



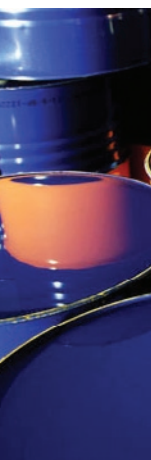
Substance Abuse in the Workplace and the Law

Deloitte.



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The Legal Framework

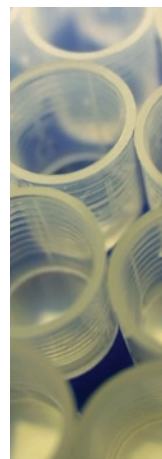
*The Employment Equity Act
No. 55 of 1998 (“The Act”)*

The Act seeks to promote equal opportunity in the workplace and fair treatment in employment through the elimination of unfair discrimination.

To the extent that the Act relates to medical testing, it applies to all employees and employers.

However, it does not apply to:

- members of the National Defence Force;
- the National Intelligence Agency;
- the South African Secret Service;
- the South African National Academy of Intelligence; or
- to the directors and staff of Comsec.



Medical Testing

Section 7 of the Act

Medical testing of an employee is prohibited, unless -

- legislation permits or requires the testing; or
- it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

Testing of an employee to determine that employee's HIV status is prohibited unless the Labour Court determines such testing justifiable.



The Labour Court

Some of the Labour Court's conditions for granting an order to the employer to test employees for HIV/AIDS are as follows:

- testing must be voluntary;
- testing must be with the consent of the employee and cannot be required as a condition of employment, promotion or other benefits;
- samples must be received and processed by a particular company;
- the management of the employer may not be involved in the testing apart from participating as employees themselves;
- the employer cannot discriminate against HIV positive employees should it become aware of the employees' status;
- the purpose of the testing should only be to discover the percentage of HIV positive employees in order to enable the company to plan an effective HIV/AIDS strategy; and
- no prejudicial inference must be drawn from a refusal to submit to testing.



The employer will not be amiss in applying these conditions to medical testing in the workplace in general. Other criteria that should be taken into account are whether:

- the test is relevant and appropriate to the job;
- the test is unbiased in how or when it is applied, assessed or interpreted;
- tests to establish the health of the employee are distinguished from tests that assess the employee's ability to perform essential job functions or duties;
- employees have been adequately informed as to the nature and purpose of the test; and
- employees have been informed of the fact that results will be confidential.

Further, the South African courts have found that the prevention of alcohol abuse at work is a management responsibility and that it is the employer who should ensure that employees may not commence with work if drunk. This would also apply to employees under the influence of drugs or other potentially harmful substances.



Health, Safety and Welfare of Employees

General duty of employers to their employees

Occupational health and safety legislation requires employers to provide and maintain a working environment that is safe and without risk to the health or welfare of its employees.

Employees affected by alcohol, drugs and other potentially harmful substances in the workplace are a risk to themselves and to others around them. The International Labour Organisation estimates that 15% of all fatal workplace accidents and 25% of all workplace accidents are drug related.

The penalties for an employer not complying with its health and safety obligations are significant. Directors and senior managers may in some instances be held personally liable for such non-compliance.

In many industries, the employer is not considered to have discharged its legal obligations in relation to occupational health and safety unless it implements policies and procedures to address the risks associated with substance abuse in the workplace. In addition, specific industry legislation, such as rail and mine safety legislation, requires employers to ensure that drugs or alcohol does not affect employees while they are at work.



Substance Abuse Programme

Deloitte, Drug Testing Africa, The Careways Group and PathCare Laboratories have joined forces to establish a complete programme to address substance abuse in the workplace.

The programme will be adapted for your specific workplace requirements and consists of four components:

- substance abuse policies;
- awareness: training and education;
- testing; and
- an employee assistance programme.



Substance Abuse Policies

To discharge the responsibility of providing and maintaining a working environment that is safe and without risk to the health or welfare of its employees, employers should implement a substance abuse policy in the workplace.

The objectives of the substance abuse policy should be to promote and ensure employee wellness and to provide and maintain a safe working environment.

The policy should ideally be incorporated as the first of a four component programme in the workplace. The aim of the policy would be to make the employees aware of the employer's stance on substance abuse. It should inter alia set out:

- a list of prohibited substances in the workplace;
- the assistance that the employer is prepared to provide to employees who voluntarily disclose a substance abuse problem;
- the consequences of working under the influence of a prohibited substance; and
- the consequences of not disclosing a substance abuse problem.

Deloitte's legal team can assist you, the employer, to develop and implement a substance abuse policy as part of a wider substance abuse management programme while ensuring that you comply with all your legal obligations without infringing on the rights of employees. The policy will be tailor-made to take into account industry best practice and the specific needs of your company.



Awareness

Training and Education

This forms the second of the four components of the substance abuse programme.

Drug Testing Africa provides in-house and external training and additionally conducts train-the-trainer courses, which are designed to enable management and other key personnel to implement and manage substance abuse programmes with staff.

Drug Testing Africa, together with The Careways Group offer train-the-trainer courses that are an integral component of a substance abuse programme as they teach managers and supervisors how to integrate the program into:

- OH & S training and policies;
- any existing Employee Wellbeing Programme;
- a Careways Employee Wellbeing Programme; and
- workplace intervention.

Drug Testing Africa and The Careways Group training in regards to a substance abuse programme is also designed to educate management on issues such as:

- communication skills;
- effects of alcohol, common drugs, other substances; and
- testing in the workplace.



Substance Abuse Testing

Testing refers to urine on-site or laboratory based testing. It takes into account such factors as procedures for the collection of urine samples, employees' right to privacy, and cut-off levels, among other things.

Deloitte's legal team will assist you in ensuring that your testing programme is aligned with your substance abuse policy, complies with legislation and is in line with best practice.

To facilitate compliance with legal obligations Deloitte's legal team and Drug Testing Africa have developed new drug testing programmes based on urine and/or swab testing, on-site or laboratory based testing, eye-scanning, collection procedures, privacy issues, cut-off levels, etc. There are many elements that can make or break your workplace substance abuse programme.





Urine Testing

Workplace drug testing has for a long time been based on urine testing.

Some of the best performing on-site test devices perform a laboratory equivalent accuracy (97-99%). The urine immunoassay-screening test will be able to detect the presence of a given drug for days and even weeks after it has been taken.

The detection time depends on a number of factors - age, sex, weight, metabolism and usage.



Oral Fluid Testing

Oral fluid testing is less intrusive than urine testing and less invasive than blood testing. Oral fluid testing gives blood-equivalent test results.

Oral fluid based testing merely detects use over the last 6-12 hours "same day use"



EyeCheck™ Scanning

EyeCheck™ pupillometer is a lightweight, hand-held instrument that measures absolute pupil dynamics to presumptively detect impairment caused by fatigue, drugs or intoxicating compounds with immediate results.

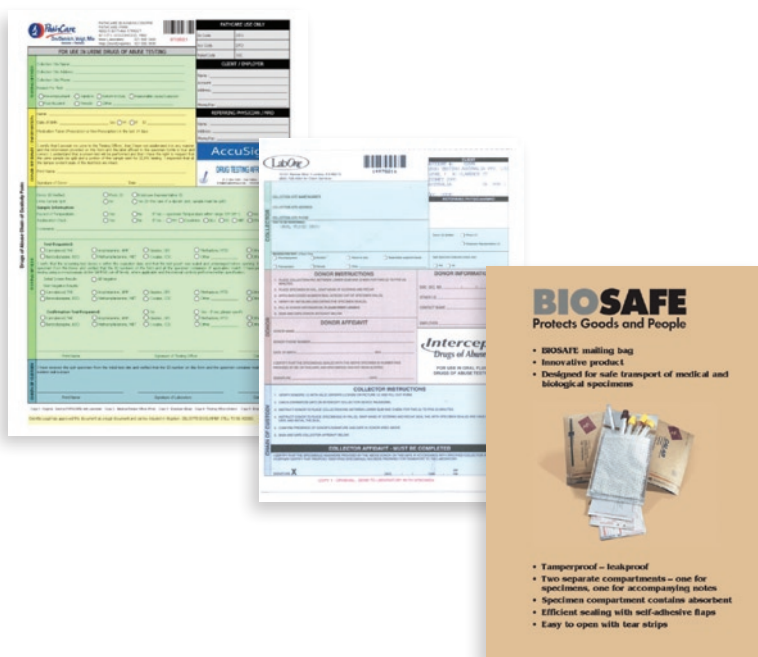
EyeCheck™ pupillometer is presently used by Law Enforcement, Corrections, Parole / Probations, and has been shown to reduce costs, save time in screening for the presumptive presence of alcohol, drugs, or inhalants.

EyeCheck™ pupillometer is portable, lightweight, and user friendly.



Confirmation Testing

Deloitte, Drug Testing Africa and PathCare has developed a new BioSafe shipping and confirmation system that includes new state of the art Chain-of-Custody forms based on urine and/or swab testing, laboratory based oral testing and eye-scanning.



Employee Wellbeing Programme (EWP)

The fourth component of a substance abuse programme is the implementation of an EWP. The objective of implementing an EWP is to ensure that all employees and their family members have access to professional and confidential counselling services. These counselling services will be provided by professional psychologists and counsellors and will be available 24 hours a day, 7 days a week from a location nearby.

The Careways Group EWP will form an imperative part of a substance abuse programme as it will assist employees to actively address and resolve any substance abuse or associated issues they may be facing.

The EWP should also be applicable to employees who have overcome any form of substance abuse and are ready and able to re-enter the workplace.

The Careways Group recognises that family participation is an integral component of any EWP and will provide family members of individuals suffering from substance abuse or associated problems with support and advice. Family support counselling is also available to employees whose work performance is affected as a result of a member of their family having a substance abuse problem.





Participation in the EWP will be voluntary. The Careways Group has various systems in place that allow for a range of referral options into the programme from self-referral to management referral.

Deloitte legal will ensure that the EWP is integrated into your workplace policies and procedures and that it complies with the relevant legislation.



Does your Substance Abuse Programme Measure Up?

To limit the risk of litigation in implementing your substance abuse programme, you should take the following steps:

- consult your employees and their representatives in planning and developing the programme. It is often useful to involve your workplace safety committee at the outset to ensure that the programme remains focused on safety risks;
- identify which substances the programme will monitor. Note that not all substances will have a negative effect on safety;
- set reasonable cut-off levels for each of the identified substances. It may be prudent to set cut-off levels for your workplace which are slightly higher than those recommended in relevant drug and alcohol testing standards to ensure that insignificant usage which is unlikely to affect safety is not detected;
- prepare a substance abuse policy setting out the test procedures;
- implement a drug and alcohol education programme;



- incorporate information on the drug and alcohol programme in employee manuals;
- develop fair and reasonable procedures for dealing with positive test results. (Note that a non-negative drug test result is not of itself sufficient grounds for summary dismissal. The employee should be given an opportunity to address the problem. It is preferable that employees who return a positive test result be referred to counselling and an attempt is made at rehabilitation prior to resorting to disciplinary action. These issues should be clearly set out in the substance abuse policy); and
- develop and implement an Employee Wellbeing Programme to complement the substance abuse programme.



How to contact the Workplace Substance Abuse advisory service team



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www.deloitte.co.za
www.carewaysgroup.com
www.drugtesting.co.za
www.pathcare.co.za

