

MEDIA RELEASE

Workplace drug and alcohol testing to come under greater scrutiny as avenues for unfair dismissal increase

24 February 2009 – With employers increasingly seeking to implement drug and alcohol testing in the workplace and the impending rollout of the Federal Government’s revised industrial relations legislation, employers need to carefully review their policies and practices in relation to conducting these tests or face the risk of decisions being challenged possibly through litigation.

According to Jamie Robinson, Brisbane Partner at Harmers Workplace Lawyers, while employers can genuinely use drug and alcohol testing in many circumstances to ensure they continue to meet their OH&S obligations to protect the health and safety of all employees, they will need to act with increasing diligence in their testing procedures. He said, “While certain industries have legislation to assist with the implementation of drug and alcohol testing, such as the police force, rail and mining industries, the majority of workplaces, especially small to medium-sized enterprises (SMEs), face an increasing risk of challenge when trying to implement and act upon drug and alcohol policies.”

Mr Robinson said, “Employers have always had to tread very carefully when implementing and acting on drug and alcohol testing in the workplace, however, the new legislation will likely re-open avenues for employees to claim unfair dismissal so these types of practices will come under more scrutiny.

“In order for businesses to avoid or minimise challenges like unfair dismissal claims resulting from workplace drug and alcohol testing, they must in the first instance have a transparent process in place that is well communicated with employees. If clarity over the fairness and impartiality of the tests is in any way suspect, then businesses run the risk of employees alleging they have been unfairly dismissed.

“Employees will generally be accepting of an employer’s responsibilities to ensure health and safety, which often includes the necessity of workplace drug and alcohol testing. However, employers must also ensure that the reasons behind the testing are explained, and that those requests seem fair and reasonable in so far as they relate to a person’s ability to work safely rather than encroach unnecessarily on a person’s private life.

“Some employers do not implement drug and alcohol workplace testing policies because they are reasonably complex to implement. This is due to the tension between the rights of the employer and the rights of the employee. While both parties have responsibilities towards the other, an employee should be able to perceive the testing to be necessary, fair and impartial,” said Mr Robinson.

Mr Robinson said that if an employee is dismissed after refusing to participate in a workplace drug or alcohol test that they consider unnecessary for the safe performance of their duties, unfair or not impartial, there is a strong possibility that the employee will be eligible to lodge an unfair dismissal claim.

“I always advise employers to think carefully about how and why they wish to implement these tests. If it is genuinely motivated by a commitment to OH&S, then there should be no reason why that explanation cannot be communicated well to employees, accompanied by the appropriate workplace testing procedures. If it is not managed correctly it could prove to be a costly oversight,” concluded Mr Robinson.

Further advice for employers:

Mr Robinson says there are a number of steps employers can take to ensure their workplace drug and alcohol testing policies and practices are satisfactory:

- The workplace drug and alcohol testing policy must be seen to be necessary, fair and reasonable by employees
- The policy must ensure that the personal privacy of each employee is respected. This should comply with National Privacy Principles.
- Testing should be impartial and objective – it is recommended that employers use an external person to conduct the testing. Employees should also be given the option of arranging their own representative to test their samples
- Employers and employees should have a mutual understanding regarding what constitutes a ‘positive’ reading
- The consequences of positive test results must be in direct correlation to the results of the test – the punishment must ‘fit the crime’
- Employers should ensure that there is a program in place to offer employees training on OH&S policies such as drug and alcohol testing

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Note to editors:

About Harmers Workplace Lawyers

Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia’s leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business’s ‘employment specialist firm of the year’ for the past three years running.

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