

# Workplace Drugs & Alcohol Use Prevention Game Plan



It doesn't matter whether the drugs and alcohol they use are legal or illegal: allowing workers to do their job while impaired undermines productivity and workplace safety. The danger is especially acute when impaired workers drive, operate machines, handle hazardous chemicals, and perform other "safety-sensitive" jobs. However, regulating drug and alcohol use (which we'll refer to collectively as "drugs") raises sensitive and complex legal issues:

- Drug testing is an invasive process that may run afoul of workers' privacy rights; and
- While casual drug use is unprotected, drug addiction and dependence are disabilities requiring reasonable accommodations under human rights laws.

As OHS coordinator, you must work closely with HR to ensure that your company's anti-drug and drug testing policies remain within the boundaries of workers' privacy and reasonable accommodations rights. Here's a 13-step Compliance Game Plan you can implement to accomplish that objective.

## Step 1. Choose Fitness for Duty Over Zero Tolerance

First, beware of "zero tolerance." While it may sound good as a statement of principal, it's not generally workable as a

practical policy. In a world where alcohol and marijuana are legal and addiction is a disability requiring accommodation, some degree of tolerance is, in fact, required. However, what you don't have to tolerate is impairment in the **workplace**. Bottom Line: Rather than zero tolerance for drug use, you should base your anti-drug policies on the requirement that all workers show up and remain [fit for duty](#) at all times when doing their respective jobs.

## **Step 2. Explain What “Fit for Duty” Means**

Define “fitness for duty” as a physical and mental state that allows an individual to perform their job duties safely and effectively without impairment due to the use of or after-effects of:

- Alcohol;
- Narcotics and illegal drugs;
- Marijuana, whether used or obtained legally or illegally; and
- Legal prescription and over-the-counter medications and drugs that cause or have the potential to cause impairment.

## **Step 3. Encourage Workers to Disclose Their Drug Problems Voluntarily**

Based on case law, we know that employers are more likely to be successful in enforcing their drug policies when they treat substance abuse as a problem requiring assistance and support, rather than a form of misconduct requiring discipline. To that end, the preferred approach is to encourage workers to voluntarily [self-disclose](#) their drug problems so they can get

the help they need without being subject to discipline. Then, if workers refuse the offered amnesty, you'll be in a stronger position to discipline them for not being fit for duty and working while impaired. A Canadian Supreme Court case called [\*Stewart v. Elk Valley Coal Corp.\*](#), 2017 SCC 30, [2017] 1 S.C.R. 591, recognizes the general legality of that approach.

## **Step 4. Get Right to Perform Medical Assessments of Safety-Sensitive Workers**

While privacy-invasive, individual medical assessments may be justified as long as they're limited to so-called safety-sensitive workers. While terms are subject to negotiation, especially in unionized workplaces, assessments should be performed by qualified medical or substance abuse professionals before workers are assigned to safety-sensitive jobs.

## **Step 5. Establish Substance Abuse Investigation Procedures**

Make sure your fitness for duty and other anti-drug policies explain how you investigate suspected substance abuse, including [red flags](#) and triggers for inquiry:

- Complaints, concerns, or reports of substance abuse;
- Declining performance;
- Uncharacteristically erratic, unstable, or dangerous behaviour;
- Involvement in safety incidents including near misses that could have but didn't result in actual injury;
- Arrests for impaired driving, drug offences and similar violations; and
- Other reasonable indications of substance abuse issues

or unfitness for duty.

## Step 6. Establish Right to Perform Drug & Alcohol Testing

[Testing](#) is the key to enforcing your anti-drug policies. It's also the most legally sensitive element of the policy. If your workers are in a union, you'll probably need to negotiate the testing policy as part of the collective agreement.

## Step 7. Define the Bases for Drug Testing

One of the most important parts of an anti-drug policy are the rules for different bases of drug and alcohol testing. In general, testing is generally justifiable only for safety-sensitive workers, especially when it's for cause, for example, right after a workplace incident or in response to other reasonable suspicions of immediate impairment. Random testing is extremely hard to justify. A standard way to apply these principles is for the policy to address:

- **Pre-employment testing:** Mandatory for applicants who receive offers for safety-sensitive jobs;
- **For-cause testing:** Allowed when there's grounds for reasonable suspicion of impairment, with such grounds specifically listed;
- **Post-incident testing:** A form of for-cause testing allowed after safety incidents and near misses;
- **Random testing:** Permitted only in narrow safety-driven circumstances;
- **Post-rehabilitation testing:** May be required for workers that test positive and who are offered last chance agreements and the opportunity for rehab in lieu of termination, and may include random testing; and
- **Scheduled periodic testing:** May be required as part of a

fitness for duty medical exam.

## **Step 8. Set Out Clear Drug Testing Procedures**

Your policy must address 6 crucial testing procedural issues:

- How job applicants and workers give their [consent](#) to be tested;
- How samples are collected and who can collect them;
- The controls in place to ensure the integrity of the sample from collection to transporting to the lab and actual testing;
- The methods used to confirm initial positive test results;
- The criteria for a positive result—which should generally track the applicable regulatory limit for the substance tested for, e.g., BAC for alcohol; and
- Procedures for retesting and appeals after positive results.

## **Step 9. Apply Drug Testing Rules Fairly & Consistently**

The legality of a testing policy depends on not just what it says but how it's applied in actual situations. Thus, for example, a fairly negotiated post-incident testing policy may cross the line if the employer applies it over broadly by treating minor incidents as reasonable cause test triggers. You can also get into trouble if you don't apply the policy consistently.

## **Step 10. Keep Drug Test & Medical**

# **Assessment Records Private**

The policy should acknowledge that testing results and individual medical assessments are privacy-protected information that you'll keep confidential and secure in accordance with privacy laws.

## **Step 11. Distinguish between Casual Drug Use & Dependency in Imposing Discipline**

It's crucial to avoid knee-jerk reactions when disciplining workers for failing drug tests and being unfit for duty. Recognize that workplace drug use and impairment is worthy of discipline when the worker is just a casual user; however, the human rights duty to accommodate kicks in if the worker has a dependency. Be sure to determine what you're dealing with before making a decision about discipline. Even when discipline is justified, be sure to mete it out in accordance with the rules and procedures set out in your company's progressive discipline policy and the terms of collective agreements covering the worker.

## **Step 12. Consider Rehab Rather than Termination**

Reserve your right to offer workers who commit drug violations the opportunity to enter a last chance agreement in lieu of immediate discipline or termination. Typically, the worker is put on administrative leave and allowed to return to work, provided they successfully complete a rehab program and meet other reinstatement conditions, which often include accepting and passing regular testing, which may include random testing. Consider entering into Last Chance agreements offering reemployment if the worker successfully completes treatment,

rehab, and other reinstatement conditions.

## **Step 13. Respect Workers' Accommodation Rights**

Last but not least, include a provision in your policy acknowledging that addiction and disabling conditions for which legally authorized medical cannabis are used fall under human rights laws for which you'll provide reasonable accommodations up to the point of undue hardship.