when it's applied only to workers who do safety-sensitive jobs, e.g., operate equipment, drive vehicles, etc.

3. Random testing is harder to justify than post-incident and for-cause testing.

Explanation: The stronger the grounds to suspect impairment, the greater the justification for testing a worker. That's why for-cause testing policies like post-incident testing after a worker is involved in a safety incident are easier to justify. Random testing, by contrast, is much more privacy-invasive because it's testing without suspicion.

4. Random drug testing is allowed only if there's proof of a safety-related drug problem.

Explanation: The leading case on random drug testing is a 2013 ruling called *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.*, in which the Canadian Supreme Court ruled that the mere fact that the workplace is dangerous and the worker is safety-sensitive isn't enough to override the privacy invasion of random testing. To justify random testing, the employer must also show that there's a history of safety incidents and problems at the workplace caused by workers' drug/alcohol use. And even that may not be enough, as an Alberta energy company named Suncor learned when a court struck down its random testing policy for safety-sensitive workers at oilsands sites despite

evidence documenting over 1,000 drug-related safety incidents at the site. ([Click here](#) for a SCORECARD summarizing these and other key drug testing cases.)

5. Post-incident testing isn't allowed if it's overly broad.

Explanation: While easier to justify than random testing, post-incident testing may fall on the wrong side of the privacy-safety balance if the policy or the way it's applied is overbroad and leads to over-testing. In other words, the mere fact that an incident occurs is generally not enough to justify post-incident testing without reasonable grounds to suspect that the worker was impaired.

6. Pre-employment and/or certification testing is generally allowed for safety-sensitive positions.

Explanation: Testing is easier to justify when it's used as part of a broader evaluation of a person's fitness for a safety-sensitive job—whether before hiring a new worker or promoting a current one to a safety-sensitive position.

7. Testing policies must account for medical marijuana.

Explanation: Legally speaking, all marijuana is not created equal. The stuff being legalized on Oct. 17 is *recreational* marijuana. Medical marijuana, by contrast, is already legal. Accordingly, it should be addressed in your current testing policy. Specifically, you need to recognize that the condition for which the worker is using medical marijuana is probably a 'disability' under human rights laws. That's a big deal because you must make reasonable accommodations for a worker's disabilities to the point of undue hardship. Theoretically, that could include tolerating his/her use of medical marijuana—at least at home.

8. Testing policies must account for drug addictions.

Explanation: One more similar twist is the difference between

recreational drug use and dependency or addiction. The former isn't protected; the latter, however, is treated as a disability under human rights laws. In other words, unlike recreational users, workers with drug addictions are entitled to reasonable accommodations.