



The thin line

Balancing duty of care and employee privacy

Testing for drugs and alcohol in the workplace has a history of contention, with many companies electing to forgo testing programs altogether due to concerns around employee rights and privacy. In truth, the single most important right of any worker is the entitlement to be safe in employment and to return to their family at the end of the day without having been put at risk. The obligation of employers to meet duty of care requirements in the provision of a safe workplace means that drug use cannot be reasonably tolerated, so how do you maintain a balance between these two seemingly at-odds requirements?

Drug use in Australia is on the rise; both socially and within the workplace. One of the nation's foremost drug rehabilitation services, Odyssey House, suggests that in many cases the stress of work in itself can be a significant contributor to employee use. They cite conflict, pressure, discrimination, poorly designed equipment and fear of losing their job as having a direct influence on the individual and their usage habits.

Recent widespread escalation of ice use in specific industries (namely construction, manufacturing, transport and mining) has led to parliamentary enquiries and input from a number of stakeholders including the Australian Industry Group (AIG). AIG is adamant that historical union opposition to drug and alcohol testing leaves employers liable to failure in their duty of care.

Conservative estimates suggest that drug use costs Australian business in excess of \$6 billion per annum through absenteeism, productivity loss, injury and death, so the enormity of the problem is without question.

Safety vs privacy – an unwinnable argument?

But what about the rights of the individual? The introduction of mandatory testing across many sectors has drawn the ire of the country's largest industry bodies and unions, with the right to privacy cited as being increasingly diminished.

This appears set to change, as evidenced by a number of high-profile industrial relations rulings which have declared that safety trumps privacy. As a result, broad adoption of testing policy and practice is likely to increase across industry, given that a precedence has been set.

The challenge for employers is to find the appropriate balance. While it is imperative to protect workers from unnecessary risk, this needn't mean delving into their private lives. The primary reason for conducting safety-focused drug and alcohol testing should be to determine an employee's fitness for work, not how they choose to spend their leisure time.

Of all the available testing types, devices that sample saliva (as opposed to urine) offer a key advantage in maintaining privacy, as the window for detection is much more condensed. Whereas urine analysis can return positive results that range to a couple of weeks' post-use, saliva will only return positive (or non-negative) results on recent use. This is central to determining an individual's current state, rather than gaining insight into lifestyle choices which have no impact on their current ability to operate machinery, drive, work at heights or conduct any other activity which drug use would impede.

Opposition outcry

As one of Australia's largest representatives for workers, the Construction, Forestry, Mining and Energy Union (CFMEU) has been consistently vocal in its opposition to the increased introduction of workplace testing, based on the perceived infringement of privacy.

Back in 2008, the CFMEU challenged Shell Refinery's decision to introduce a program of random testing for employees and contractors. Shell had argued the case for urine testing, suggesting that their drug and alcohol testing policy was designed to address not only the risks created by actual impairment, but also those related to the habitual use of alcohol or drugs. The CFMEU countered that any clinical impairment resulting from drug use tends to last hours, rather than days, and that saliva testing represented a fairer detection method, as it was less invasive in terms of employee privacy.

In this instance, the Australian Industrial Relations Commission (AIRC) found that, whilst employers have a legitimate right (and, indeed, an obligation) to eliminate risks to safety, they have no right to dictate what drugs or alcohol employees take in their own time. It was deemed unjust and unreasonable to do so and this ruling paved the way for saliva sampling to become the preferred drug testing method within industry.

As safety is increasingly in the cross hairs of many businesses and government departments, drug and alcohol testing has become more commonplace. In February 2015, the Victorian government announced plans to impose mandatory testing at construction sites and once again the CFMEU

hit back, suggesting the plan represented a slur on members of the construction industry and that there was no evidence to suggest a pattern of substance abuse in these workers above and beyond any other group in the community.

By contrast, the Master Builders Association (MBA) backed the plan, citing research they say clearly indicated widespread drug use in the sector. Less than one month later the CFMEU about-turned on the matter, explaining its change in position as a response to rising evidence that drug use within the construction industry was more significant than first believed.

No longer either/or

The Fair Work Commission cautions industry and worker representative groups against over-simplifying the situation and focusing solely on privacy versus safety, as it makes the matter a 'contest of private lives or saving lives', whereby provision of a safe workplace must ultimately win out. There is growing recognition that employers are best placed to make choices which impact their individual businesses and that, as such, a blanket ruling will never apply across the board.

Industry group, the Australian Mines and Metals Association (AMMA) believes a strong drug and alcohol management regime is an important safety strategy that serves to protect employees, as well as their families and the wider community. Opposition to workplace testing often creates an 'us vs them' mentality, but the AMMA sees it differently. Chief executive Steve Knott says that the responsibility of the individual is paramount to the process.

"In accepting an employment contract, employees have a responsibility to ensure they don't compromise workplace safety and be fit for work."

"It's critical for other stakeholders in the community, including the CFMEU, to encourage practical and effective alcohol and drug testing processes," he says.

Ensuring equity

No employer wishes to threaten the civil liberties of its workforce, just as the government does not seek to unfairly target particular industries or occupations, but where there is evidence of a problem and lives are at stake, the case against drug testing becomes harder to argue.

The best possible outcome is derived from consideration of all sides of the argument and the challenge is to develop a drug and alcohol testing policy and practice that upholds employer duty of care, whilst protecting employee rights and privacy. It is no longer a case of whether a policy 'should' be implemented, but one of 'which type of testing will deliver the results required without undue interference?'.

For business owners and managers that place safety above all else, while still respecting an individual's right to privacy, implementing a comprehensive drug and alcohol policy that incorporates saliva-based testing is the obvious choice. One of the greatest strengths of a drug and alcohol testing program is the consequent deterrent impact. If employees are aware of random testing and the consequences of returning a non-negative result, they are more likely to abstain entirely – surely the best outcome of all.