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Cannabis and Workplace Drug & Alcohol Testing — Why a Clear Policy Matters

Dr Tim Laurens

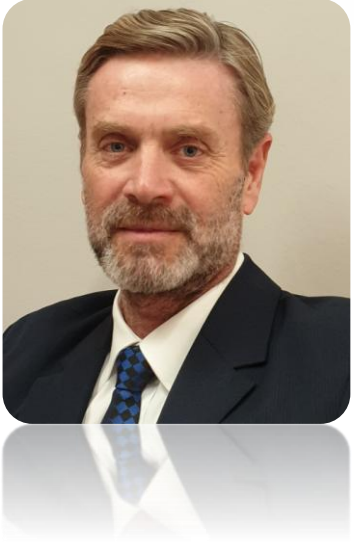
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Legal and illegal Drug use and Ensuring Workplace Sobriety in a Legal Landscape.



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Cannabis use and possession legal



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SAMJ

IN PRACTICE

MEDICINE AND THE LAW

Cannabis legalisation and testing for cannabis use in safety- and risk-sensitive environments

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DRUGS & ALCOHOL TESTING – WHY?

We want everybody to be productive and to go home safe and well every day.

“Bonus et diligens paterfamilias”

Good and diligent father of the family

“Reasonable” father of the family

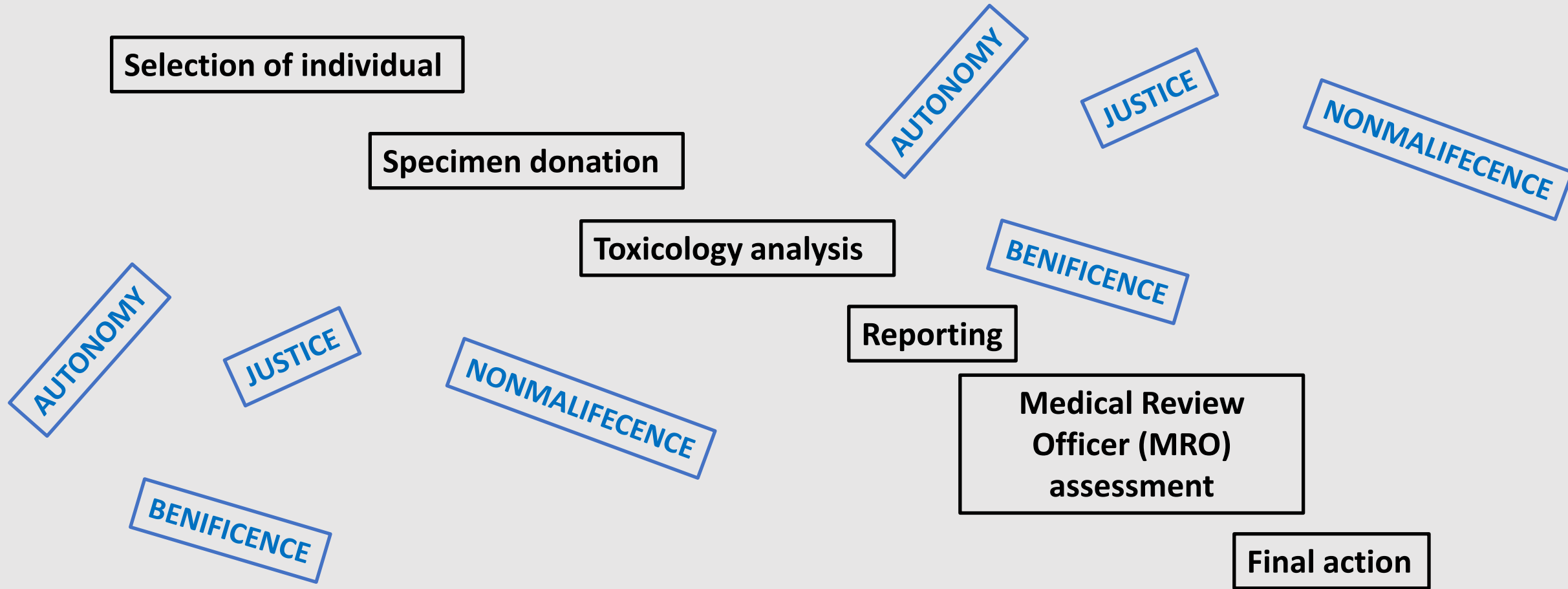
DRUG & ALCOHOL TESTING – WHY?

1. The obligation of the employer/employee to **ensure a safe and healthy workplace.**
2. To minimise risk
3. To detect “Impairment”
4. To act as a deterrent
5. Detect inappropriate use – **irresponsible & negligent** use

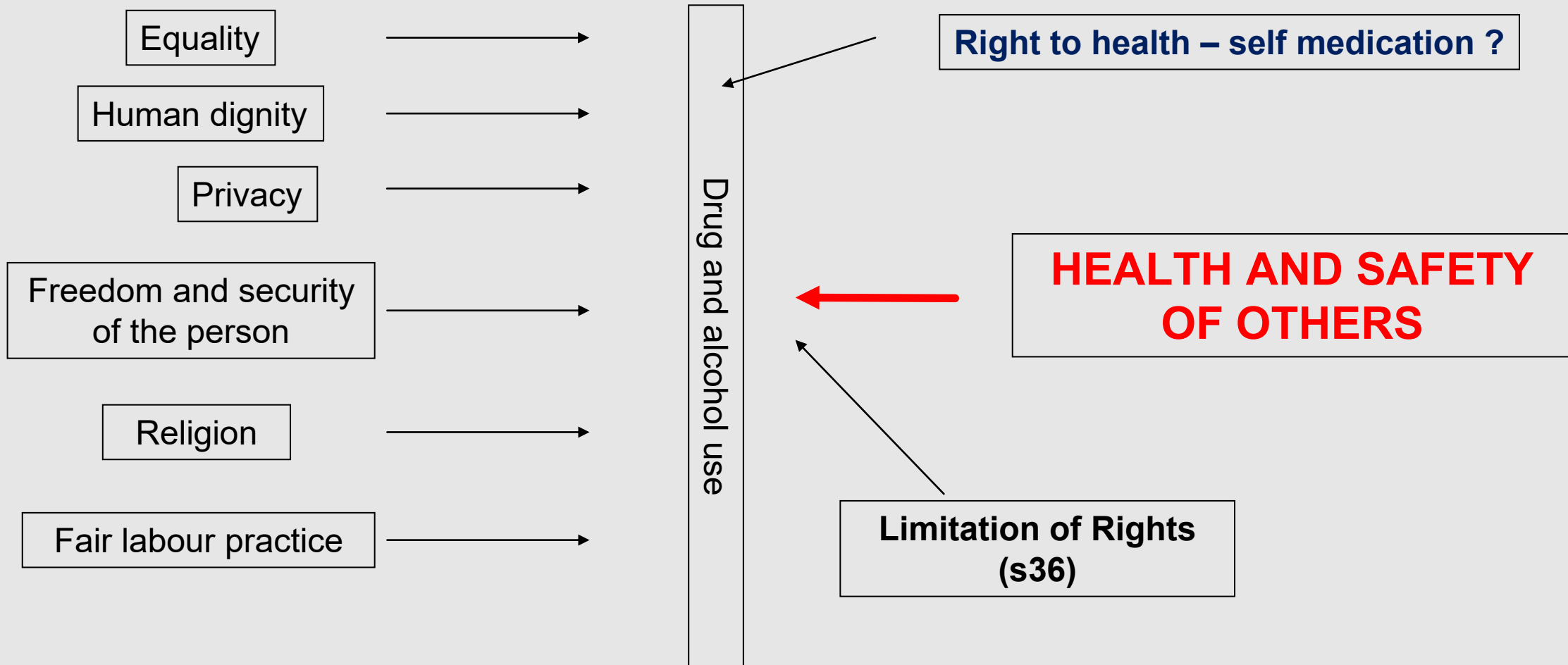
How to address all the concerns ?



Theories of Ethics - PRINCIPALISM



CONSTITUTION OF SOUTH AFRICA, 1996



Statutes / Acts

- Employment Equity Act 55 of 1998 (EEA)
[No discrimination, inherent requirements of the job]
- Labour Relations Act 66 of 1995 (LRA)
[Procedural fairness: Employer must generate rules of conduct: POLICY]
- Occupational Health and Safety Act 85 of 1993 (OHSA)
[NO INTOXICATION & UNDER THE INFLUENCE]
- Mine Health and Safety Act 29 of 1996 (MHSA)
[NO INTOXICATION & UNDER THE INFLUENCE]
- Protection of Personal Information Act 4 of 2013 (POPI)
(Consent and Confidentiality)
- Cannabis for Private Purposes Act 7 of 2024
[May use cannabis in private]

Mine Health and Safety Regulations

- When is an employee **intoxicated** enough to endanger themselves and others by not performing their job safely?
- Visibly intoxicated or impaired ???
they may already be far beyond the point where they can function safely
- a blood, breath, urine, or oral fluid test result - it is **not straightforward** to assess an individual's level of intoxication, partly because different people metabolise and react to intoxicants in various ways.

Common law of Contract

Employment contract:

- employees are required to perform their duties diligently and effectively, and failure to do so constitutes a breach
- If an employee is found to be impaired or intoxicated, they breach the contract, which justifies disciplinary action for failing to meet performance expectations, such as arriving fit for work.
- In addition, employers also have a common law duty to ensure workplace safety

The main aim of the OHSA/MHSA is health and safety; it is not concerned with protecting an organisation's other interests, such as property, liabilities, finances, reputation and public image.

OHSA

General Safety Regulations OHSA 'Section 2A:

Intoxication:

(1) ... an employer or user, ..., shall not permit any person *who is or appears to be **under the influence of intoxicating liquor** or drugs*, to enter or remain at a workplace;

(2) ... no person at a workplace shall be under the influence of or have in his possession or partake of or offer any other person **intoxicating** liquor or drugs';

(3)...**where a person is taking medicines, only allow such person to perform duties at the workplace if the side effects ...do not constitute a threat to the health and safety ...at such workplace**

COMMON LAW

- **Vicarious liability** – “no-fault” liability of the employer
- **Law of delict** – Wrongful act causing harm to another person
- **Law of contract**
 - Employer has the right to maintain discipline
 - Employee must act in good faith and comply with safety regulations
 - Wilful or negligent breach of contract regarded as misconduct

Common law of contract

Cut-off concentrations, as defined in the organisation's drug and alcohol testing policy, may then not be exceeded – **Employment contract**.

The cut-off (per se) levels must be determined rationally for each specific substance in each biological matrix.

Reasoning for “dual approach”

Practicability and eliminate subjectivity

OBSERVATIONAL DETECTION / Sobriety testing

“Under the Influence”

Reddened or Glossy Eyes

Rosy Complexion

Scent: (**presence of substance in the body**)

Compromised Movement Control:

Unclear Speech:

Delayed Reactions:

OR

“Per Se”

2 ng THC per ml blood

The concentration level must be **rational...**
for alcohol and other drugs also

Misconduct – Intoxication - Under the influence - Impaired



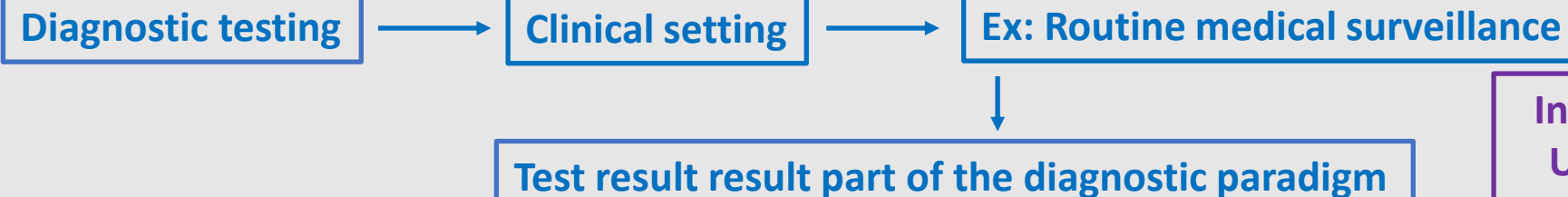
Cut-off
concentration
levels

Analytical
detection

Drugs and alcohol testing

Policy

Rules



Intoxicated,
Under the
influence

Observational/clinic
al detection

Sobriety
testing

Misconduct – Intoxication - Under the influence ?

Compliance-threshold testing

Safety-sensitive environments

Ex: Random testing

Test result prime information

Cut-off
concentration
levels

Analytical
detection

ZERO-TOLLERANCE vs ZERO CONCENTRATION

POLICY (1)

Mission statement

Off-site consumption and Boardroom

Formally accepted

Based on ethical principles

**Reasonable accommodation
of dependency**

“RULE VIOLATIONS”

Goals of the programme

“REFUSAL-TO-TEST”

To whom does the policy apply?

Employees, prospective employees, contractors, visitors, temp staff, agency staff

POLICY (2)

Testing strategy Observation Screening and
CONFIRMATION

Sequence of events

Role of professionals

WHEN & HOW will tests be performed

Screening and **CONFIRMATION** cut-off levels

Specimen collection

Biological matrices

Stand-down-protocol

Prohibited substance list

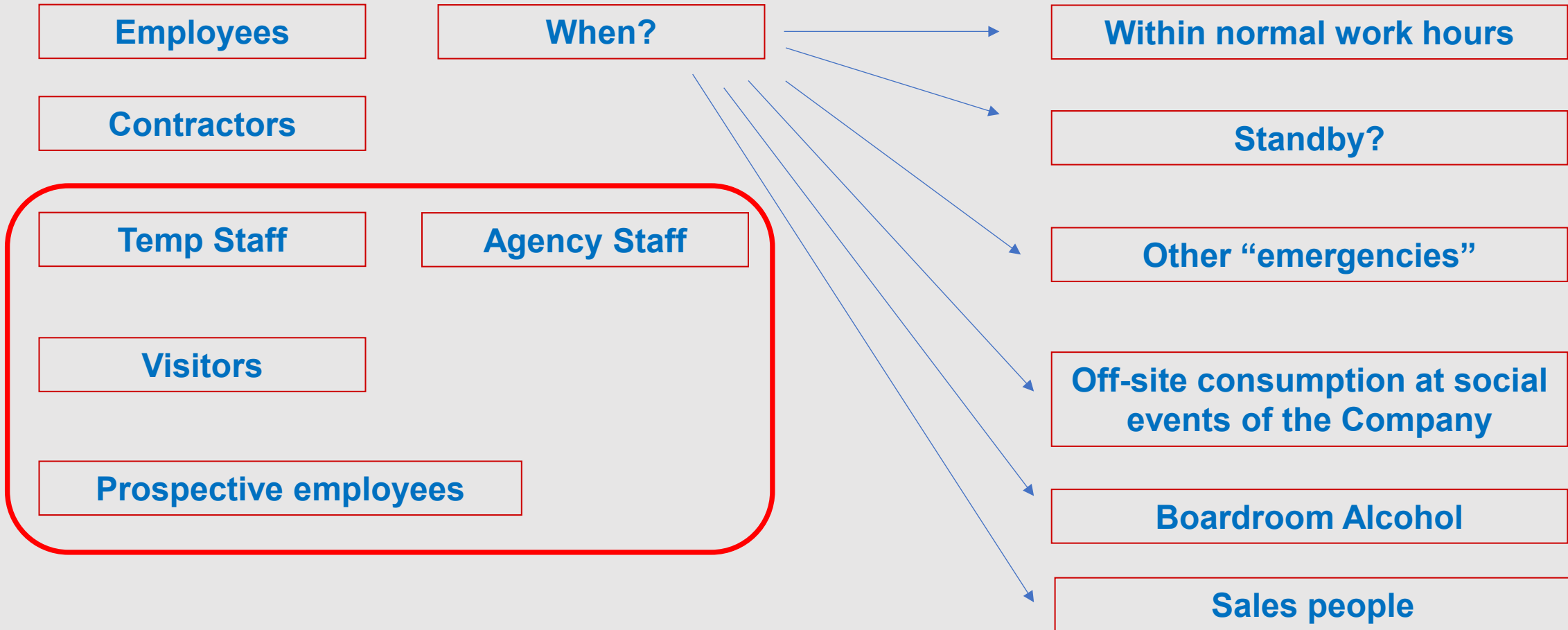
Prescription medication

Technical standards for dug and alcohol testing

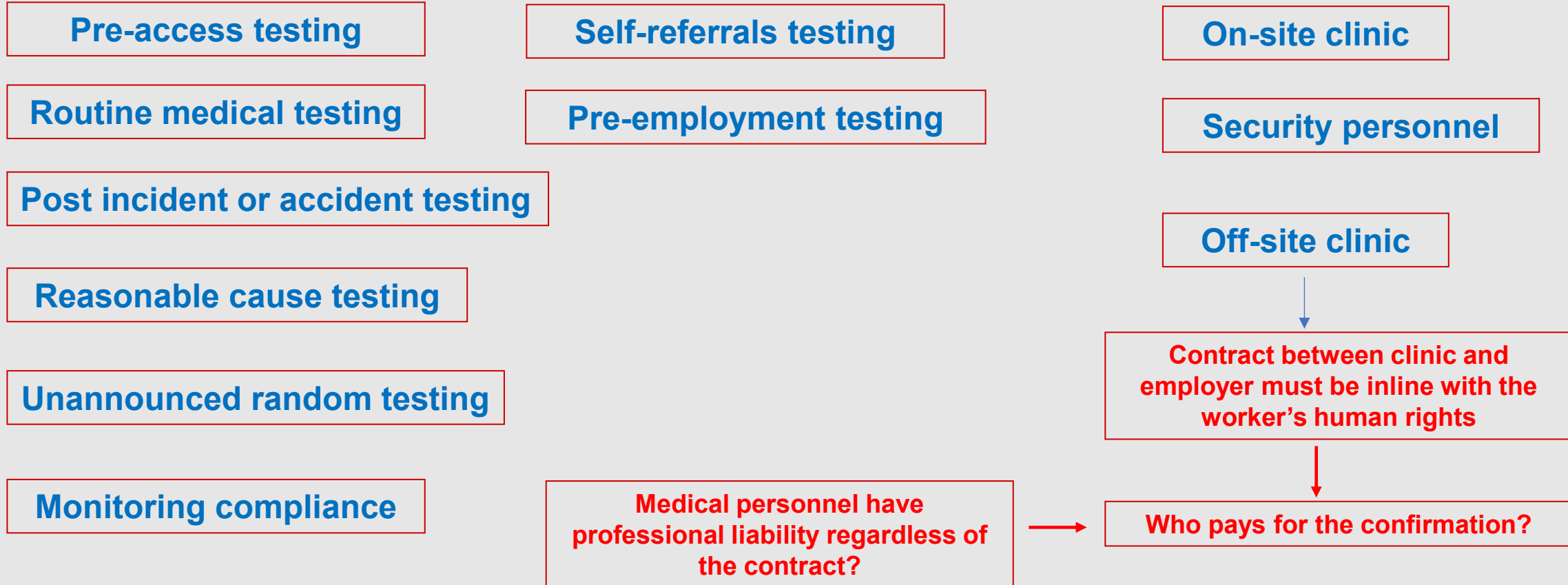
Disciplinary Action

Progressive discipline

To whom does the policy apply?



When will testing be performed and by who



Rule violations

1. Presence of a prohibited substance, or its metabolites, or marker in a specimen – Above a threshold concentration

2. Presence of substances schedule 7 and 8 (unless it is a threshold substance)

3. Non-declaration of prescription medication in schedules 5 and 6

4. SELF REFERRALS accepted only to a certain extent

5. Evading or failing to submit to specimen collection

6. Acknowledgement of drugs and alcohol use (must be confirmed as well)

7. Tampering

8. Complicity

9. The use of alcohol or substances/medication after an incident

10. “REFUSAL-TO-TEST”

Refusal to test

1. Refuse to be tested

2. Not appearing within 30 min at collection site

3. Not completing the collection

4. Refuse an observed specimen

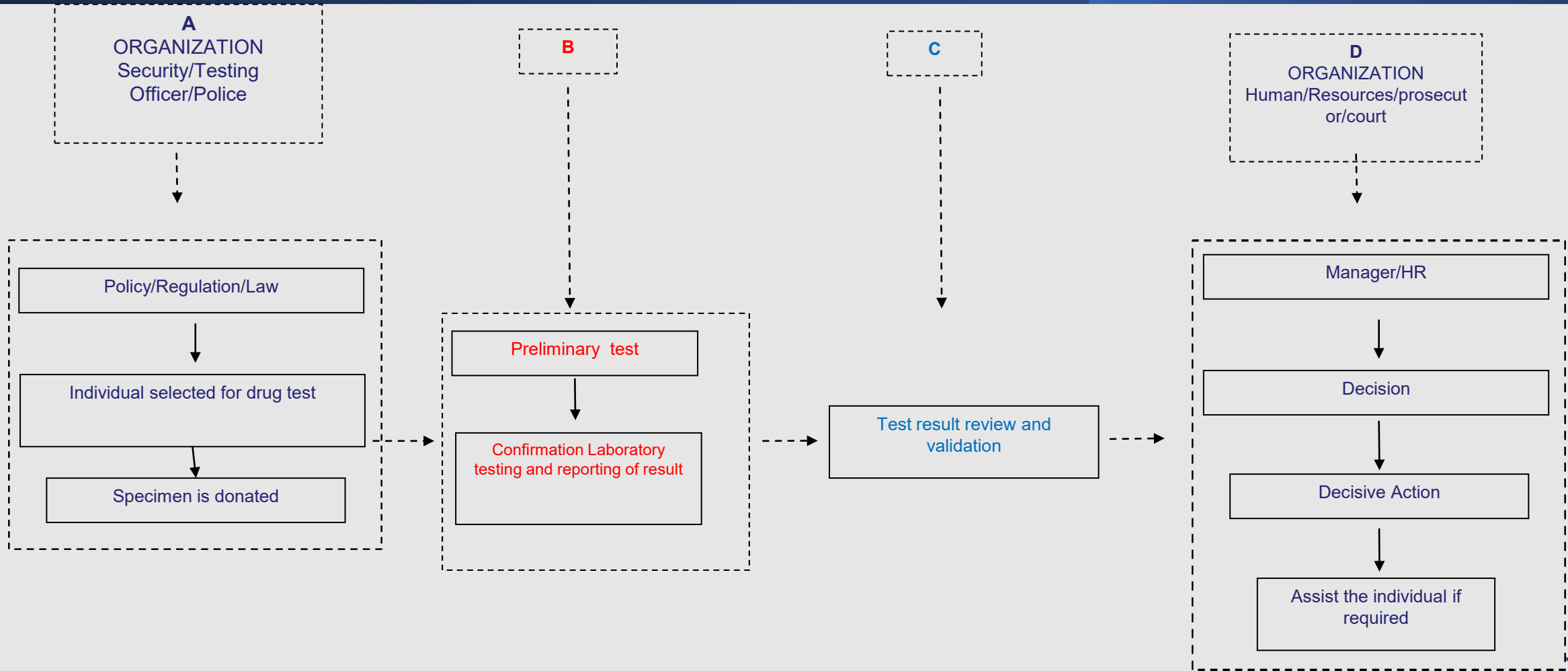
5. Not cooperating with the collection officer

6. Not providing a second specimen on request

7. Adulterated specimen can be regarded as a refusal to test

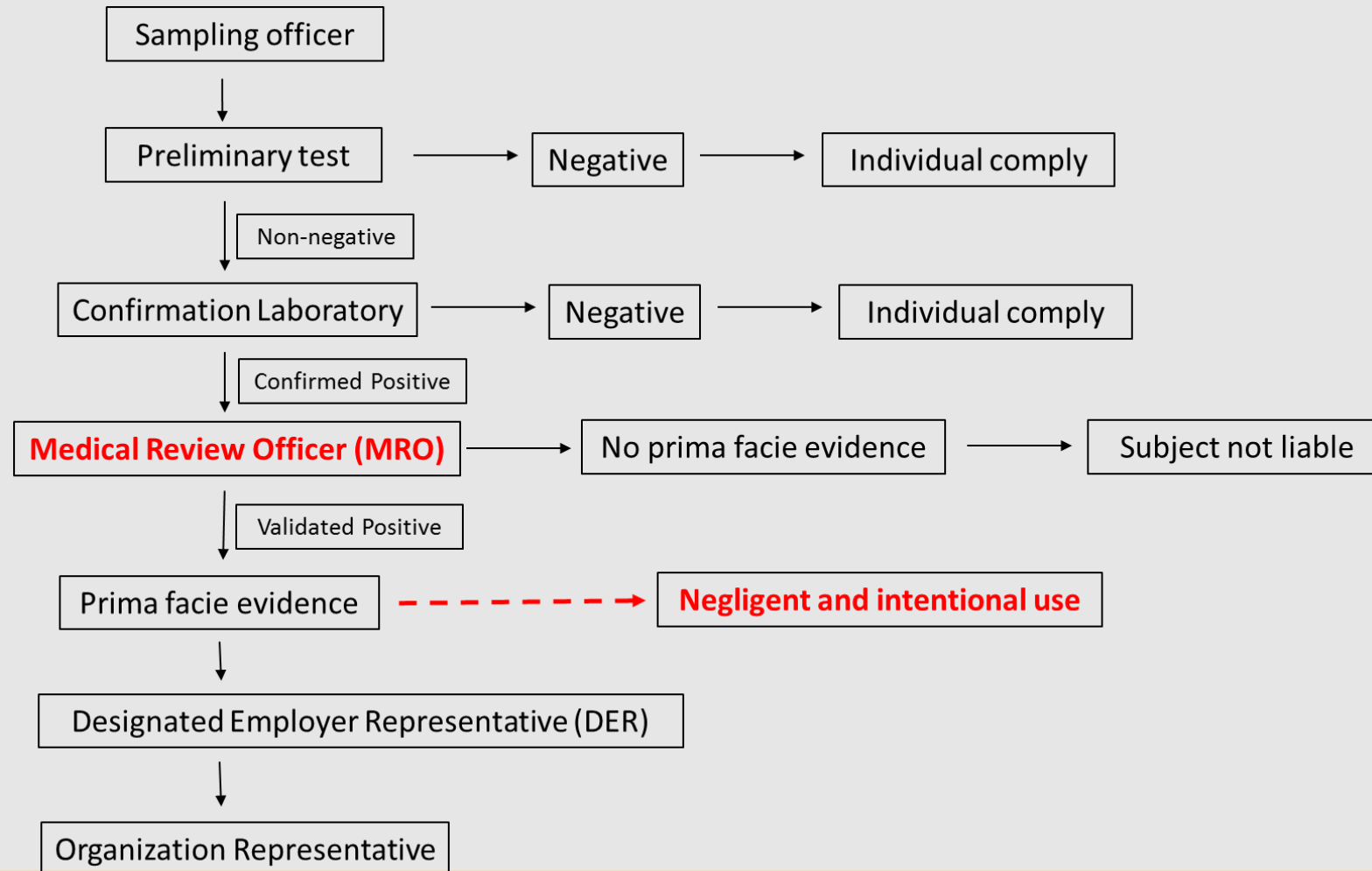
**Consequences of refusal
to test**

PROHIBITED SUBSTANCE REGULATION



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PROHIBITED SUBSTANCE REGULATION



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ZERO TOLLERANCE

“ZERO TOLERANCE” does not mean:

- ▶ 0.00 g / 100 mL of blood
- ▶ No alcohol or drug is present in the specimen/body
- ▶ The value of “zero” depends on the detection technique
- ▶ A sensitive technique will have a “low zero” and a less sensitive technique will have a “high zero”
- ▶ Test methods, protocols and testing devices must be detailed in the policy.

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MEANING OF ZERO TOLERANCE

The threshold cut-off concentration levels as specified in the policy must not be exceeded.

Negligent and intentional prohibited substance use will not be tolerated!

Inappropriate use

Case law: Barloworld case

Judgement:

- Enever's dismissal was found **automatically unfair** due to the lack of evidence of impairment at work – Unfair discrimination
- Barloworld overreached into Enever's private behaviour without clear safety risks and evidence of impairment and/or danger to Barloworld (Invasion of privacy)
- Enever was awarded compensation equivalent to 24 months' remuneration for her unfair dismissal

Reference: Enever v Barloworld Equipment South Africa, a division of Barloworld South Africa (Pty) Ltd [2024] 6 BLLR 562 (LAC).

WHICH MATRIX TO CHOOSE??



BLOOD



SWEAT



URINE



HAIR

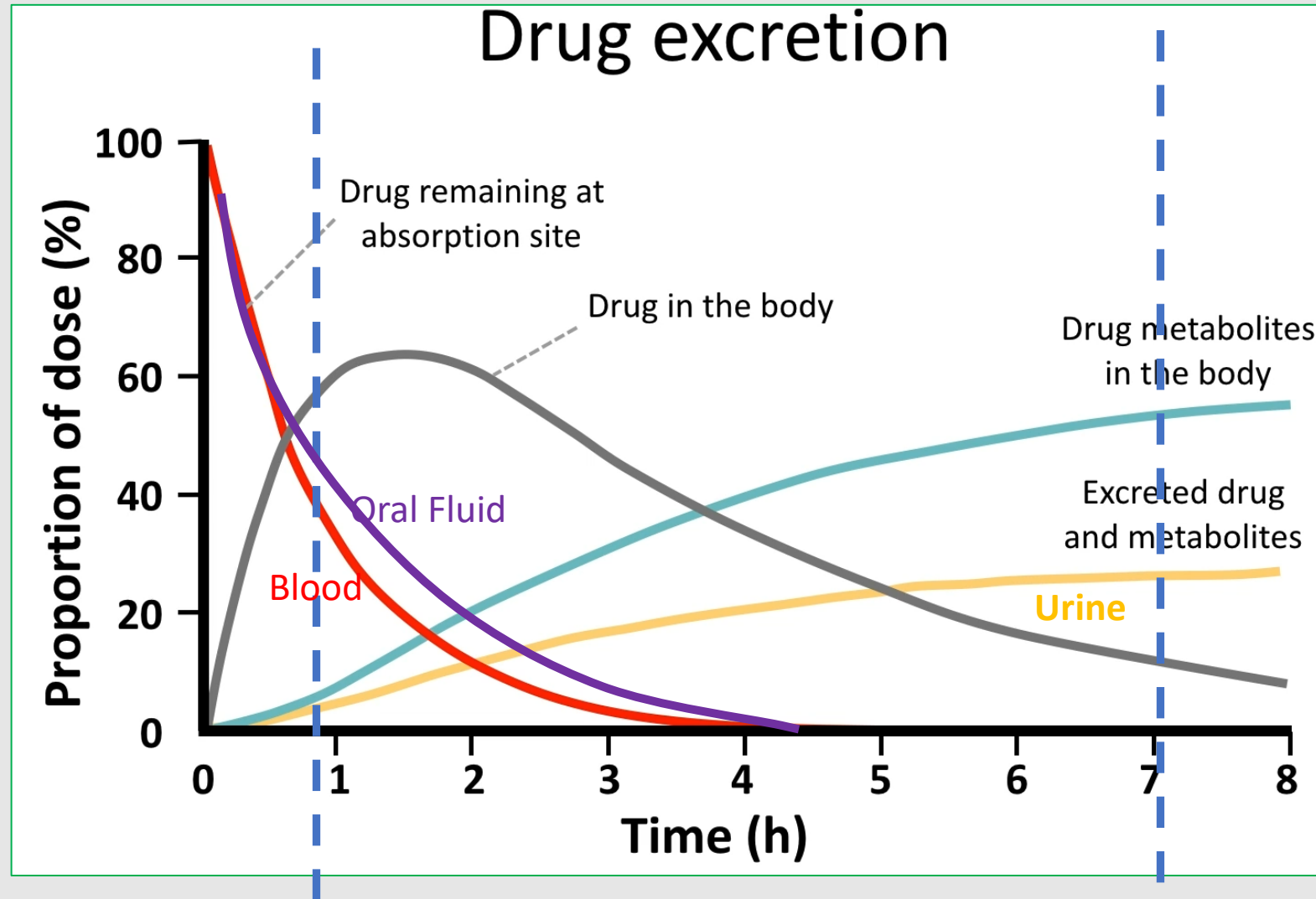


ORAL FLUID

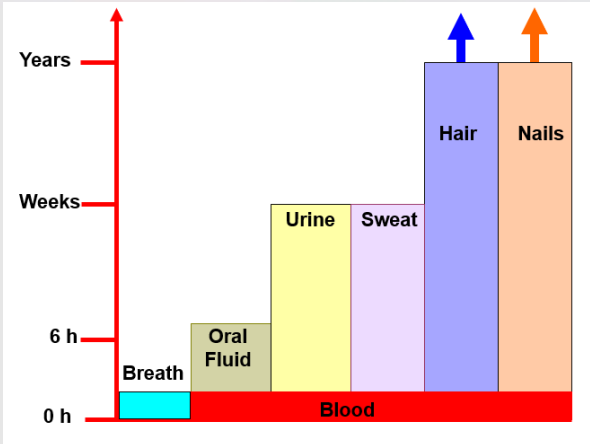


BREATH

PHARMACOKINETICS - EXCRETION



ORAL FLUID TEST – HOW DOES IT WORK?



- Oral fluid (saliva) is excreted primarily by three glands: the parotid, submaxillary and sublingual.
- Excretion of saliva varies in flow rate – zero to several ml/min
- Dry mouth syndrome (caused by anxiety, lack of hydration) is relatively common
- Sample collection – spitting or absorbent pad
- Stimulated collection (citric acid) will change the pH and concentration of the drug
- Parent drug

Case law: Barloworld case

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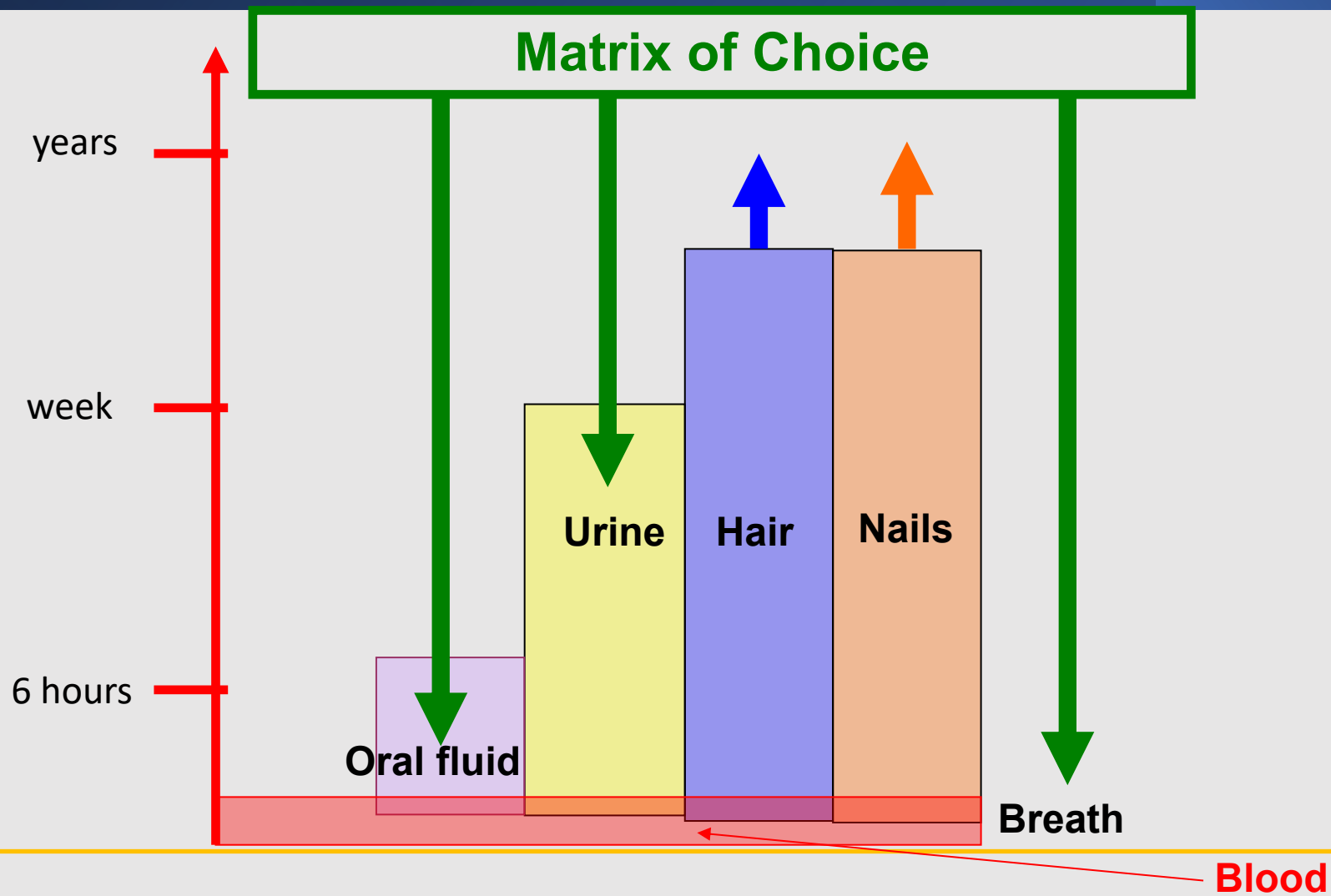
Reference: Enever v Barloworld Equipment South Africa, a division of Barloworld South Africa (Pty) Ltd [2024] 6 BLLR 562 (LAC).

Case law: Barloworld case

- The employer must motivate why the employee is tested for a **specific substance** in a **specific matrix** **rationally** so as not to infringe **unnecessarily** on the **right to privacy**.
- **Drug** – **Matrix** – **cutoff concentration limit** – **testing protocol/technology** – **Evidence required**
- The ZERO-TOLERANCE approach must be revised
- The worker was tested in urine → Company claimed she was intoxicated
- The judge **did not say testing is illegal**

Reference: Enever v Barloworld Equipment South Africa, a division of Barloworld South Africa (Pty) Ltd [2024] 6 BLLR 562 (LAC).

BLOOD, URINE OR ORAL FLUID



Which Matrix?

Pre-access testing

Self-referrals testing

Post incident or accident testing

Reasonable cause testing

Unannounced random testing

Routine medical testing

Monitoring compliance

Pre-employment testing

Current

Past

Time →

Blood

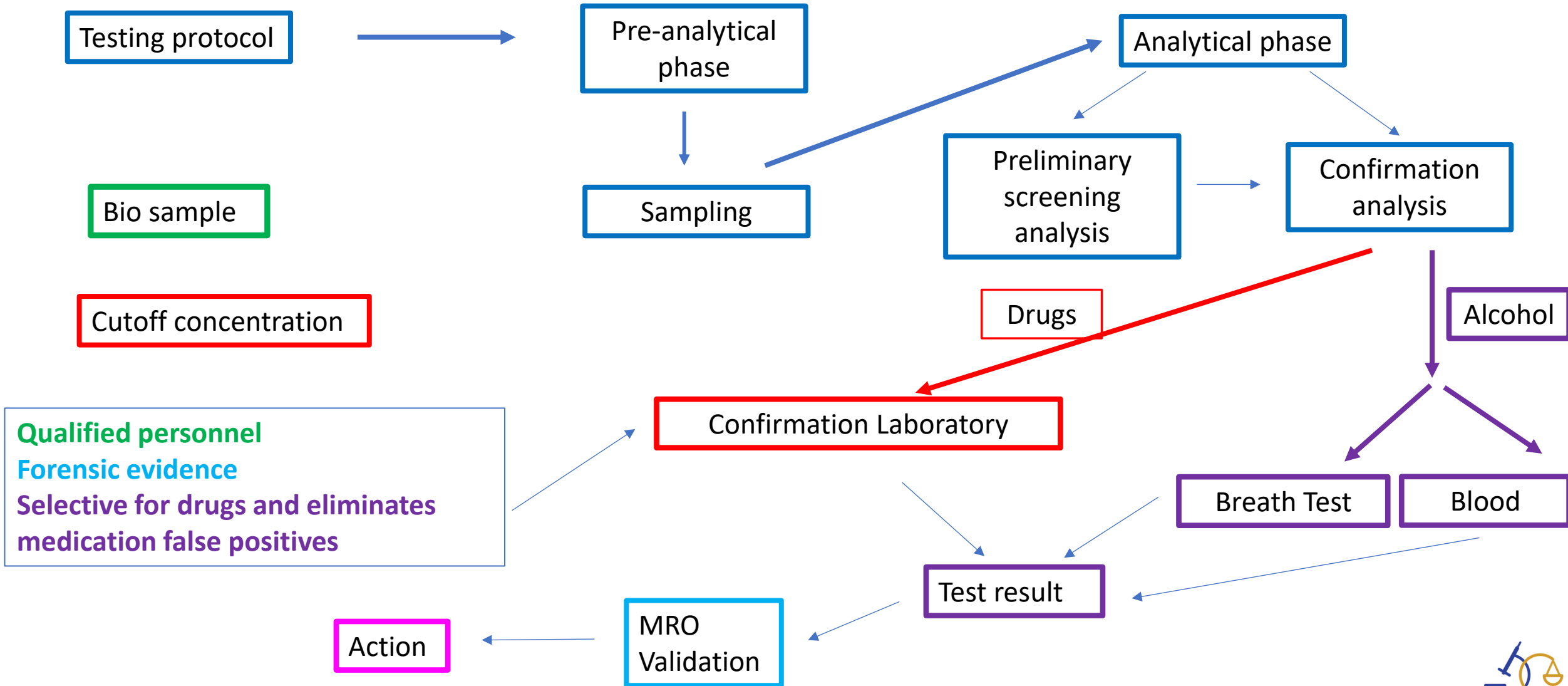
Oral fluid

Urine

Keratine (Hair, nails)

Breath

Example: Drug test



How do we exercise “zero-tolerance”

It depends on the QUESTION to be answered...

UNDER THE INFLUENCE / INTOXICATED



OVER THE CONCENTRATION CUT-OFF LIMIT (*per se*)

- Need to prove the presence of a substance in the body
- Match the substance with the behavioural or performance

- Acknowledgement of use or chemical test that can identify the substance and in a matrix that can prove recent use
- That the substance can still influence their abilities...
- Matrix choice is important.
- Clinical observations – Medically qualified person.
- Performance indicators – Lay person observation.

Drugs and Alcohol Testing Policy
THC-COOH = 15 ng/mL urine

Accurate confirmation test result
in urine oral fluid or blood
THC = 2 ng/mL blood

Qualified Toxicologists and
Scientists who can testify in
Courts

Question: Fit-for-service ??



Immunoassay preliminary screening



Opiates (Heroin, morphine, Codeine)

Cocaine – Benzoyl ecgonine

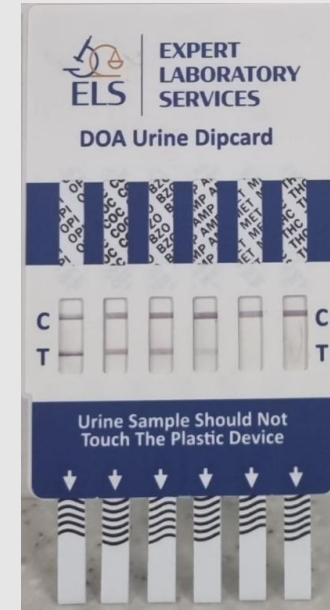
Benzodiazepines – Valium, etc



Cannabis - THC

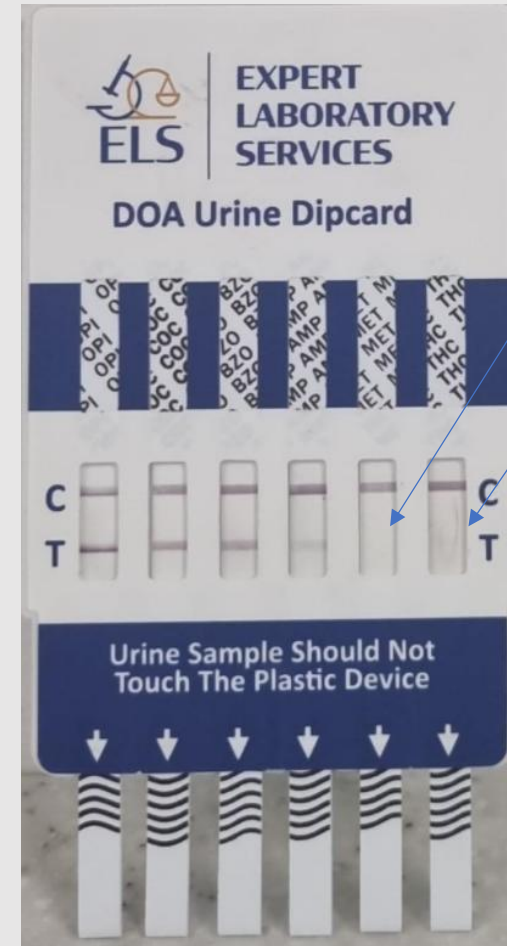
Amphetamines

Methamphetamine - TIK



Methaqualone - Mandrax

Immunoassay preliminary screening



ORAL FLUID SCREENING

Immunoassay preliminary test



Drug Test Analyzer

WDTP-80

Benefits

- ✓ Provide unambiguous judgment of the test results
- ✓ Digital record keeping for evidential use

Features

- Android 7.1
- Touch Screen
- 100,000 tests records storage
- Thermal Printer
- 2D Barcode Scanner
- Wifi, 4G, Bluetooth, NFC
- GPS
- Maximum 9 drugs detected in one cassette
- Saliva, Hair, Urine & Surface Residue Test



Testing strategy

Screening / preliminary test

- “On-site” testing provides results quickly
- The worker can be temporarily removed from a safety sensitive position...awaiting *confirmation*
- The confidentiality of the initial test results must be maintained !!!!

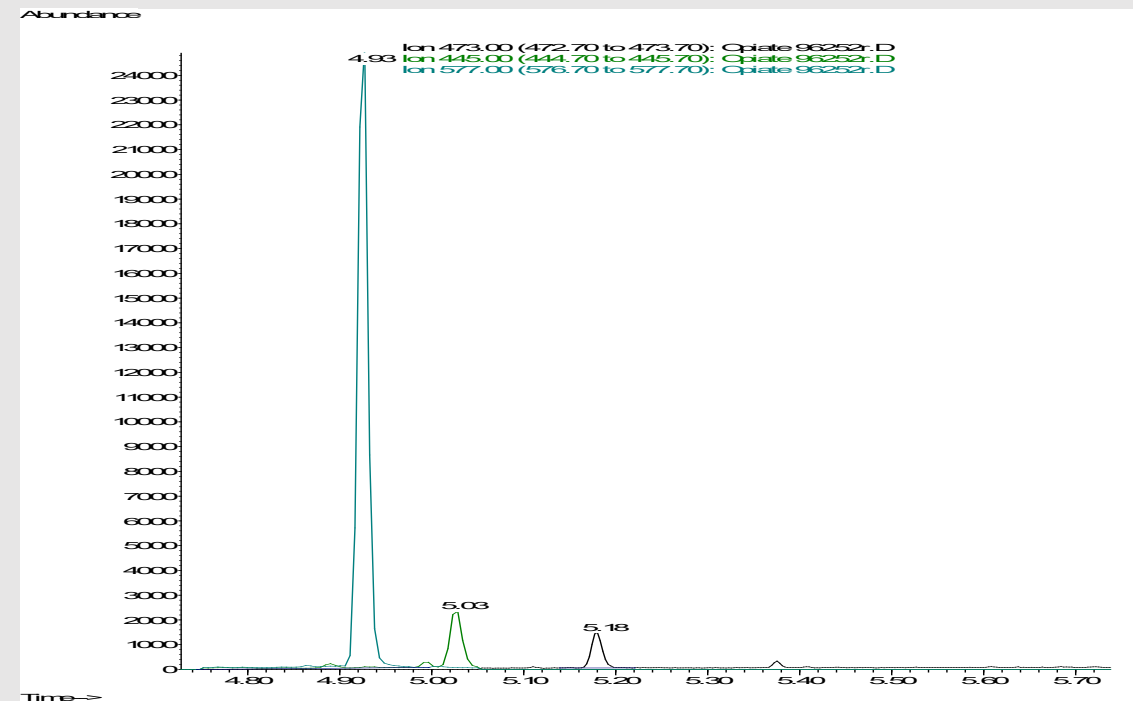


ALL “non-negative results”

Confirmation by GC-MS

- Specialized laboratory (GC-MS) by **EXPERT LAB SERVICES**
- Competent to provide evidence in a disciplinary hearing or a Court of Law

GC-MS Confirmation test



Sensitivity and Specificity ca 99,9%

SAMHSA PRELIMINARY CUT OFF CONCENTRATIONS

URINE

Confirmation drug or metabolite	Cut-off (ng/mL)
Cannabis metabolites	
<i>11-Nor-Δ^9-Carboxy-THC</i>	15
Opiate metabolites	
<i>Morphine (Total)</i>	2000
<i>Codeine (Total)</i>	2000
<i>Morphine (Free)¹</i>	100
<i>Codeine (Free)¹</i>	100
<i>6-Acetylmorphine (Free/Total)¹</i>	10
Cocaine metabolites	
<i>Benzoyllecgonine</i>	100
Amphetamines	
<i>Amphetamine</i>	250
<i>Methamphetamine²</i>	250
<i>MDMA</i>	250
<i>MDA</i>	250
<i>MDEA</i>	250
Phencyclidine	25

SALIVA

Parent drug	ng/mL
THC Parent drug	2
Cocaine	8
Opiates:	
• Morphine	40
• Codeine	40
• 6-Acetylmorphine	4
Phencyclidine	10
Amphetamines	
• Amphetamine	50
• Methamphetamine	50
• MDMA	50
• MDA	50
• MDEA	50



Agency	Purpose	Screening Threshold (ng/mL Oral fluid)	Confirmatory Threshold (ng/mL Oral fluid)
Australia	DUID	30 (DrugWipe™) 50 (RapiScan™)	2
Belgium	DUID	25	10
Canada			2
DRUID	DUID		1
France	DUID	15	
Talloires	DUID		2
AS4760	Workplace	25	10
EWDTs	Workplace	10	2
SAMHSA	Workplace	4	2

MEDICATION & DIET

Herbal

Positive opiate result?

Codeine? Morphine? Heroin? Poppyseed muffin?

Cannabis

Coca tea

Positive amphetamine/ecstasy result?

Flue medication?

Dietary supplements - Amphetamines

Company policy - retesting...continuous monitoring?



Way forward

Per Se Levels and Testing Protocols

Per Se Levels and Testing Protocols			
Job Category	Per Se Levels (THC Blood/OF)	Per Se Levels (THC-COOH Urine)	Testing Protocols
High-Risk Jobs (e.g., operating heavy machinery)	≤ 2 ng/mL	≤ 15 ng/mL	- Pre-employment testing - Random testing - Post-incident testing - Reasonable suspicion testing
Medium-Risk Jobs (e.g., handling large amounts of money)	$\leq y$ ng/mL	$\leq y'$ ng/mL	- Pre-employment testing - Reasonable suspicion testing - Post-incident testing - Random testing (with guidelines)
Low-Risk Jobs (e.g., administrative tasks)	$\leq z$ ng/mL	$\leq z'$ ng/mL	- Pre-employment testing (optional) - Post-incident testing - Reasonable suspicion testing

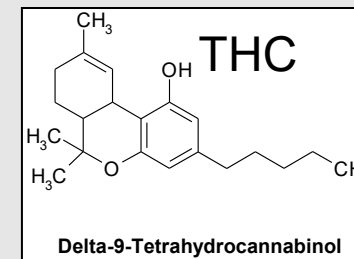
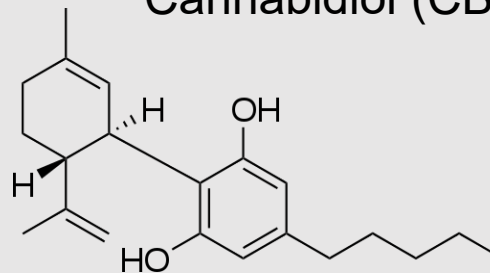
Key messages

- 1) **National Health and Safety Act** - Employers must prove that an individual was "under the influence" and unable to perform their duties safely when invoking the National Health and Safety Act for testing.
- 2) Employment contracts should specify threshold or **cutoff concentrations** for drugs and alcohol in biomatrices, supplementing the Occupational Health and Safety Act.
- 3) The notion of "**zero-tolerance**" should be **approached cautiously**, as it may infringe on human rights, as demonstrated in the Barloworld case.
- 4) Companies must **justify why a specific individual** is tested; "**blanket testing**" of all employees may not be acceptable.

MEDICATION !!! 😊



Cannabidiol (CBD)



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