

#### Importance of alcohol and drug testing

Following concerns that alcohol and drugs are a growing contributing factor to accidents and serious incidents on the roads, with an estimated 200 drug related deaths per year, the Government introduced new legislation in 2015, making it an offence to drive with certain drugs in the body; including illegal drugs and some prescription drugs above certain limits.

As a result of this new legislation police forces throughout the UK are now equipped to test for both alcohol and drugs at the roadside.

Recent analysis of the results of 24 police forces with 4292 preliminary drug screening tests, shows that 54 percent of the tests were positive for either cannabis, cocaine or both, with 75 percent positive for cannabis only.

Research has indicated that drivers who consume cannabis (the most common used illegal drug amongst adults) are 6 times more likely to have a Road Traffic Collision (RTC), and if combined with alcohol, that risk increases to 16 times. Other less used drugs can have a higher rate of RTC.

Under the Health & Safety Act a company has a duty of care to its employees and to others that may be affected by their actions or omissions; whilst driving on company business the employee is in the workplace and therefore you are responsible for whatever they do. Also under the Corporate Manslaughter Act, an offence will be committed where failings by an organisation's senior management are a substantial element in any gross breach of the duty of care to the organisation's employees or member of the public, which results in death.

If your employees are working in transport, or any other safety critical job, liability can be substantially reduced by applying an alcohol and drug testing system. Eliminated or reducing the risk is better than ignoring it and facing the consequences after a alcohol or drug related incident.

#### GDPR

I am sure that many of you now have your data protection policies and procedures in place, and well documented. In May the new Data Protection Act 2018 obtained Royal Assent, implementing in the UK the EU General Data Protection Regulations (GDPR)

However, ensuring compliance with the Act is not a one off exercise and it will be important to assess and monitor the procedures and in particular the safety and security of personal data, on a regular basis.

Sometimes it may not be obvious how the security of data can be breached, as well as confidentiality.

But this may be due to leaving files unattended on a desk, particularly if there are people who come into the building or office at night; leaving sensitive documents in an unlocked draw, including payslips; printing to a shared printer, where anyone can pick up the print-out, deliberately or accidentally; working in an open public place, for example on a train where there is the risk of others viewing the content. I was on a train recently, where a studious person sitting next to me was typing a confidential letter, seemingly unaware that anyone could see the document from the side or from behind; and the fact that it was from the HMRC to an individual, does raise the question as to whether such material should be worked on outside the security of the office.

In addition, it is important reminding employees that a breach of data protection and confidentiality can be as a result of disclosing personal information of an individual (without their consent) on any media site, public email or when talking in an open public place on the mobile or directly to others.

The Information Commissioner's Office (ICO) is the enforcement body in the UK for breaches of Data Protection. A number of recent cases give an example of the type of incidents that can lead to a serious breach and hefty fine:

In the first case a Government agency sent highly sensitive interview videos to another location. Although sent by tracked delivery, the delivery was made outside of office hours and left at the reception desk of the shared building. They subsequently went missing. The ICO held that the agency had been negligent when it failed to ensure the videos were kept safe. The Agency was fined £325,000.

In another case a former recruitment consultant, who gave his notice and intended to set up his own recruitment business, stole 272 CV's from his former employer's database. He has been fined £355 order to pay a victim surcharge and also ordered to pay £700 in costs.

## Employment status

There has been considerable publicity during the last few years on the status of employment of individuals working as so called self-employed.

The reason for the increase in claims by individuals is because unlike employees they have limited rights. In addition, there has been an increase in investigations and prosecutions by the HMRC due to the avoidance of tax and NI contributions by engaging person on the basis that they are self-employed, and the reduced tax liability of the individuals.

So in what situation will a so called self-employed person likely to be classed as an employee (with full employment rights and protection) or a worker (with the right to the National Minimum Wage and paid holiday entitlement)?

Through case law the test includes:

- The level of control by the company on the individual(s);
- Whether there is mutuality of obligation - if work is offered it must be taken;
- The level of integration into the company;
- Whether the individual has personal financial risk, as with running an independent business;
- Whether the individual can be substituted by another person;
- Whether the individual works with other customers or clients, and not limited to the one company;

In the recent case of Pimlico Plumbers the Supreme Court held that although there was an agreement between the company and individuals stating they were self-employed, in reality the company exerted significant control, individuals had to wear the company uniform and drive a branded vehicle, they were fully integrated into the workforce, and they could only substitute with another Pimlico operative. The individuals were held to be workers and entitled to NMW, working time and paid annual holidays.

## Mobility clauses

It is general practice in terms and conditions of employment to include a mobility clause, such as the right of the employer to request the employee to work at another work location; either temporarily or permanently. But to what extent can an employer rely on a mobility clause?

The enforceability of a mobility clause will partially depend on the wording of the clause, but it will also depend on the test of reasonableness. That is, whether it is reasonable for an employer to rely on such a clause, or conversely, whether it is reasonable for an employee to refuse the change in work location.

In a recent judgment it was held that the test of reasonableness is subjective and not objective; that is, consideration needs to be given to the employee's subjective view as opposed to what the employer deems reasonable.

In this case the employer was compelled to find alternative premises due to circumstances beyond its control. The majority of employees moved to the new location. However, one employee refused to move, she was dismissed and she subsequently brought a claim of unfair dismissal. Although the company had a mobility clause it was deemed reasonable by the judge for the employee to turn down the relocation, as due to childcare and transport difficulties she would have significant difficulty in reaching the new premises, which were 17 miles from the old location.

In another case employees were informed of a change in work location, due to the closure of one its two UK offices. The employer believed that it could rely on its mobility clause and reasonable instruction to require the employees to work at the new location. However, two employees refused to move and were subsequently dismissed. The Judge held that consideration should have been given to the fact that the one employee had just purchased a flat near to the original site, the other was close to retirement and to move location would have been a significant issue; for both the new location would have increased travel time by 20-30 hours per week. The Judge held that both were entitled to a redundancy payment.

When considering a change of work location, communication and meaningful consultation with the affected employees is important. There are often temporary solutions that can be considered, for example travel subsistence, change of working hours to allow for the additional journey time, etc. Every situation will be different, but it is important not to assume that you have the absolute right to demand that employees move location, irrespective of where it is, or what impact it will have on the individual(s).

If you have a situation where relocation is a requirement, do contact us so that we can advise accordingly.