Workplace Substance Abuse Prevention & Compliance Game Plan



For employees to work safely and productively, they must show up sober, fit for duty and free from the intoxicating effects of alcohol, drugs and other impairing substances, both legal and illegal (which, for simplicity's sake, we'll refer to collectively as "drugs"). But while implementing anti-drug policies is essential, drug dependency also happens to be a disability that human rights laws protect from discrimination. In addition, drug and alcohol testing, the principle means of enforcing workplace substance abuse rules, is highly privacy invasive. As HR director, you must ensure that your company's anti-drug policies don't violate discrimination and privacy laws. Here's a 13-step Compliance Game Plan to help you meet that challenge.

Step 1. Choose Fitness for Duty Over Zero Tolerance

First, be wary about relying on the principle of "zero tolerance." Recognize that in a world where alcohol and marijuana are legal and addiction is a disability requiring accommodation, tolerance may, in fact, be required. Drug use may or may not be legal. But the one thing nobody disputes is that **workplace** drug use or impairment creates an unacceptable safety risk. And that's why you should base your anti-drug policies on fitness for duty and not zero tolerance.

Step 2. Explain What "Fit for Duty" Means

Understand and make sure employees understand that "fitness for duty" is a physical and mental state that allows an individual to perform their job duties safely and effectively without impairment due to the use of or after-effects of:

- Alcohol;
- Narcotics and illegal drugs;
- Marijuana, whether used or obtained legally or illegally; and
- Legal prescription and over-the-counter medications and drugs that cause or have the potential to cause impairment.

Step 3. Encourage Employees to Disclose Their Drug Problems Voluntarily

Treat substance abuse as a problem, not a form of misconduct, and establish a self-disclosure policy promising to get employees who self-disclose the issues they're experiencing the help they need without being subject to discipline, provided, of

course, that they're fit for duty when performing their job. If employees don't accept the amnesty you offer and later get caught being unfit for duty, you'll be in a stronger legal position to discipline them. A Canadian Supreme Court case called *Stewart v. Elk Valley Coal Corp.,* 2017 SCC 30, [2017] 1 S.C.R. 591, recognizes the general legality of that approach.

Step 4. Get Right to Perform Medical Assessments of Safety-Sensitive Workers

While privacy-invasive, individual medical assessments are justified as long as they're limited to so called "safety-sensitive" workers like machine operators, miners, drivers, etc. Assessments should be performed by qualified medical or substance abuse professionals before workers are assigned to a safety-sensitive job.

Step 5. Establish Investigation Procedures

Make sure your fitness for duty and other anti-drug policies explain how you investigate suspected substance abuse, including red flags and triggers for inquiry such as:

- Complaints, concerns or reports of substance abuse;
- Declining performance;
- Erratic behaviour;
- Involvement in safety incidents including near misses;
- Arrests for impaired driving, drug offences and similar violations; and
- Other reasonable indications of substance abuse or unfitness for duty.

Step 6. Establish Right to Perform Drug & Alcohol Testing

Testing is the key to enforcing your anti-drug policies. It's also the most legally sensitive element of the policy. If your employees are in a union, you'll probably need to negotiate the testing protocols, procedures and policy as part of the collective agreement.

Step 7. Define the Bases for Drug Testing

The anti-drug policy must include provisions that describe the different bases for performing drug and alcohol testing. In general, testing is justifiable only for safety-sensitive workers, especially when it's for cause, for example, right after a workplace incident or in response to other reasonable suspicions of immediate impairment. Random testing is extremely hard to justify. A standard way to apply these principles is for the policy to address:

- **Pre-employment testing:** Mandatory for applicants who receive offers for safety-sensitive jobs or current employees in non-safety-sensitive positions before being redeployed to safety-sensitive jobs;
- For-cause/Reasonable-cause testing**:** Allowed when there's grounds for reasonable suspicion of impairment, with such grounds specifically listed in the policy;
- **Post-incident testing:** A form of for-cause testing allowed after safety incidents and near misses;
- Random testing**:** Permitted only in narrow safety-driven circumstances;
- **Post-rehabilitation testing**: May be required for employees that test positive and who are offered last chance agreements and the opportunity for rehab in lieu of termination, and may include random testing; and
- **Scheduled periodic testing:** May be required as part of a fitness for duty medical exam.

Step 8. Set Out Clear Drug Testing Procedures

Your policy must address 6 crucial testing procedural issues:

- How job applicants and employees give their consent to be tested;
- How samples are collected and who can collect them;
- The controls in place to ensure the integrity of the sample from collection to transporting to the lab and actual testing;
- The methods used to confirm initial positive test results;
- The criteria for a positive result—which should generally track the applicable regulatory limit for the substance tested for, e.g., BAC for alcohol; and
- Procedures for retesting and appeals after positive results.

Step 9. Apply Drug Testing Rules Fairly

The legality of a testing policy depends on not just what it says but how it's applied in actual situations. Thus, for example, a fairly negotiated post-incident testing policy may cross the line if the employer applies it over broadly by treating minor incidents as a test trigger. You can also get into trouble if you don't apply the policy consistently.

Step 10. Keep Drug Test & Medical Assessment Records Private

The policy should acknowledge that testing results and individual medical assessments are privacy-protected information that you'll keep confidential and secure in accordance with personal privacy laws.

Step 11. Distinguish between Casual Drug Use & Dependency in Imposing Discipline

Avoid knee-jerk reactions when disciplining employees for failing drug tests and being unfit for duty. Recognize that discipline for workplace drug use and impairment is generally appropriate when the employee is just a casual user; however, the human rights duty to accommodate kicks in if the employee has a dependency or addiction. Be sure to determine what you're dealing with before making a decision about discipline. And when discipline is justified, be sure to mete it out in accordance with the rules and procedures set out in your company's progressive discipline policy and the terms of collective agreements covering the employee.

Step 12. Consider Rehab Rather than Termination

Reserve your right to offer employees who commit drug violations the opportunity to enter a last chance agreement in lieu of immediate discipline or termination. Typically, companies put the employee on administrative leave and allow them to return to work only if and when they successfully complete a rehab program, and meet other reinstatement conditions, which often include accepting and passing regular testing, including random testing. (Policy, Sec. 11). Consider entering into Last Chance agreements offering reemployment if the employee successfully completes treatment, rehab and other reinstatement conditions.

Step 13. Respect Employees' Accommodation Rights

Last but not least, include a provision in your policy acknowledging that addiction and dependency, as well as disabling conditions for which legally authorized medical cannabis are used are disabilities under human rights laws for which you'll provide reasonable accommodations up to the point of undue hardship.