

May Employers Use Alcohol or Drug Tests At the Workplace for Testing Employees?

Most employees contemplate the question, in what ways or how frequently they may test their employees, whether they would breach a legal provision if, on a particular occasion, they compel their employees to undergo alcohol or drug testing.

There are numerous forms of alcohol and drug testing, like for instance, testing preceding commencement of daily work, tests to be conducted in case of a certain degree of probability (e.g. an accident), in suspicious cases (e.g. disorderly conduct) periodical testing, random testing etc. It is essential for a company to formulate a proper workplace alcohol and drug policy wherein if necessary, certain controls shall be implemented.

Pursuant to the effective data protection rules, data obtained through the use of alcohol and drug testing – similarly to the political views, religious beliefs, sexual identity – are deemed sensitive information which shall solely be handled on the basis of statutory authorisation or written consent by the concerned party.

Application of alcohol testing is enabled by the fact that under the Act on Labour Safety, the employer is responsible for the establishment of conditions of occupational health and occupational safety furthermore, pursuant to the same act, an employee may only report to work in a condition appropriate for safe performance of work and [in a manner] adherent to the occupational safety and health rules and regulations and following the instructions received at labour safety training.

The Labour Code furthermore prescribes that an employee shall appear at the time and place specified by the employer in a condition fit for work.

Obviously, while at certain work places it is merely inconvenient and unproductive if an employee commences work in a condition under alcoholic or post alcoholic influence, at other places such a condition is extremely dangerous and may even cause fatal accidents.

It is the employer's responsibility to establish the conditions for occupational health and safety furthermore, it is the employer's right and obligation to cause employees to comply with the above detailed rules and regulations and therefore the prevalent judicial practice is uniform regarding that the employee shall regularly ascertain of the employees' adherence to the above rules. The employer, for the sake of compliance with such an obligation may apply alcohol testing while the employee is obligated to undergo such testing; its refusal constitutes a breach of employment-related obligation as an employee is obligated to facilitate such measures of the employee through which it wishes to ascertain of his/her condition being fit for safety work.

Apparently, in accordance with the above the employee's consent is not necessary for the use of alcohol testing as statutory provisions empower it to do so. Notwithstanding the above rules, **it is worthy of emphasising that the employer is also bound by the obligation to co-operate and provide information and accordingly it is by all means advisable that the full procedure of testing – including the possibility of legal remedy in the event of a positive test result – be knowable to the employees.**



However it is very important to emphasise that the statutory authorisation shall be applicable solely for employment relationship, but not for contractors or agents of a company on account of the absence statutory grounds and therefore in such cases the concerned party's prior written consent shall always be obtained. It is advisable to consider that a contractor and its employees may refuse consent furthermore may withdraw such consent at any time without justification.

Difference in the Evaluation of Drug Testing Use

Conducting drug tests is different from alcohol tests in numerous regards: test results show days or weeks prior drug consumption and not only the state influenced by the actual substance, there are frequently occurring false positive results too, e.g. in case of administration of certain anti-depressants or antiphlogistic medication; pursuant to the effective legal regulation, drug-related conducts are usually deemed criminal offences.

In his position paper issued in 2005, the former data protection ombudsman, dr. Attila Péterfalvi elaborated that considering the dangers of drug abuse and the infringement of privacy impacted by testing, the application of drug tests at work places and the pertaining data handling, as a general rule is not acceptable as:

- voluntariness of employee's consent owing to the unbalanced employer-employee positions of power are largely questionable;
- testing may lead to a practice gravely intruding privacy and infringing personality rights in addition to
- the efficiency of mobile tests are not conclusive as the test results provide information of the fact of consumption - or only of the actual physical contact with a substance - and not of fitness for work.

According to opinions of experts, the rate of certain substances' elimination from the body are not necessarily appropriate for determining the detrimental effects of drug. Drug testing devices are not necessarily able to determine the amount of the drug consumed and the time elapsed since consumption. Distinction between occasional and regular consumption is also problematic, furthermore, the weighing of so-called light and heavy drugs.

Naturally, differently judged are such professions (e.g. professional and contracted soldiers) where, under statutory empowerment, drug testing for the assessment of the concerned parties' health, psychical and physical aptitude is a permitted and even mandatory tool.

Should you have any further employment law-related question or problem, please contact us.

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