

As previously advised, on 16 October 2015, the [Building Code \(Fitness for Work / Alcohol and Other Drugs in the Workplace\) Amendment Instrument 2015](#) (the amendment) came into effect. The amendment requires 'code compliant' main contractors to implement [drug and alcohol testing procedures](#) on most code compliant construction sites. Fair Work Building and Construction (FWBC) have advised that the education phase is now over and, as of 1 February 2016, they have begun compliance audits which can lead to [sanctions](#) being issued.

The testing controversy

Drug testing on-site has been the cause of considerable industrial relations [controversy](#), especially over the type and scope of testing. This is because testing identifies the presence of a particular substance but not the level of impairment. There is no reliable, objective, scientific test for impairment. This debate is compounded because different tests have different detection windows. Urine testing can detect drugs still in the system after they have ceased to have an effect, whereas in some cases saliva testing will not detect drugs in the system even though a person may still be impaired by the substance.

Implementing a testing regime

The Federal Court has already [held](#) that unless there is an express prohibition (such as in an enterprise agreement), an employer is permitted to introduce a drug and alcohol testing regime. However, employers who wish to implement a testing regime should ensure that they have an appropriately drafted policy in place along with a reasonable strategy for implementing the policy, including appropriate [consultation](#).

Managing drugs onsite

For some time, employers have found it difficult to manage drug and alcohol on-site, with unfair dismissal decisions sending a mixed message to employers taking strong action.

A Full Bench of the Fair Work Commission has recently made a clear [statement](#) in relation to drug testing policies in the context of high risk environments. In this case, the applicant had tested positive to the presence of drugs through a urine test. The Commission held:

(T)he issue in this case was not Mr Sharp's "out of hours" conduct in smoking cannabis, but rather that he attended for work ... with a level of cannabinoids that was above (and very significantly above) the permitted threshold. That was "at work" conduct ... (A) critical consideration in assessing whether a dismissal in these types of circumstances was unfair is the fact that there is currently no direct scientific test for impairment arising from the use of cannabis ... Apart from reliance upon the employee's own explanation about the matter, which will probably not be verifiable, the employer will therefore not be in a position properly to assess whether the employee is impaired ... and therefore represents a threat to safety. For that reason, employer policies which provide for disciplinary action including dismissal where an employee tests positive for cannabis simpliciter may, at least in the context of safety-critical work, be adjudged to be lawful and reasonable. Likewise, depending on all the circumstances, it may be reasonably open to find that a dismissal effected pursuant to such a policy was not unfair (footnotes omitted)

Relevantly, in the context of high risk work, employers may implement a policy that avoids the

subjective difficulties that impairment testing present. The Commission has made it clear that the relevant misconduct is presenting for work with the substances present in the system, rather than presenting for work under the influence of drugs. However, it is crucial that the employer's policies are suitably drafted.

The Full Federal Court has recently [upheld](#) a dismissal on similar grounds.

No automatic dismissal

Although a breach of a policy may give grounds for dismissal, it does not mean that an employee can be automatically dismissed. Employers must consider all [relevant factors](#) and afford procedural fairness. This is the case, even with "zero tolerance" policies, although a properly drafted, implemented and enforced policy will generally be upheld. However, difficulties can arise where the policy is not [well drafted, not implemented properly](#), or not [consistently applied](#).

If an employee is [removed from site](#), it may be a valid reason to dismiss, but it is not an automatic right. Again, all relevant factors must be considered, and procedures followed, before dismissing.

Dealing with breaches

Fair Work Lawyers recommend employers seek legal advice immediately upon an employer becoming aware that an employee has failed a drug test. If employers are considering dismissing the employee they should ensure that the employee is promptly suspended, with pay, pending investigation and disciplinary proceedings.

Need more information

If you would like to discuss implementing a testing regime or any aspect of managing such a scheme, including dealing with breaches, please contact the team at Fair Work Lawyers.



Tom Earls
Partner
tom@fairworklawyers.com.au
m: 0409 939 010



David Putland
Partner
david@fairworklawyers.com.au
m: 0419 839 125

The information contained in this publication is general in nature and does not constitute legal advice. Employers should seek legal advice in relation to their circumstances including, without limitation, drafting, implementing and enforcing a drug and alcohol testing policy.
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