

Employment Law Plus

- Practical and commercial solutions to HR challenges

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- Drug and alcohol policies and right of search
- For South Oxon HR Network 16 April 2015

What are the risks to the business associated with alcohol and drugs?

What should your drug and alcohol policy try to stop happening?

What should your drug and alcohol policy try to stop happening?

- Possession of drugs or alcohol?
- Consumption of drugs or alcohol?
- Being under the influence of drugs or alcohol?
- When?
- Where?

Liberty Living v Reid

- Disc Policy: Gross misconduct to be under influence of alcohol in working hours
- Alcohol Policy: Prohibited consuming alcohol while performing company business or in the workplace. Not say would be gross misconduct

Liberty Living v Reid

- Drunk pint of lager shandy off work premises during working hours
- Dismissed
- Not aware of alcohol policy

Dairy Produce Packers v Beverstock

- B dismissed for drinking in pub when should have been working
- Others who had been drinking in working hours had not been dismissed
- Company said this was because others had drunk on their premises

Dairy Produce Packers v Beverstock

- Unfair dismissal because company had not made different penalties clear in policy

How would your policy deal with

- Drinking alcohol at a staff social event
- Drinking alcohol with clients while entertaining them
- Having a bottle of wine with food in a supermarket bag

You suspect that your employee is under the influence of alcohol at work in breach of your policy

- What can you do about it?
- What legal issues are there?

Dealing with suspicion of alcohol influence

- Ask him/her to walk following a straight line on the ground?
- Confront employee with suspicion?
- Address it as a performance issue?
- Get permission to write to GP for medical report?
- Require the employee to take a breathalyser or blood test?

Dealing with suspicion of alcohol influence

- Can you send the employee home without pay?

Drug/alcohol testing

- Human Rights Act
- Data Protection Act
- Employer duty of trust and confidence

Drug/alcohol testing - HRA

- Interference with private life
 - Invasive
 - Tests could show up other things like pregnancy
 - Tests can show up activity in private life which no impact on work
- Necessary to achieve legitimate aim
 - What aim would be the most likely to justify testing?

Drug/alcohol testing - HRA

- Unlikely that testing employee in safety critical position would be an unjustified invasion of privacy

Drug/alcohol testing - DPA

- Covers electronic data or hard copy in very structured filing system
- Sensitive personal data
- Particular processing pre conditions for sensitive data:
 - Explicit consent
 - Necessary to enable employer to meet legal obligations like H&S

Drug/alcohol testing - DPA

- IC Code of Practice
- Sensitive personal data
- Particular processing pre conditions for sensitive data:
 - Explicit consent: needs to be freely given based on proper information
 - Necessary to enable employer to meet legal obligations like H&S

Drug/alcohol testing - DPA

- Impact assessment
 - Legal duty to process information about workers' health
OR
 - The benefits gained justify the privacy intrusion: needs to be proportionate response to problem. Must consider:
 - Purpose
 - Adverse impact
 - Alternatives: Triggered by cause not random? Limit data collected?

Unlikely to be justified unless for H&S reasons

Drug/alcohol testing – DPA

- Unlikely to be justified unless for H&S reasons
- Incident where reasonable suspicion of drug/alcohol use more likely to be justified than random testing

Drug/alcohol testing - DPA

- General DPA obligations
 - Make workers aware that testing may take place and in what circumstances; what info will be collected; what it will be used for; what the possible consequences are – what is the blood alcohol level which is unacceptable?
 - Accurate data: need sufficient technical accuracy to rely on it; interpretation of results by suitably qualified person
 - Keep results confidential
 - Keep for limited period of time

Drug/alcohol testing - DPA

- Unfair to say it is random testing if isn't
- If it is random, make it genuinely random
- If not random, tell workers the criteria to be used
- Testing everyone not justified if only limited workers are in H&S critical roles
- Give worker duplicate sample so they can have it tested

Drug/alcohol testing – Trust & confidence

- Contractual terms or for cause
- Risk: (unfair) constructive dismissal
- Follow DPA guidelines!

Drug/alcohol testing – Refusal to take test

- Can you dismiss for the refusal?

Drug/alcohol testing – Refusal to take test

Bedford v H Young Holdings ET

- Employer introduced policy for alcohol and drug testing and stated positive results or refusal to be tested would lead to disciplinary action up to dismissal
- B refused to take test and disputed er's right to test
- B dismissed

Drug/alcohol testing – Refusal to take test

Bedford v H Young Holdings ET

- Employer had not consulted on introduction of new policy
- Employer not address B's concerns about legality of test
- Dismissal unfair

Is alcoholism a conduct issue or a medical (performance issue)?

Strathclyde Regional Council v Syme

- S, a school cleaner, dismissed for being drunk at work
- Held: problem should have been treated as medical issue because related to underlying bipolar issue. Dismissal unfair.
- (Otherwise, may have been fair given employer's duties to pupils and staff)

- Over the counter or prescribed medication
- Duty to report colleagues
- Recognising dependency primarily as medical problem
- Contractual right to transfer staff
- Performance meeting

Right of search

- What issues are the same as for alcohol and drug testing?
- So what would it be sensible to do?

Right of search

- Of person/desk/locker/bags?
- What is the aim?
- Same sex if personal
- Will it be random or for cause?
- In way to avoid embarrassment or distress or cultural sensitivities
- Keep note of any reasons given objecting to search
- Proper consideration to reasons for any refusal
- Make employees aware of right to but implications of refusing
- Clear policy for stealing
- Allow to be accompanied
- Document results
- Restrict to what necessary

Ensure contract reflect any rights the company is trying to give itself under the policy

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