

Substance abuse in the workplace - the legal background

The following is a summary of the legal issues that need to be taken into account by any employer who is considering introducing medical testing for substance abuse or alcohol. It should also be of assistance to any employer who already has a policy on testing but who is unsure or concerned about using it.

Pre-employment issues

In principle you can ask job applicants to undergo testing, provided that the request is not dealt with in a way that is discriminatory.

Examples of discriminatory requests would be:

- only asking Rastafarians to undergo drug tests¹
- refusing to appoint because the test also showed that the applicant was pregnant²
- only requiring homosexual applicants to have a test³
- refusing to appoint someone who is borderline alcoholic because the test showed liver damage⁴
- only asking under 25's to have a test⁵

If there is no discrimination issue and the applicant refuses to be tested then you are simply able to refuse to progress with their application.

It may amount to a criminal assault for testing to take place without consent.

References

An employer is entitled to disclose in a reference that a former employee had been dismissed because of substance misuse. There would be no action against the former employer provided the information was accurate. A former employer who negligently misleads a future employer by not disclosing this information on a reference would be vulnerable to a damages claim from the future employer.

Criminal records

If a conviction has been dealt with under the Rehabilitation of Offenders Act 1974, the applicant is entitled to withhold the fact that he/she has a past conviction.

¹ Discrimination on the basis of Religion or Belief

² Sex Discrimination

³ Discrimination on the basis of Sexual Orientation

⁴ Potential Disability Discrimination

⁵ Age Discrimination

During employment

The extent to which you can test is largely a matter for the written contract or other company policy documents. The consequences of breach of the contract or policies are matters that are governed by both contract law and statutory legislation, in particular the law on unfair dismissal.

Contract

It is possible to have an express provision in the contract that gives the employer the right to require testing. The right may be limited to circumstances where there is reason to suspect that the employee is under the influence of illegal drugs or alcohol. Alternatively, the right may be very broad and allow random testing without cause. Even where there is a contractual right, the testing may not be permitted under data protection law, which is considered below.

Provided the employer exercises the contractual right to test in a reasonable manner, then there will be no breach of contract if the employer insists on a test being carried out. However, it must be noted that the test must not be carried out in a manner which would amount to an assault.

If there is no express contractual right to require a test to be undertaken then the employer must rely on the implied duty owed by every employee to their employer to obey lawful and reasonable orders and to co-operate with the employer. Difficulties only usually arise if the employee will not co-operate and consent to the test. If there is a stalemate the employer will have to back down on the request, but may take disciplinary action against the employee on the basis of the limited information and reasonable suspicions.

As in the matter of pre-employment testing, any testing that is undertaken by an employer in a manner that is discriminatory, will be a breach of the relevant legislation.

Disciplinary action short of dismissal

Any such action, including the issue of warnings, must follow the normal disciplinary procedure and comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures which was revised in April 2009.

Dismissal

If the employee has statutory continuity of employment (currently one year^{*}) then the reason for and manner of dismissal needs to be fair and reasonable to avoid a finding of Unfair Dismissal under the Employment Rights Act 1996. It also needs to comply with the revised ACAS Code of Practice on Disciplinary and Grievance Procedures to avoid a potential uplift in any compensation award of up to 25%.

An important first step is to decide whether or not the action is being progressed as a 'misconduct', 'poor performance' or 'ill-health' issue.

Where the misuse amounts to an addiction the Employment Tribunal tends to treat this as an ill-health issue, but there is no rule of law or consistency of approach. It is important to take each situation on its facts and double check the most recent case law before progressing.

In all circumstances the dismissal procedure to be followed must include the following elements:

- proper and thorough investigation
- advance written notification to the employee informing them of the issues to be addressed and the many other points that the ACAS Code of Practice requires the employee to be notified of
- an unbiased hearing
- the right to be accompanied
- an opportunity for the employee to put forward explanations and submissions and ask questions

^{*} Please note that discrimination claims do not require statutory continuity of employment and certain unfair dismissal claims may also be made without it.

- a sanction that is proportionate and appropriate notified to the employee in writing
- the right of appeal, including being accompanied at the appeal and written notification of the outcome

The sort of issues that will need to be taken into account may include:

- was this a first offence?
- what action has been taken in similar circumstances in the past?
- was the misconduct during or outside working hours?
- was the misconduct on or off business premises?
- would remedial help or therapy be a reasonable alternative to dismissal?
- does the misuse affect work performance?
- is the employee engaged on safety critical duties?
- if there is ill-health absenteeism should a medical report be obtained?
- are there aggravating personal circumstances to be taken into account eg recent bereavement or family breakdown?
- would demotion or a sideways move be an alternative to dismissal?
- is there any suggestion that workplace stress is a factor in the misuse?

Data protection

Information obtained as a consequence of testing will be 'processing' of information for the purposes of the Data Protection Act 1998. The classification of the information in most instances will be 'sensitive personal data'.

As a result, the processing of the information must be necessary for the purpose of exercising or performing a legal right or obligation that is conferred or imposed by law on the data controller in connection with employment.

Compliance with the implied contractual duty to ensure a safe working environment, including safe working colleagues is likely to be a valid reason. Employers can also cite their duty to comply with health and safety regulations.

However, the processing also needs to be adequate, relevant and not excessive in relation to the purpose(s) for which it is processed. As drug testing is highly intrusive an impact assessment should normally be undertaken to show that the collection of the information is a proportionate response to the employer's need to comply with health and safety obligations. All information processed should be kept securely.

The Information Commissioner's Employment Practices Code on Data Protection needs to be consulted wherever testing is done. Amongst the standards it requires are:

- that wherever practicable only suitably qualified medical practitioners should have access to medical details (this means giving managers no more information than is necessary for them to carry out their management responsibilities)
- that the rules and standards of an organisation with regard to testing should be set out clearly in a policy which workers are aware of
- that testing should be of a sufficient quality and subject to rigorous quality control procedures
- that testing should be conducted by someone suitably qualified and competent in the field of drug testing who can also interpret the results

A thorough review should be conducted to ensure any testing practices comply with data protection law.

Human rights

If the employer is a public authority then the Human Rights Act (HRA) will have direct application and any testing would have to be objectively justified in order to avoid being a breach of Article 8 which protects an individual's right to respect for a private life.

The HRA does not have direct effect if the employer is in the private sector although this does not mean that the HRA is irrelevant. Because the legislature and courts have to apply and interpret laws in a way that is not inconsistent with the HRA, any ambiguity will generally result in a decision that favours the rights of the employee.

Contacts

For further information or guidance on this subject, please contact the Employment law team at employmentinfo@blaw.co.uk or call us:

Southampton

023 8090 8090

Oxford

01865 248607

London

020 7405 2000

This publication is not a substitute for detailed advice on specific transactions and problems and should not be taken as providing legal advice on any of the topics discussed.

Blake Laphorn uses the information it holds about you to contact you where necessary if (for instance) you have registered to attend a seminar that we are hosting or have requested information regarding the services that we provide. We will also use it to administer, support, improve and develop our business and to contact you for your views on our services, as well as to let you know about other products and services which we offer which may be of interest to you. We may send them by post, telephone or fax, email or SMS. If you would rather NOT receive further information by any particular format, or at all, or if your details need updating, please contact Kay Hogg on 01865 258010 or by email at kay.hogg@blaw.co.uk

We will not disclose any of your personal identifiable information to any third parties without your express permission to do so, unless we believe that we should do so to comply with the law.