

General Advice

Drug and Alcohol Testing Setting Tolerance Limits

18/05/2018

Workplace drug and alcohol testing

Testing for the presence of drugs and alcohol in the workplace is now regularly included in the overall management of workplace health and safety.

An employer has a duty under WHS legislation to provide a safe place of work. This includes ensuring that workers who may be affected by drugs or alcohol are identified and removed from the workplace until such time as they are no longer affected by the substance.

In some cases, where there is a pattern of repeated drug or alcohol use, and the employee attends for work affected by the substance, then the employer may permanently remove the worker from the workplace. In all cases the employee must be provided fair process in accordance with the Fair Work Act 2009.

The 2015 amendment to the Building Code requires mandatory testing for drugs and alcohol on any building site where the Australian government contribution to the project is greater than \$5m and 50% of total cost or \$10m. The requirement for testing set out in the amendment is quickly becoming the standard across the construction industry and other industries.

Structured and agreed testing program

Drug and alcohol testing programs should be carefully structured. Workers and their representatives should be aware of the details of the testing program including the testing methods, frequency, type of testing and the management of test outcomes.

Workers should be aware of the testing to be applied which may include:

- Random testing
- Periodic testing
- For-cause testing
- Targeted testing

The Drug and Alcohol testing policy and program should be clearly set out and understood by all parties.

Setting tolerance limits

Where a drug and alcohol policy is implemented by an employer, the employer is required to set the tolerance limits for the presence of drugs and alcohol. Typically there is discussion around the appropriate limits for the enterprise or site.

A zero tolerance policy is mandatory on many construction sites pursuant to the Building Code Amendment 2015.

Where there is a zero tolerance policy the simple return of a positive result is a breach of company policy and is, in itself, a risk to health and safety.

Drug testing

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The testing for drugs identifies the presence or not of the substance. This is an absolute. Where there is a positive result and a follow up test is performed by an accredited laboratory the concentration of the substance is confirmed. The testing for drugs is set at a zero tolerance. Cut of thresholds are included in the relevant Australian Standard AS

It is counterproductive to debate either the quantity of the drug/alcohol that was taken or when it was taken. Both of these issues are irrelevant if the test result was positive. We would not recommend the employer take these issues into account as there can be no exceptions to a positive result other than where a declaration in relation to prescribed medication was made by the worker prior to the test. In our view, it may be appropriate to listen to any rationale put by the worker. However, the employer must treat the positive result as a breach of policy and a risk to health and safety and as such discuss and manage the consequences with the worker.

Alcohol testing

There may be consideration of setting limits for alcohol testing. Should the limit be 0% BAC, or 5% BAC, or somewhere else in between?

The Building Code requires a zero tolerance at sites covered by that Code.

A zero tolerance is also required for high risk work. High risk work is set out in the WHS legislation and is listed in Attachment 1.

WHS legislation requires an employer to conduct a risk assessment of all workplaces under the control of the employer. The risk assessment is to identify the risk category applicable to the workplace and to identify appropriate risk controls. Where an employer assesses a workplace as a high risk site then appropriate controls must be applied, this would include assessing the drug and alcohol tolerance limits for the site. A zero tolerance policy would be an appropriate control where the site is assessed as high risk.

It is open to an employer to apply different tolerance levels commensurate with the assessed risk.

Refer WHS Regulation [Harmonised legislation] Chapter 3

For further reference in relation to the duty to identify and control risks:

OHS Act 2004 VIC

Section 21 Duties of employers to employees

(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

(2) Without limiting subsection (1), an employer contravenes that subsection if the employer fails to do any of the following—

- (a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;
- (b) make arrangements for ensuring, so far as is reasonably practicable, safety and the

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absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

(c) maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;

(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;

(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.

WHS Act 2011[harmonised legislation NSW, SA, Qld, Tas]

17 Management of risks

A duty imposed on a person to ensure health and safety requires the person:

(a) to eliminate risks to health and safety, so far as is reasonably practicable, and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

18 What is “reasonably practicable” in ensuring health and safety

In this Act, ***reasonably practicable***, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

(a) the likelihood of the hazard or the risk concerned occurring, and

(b) the degree of harm that might result from the hazard or the risk, and

(c) what the person concerned knows, or ought reasonably to know, about:

(i) the hazard or the risk, and

(ii) ways of eliminating or minimising the risk, and

(d) the availability and suitability of ways to eliminate or minimise the risk, and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk

For further information contact:

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References: Building Code (Fitness for work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015

Attachment 1: High Risk Work

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Ref: WHS Regulation NSW 2011

Scaffolding
Dogging and rigging
Crane and hoist operation
Reach stackers
Forklift
Pressure equipment

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