



CANNABIS IN THE WORKPLACE

What employers need to know.



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ATTORNEYS





AGENDA

- 1. Legalization of Cannabis in SA**
- 2. Does legalization lead to an increase in use?**
- 3. South African and International statistics on the use and effects of Cannabis**
- 4. Legal Framework**
- 5. Testing employees**
- 6. Incapacity or Misconduct**
- 7. Recommendations**

Minister of Justice and Constitutional Development and Others v Prince (CCT108/17)

10. It is declared that, with effect from the date of the handing down of this judgment, the provisions of sections 4(b) of the **Drugs and Drug Trafficking Act 140 of 1992** read with Part III of Schedule 2 of that Act and the provisions of section 22A(9)(a)(i) of the **Medicines and Related Substances Control Act 101 of 1965** read with Schedule 7 of GN R509 of 2003 published in terms of section 22A(2) of that Act are **inconsistent with right to privacy** entrenched in section 14 of the Constitution and, therefore, **invalid** to the extent that they make the **use** or **possession** of cannabis in **private** by an **adult person** for his or her own consumption in private a criminal offence.

11. It is declared that, with effect from the date of the handing down of this judgment, the provisions of **section 5(b)** of the **Drugs and Drug Trafficking Act 140 of 1992** read with Part III of Schedule 2 of that Act and with the definition of the phrase “deal in” in section 1 of the Drugs and Drug Trafficking Act 140 of 1992 are **inconsistent** with the **right to privacy** entrenched in section 14 of the Constitution and, are, therefore, **constitutionally invalid** to the extent that they **prohibit** the **cultivation** of cannabis by an adult in a private place for his or her personal consumption in private

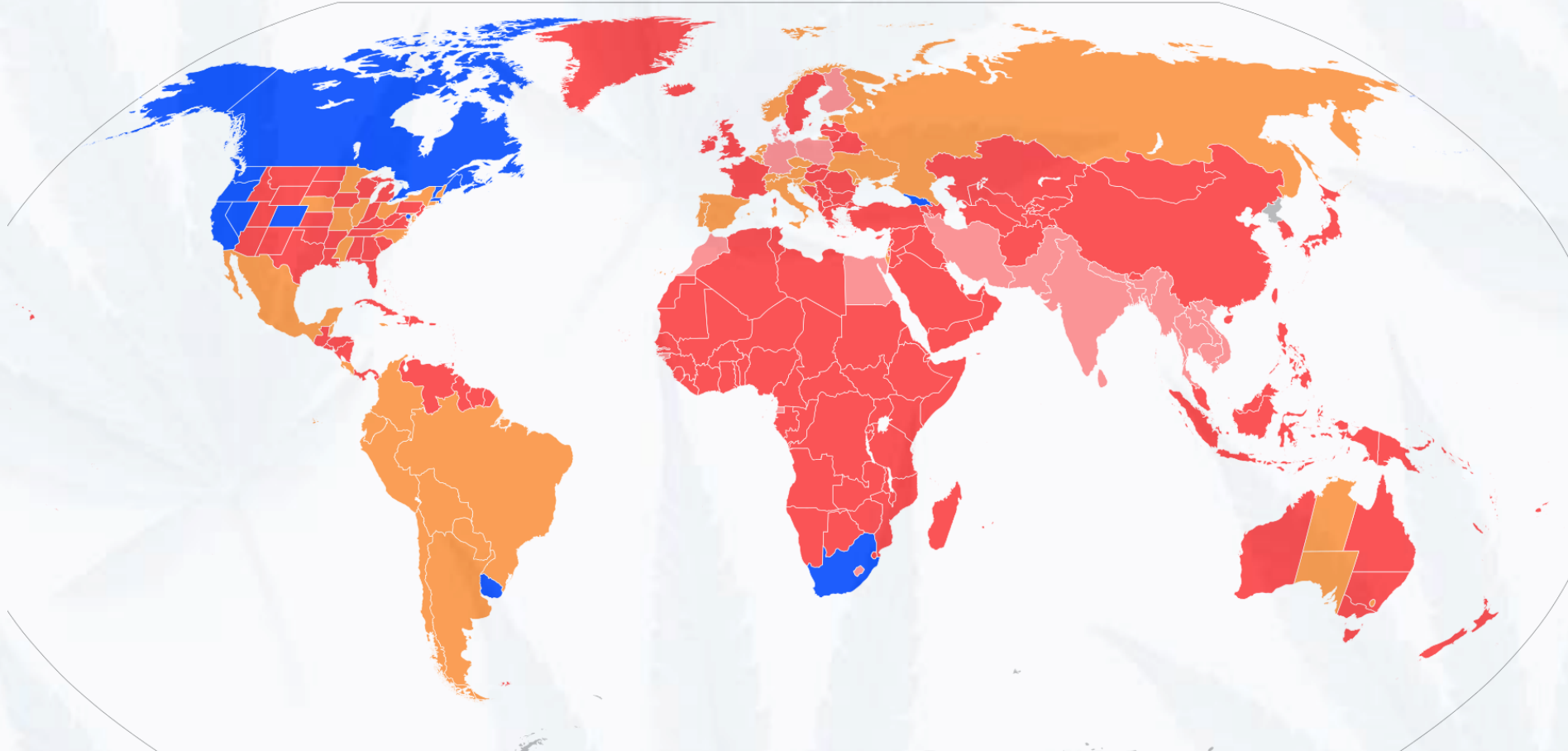
The effect of the judgement is:

- **Adult individuals** are now permitted to **use, possess and cultivate cannabis in private and for personal consumption** only.
- The judgement makes it clear that 'in private' is not confined to one's "home or private dwelling".

How much is too much?

- Judge left it up to Parliament to decide how much a person may use, possess or cultivate in order for it to amount to "personal use".
- Police officer will have to consider all circumstances to assess whether it is for someone's personal use or not.
- If the police officer, on reasonable grounds, suspects that the person concerned is in possession of that cannabis for dealing and not for personal consumption, the officer may arrest the person, but a court will ultimately decide whether the person was in possession of cannabis with the intent to deal, or for their own personal consumption.

World View



Description English: Map showing legal status of cannabis across the world.

	Legal
	Illegal but decriminalized
	Illegal but often unenforced
	Illegal
	No information

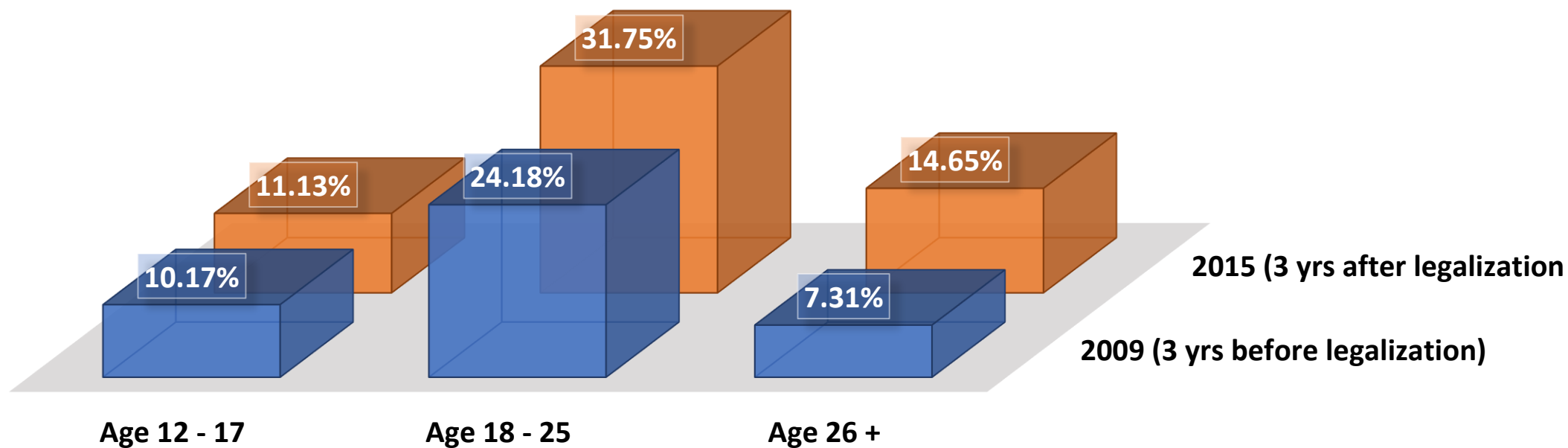
Medicinal and Recreational Legalization

- Canada
- Georgia
- US - Colorado, Washington, California
- Uruguay

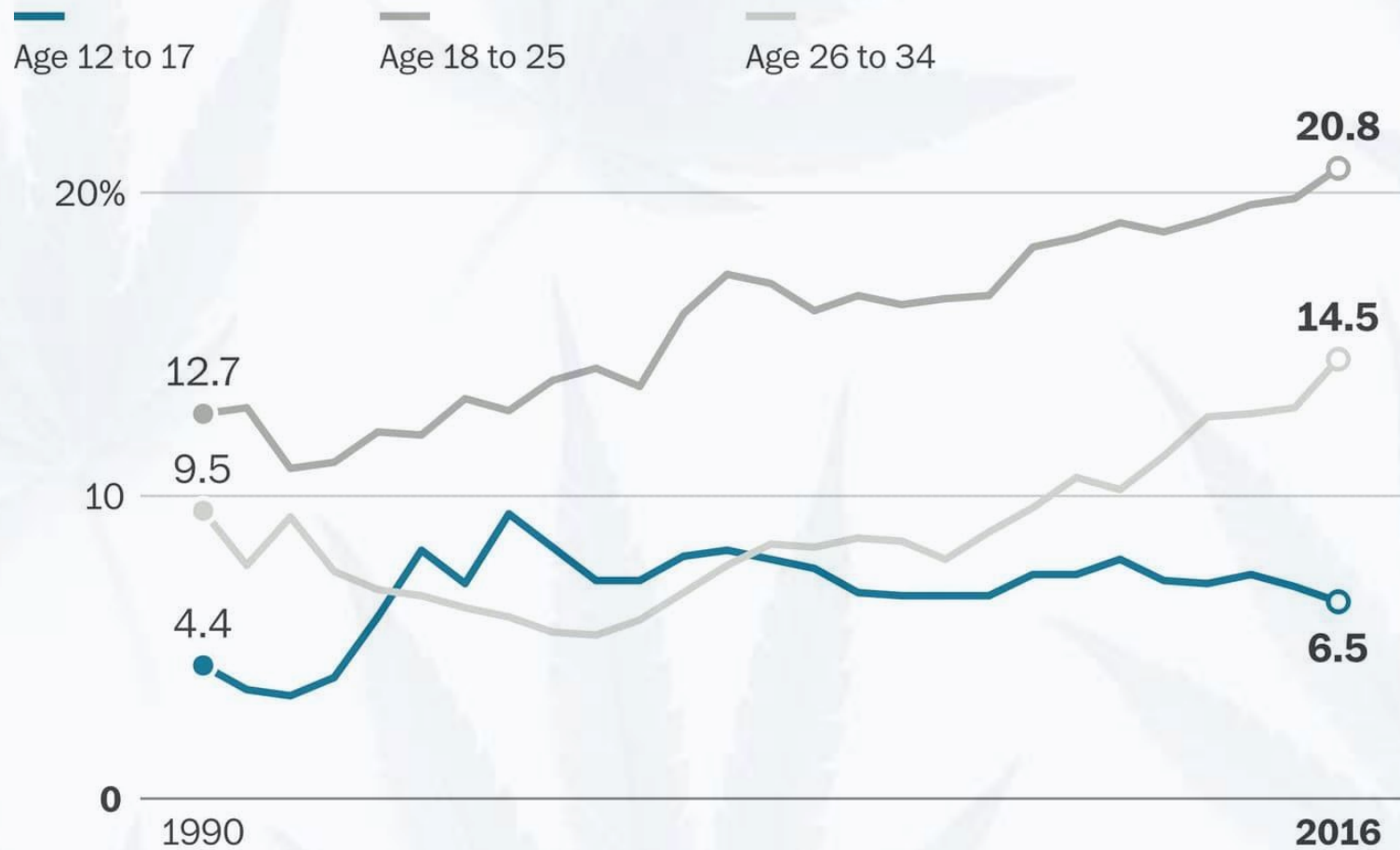
Does cannabis legalization lead to increased use? Varying opinions:

- Statistics support this conclusion
- Various arguments against conclusion
 - policy changes appear to have occurred in response to changing attitudes
 - less likely to admit to cannabis use because of its criminalization
- Research Report by Society for the Study of Addiction: *"The steep rise in marijuana use in the United States since 2005 occurred across the population and is attributable to general period effects not specifically linked to the liberalization of marijuana policies in some states.."*
<https://onlinelibrary.wiley.com/doi/full/10.1111/add.14031>
- Portugal decriminalized all drugs in 2001 - prevalence rates of marijuana use decreased from 26% in 2001 to 19% in 2006. Drug-induced death rate has plummeted to five times lower than the E.U. average and stands at one-fiftieth of the United States'.
- Federal data show that adult marijuana use, on the other hand, is rising. Last year 20.8 percent of Americans between the ages of 18 and 25 used marijuana at least monthly, the highest number since 1985. Among adults ages 26 to 34, 14.5 percent used marijuana monthly in 2016, also the most since 1985. See Graph.
<https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.htm#summary>

■ 2009 (3 yrs before legalization) ■ 2015 (3 yrs after legalization)



Rates of past-month marijuana use, 1990 to 2016



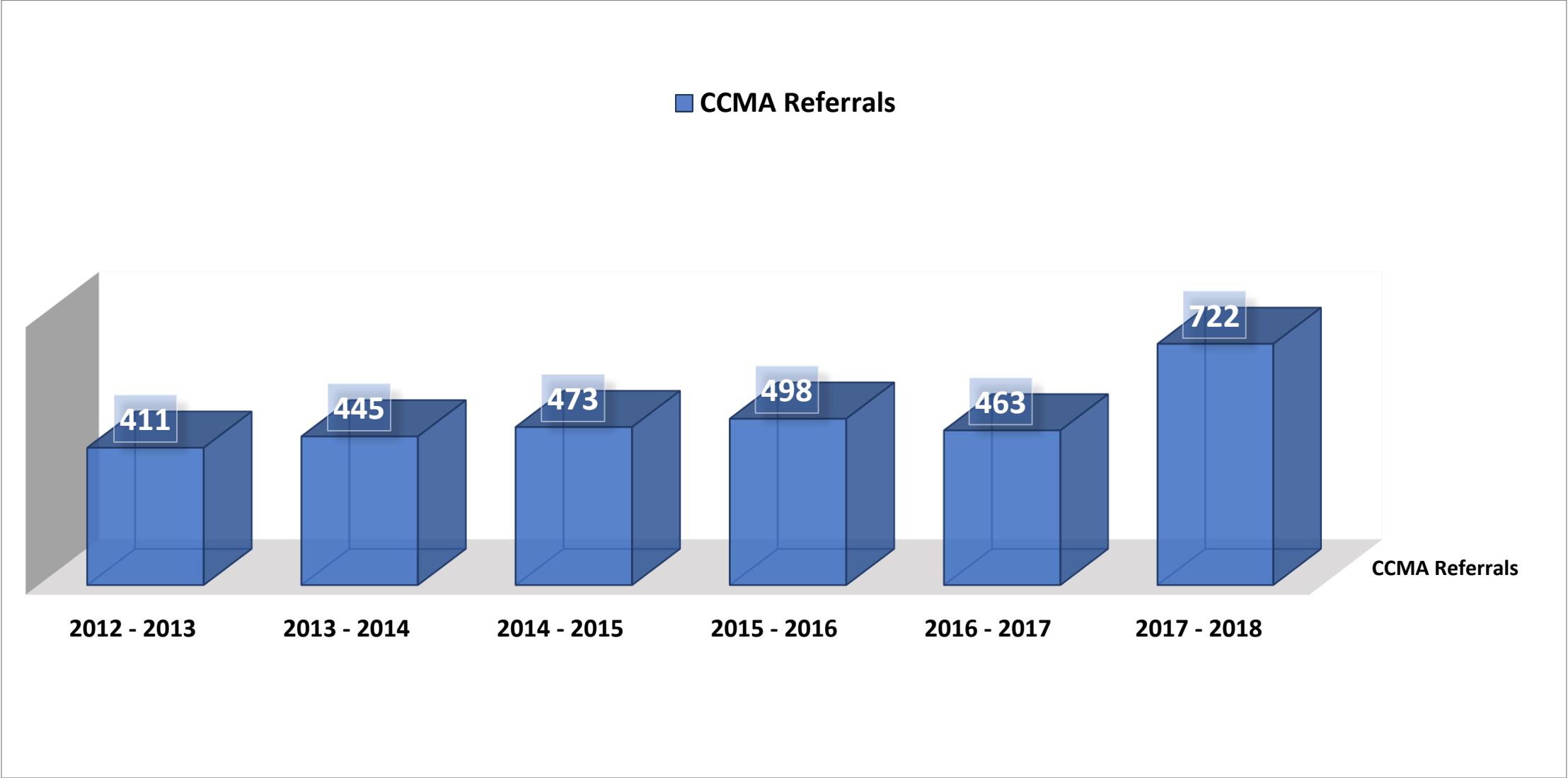
Source: National Survey on Drug Use and Health

<https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.htm#summary>

SOUTH AFRICAN STATISTICS ON DRUG USE:

- “consumption of substances in South Africa is **twice the world norm**; 15% of South Africa’s population has a substance-related problem; United Nations World Drug Report in 2009 (Anon,2009:1)
<http://www.scielo.org.za/pdf/sw/v50n1/05.pdf>
- According to Hitzeroth and Kramer (2010:39), a study among mine workers in South Africa revealed cannabis use of 9.1%. <http://www.scielo.org.za/pdf/sw/v50n1/05.pdf>
- Sectors such as public transport, the construction and engineering industry, the security industry and financial institutions are considered especially vulnerable to the impact of substance abuse.
<http://www.scielo.org.za/pdf/sw/v50n1/05.pdf>
- Internal data compiled from drug screening results over a 12-month period (2016) indicate that cannabis remains the drug of choice amongst workers and the general public with 22% non-negative results on the screening test (Occupational Health Southern Africa, Volume 23 Number 4, Jul / Aug 2017, p. 44)
- The largest producer is South Africa with about 2 500 metric tons of the total of 8 900 metric tons produced, i.e. 28% of the African production and **7% of the world production**. National Drug Master Plan 2013 - 2017

CCMA Referrals Involving Drug and Alcohol Abuse

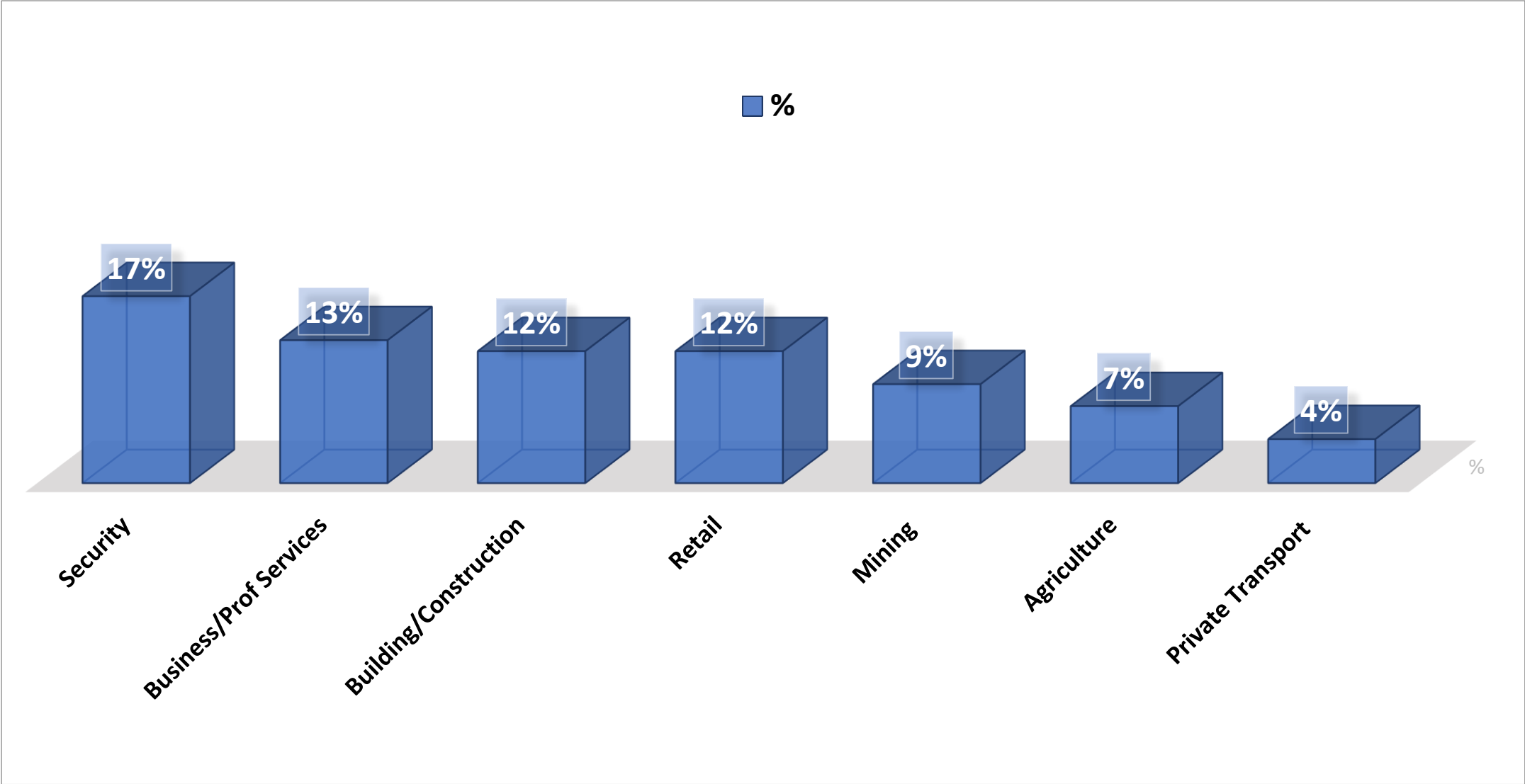


Statistics derived from the CCMA 2018

Average referrals per year: 165 000

Sample represents: less than 0.5% of total referrals

CCMA referrals by sector involving drug and alcohol abuse

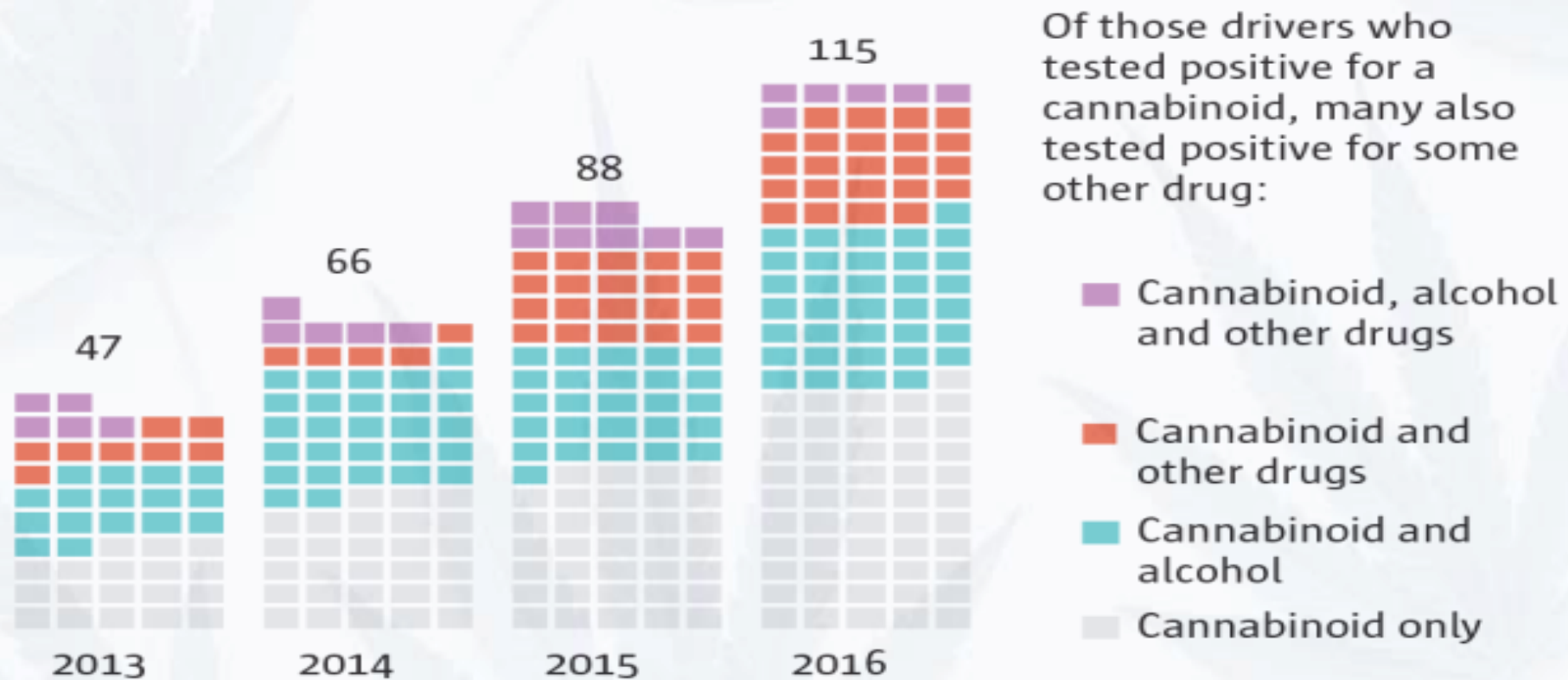


INTERNATIONAL STATISTICS ON THE EFFECTS OF CANNABIS USE:

- Surveys that established recent use of cannabis by directly measuring THC in blood showed that THC positives, particularly at higher doses, are about three to seven times more likely to be responsible for their crash as compared to drivers that had not used drugs or alcohol. (Experimental Psychopharmacology Unit, Department of Neurocognition, Faculty of Psychology, Maastricht University, The Netherlands)
<https://www.ncbi.nlm.nih.gov/pubmed/14725950>
- The degree of performance impairment observed in experimental studies after doses up to 300 microg/kg THC were equivalent to the impairing effect of an alcohol dose producing a blood alcohol concentration (BAC) ≥ 0.05 g/dl, the legal limit for driving under the influence in most European countries.
<https://www.ncbi.nlm.nih.gov/pubmed/14725950>
- Results of this case-control analysis indicate that use of drugs, such as marijuana, narcotics, stimulants, and depressants, may more than double drivers' risk of being involved in fatal motor vehicle crashes, irrespective of age, sex, time of the day, and geographic region. <https://www.cuinjuryresearch.org/wp-content/uploads/2013/10/Li-et-al-AAP-2013.pdf>

Testing for cannabinoids

The number of drivers involved in fatal crashes who tested positive for marijuana use in Colorado rose from 47 in 2013 to 115 in 2016 – a 145 percent jump.



<https://www.denverpost.com/2017/08/25/colorado-marijuana-traffic-fatalities/>

LEGAL FRAMEWORK

LEGISLATION – REGULATIONS – DRUG AND ALCOHOL POLICY - CASE LAW – COMMON LAW

LEGISLATION AND REGULATION

- The **Constitution** of the RSA: no unfair discrimination directly or indirectly may be practiced on the grounds of disability, including substance abuse dependence;
- **Prevention of and Treatment for Substance Abuse Act (70 of 2008)**: acknowledges that substance abuse is a chronic and relapsing medical condition;
- **Occupational Health and Safety Act (85 of 1993)**: Sec 8 Employer must reasonably practicable provide safe working environment. Sec 9 Ensure others (non-employees) are safe. Sec 14 places duties on employees to maintain safety. Sec 38 – non compliance with 8, 9 and 14 offence; fine and/or imprisonment. Reg 2A General Safety Reg: an employer or a user, as the case may be, shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace

- Compensation for Occupational Injuries and Diseases Act (130 of 1993): Sec 22(3) employees may not claim compensation from their employers to cover workplace damages and accidents resulting from their own serious and willful misconduct because of substance intoxication.
- **Labour Relations Act (66 of 1995)**: Item 10 of Schedule 8 of the Labour Relations Act alcoholism and drug abuse are considered to be forms of incapacity and should therefore not exclusively dealt with in terms of the disciplinary code of the company. Sec 187(1)(f) dismissal is automatically unfair if .. reason for the dismissal is .. employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to... disability, religion, conscience, belief...
- **Employment Equity Act (55 of 1998)**: Sec 6 prohibits unfair discrimination against employees on the grounds of disability. Sec 7 testing is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.
- Machinery and Occupational Safety Act: Reg2A employer shall not permit any person who is or who appears to be under the influence of intoxicating liquor or drugs, to enter or remain at a workplace.

DRUG AND ALCOHOL POLICY

Usually one of two approaches:

- **Absolute Rule (Zero Tolerance)**

For example there may be a rule against consuming or possession of alcohol and drugs irrespective of reading on the test.

- **Relative Rule**

For example intoxication which impairs ability to perform work properly and safely, or being found with an alcohol reading above a prescribed level.

- **Combined approach**

For example, zero tolerance for safety critical positions and impairment test for other positions.

Ensure that your Code of Conduct is aligned with the Drug and Alcohol Policy and the Incapacity Policy

CASE LAW

Inconsistent application of zero tolerance

- *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry & others* (2012) 33 ILJ 2985 (LC) – breathalyzer, over the limit, zero tolerance policy, considering job responsibilities, impairment not proven, dismissal unfair. Taken on review – dismissal unfair.
- *Transnet Freight Rail v Transnet Bargaining Council & others* [2011] 6 BLLR 594 (LC) – safety critical position, breathalyzer, over the limit, zero tolerance, safety critical position, dismissal initially unfair by CCMA. Taken on review, dismissal fair. (Arbitrator blurred lines between incapacity and misconduct).
- *Goodyear SA (Pty) Ltd v CCMA & others* (2004) 1 BLLR 7 (LAC) – employee asked to come to work early, sleeping off effects of a party, breathalyzer, zero tolerance, dismissal unfair.

Evident from jurisprudence that a **zero tolerance policy cannot be applied the same across the border**. The key duties and responsibilities of the employee will also determine and contribute to the seriousness of the intoxication offence.

TESTING FOR CANNABIS

- **Observance test first:**

Checklist for assessing intoxication: Smell of cannabis; bloodshot eyes; incoherent/slurred speech; talkative; “Field sobriety tests” - **Horizontal Gaze Nystagmus Test, Walk and Turn Test, One Leg Stand Test, Romberg Test.**

Field Sobriety Tests:

(Statistically reliable indicators of impairment - California)

Horizontal Gaze Nystagmus Test

The horizontal gaze nystagmus test is usually administered by an individual moving an object, or their own finger, from side to side in front of a person’s face. The reason they do this is to try and detect an involuntary jerking of the eye associated with high levels of intoxication. A person’s eye will reportedly jerk naturally after being strained beyond a 45 degree angle, but if the eye begins to jerk at or before moving 45 degrees, reaction as evidence that the subject is under the influence.

(The National Highway Traffic and Safety Administration (NHTSA) estimates that these tests are 77% reliable.)

Walk and Turn Test

The walk and turn test splits the subjects attention between physical and mental tasks. Also referred to as the “walk the line test”. Watch if any of the following occur:

- Loss of balance
- Wrong number of steps
- Inability to stay on the line
- Breaks in walking
- Beginning before instructed

NHTSA estimates that this test is effective 68% of the time

One Leg Stand Test

Another divided attention test, during the “one leg stand” request subject to raise his or her foot, hold still, count, and look down. Watch for:

- Swaying
- Hopping
- Putting foot down

NHTSA estimates that this test is effective 65% of the time.

Romberg Test

Instructs the subject to tilt his or her head back slightly, close his or her eyes, and estimate 30 seconds. When he or she believes 30 seconds have passed, the subject is supposed to tilt his or her head forward, open his or her eyes, and say “stop.”

- **Oral Fluid Analysis or Urine Test second**
 - Tetrahydrocannabinol (**THC**) – the principal psychoactive constituent of cannabis
 - **Urinalysis** identifies carboxy-THC, the inactive metabolite.
 - **Oral Fluid Analysis** detects active THC, not carboxy-THC (4 – 8 hrs)
 - In studies “performance impairment has repeatedly been shown to last for 3-4 hours after smoking THC” (Psychopharmacology (2012) 223:439-446).
 - A positive reading for THC is not an indication of impairment
- Medicinal Cannabis? Contains the cannabinoid CBD. Testing looks for THC.
- Confirmatory / Evidentiary Test ?

Saliva Test:

- Optimal for purposes of workplace testing - Detects use of THC in the preceding 4 – 8 hrs
- Urine and blood test detect THC metabolites (test dependent) which could be from use as far back as 2 or more weeks.



Oratect tests saliva for 5 or 6 drugs in minutes, in a format that is portable, non-invasive and easy to use.

<http://www.alcosafe.co.za/Products/Drug-Testing-Saliva/Oratect-Sticks>

How long will Cannabis stay in your system?

Saliva Tests:



Urine Tests:

One Time User



Moderate User



Frequent User



Heavy User



POSSESSION OF CANNABIS

- Prince Judgement clear - use, possess and cultivate cannabis **in private and for personal consumption only.**
- Definition on “in private” not entirely clear. “In private” is however not confined to where you live.
- It can be argued that workplaces generally have other employees (some of whom may be non-consenting employees), workplaces should be seen as public spaces in this context.
- Provided alcohol and drug policy state possession is not allowed – an investigation into why the employee has it is necessary.
 - Could be using at work;
 - Could be selling.

INCAPACITY OR MISCONDUCT

- The **correct distinction** between misconduct and incapacity is essential in determining the appropriate employer response to a case of intoxication.
- **Item 10 Schedule 8, Code of Good Practice, Dismissal**; the employer is **obliged** to take reasonable steps to ascertain whether or not the employee is dependent on substances:
 - employee must co-operate in this connection.
 - denial of alcohol dependency will move the offence into the misconduct arena (*Spoornet (Ermelo) v SARHWU obo Nkosi [1998] 1 BALR 108 (IMSSA)*);
 - a claim of dependency must be substantiated by the employee on medical analysis.
- *Transnet Freight Rail v Transnet Bargaining Council & others [2011] 6 BLLR 594 (LC)*
 - “employer is under an **obligation** to counsel and assist the employee in accessing treatment for their disease.”
 - Intoxication is a species of incapacity. Address through progressive disciplinary action;
 - Employee assistance program if alcohol or drug dependency coupled with suspended disciplinary sanction subject to the employee faithfully following the rehabilitation program;

Policy content very important

Black Mountain v CCMA & others [2005] 1 BLLR 1 (LC)

Slight deviation allowed.

Policy required a referral to treatment where alcohol and drug use are involved irrespective of the seriousness of the misconduct. Employee caused truck accident due to intoxication. Was dismissed without being referred to treatment program. Dismissal unfair. Labour Court Review, dismissal unfair.

Superstone Mining (Pty) Ltd v CCMA & others (Unreported)

Zero tolerance policy. Employee positive for alcohol. At disciplinary hearing employee alleged dependence. Dismissed. CCMA found unfair dismissal. Labour Court found fair dismissal. Policy requires an employee to inform of dependency issues. No evidence provided at disciplinary that he was dependent either.

Your policy should:

- Require employees to disclose if they have, or suspect that they might have, an addiction or dependency;
- If employee asserts to have an addiction or dependency, request medical to substantiate the addiction

RECOMMENDATIONS

Your alcohol and drug policy should address:

- Implementation of the policy ie management, workers, union members etc
- Application of legislation and statutory authorization in relevant Acts
- Information, education and training of personnel on all aspects of substance use, abuse and dependency
- Management of suspected intoxication and testing protocols
- Disciplinary procedures for dealing with substance-abuse problems
- Employee assistance programmes

Training and awareness:

- Information, education and training of personnel on all aspects of substance use, abuse and dependency

Employee Assistance Program:

- Many service providers

Engagement with Unions

- Pikitup (SOC) Ltd vs SAMWU obo members (LAC) <http://www.justice.gov.za/labourcourt/jdgm-lbac/2013lbac/ja82-13.pdf>
 - Health and safety is a matter of mutual interest.
 - Constitutional rights affected: human dignity, privacy, freedom of movement and bodily integrity.
 - Significant changes could result in strike action. Agreement and consultation on the implementation of a drug and alcohol policy is essential.

Disclaimer:

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