

The cannabis referendum – what does it mean for workplace drug testing?

On 17 October 2020, New Zealanders will be able to vote in a referendum on whether or not they support the Cannabis Legalisation and Control Bill (Cannabis Bill), which would legalise the recreational use of cannabis. The Bill, in its current form, does not cover workplace health and safety issues.

Workplace drug testing

Employers have limited rights when it comes to dictating what an employee can do in their own time. However, it becomes a valid concern for the employer where there is a risk that an employee might come to work impaired by drugs.

Many workplaces, particularly those that operate in safety sensitive environments, carry out drug testing on employees and contractors. The Health and Safety at Work Act 2015 requires business operators to ensure, so far as is reasonably practicable, the health and safety of their workers and other persons. The risks of working while impaired by drugs are well known, especially if a worker is carrying out potentially dangerous work, such as operating machinery. Drug testing is one step a business owner can take to mitigate these risks. That being said, dismissals and other disciplinary action resulting from positive drug tests are scrutinised closely by the Employment Relations Authority or Court if challenged by an employee. The case law is clear that any drug testing regime must be fair and reasonable, and carried out in strict accordance with the employer's policy.

What will change?

If cannabis is legalised for recreational use, does this mean business owners can no longer test their workers for drugs? In short, no. It's worth remembering that that testing for alcohol in the workplace is a well-accepted practice. There will still be legitimate safety concerns relating to cannabis use which warrants continued testing. Concerns may even be heightened if cannabis becomes more widely used as a result of legalisation.

A current problem with testing for cannabis is that test results cannot indicate impairment levels. Urine testing is the most common method of drug testing in New Zealand workplaces, but it is somewhat problematic in that THC can remain in urine for lengthy periods. This has been noted by the Employment Court in *Hayllar v The Goodtime Food Co Ltd*. The Court in that case considered an Australian decision that held due to the fact urine testing can show a positive result several days after a person has smoked cannabis, they may be found to have breached a drug policy even though the actions were taken in their own time and in no way affected their capacity to do their job safely. The Australian court held that saliva testing should be used instead of urine testing. The Employment Court in the New Zealand decision stated that the Australian case was relevant, but urine testing has not yet been held to be unjust or unreasonable by a Court in New Zealand. There are also concerns about among drug testing agencies about the reliability of oral fluid testing devices.

Where to from here?

We are watching with interest to see the developments in this area. In the meantime, we suggest businesses continue to be guided by the current Australian and New Zealand Standards¹ on drug detection in urine, including the cut off levels outlined in that document, until such a time as they are updated.

¹ AS/NZS 4308:2008 – Procedures for specimen collection and the detection and quantification of drugs of abuse in urine

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If the Cannabis Bill is enacted, businesses will need to review current drug testing policies to ensure these reflect any legalisation of recreational cannabis use and that they are otherwise fair and reasonable. We also strongly suggest employers seek legal advice if they are planning to implement a drug testing regime, or if they wish to take disciplinary action against an employee for a failed drug test.

Want to know more?

If you have any questions about how the cannabis referendum could impact workplace drug testing please contact our specialist [Employment](#) Team.