

GUIDELINES FOR NEGOTIATORS

WORKPLACE DRUG & ALCOHOL POLICIES



Foreword

This guide aims to provide trade union representatives with information on negotiating safe, legal and ethical workplace drug and alcohol policies.

The need for the guide arises in part from workers concerns about increased marketing campaigns by a number of HR and drugs-testing companies who are promoting 'zero tolerance' drug and alcohol testing to employers. Sometimes the issue arises because the enterprise already has a practice of drug and alcohol testing in their head office or other jurisdictions. At other times it arises in response to real identified safety critical risks. This guide seeks to help union representatives to respond to any such proposals and negotiate for safe, ethical, legal policies that respect the rights of workers.

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At the outset it is important to note that there is no requirement for employees to undergo testing for intoxicants under health and safety legislation. There is also no requirement for employers to test employees for intoxicants. In the Safety, Health and Welfare at Work Act there is a clause – section 13 (1) (c) - which allows regulations to be made for testing for intoxicants. However, until such a regulation is introduced by the relevant Minister, this clause does not apply. To date there are no regulations and as such there is no requirement for employers to test or for employees to be tested.

Unions strongly believe that there is no place for intoxication in the workplace. Any person who is under the influence of drugs or alcohol while working can be a danger to both themselves and their colleagues. The best gauge of impairment is likely to be old fashioned observation of the worker and management training and systems are more likely to have a higher impact on safety, than the introduction of drug-testing at work. The growing concentration on testing for prior use of drugs or alcohol rather than intoxication is largely misplaced. Drugs and alcohol have not been shown to play a significant role in accidents at work and the focus on testing is at the expense of proper attention to other, more common causes of accidents at work, such as fatigue and unsafe systems of work.

The most effective way of ensuring that drugs are not a problem in the workplace is to have a comprehensive drugs and alcohol policy that seeks to support those that need help in a non-judgemental way, rather than a policy that focuses on testing as a tool for dismissal or to refuse someone a job or promotion. This is best achieved through a comprehensive Employee Assistance Programme (EAP).

On behalf of the Congress Health & Safety Committee I would like to thank Esther Lynch, Legislation and Legal Affairs Officer with Congress for preparing the Guide and trust you will find it a useful tool to assist you in understanding the issues involved and ensure that you are better equipped to deal with any negotiations in this complex issue.

Eamon Devoy,
Chairperson,
Congress Health & Safety Committee
(UPDATED: October 2012)

INTRODUCTION

While there is little evidence that alcohol and drugs are involved in workplace injuries and accidents it is clear that the use of substances can lead to poor performance and behaviour that may compromise safety. A person's performance can be impaired by alcohol, prescribed or over the counter drugs or indeed unlawful drugs. Therefore adopting a drug and alcohol policy dealing with all forms of intoxication is increasingly on the workplace negotiation agenda.

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WHY HAVE A WORKPLACE DRUG AND ALCOHOL POLICY?

The aim of a workplace drug and alcohol policy is to ensure that problems are dealt with early, effectively, consistently and in a non-judgemental way. The policy should protect workers and encourage those with substance abuse problems to seek help. This is the type of approach advocated by the International Labour Organisation (ILO) who as far back as 1996 agreed a tripartite Code of Practice on 'The Management of Alcohol and Drug-related issues in the workplace'.

The ILO Code emphasises a preventive approach and recommends that a joint assessment by employers and workers of the effects of alcohol and drug use, underlining the importance of involving employees and their representatives from all levels in the discussions. The Code states that the aim of a workplace drug and alcohol policy should be prevention, education, training and rehabilitation.

The policy must be consistent and fair to all. If testing is done, the test should be for on the job impairment, not off the job usage. Education programmes for managers are particularly important: these could include details of signs to look for, how to deal with workers who seek help, and where expert advice and help may be obtained. The ILO Code has provided the blueprint for our guidelines for negotiators but the ultimate test of a fair workplace drug and alcohol policy's effectiveness is that workers would feel confident to report rather than hide their problems.

Needless to say this guide is not legal advice and every situation has its own specific circumstances that negotiators may need to discuss with their union.

FAIR, LEGAL AND ETHICAL DRUG & ALCOHOL POLICIES

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- *Are developed and implemented through consultation and agreement with the workers and their union(s);*
 - *Prevent accidents and protect the safety, health, welfare and dignity of the worker.*
 - *Start with a clear statement of aims: why the policy exists; who it applies to;*
 - *Define what is meant by drug or alcohol misuse and what expectations the employer has about intoxication during working hours*
 - *Identify workplace conditions which expose workers to heightened risk of developing drug or alcohol problems;*
 - *Set out who has responsibilities under the policy: from the senior manager who oversees the operation of the policy; line managers' responsibilities; the role of trade union reps, employee assistance staff, safety reps, safety committees and of individual employees;*
 - *Adhere to the principles of 'natural justice' and fully respect confidentiality, data protection, privacy and equality rights;*
 - *Focus on support -not discipline- with the emphasis on prevention, identification, treatment and rehabilitation;*
 - *Allow that participation in the employee assistance programmes are voluntary, with job security not prejudiced and rehabilitation as a central element;*
 - *Clearly identify the circumstances in which disciplinary procedures will be invoked;*
 - *Only provide for testing when it is justified, proportionate and necessary, and is based on reliable scientific evidence of the effect of particular substances on workers;*
 - *Provide that testing is for on the job impairment, not off the job usage;*
 - *Require testing to be collected and carried out by a 'competent person' working to medical ethical standards, with a robust chain of custody, carried out by a laboratory accredited by ISO - adhering to the EWDTS Standard;*
 - *Do not apply a 'zero tolerance' regime to the extent that it records 'innocent' exposures or gives rise to 'false positives' for intoxication;*
 - *Include an appeals process, with a right to union representation, that provides the worker with a 'B' or 'C' sample and independent verification, without charge;*
 - *Kept under review at regular intervals, to help refine and improve the policy*
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DEVELOPING THE DRUG & ALCOHOL POLICY

STAGE 1: ESTABLISH A NEGOTIATION GROUP

The negotiation group should be representative of the workforce and should include management and trade union representatives. In small or medium sized enterprises the group will be smaller than in a large enterprise or organisation. It may be of benefit, especially in the context of providing an employee assistance programme for a number of small enterprises to come together, but in any event be sure to include representatives from all sectors and occupations.

From the outset it must be clear that the principles underpinning the approach are for a fair, legal and ethical policy. That is built on a commitment to a safe and health working environment in which employees and management who require assistance to overcome problems, caused by alcohol or drug misuse, will be supported.

The discussions should take place in an atmosphere of respect.

STAGE 2: EVALUATE EXISTING POLICIES AND PROCEDURES & IDENTIFY ISSUES

The group should undertake a review of current policies, practice and procedures in the enterprise, remember the old adage 'if it isn't broke don't fix it'. The group should include in their considerations whether the working environment is contributing to an intoxicant or dependency problem, bearing in mind that work organisation or work-related stress or fatigue may be playing a role. The group should ensure to consult with the safety representatives and the safety committee and identify what actions should be taken to remove or ameliorate such hazards. Likewise if the company has an Employee Assistance Programme in place they too should be consulted.

Workplace drug and alcohol issues are a developing field in national and international law. The negotiation group should review any legislative developments or evolving case law (unions can help with providing up-to-date information).

The group needs to consider what are the real needs regarding alcohol and drug use in the workplace? For example, can workers have alcohol during work hours? During their lunch? On special occasions? At work related events? With clients? The answer may not be a simple yes/no - it may be 'depends on...' but even so there needs to be clarity about the employers expectations.

Are there safety-sensitive safety-critical jobs? If so what are these? What is the standard that applies to these workers? If testing is being considered it must clearly demonstrate that testing can reasonably be expected to achieve its intended goals.

Other questions that need to be thought about include what measures relating to intervention, support and treatment will be provided to workers. How will the organisation deal with an employee who knowingly ignores restrictions on intoxication? Is it a health, safety, disciplinary or other issue?

STAGE 3: PREPARE A DRAFT POLICY

It is possible that when the group has completed stage 2 it may determine that the existing policy and procedures are sufficient and are serving the enterprise well. Or it may be that some amendments are needed. In other circumstances a whole new policy may be called for. The group needs to prepare draft amendments or the new policy based on the consideration at stage 2 and with regard to the fair, ethical and legal principles set out in this guide.

STAGE 4: COMMUNICATION AND CONSULTATION ON DRAFT POLICY

At this stage of preparation it is helpful to 'touch base' with the workforce and get their feedback on the draft, this is not for acceptance/rejection at this stage as it is a consultation draft; the idea is to get feedback for the negotiators. Unions and management can circulate the draft using existing procedures or with agreement might agree another method best suited to this early stage of consultation. It is essential to ensure consultation with the safety committee and safety reps in line with Health and Safety legislation and the Employee Assistance programme as they are central to the policy.

STAGE 5: FINALISING THE POLICY

From the feedback provided during stage 4 - make any amendments in line with the issues raised. The final draft should include a statement about why the enterprise considered it appropriate to draw up an alcohol and drug policy (this will have been determined at stage 2 and refined during the consultation). The final version should also include a reference to how the policy was formed in consultation with the workers and their representative trade union(s) and if the policy has the full support of the union(s).

STAGE 6: SUBMIT POLICY FOR AGREEMENT

The draft can then be submitted to the established procedures that agree or make changes to the organisation or enterprises' policy. (If it is refused it will most likely need to go back to stage 2).

STAGE 7: DISSEMINATION AND IMPLEMENTATION OF POLICY

Communicate the policy throughout the workplace and implement it equally (managers, CEO and Directors). Communication is an essential stage that is often overlooked – effective communication requires more than sending an e-mail to staff, be sure to involve the union.

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STAGE 8: REVIEW POLICY

As with all other policies, be sure to keep this under review on a regular basis returning to Stage 1.

LEGAL CONCERNS AND PRINCIPLES TO INFORM THE NEGOTIATIONS

There are a number of legal considerations and principles to be taken into account when negotiating the workplace policy. Workplace drug and alcohol policies are a complex area where different rights and laws converge and what follows is a pointer towards some of the key issues, it is not intended to be legal advice. Your union will be able to provide greater information about the specifics that apply in your industry, occupation and job.

HEALTH AND SAFETY

Employers have a general duty under Section 8 of the Safety Health and Welfare at Work Act 1995 to ensure; so far as is reasonably practicable, the safety, health and welfare at work of everyone at their workplace. This includes managing and conducting work activities to prevent improper conduct or behavior likely to put employees at risk. Section 13(1) (b) of the Act requires employees and employers, while at work, not to be under the influence of an intoxicant to the extent of being in such a state as to endanger their own safety, health or welfare at work or that of any other person. It is clear that for safety purposes there needs to be consideration of the type of work being carried out when establishing what constitutes being under the influence of an intoxicant to the extent it will endangering the workers or others safety.

There is a considerable confusion about the obligations on employers to carry out drug and alcohol testing. Driven to some extent by companies who sell drug and alcohol services raising a provision in the Safety Health and Welfare at Work Act 2005. Section 13 (1) (c) of the Act makes reference to employees presenting themselves for any testing *as may be prescribed*. The phrase “as may be prescribed” means that this requirement would become a legal requirement *only* in the event of the Minister introducing specific legislation requiring employees to present themselves for testing. The Minister has not as yet

introduced any such Order and has indicated that he has no plans to. For the purpose of being clear ‘as prescribed’ does not refer to the employer ‘prescribing’ testing in their employment policy, it refers to the Minister bringing in an ‘Order’.

CONSULTATION AND AGREEMENT

Drug and Alcohol policies should only be introduced following consultation and agreement with workers and their union. The Safety Health and Welfare at Work Act 2005 provides for a right to consultation between employers, employees to help ensure co-operation in the prevention of accidents and ill health. Under section 25 of that Act, employees are entitled to select a safety representative to represent them on safety and health matters with their employer. Section 26 sets out the arrangements for consultation on a range of safety and health issues at the workplace. These are key provisions of the 2005 Act and a central part of the preventive system of promoting safety and health at work and must be respected when introducing a drug and alcohol policy.

The Labour Court has reinforced the desirability for agreement with workers and their unions stating that they *“consistently supported the use of drug and alcohol testing in safety critical employments. However, given the inevitable consequences for employees who test positive it is crucial that the modalities of all aspects of the testing conform to predetermined standards, which as far as possible, are agreed between the employer and the trade unions representing staff.”* (CD/07/413).

RAILWAYS AND DRIVING FOR WORK LEGISLATION

From 28 October 2011, Section 4 of the Road Traffic Act 2010 reduces the drink driving alcohol limits for all drivers. The new rules also differentiate between experienced drivers and new drivers – those with learner permits or who hold a driving licence for 2 years or less, or have no valid licence/permit. Lower alcohol limits apply to new drivers than those that apply to experienced drivers. The lower alcohol limits applying to new drivers also apply to drivers of buses, lorries, trailers, work vehicles, taxis and other public service vehicle drivers.

The Railway Safety Act, 2005 covers all aspects of intoxicant testing for the railways. Section 37(2) states that there is a general duty on rail workers not to be *“under the influence of an intoxicant to such an extent as to expose a person (including himself or herself) to danger or risk of danger as a consequence of being under such influence”*. Section 84: defines “analysis” and what specified level is allowable in relation to blood, urine or alcohol (in breath). Section 87: provides a code of conduct in relation to intoxicants and establishment of procedures in relation to the mandatory provision of samples. Section 89: sets out how, when, where and by whom sampling can be undertaken. Section 90: deals with disciplinary measures arising from testing, including non-compliance and failure to provide a sample. Section 91: importantly, deals with proof of certificate of analysis, a document which would be used as evidence in any disciplinary hearing.

EMPLOYMENT EQUALITY CONSIDERATIONS

The drug and alcohol policy must be fair and not discriminatory in its application across the nine equality grounds. Discrimination can be direct or indirect, for example applying the drug and alcohol policy only to young workers would be discriminatory.

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A recent decision by the Labour Court in *A Government Department v An Employee* (DETERMINATION NO. EDA062) confirmed that alcoholism is a disability under the Employment Equality Acts 1998-2011. The case highlighted that a link to Employee Assistance Programmes (EAP) is an essential requirement under Section 16 (a) of the 1998 Equality Act. That section provides that an employer shall do *“all that is reasonable to accommodate the needs of a person who has a disability by providing special treatment or facilities and that a refusal or failure to provide special treatment or facilities shall not be deemed reasonable unless such provision would give rise to a cost, other than a nominal cost to the employer”*. The other important outcome from this case is that employers cannot treat someone less favorably simply because they suffer or suffered from a condition – in this instance alcoholism – such less favourable treatment is contrary to the Acts. Workers who come forward seeking help should not have their job security or opportunities for advancement jeopardised.

There are particular equality concerns when testing is involved. Testing raises the possibility that an employer will find out about previously undisclosed conditions because prescribed medications are known to be associated with certain conditions. Testing can uncover or require disclosure of these medications and this has been found to be contrary to the proper respect for the workers right to private life. In *X v EU Commission* the European Court of Justice (ECJ) held that the right to respect for private life includes right of a person to maintain secrecy in respect of the state of his or her health (the case involved HIV).

It is essential that the policy properly respects employment equality rights, and that the policy ensures that employers are not able to single workers out, for example whistleblowers or union activists.

RIGHT TO PRIVACY: CONSTITUTIONAL AND HUMAN RIGHTS CONCERNS

Workers do not shed their human rights at the door of the workplace. The Constitution of Ireland (Bunreacht na hEireann) recognises a persons' right to their livelihood; their good name and their right to privacy. Privacy, is an unenumerated right in the Irish Constitution (i.e. it is not explicitly referred to in the Constitution but it has been accepted that article 40.3 of the Constitution implicitly guarantees a right to privacy). Article 8 of the European Convention on Human Rights (ECHR) is more explicit and states that a person has a right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

While Article 8 does not provide an absolute guarantee of privacy it does mean that any invasion of an individual's privacy needs to meet the test that it is 'necessary' and 'proportional'. The European Convention of Human Rights (ECHR) is now part of Irish law through the Human Rights Act 2003. It has been given a higher standing in the Treaty of the Functioning of the European Union (Lisbon Treaty).

Attempts by employers to force employees to take drugs tests could be vulnerable to challenge as a violation of privacy under the European Convention on Human Rights, except where the testing is necessary, justified and proportionate with regard to the genuine identified reasons. Any measure that affects a human right must be objectively justified and be shown to be necessary towards the achievement of the aim being pursued. Employers must always bear reasonableness in mind when testing an employee for drugs or alcohol consumption.

Workers are also entitled to privacy when giving a sample particularly when urine samples are used, it is also a practical consideration as a number of people have an inability to pass urine in front of another person.

ASSISTANCE AND TREATMENT

Workers with alcohol or drug related problems should be treated in the same way as workers with other health problems, in terms of paid sick leave and health insurance coverage.

All records and information regarding alcohol or drug related problems disclosed voluntarily to the employer by the worker should be treated in the same way as other confidential health data. Best practice requires that as such should not be included in the workers personnel file but stored separately.

Employers may wish to establish an Employee Assistance Programme. EAPs may have different forms of organisation and services offered. They provide confidential assistance to workers – and frequently their families- to help them with a whole range of problems. EAPs often act as a point of initial assessment and referral to specialists in alcohol and drug counselling, treatment and rehabilitation. Unions should consider negotiating access to paid specialised services as part of the policy.

MEDICAL LAW AND PRACTICE

Laws underpinning the medical profession require that samples should not be taken without getting the 'informed consent' of the person. Increasingly samples are not taken by doctors, this can be problematic as technicians working for a drugs testing company, may not be covered by the same ethical framework. It is important to note that the Railways Acts require a medical professional to supervise the testing. Given what is at risk for the worker the loss of their job and reputation it is essential that the competence and qualifications of the personnel involved at all stages are in line with 'Legally Defensible Standards'.

Any health-care or other person involved should respect the principles of medical, psychological and counselling confidentiality and not disclose the workers condition to the employer. Occupational health professionals communicate to the employer whether a worker is fit or not or fit with restrictions and the duration of any disabling condition for health reasons with regard to the performance of the persons job.

DATA PROTECTION

Data Protection Acts 1988 and 2003 confer rights on individuals as well as placing responsibilities on those persons processing personal data. Individuals have a number of legal rights under data protection law. To comply with their data protection obligations data controllers must:

- *obtain and process the information fairly;*
- *keep it only for one or more specified, explicit and lawful purposes;*
- *use and disclose it only in ways compatible with these purposes;*
- *keep it safe and secure;*
- *keep it accurate, complete and up to date;*
- *ensure that it is adequate, relevant and not excessive;*
- *retain it no longer than is necessary for the specified purpose or purposes;*
- *give a copy of his/her personal data to any individual, on request.*

These Data Protection Rules apply to the obtaining and handling of information about workers generally, but doubly so when the data is 'sensitive' data such as that relating to 'health'. In this circumstance there are even stricter limits on the health information that can be obtained by employers. It's worth noting that in the UK the Data Protection Office has concluded that in most instances alcohol and drug testing is an unwarranted intrusion. The fourth part of the UK Employment Practices Data Protection Code - 'Information about Workers' Health' says: *'Very few employers will be justified in testing to detect illegal use other than on safety grounds,' adding: 'even in safety critical businesses such as public transport or heavy industry, workers in different jobs will pose different safety risks. Therefore, collecting information though the random testing of all workers will rarely be justified.'*

Valid and informed consent is the essential ingredient in data protection rules but it is difficult to be sure that workers' consent is genuine given the imbalance of power in the employer-employee relationship, especially when the consent was at the recruitment stage. Genuine consent is more likely if the worker has the protection of their union and the policy is agreed through collective bargaining.

DISMISSALS

The policy should prefer treatment to dismissal.

It should be recognised that the employer has the authority to discipline workers for employment related misconduct associated with alcohol and drugs. However, counseling

treatment and rehabilitation should be preferred to disciplinary action. Should a worker fail to cooperate with the treatment programme the employer may take disciplinary action as provided in the agreed company policy. Rules should be clear and consistently applied so that workers understand what is prohibited and the sanctions for violations of the rules.

Where it is proposed to dismiss an employee as a result of misconduct under the policy the employer must comply with the rules of natural justice and the procedures as set out in **S.I. No. 146/2000 — Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000**. Including that details of any allegations or complaints are put to the employee concerned, that the employee concerned is given the opportunity to respond fully to any such allegations or complaints, including that the employee be allowed to confront or question witnesses. It is essential that the employee is given the opportunity to avail of the right to be represented throughout the procedure and that there is a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

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It is worth mentioning that the Employment Appeals Tribunal have determined that an employer cannot automatically dismiss someone simply because they have been found in possession of drugs outside the workplace; rather what has to be considered is the reasonableness of the dismissal in light of the nature of the employment. It depends on the context and the degree to which the offence impinges on their ability to carry out their employment.

As in any situation where a person is facing disciplinary action, or dismissal following a positive drugs result, or if they are threatened with action for refusing to take a drugs test, individuals are advised to contact their union for help.

TESTING FOR INTOXICANTS

It is not necessary to include 'testing' in the drug and alcohol policy. Where problems in workplace performance exist, a number of responses may be considered and testing may not be best method. In fact there are a number of reasons why organisations have decided not to include testing in their policies. Not only can the introduction of testing damage the level of trust in an enterprise, there is no evidence that introducing drug testing actually reduces injury rates. Instead they can give a false sense of security and worse allow an employer to believe they have the right to involve themselves in what their workforce do in their own time and make it more likely that a worker will hide any problem.

The most common reasons for including testing are investigations of accidents and incidents, referral for assistance and deterrence.

WHAT IS INVOLVED IN TESTING FOR DRUGS

Most drug-testing methods do not actually test for the presence of drugs. This is because most drugs break down very quickly in the body. Therefore the test looks for the chemicals that remain after the drug breaks down. These are called the 'metabolites'. Unlike alcohol testing, drug testing will not tell if a person is either under the influence of a drug or what the level of impairment is. It will simply tell if the metabolites of a drug are present.

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Metabolites of drugs can be detected in blood, urine, hair, sweat or saliva. The most common type of testing is urine but saliva is increasing in use.

Metabolites for most drugs can be detected in urine for up to three or four days after use, although in the case of some drugs they can be detected for up to 30 days after use. They can be detected in blood for roughly the same period or slightly less, and for an even shorter period in saliva. Most drugs can however be detected in hair for up to 90 days.

There are a considerable number of different types of drug tests. In the case of urine and saliva no preparation is needed but if blood is used the plasma has to be separated before testing. Hair is more complex and expensive to test because it has to be both washed and broken down. The most common packages are a urine test or saliva test for cannabis, cocaine, amphetamine, methamphetamine, benzodiazepine and opiates.

In terms of testing for alcohol, the breath is the most commonly used specimen. The policy should determine which methods of testing and for what substances bearing in mind the consequences of use in the workplace.

STANDARDS FOR TESTING

Workplace Drug Testing involves three linked stages - collecting the specimen, analysing the specimen and interpreting the results of the analysis. If any one of these three stages has flaws, then the whole process may be invalid. Unlike most other EU or US states, Ireland does not have a system for licencing laboratories. This is a serious drawback as workers jobs and reputations are on the line. However the Labour Court has shown itself capable of responding to the modern realities and has held that to be legally defensible, the tests must comply with the European Standard EWDTS and comply with the International Standard for Laboratories (ISO 17025).

Where workers agree that there are objective and justified reasons to include testing in the policy, then the procedures must conform to the '**Legally Defensible Workplace Drug and Alcohol Testing**' standards set by the European Workplace Drug Testing Society (EWDTS). These standards are comprehensive and cover matters such as the qualifications of personnel, the quality of the testing kits, handling of the specimens, access to 'B' samples and independent verification and medical reviews, among many other matters. Negotiators are encouraged to get copies of these standards as they outline in detail essential elements of testing.

CHAIN OF CUSTODY

This is the system of controls which demonstrates that the specimen was freshly provided by an identified individual, and that the results reported relate beyond doubt to that specimen. Specimens for legally defensible workplace drug testing need to be collected under circumstances which respect the dignity and confidentiality of the individual. They must guarantee the integrity of the specimen and ensure that it cannot be tampered with in any way. Suitable records must be made available to the worker and their representative to prove that the specimen collected and the specimen received by the laboratory are one and the same. The linking paperwork is referred to as the Chain of Custody Form, or Custody and Control Form.

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FALSE POSITIVES

Even when a laboratory complies with the EWDS standard, the tests can produce 'false positives'. Simple over the counter remedies and some ordinary foodstuffs can break down into the same metabolites as 'drugs'. Eating as little as a teaspoon of poppy seeds - less than the amount on a poppy seed bagel - can produce false-positive results on tests for opioid abuse. As can cold medications, antidepressants, painkillers, antibiotics, slimming and muscle building products.

When a sample proves positive it should be subject to a confirmation test which is more precise and set at scientific thresholds. If a positive result is confirmed it should not be acted upon until the person who gave the sample has been interviewed by a medical doctor to find out if anything else could have resulted in the positive result. In addition workers should have access to a C sample for independent testing without charge.

'ZERO TOLERANCE'

Zero tolerance policies are greatly misunderstood concept and have been promoted in ways that are inherently unfair, unscientific and unlawful. The key problem is that unlike the USA, Zero Tolerance' policies in Ireland sometimes do not operate an appropriate cut off threshold.

As previously outlined positive results can occur from entirely 'innocent' means. A correctly operated 'zero tolerance' policy will mean that only where the test results are above the 'innocent' level are they reported as an indicator of actual drug use. In a nutshell Zero Tolerance without the application of thresholds is not scientific nor is it legally defensible as it risks accusing an innocent person.

It is worth pointing out that even with the use correct thresholds there may still be a danger of 'false positives' i.e. the test is positive above the threshold but may be from something other than a prescribed drug. Before making the final interpretation of the test result the worker (with their representative if requested) should be given the opportunity to discuss the results with the medical reviewer. If there is a legitimate medical explanation for the positive test the result should be reported as negative and no further action taken.

WHEN TO TEST?

Firstly, it should be noted that no testing can take place without the agreement of the workers concerned either through a collective agreement or in circumstances where there is no collective agreement - the individuals' contracts. Issues arise for negotiators are:

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At pre-employment: screening of all potential employees or applicants prior to their being employed. This is when workers are at their most vulnerable because they are not employed, they are unlikely to be covered by the enterprises' grievance or appeals procedures and they may not have the support of a union. Some job applicants have claimed that they suspect that have been denied employment because of a prescription drug they were taking but were not given the opportunity to challenge the result. There is also a danger that testing will be undertaken without the full knowledge of the worker as part of a pre-employment medical. This type of testing is very problematic from a fundamental rights point of view and as such is unlikely to be agreed by the trade union.

With cause or post incident: This test is used after an incident that causes an injury, damage or a near miss. Sometimes this is done automatically after an incident, in other cases it is only done if the supervisor suspects that alcohol or drugs may have played a part. A key problem with this arises if the test is introduced as an attempt by the employer to absolve themselves from liability if an employee injures themselves.

Random: Random testing involves selecting a number of employees at random at regular intervals and testing them. Drugs-testing companies claim that it is a major deterrent, although in the USA, where testing is far more common, it has been claimed that users are more likely to switch from cannabis (which remains in the urine for much longer) to harder drugs which disappear from the system much quicker. Key problems are that the company may be testing not for intoxication or impairment but off the job use and depending on the testing used a worker may be in danger of failing a test some weeks after legal use while on holiday. The selection procedure for random testing should be genuinely random.

USEFUL RESOURCES

Irish Congress Trade Unions www.ictu.ie

ILO Code of Practice http://www.ilo.org/public/libdoc/ilo/1996/96B09_297_engl.pdf

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Health and Safety Authority Fact Sheet

http://www.hsa.ie/eng/Publications_and_Forms/Publications/Occupational_Health/Intoxicants_at_Work_Information_Sheet.html

Trade Union Hazards Magazine <http://www.hazards.org/>

Workplace Relations (making a complaint)

<http://www.workplacerelations.ie/en/services/howtomakeacomplaint/>

Labour Court <http://www.labourcourt.ie/Labour/labour.nsf/lookuppagelink/flashpage.htm>

Equality Tribunal <http://www.equalitytribunal.ie/>

Equality Authority <http://www.equality.ie/>

European Workplace Drug Testing Society (EWDTS) <http://ewdts.org/>

Legislation <http://www.oireachtas.ie/parliament/>

Information on Drug and Alcohol Addiction Services

http://www.citizensinformation.ie/en/health/alcohol_and_drug_treatment_services/alcohol_addiction_services.html

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For more information contact:

Esther Lynch,

Irish Congress Trade Unions

31/32 Parnell Square, Dublin 1

esther.lynch@ictu.ie