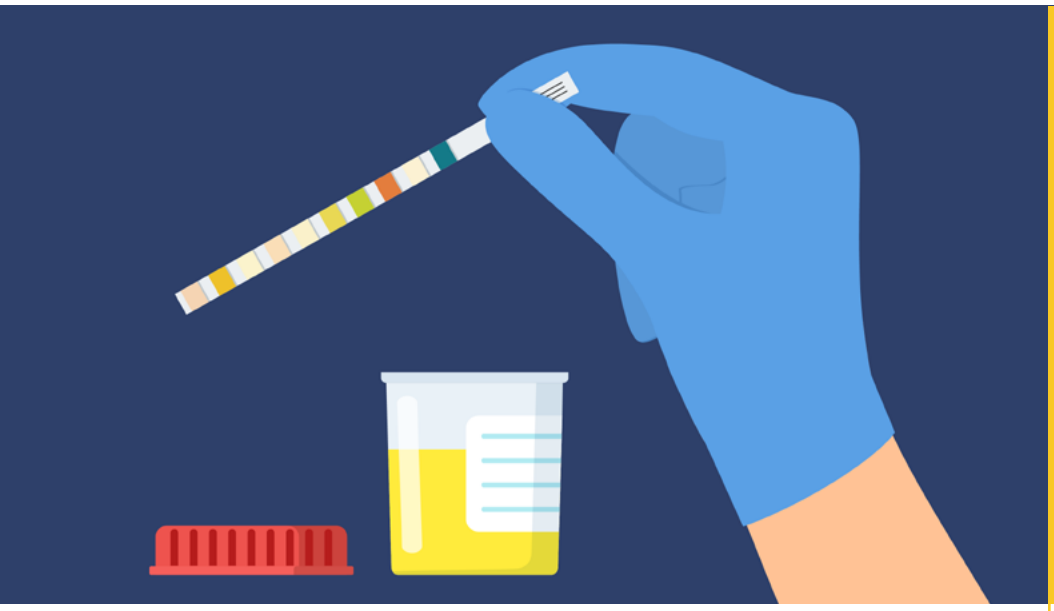
outset.

JAN 22



work place news by Chloe

Guest article

Drug and alcohol testing in the workplace

Employers have a duty to ensure a safe place of work and safe systems for their employees, as well as to protect the health and safety of visitors to their premises and anyone else who may be affected by the work of their staff.

Substance misuse can seriously impair employees' judgment and concentration which can affect the productivity and performance of employees at work, as well as attendance.

If effects of the substance persist, then performance can be impaired even when that drug or alcohol use happens outside of the workplace. For some safety critical roles – such as HVG drivers, machinery operators or medical workers - substance misuse can have severe, even fatal, consequences.

HOLLIE WHYMAN

Read more about Hollie here
or send her an email here

On top of all that, an employer could be breaking the law if they knowingly allow an employee to be under the influence of drugs or alcohol at work, or are aware of drug-related activity in the workplace and fail to act.

Continue reading >

The editor's welcome

Happy New Year! I hope everyone's 2022 is looking bright, happy and healthy.

For our first issue of 2022, we're taking a look at what employers need to look out for this year, as well as our usual pieces of news and insights.

As always, please follow us on LinkedIn for our latest updates and latest news.

Chloe Pereira

Senior Employment & Business Immigration Lawyer

01622 606 422 | Email me | outsetuk.com

This month...

What's coming up in 2022

Employment law changes coming in 2022...

Read more >

Tackling tricky issues

This month we look at personal hygiene...

Read more >

SSP rebate

A review of the SSP rebate scheme - when and how to claim...

Read more >

It's understandable therefore that employers may want to implement drug-testing in order to manage these risks. However, drug and alcohol testing can be a tricky issue for businesses to navigate.

Employers must ensure the benefits to the business justify any adverse impact on the individual, unless the testing is required by law. Relevant factors to consider are whether the business or employee roles are safety-critical, as well as concerns over staff performance and organisational reputation.

Drug and alcohol testing of staff must also be managed in line with data protection legislation.

In this article we take a look at the rules relating to drug and alcohol testing at work and offer some guidance on best practice.

When can an employer test for drugs and alcohol?

The approach to drug testing will depend on the specific needs of the business and justification for testing. The Information Commissioner's Office (ICO) states in its Employment Practices Code that testing workers for drugs or alcohol use is unlikely to be justified unless it is for health and safety reasons.

Where testing is used to enforce other rules or standards, employers should make sure those rules and standards have been clearly set out to workers.

For example, testing to detect illegal use of drugs may, exceptionally, be justified where it would breach the employee's contract or cause serious damage to the employer's business, for example, substantially undermining public confidence in the integrity of a law enforcement agency.

The Employment Practices Code sets out the following guidance:

- Undertake and document an impact assessment before testing.
- Only use drug or alcohol tests where they provide significantly better evidence of impairment than other less intrusive means. Use the least intrusive forms of testing that will bring the intended benefits to the business.
- Tell workers what drugs they are being tested for.
- Base any testing on reliable scientific evidence about the effect of particular substances on workers.
- Limit testing to those substances and the extent of exposure that will meet the purpose(s) for which the testing is conducted.
- Ensure random testing is genuinely random. It is unfair and deceptive to let workers believe that testing is random if, in fact, other criteria are being used.
- Do not test all workers, whether randomly or not, if only workers carrying out a particular activity pose a risk. Workers in different jobs will pose different safety risks, so the random testing of all workers will rarely be justified.
- Post-incident testing, where there is a reasonable suspicion that drug or alcohol use is a factor, is more likely to be justified than random testing.

Employers should also be careful to treat employees consistently and not single out an employee for testing unless this is justified by the nature of their role or a reasonable suspicion that a worker's performance is impaired as a result of drug/alcohol use. It may be discriminatory to target an individual or a group of employees.

How to undertake testing

If your business decides to implement workplace testing you will need to use a professional service with qualified staff that meet appropriate standards. The Employment Practices Code recommends that information obtained through drug and alcohol testing is subject to rigorous integrity and quality control procedures and is of sufficient technical quality to support any decisions or opinion that are derived from it.

Continue reading >

In addition, employers who implement testing should create a policy that outlines their rules, reasons for testing, processes, how data will be used and the consequences of breaching the policy.

Employers may also want to outline any support they want to provide to staff who have dependency issues or need assistance or treatment. The policy should be incorporated into the employee's contract or staff handbook, forming part of their contractual terms and conditions.

What if an employee refuses to take a drug or alcohol test?

Businesses will not be able to require employees to submit to drug testing without their consent. However, a refusal to undertake a test may be disciplinary matter in circumstances where they are under a contractual obligation to do so.

Equally, if an employer has a reasonable suspicion that an employee is under the influence, or suffering the effects, of drugs and alcohol at work, then it may be reasonable to take disciplinary action against an employee who refuses to take a test. This may be the case if, for example, an employee has shown an obvious decline in their performance or a marked increase in incidents.

Employers should proceed with caution however, as unwarranted disciplinary action, or attempts to force or coerce an employee into taking a test against their will, could lead to an individual resigning and bringing a constructive dismissal claim (if they have the necessary length of service).

What if an employee fails a test?

A positive test won't necessarily justify instant dismissal unless there is clear evidence of substance misuse taking place at work, or there has been a serious incident whilst under the influence.

When considering what disciplinary sanction is appropriate in light of a positive test, employers should consider the circumstances, the likely extent of the drug/alcohol use on the employee's performance, and the risk posed to the health and safety of others. It is also important that disciplinary action is not taken until the test result is confirmed, although a suspension may be appropriate in the meantime if the employee is carrying out a safety critical role and there are genuine, reasonable concerns.

Employers should also discuss the results with the individual, give them the opportunity to explain themselves and explore the underlying reasons for any positive test result. For example, whether the issue is one of dependency or recreational use. The employee's explanation will be relevant, as well as whether or not they admit using the substance. It's also worth bearing in mind that, in unusual cases, positive results could even be triggered by something else entirely, such as a medical condition or treatment.

Where addiction or dependency is identified, the issue may be one of capability rather than misconduct, and the focus in the first instance should be on encouraging and assisting the employee to seek help and treatment. A performance management process may also be warranted, which – if no improvement is seen, or confidence in the employee is undermined – may lead to dismissal.

Substance misuse may also be a sign that the employee is suffering from a mental health condition, such as depression, which may be classed as a disability. Where this is reasonably known, reasonable adjustments should be considered.

The key takeaway for employers is that, while it may seem unbelievable, an employee who tests positive for drugs or alcohol cannot necessarily be fairly dismissed based purely on that positive result. You'll always need to dig deeper, and consider the whole picture, before taking any formal action.

SSP rebate scheme

On 19 January 2022 the government reintroduced the SSP rebate scheme.

Employers with 250 employees and less can reclaim up to 2 weeks' SSP paid to an employee from 21 December 2021 onwards. If a period of sickness started pre 21 December, the employer will have to use 21 December as the start date.

The maximum number of employees an employer can claim for is the number that were on the company's PAYE schemes on 30 November 2021.

Employers are required to:

- keep records of Statutory Sick Pay paid that the employer wants to reclaim from HMRC
- keep the following records for 3 years after the date the employer receive the payment for its SSP rebate claim:
  - the dates the employee was off sick
  - which of those dates were qualifying days
  - the reason they said they were off work - if they had symptoms, someone they lived with had symptoms or they were shielding
  - the employee's National Insurance number
- keep records of employees' sickness absence. HMRC may need to see these records if there's a dispute over payment of SSP
- print or save their state aid declaration (from the claim summary) and keep this until 31 December 2024

What to watch in 2022?

03 April 22

Increase to Statutory family related payments (SMP, SPP, ShPP, SPBP) - **£156.66 per week**

01 April 22

Increases to National Living and Minimum Wage:

	New	Old
Age 23+	£9.50	£8.91
Age 21 – 22	£9.18	£8.36
Age 18 – 20	£6.83	£6.56
Age 16 – 17	£4.81	£4.62
Apprentice rate	£4.81	£4.30

COVID vaccinations for health & social care workers in face-face roles will become mandatory

26 January 22

The temporary measures that permit employees to self-certify for 28 days ends.

Any period of sickness starting after 26 January will revert to the usual 7 day self-certification.

06 April 22

National Insurance contributions for employers and employees will **rise by 1.25%**. The increase is to fund health and social care. In April 2023 the rates will reduce again and a separate levy will be introduced.

06 April 22

Increase to Statutory Sick Pay - **£99.35 per week**

June

A 6-month trial of a 4-day working week will start. A number of organisations (including Oxford and Cambridge universities) are running the program, which they hope 20-30 employers of various sizes will sign up to. The trial will see employees working 4 days for the same amount of pay.

06 April 22

The obligation on employers to provide suitable PPE where there is a health and safety risk will be extended to workers (currently it covers only employees).

06 April 22

End to COVID adjusted right to work checks (see our separate article on this)

Others for your watch list...

Menopause protection

The Women and Equalities Committee is looking at discrimination faced by women in the workplace going through the menopause. Recommendations should be published this year and we may see changes to the Equality Act as a result

Sexual harrassment protection

Sexual harassment protection – we're still waiting for the promised changes to the Equality Act to protect employees against harassment by third parties.

The government has also said it will consider extending the 3-month time limit for bringing discrimination claims to 6 months. 2022 could be the year...

Ethnicity pay gap reporting

Ethnicity pay gap reporting – a parliamentary debate followed a petition to introduce mandatory ethnicity pay gap reporting. This took place in September 2021, so we may see a response this year.

Flexible working

Flexible working – we wrote about the government consultation on this last year. There are a number of proposals under consideration to widen flexible working rights and we might see the government response to these in 2022.

Data protection

Data protection – following a consultation which closed in November 2021, we could see changes to data protection laws to ease the burden on employers. New guidance for employers is also expected from the ICO in 2022

Disability pay gap reporting

Disability pay gap reporting – a consultation launched in December 2021 and closes in March 2022 so that response should also be published this year.

Employment Bill

Pre Pandemic, the government promised a new Employment Bill covering a number of new rights and protections. We don't know whether 2022 will be the year it all happens, but it could be. If it does, changes will include:

- **Carer's leave** –one week's paid leave for carers
- **Extension of redundancy protection** - from the point when a woman confirms to her employer that she's pregnant, until 6 months after she returns from maternity leave
- **Neonatal leave and pay**
- **Right to a more stable contract** after 26 weeks for zero hours workers
- **Confidentiality and NDAs** – we're likely to see tighter rules on the use of confidentiality provisions in employment contracts and settlement agreements, as well as a requirement for independent legal advice where an employee is asked to sign an NDA
- **Tips** – employees working in the hospitality industry will gain the right to receive 100% of their tips (subject to PAYE deductions), and employers will be required to operate fair and transparent practices for tip sharing among staff

More changes to right to work checks

Most employers welcomed the convenience of remote right to work checks over the last couple of years, introduced as a result of the pandemic. Reverting to the usual in person checks has been a pain.

However, from 6 April there will be some permanent changes, which will mean online checks will be the norm for a number of workers.

BRP, BRC and FWP Holders

Anyone holding one of the following:

- Biometric Residence Permit
- Biometric Residence Card
- Frontier Worker Permit

will have to use the Home Office online service in order to provide their right to work.

This means that for any employee joining on or after 6 April 2022, employers cannot accept a physical BRP, BRC or FWP as evidence of right to work. The employee must provide a share code, and the employer must use the online 'view right to work' service to obtain a positive ID check to keep on record.

British and Irish passport holders

From 6 April 2022, British and Irish nationals will be able to log details of their passports using Identification Document Validation Technology (IDVT). This will enable them to provide evidence of their right to work remotely, without employers having to see physical documents.

IDVT will also be used for rent and DBS checks. It will be available from private sector identity service providers which will have to apply and be approved for certification. It is possible that employers will have to pay in order to use IDVT services to conduct online checks.

The Home Office is yet to publish further details of how this will work in practice, including whether hard copy documents will still be acceptable as an alternative. If IDVT services will result in a charge, it seems likely that the ability to conduct in person checks of hard copy documents will remain in place as an alternative.

Tackling Tricky issues

Personal hygiene in the workplace

One of the most difficult situations for employers is dealing with an employee who is dirty, smelly or a combination of both.

If you've received complaints about an employee's lack of personal hygiene, it's always best to have an initial conversation in private. It's not an easy one, so approach it sensitively and supportively.

It's imperative to tread carefully. The employee could be suffering from a medical condition, bereavement, depression, or stress – any number of things could be responsible for a lapse in personal hygiene.

Support your employee and suggest remedies but make clear the situation needs to improve for the benefit and health and safety of them and their colleagues. Provide a reasonable time frame for this to happen and document the details of your meeting.

If the matter doesn't improve you may need to resort to disciplinary proceedings. This should always be handled carefully, taking into account any risks around disability discrimination and making sure you've provided reasonable support.

Fear of catching COVID is not a protected belief

In this anonymised Employment Tribunal case, the Claimant brought a discrimination claim against her employer who insisted she return to the workplace when restrictions were lifted in 2021.

The employee claimed she had health and safety concerns about being in the workplace and contracting COVID, especially as her partner was in a high risk category.

The Employment Tribunal found that the employee failed to meet all of the criteria for her views to be considered a 'philosophical belief' protected by the Equality Act. In particular, the just stated that "a fear of physical harm and views about how best to reduce or avoid a risk of physical harm is not a belief for the purposes of section 10".

As we move further away from COVID restrictions, and more of us are encouraged to return to work, employers will increasingly face push-back from the most fearful. This decision was only first instance, so other tribunals won't be bound by it.

It also doesn't mean ignoring any concerns employees may have, but it does provide some welcome reassurance and guidance to employers who are struggling to get their people back to the workplace.

RECENT CASE LAW

RECENT CASE LAW

Hope v British Medical Association

Nuisance complainer fairly dismissed

This case involved an employee who lodged seven grievances against senior management. He refused to take part in the formal process to progress them, although he tried to reserve his ability to do so at some point.

The employer held a grievance hearing in his absence and didn't uphold any of his complaints. Not only that, but he was dismissed for gross misconduct for raising multiple vexatious grievances and failing to follow a reasonable management instruction to attend a hearing.

Mr Hope brought an unfair dismissal claim against his employer, which was rejected at both first instance, and by the Employment Appeals Tribunal.

Some employers will find themselves getting excited at this decision – does this mean you can get rid of those nuisance complainers? Maybe.

Each case is fact specific, and employers should always tread carefully when considering disciplinary action against someone who's raised a complaint. You might have a situation similar to Hope v BMA, but, on the other hand, you could find yourself on the losing side of a whistleblowing, unfair dismissal and/or victimisation claim.

Believe it or not?

Remote working and an increase in using social channels for communicating with colleagues has led to an increase in more casual language over email and instant messaging.

Whilst there will always be a need for formal communication, there's nothing wrong with using more relaxed words and even emojis to express tone and personality.

But some of us might get stuck trying to work out what our colleagues are saying, so we've put together a guide to some of the phrases you might come across at work:

BRB - be right back
I'm just going to lunch, BRB

LOL - laugh out loud
You were on mute, again, LOL

DND - do not disturb
I've an urgent deadline so will be on DND for a few hours

OOO - out of office
I'm on holiday next week so will put my OOO on

IRL - in real life
I can't wait to get back to the office and see everyone IRL

BTW - by the way
BTW I returned that call

WFH - work(ing) from home
I'm WFH today

IMO - in my opinion
IMO we should go with blue

F2F - face to face
Let's discuss F2F when we're in the office

OMW - on my way
OMW to the office now