

Cobalt Solutions
For Business Owners



Alcohol and drug abuse in the workplace

Alcohol abuse and use of non-prescription drugs at work raise many difficult factual and legal questions. For example, is there a difference between testing positive for the presence alcohol, and being under the influence of alcohol? Is a breathalyser or blood test sufficient to determine whether or not someone is under the influence? Can there be different standards relating to the use of alcohol for different jobs? When should being under the influence be treated as a form of misconduct and when as an instance of incapacity?

There is indeed a difference between being under the influence of drugs or alcohol, and having drugs or alcohol in one's system. The presence of drugs or alcohol can be established through, e.g. professionally administered blood or breathalyser tests. However, being under the influence of such substances is usually established through visual observation of the employee's appearance, speech or behaviour. For the employee to be found guilty of being under the influence, employers will have to prove not only that there were traces of alcohol or drugs in the employee's system, but also, based on eye witness observation and on a balance of probabilities, that the employee's performance or behaviour was affected by it. In some cases the level of alcohol in the employee's system may be so high, that one can conclude that the employee must have been under the influence given the quantity of forbidden substances in his or her system. However, it is safest to look for tell-tale signs of a person being under the influence, e.g. slurred speech; a dishevelled appearance; unsteadiness; out of character behaviour and the like.

What if an employee refuses to undergo an alcohol or blood test? If there is a known rule in the workplace that requires employees to submit to a test, then the employer may take disciplinary action against employees who refuse to submit to a test. Obviously, the test must be done by someone trained to administer the test. If there is no such rule, employers are free to introduce it after explaining to employees why the rule needs to be introduced (e.g. the nature of people's work or an increase in alcohol or drug related incidents). Publicity should be given to it so that employees cannot plead ignorance. If such a rule is in place, not only will refusal to submit to a test constitute a disciplinary transgression in itself, but it may also constitute evidence of the fact that the employee was probably under the influence. The latter will be the case if there is enough circumstantial evidence to point towards the employee having been under the influence. For example, if Joe Soap arrives at work, appears unsteady on his feet and unusually aggressive in his behaviour towards others, while smelling of alcohol, his refusal to submit to a test can be used as a further piece of circumstantial evidence pointing towards his guilt. In legal terms, one can draw a 'negative inference' from his refusal to submit to the test.

It is quite permissible for employers to have a 'horses for courses' approach to workplace rules dealing with drug and alcohol abuse, i.e.

- a. A rule prohibiting the use of any drugs or alcohol for health and safety reasons for people working with machinery (this may extend to prescription drugs that, e.g. cause drowsiness)
- a-b. A rule that prohibits people from driving company vehicles when their blood-alcohol limit exceeds the legally prescribed limits of 0.05% for normal vehicles and 0.02% for heavy duty vehicles

a-c. A rule that prohibits people, who deal with members of the public, from smelling of alcohol

a-d. A rule that prohibits all employees from being under the influence while at work or engaged in the employer's business

a-e. A rule that prohibits the possession, use or distribution of alcohol or non-prescription drugs at work

a-f. A rule that prohibits the drinking of alcohol or taking of non-prescription drugs during 'own time', i.e. during lunch or tea breaks.

Many managers would have experienced the frustration of having a disciplinary hearing into an employee's allegedly having been under the influence of alcohol thrown out because the employee is allegedly alcohol (or drug) dependent. In all such cases, provided he or she is satisfied that the employee is indeed dependent, the chairperson would have to consider referring the employee for rehabilitation before considering dismissal. If such proof is not forthcoming, e.g. the employee is unable to provide a report from a medical or health practitioner to the effect that the employee is dependent, the incident remains one of misconduct pure and simple. Whether dismissal would be appropriate depends on the circumstances, including the employer's attitude towards the use of alcohol (e.g. a zero tolerance policy); the effect on health and safety in the workplace; the employee's record, etc.

If, on the other hand, the chairperson is satisfied that the employee is dependent, a programme for the employee's rehabilitation would normally need to be considered. The reason for this is that in terms of labour law alcohol or drug dependency is regarded as a form of ill health: alcoholics or drug addicts cannot help themselves. There is no requirement that the employer should pay for this, but it is good practice to come to some arrangement with the employee about the costs and timing of rehabilitation. For example, it may be agreed that rehabilitation will be full-time and that sick leave will be used for this purpose until that has been exhausted, after which further absences will be unpaid; or that it has to happen in the employee's own time. As far as cost is concerned, it may be agreed in writing that the employer will advance the rehabilitation fee and recover it from the employee's salary over a period of time.

Is there a way around this for employers? Indeed there is: if line managers were able to pick up the tell-tale signs of drug or alcohol dependency early on and took the trouble of engaging the employee about treatment options before any workplace rules are broken, it would be difficult for the employee concerned to argue at a subsequent hearing that he or she should be given a further chance when they had the opportunity to seek help. We know that it is notoriously difficult for people to admit to drug or alcohol dependency, but one cannot fairly expect more of a line manager than to bring the proverbial horse to the water. In this regard employers are advised to provide access to counselling services, or at least information about such services, to employees.

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