



# Report

**Date:** 2 September 2016

**Security Level:** IN CONFIDENCE

**To:** Hon Anne Tolley, Minister for Social Development

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## Alignment Project: Reimbursing employers for the cost of unnecessary evidential drug tests

### Purpose of the report

- 1 Clients with work obligations are subject to drug test obligations, and the Ministry of Social Development (MSD) can sanction clients who are referred to a suitable vacancy and fail a drug test.
- 2 There are two types of drug tests:
  - a screening drug test indicates the presence of one or more controlled drugs
  - an evidential drug test confirms the type and amount of drugs.
- 3 MSD provides a waiver form which enables clients to accept the result of the failed screening drug test, and waive the need for further evidential testing. This is intended to eliminate the need for any further testing.
- 4 Section 102C(3) of the Social Security Act 1964 (the Act) allows employers to seek reimbursement from MSD for failed pre-employment drug tests. To date, practice has been to reimburse employers for an evidential drug test they perform, even if the client has waived the need for a further evidential test.
- 5 The additional evidential drug test has a potential impact for clients – as they are liable for the cost of the evidential drug test if it returns a failed result and the employer successfully seeks reimbursement from MSD.
- 6 Section 9(2)(h) Legal professional privilege
- 7 Amendments to primary legislation could also be made to clarify that reimbursement cannot be provided for an evidential test which was unnecessary due to the client waiving the need for evidential testing. This would eliminate the risk of successful legal challenge on this issue.
- 8 We seek your agreement to clarify related sections in the Act at the next opportunity.

## Recommendations

It is recommended that you:

- 9 **Note** that concerns have been raised about the Ministry's practice of reimbursing employers for the cost of unnecessary evidential drug tests because of the consequential creation of a debt for the client

Yes / No

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Section 9(2)(h) Legal professional privilege

Yes / No

- 11 **Note** that the Ministry will change its practice to better align with legislation by not reimbursing employers for the cost of unnecessary evidential drug tests

Yes / No

- 12 **Agree** that the Ministry will develop detailed advice for you on amending the Social Security Act for legislative clarity and to eliminate the risk of legal challenge

Agree / Disagree

- 13 **Note** that these amendments would be within the scope of the *Social Assistance (Remedial and Other Matters) Amendment Bill*, for which you have an approved legislative bid

Section 9(2)(f)(iv) Active Consideration  
Section 9(2)(f)(iv) Active Consideration

Yes / No

- 14 **Note** that MSD will retrospectively review the two previous clients who may have incurred costs because of previous practice

Yes / No

- 15 **Agree** to send a copy of the report to the Associate Minister for Social Development.

Agree / Disagree



Ruth Bound  
Deputy Chief Executive  
Service Delivery

7/9/16  
Date

Hon Anne Tolley  
Minister for Social Development

Date

## Screening drug tests and evidential drug tests

- 16 Some vacancies listed with the Ministry of Social Development (MSD) require a client to undertake and pass a pre-employment drug test to be considered for the role.
- 17 MSD practice is that these pre-employment drug tests must comply with Standard *AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* (the Standard).
- 18 There are two types of drug tests defined in the Standard:
  - a screening drug test which indicates the presence of one or more controlled drugs in a sample usually done using on-site urine tests
  - an evidential drug test which uses laboratory confirmatory procedures to identify the type and calculate the amount of controlled drugs in a sample.
- 19 A screening drug test (usually done on-site by employers) generally provides employers with enough information to make a decision about whether to hire a client, making the evidential drug test unnecessary.
- 20 The additional evidential drug test (done in a laboratory by qualified staff) provides verified and legally binding results, as the test is able to accurately identify the actual drugs, the drug family and the amount of drug present.
- 21 The additional evidential drug test has a potential impact for clients – as they are liable for the cost of the evidential drug test if it returns a failed result and the employer successfully seeks reimbursement from MSD (as a debt is established against the client for the amount approved and paid to the employer).

### Legal advice

22 Section 9(2)(h) Legal professional privilege

## We currently reimburse employers for the cost of failed evidential drug tests and recover those costs from the client

- 23 Clients who have work obligations are subject to drug test obligations<sup>1</sup>, and MSD can sanction clients who are referred to a suitable vacancy and fail a drug test.
- 24 If a client fails a screening drug test, they will be advised that they have failed and they will be asked if they:
  - accept that the results are accurate; or
  - would like the sample to be sent for a further evidential drug test.
- 25 MSD provides a waiver form, for employers to use, which enables clients to accept the result of the failed screening drug test, and waive the need for further evidential testing. This is intended to eliminate the need for any further testing.
- 26 However, some employers send all failed drug screening samples to the lab for evidential testing – even if a client has waived the need for evidential testing.
- 27 Employers are able to seek reimbursement from MSD for failed pre-employment drug tests whether the client has waived the need for a further evidential test or not. When a claim is approved, MSD use our discretion to reimburse the employer, and then a debt is established against the client for the amount that has been approved and paid to the employer.
- 28 It is unclear why MSD have had the practice of reimbursing an employer for the cost of an evidential drug test which was unnecessary due to the client waiving the need for evidential testing.

<sup>1</sup> The drug testing work test obligations were introduced in July 2013 as part of the welfare reform package.

## Legal advice on current practice

29 Section 9(2)(h) Legal professional privilege

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### **The policy intent was not to indebt clients for the cost of evidential drug tests where the client waived the need for this**

- 35 Some industries require potential employees to pass a pre-employment drug test as a condition of employment. The pre-employment drug-testing policy was introduced because recreational drug use limits people's employment options.
- 36 In July 2012, Cabinet agreed that where MSD refer a client to a job and the employer provides information showing that they have failed a pre-employment drug test, MSD will reimburse the employer for the cost of the test, and create a debt for that amount to be from the client [Cab Min (12) 26/11.4 refers].
- 37 While the Cabinet paper was not explicit on what should be done in this particular situation, the policy agreed by Cabinet anticipates, and the *Social Security (Benefit Categories and Work Focus) Amendment Bill* was drafted to reflect, that when a client fails a screening drug test, they will be required to undertake an evidential drug test (unless they waive it) before a sanction can be imposed. This is noted in a November 2012 report to the previous Minister for Social Development.<sup>2</sup>

38 Section 9(2)(h) Legal professional privilege

<sup>2</sup> 'Pre-employment Drug Testing – Modified Approach', 22 November 2012.

39 The policy intent was not to indebt clients for evidential drug tests which have been undertaken despite the client waiving the need for that evidential test.

## **We will change current practice to better align with legislation**

### *Legal advice on risk of current practice*

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Section 9(2)(h) Legal professional privilege

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### *Client impacts*

45 Since July 2013 a total of 21 reimbursements have been made to employers for the cost of failed pre-employment drug tests. Two of these were in respect of an evidential test that was carried out following a failed screening drug test. We are unable to determine if either client waived the need for evidential testing as MSD does not request this information from clients or employers.

### *Practice change to align with legislation*

46 MSD will change its practice to better align with legislation by not providing reimbursement to employers for the cost of unnecessary evidential drug tests. We propose that employers will be required to provide a copy of the waiver form when seeking reimbursement to enable MSD to determine whether reimbursement should be made. This approach:

- significantly reduces the risk of challenge to Ministry practice
- would be relatively easy to implement
- ensures fairness and certainty for clients
- aligns with the original policy intent.

47 The cost of practice change would be absorbed into existing baselines and would incur no additional cost to the Ministry.

## **MSD could provide you with further advice on amending primary legislation to remove the risk of successful legal challenge**

48 Amendments to primary legislation could also be made to clarify that reimbursement cannot be provided for an evidential test which was unnecessary, due to the client waiving the need for evidential testing. This would eliminate the risk of successful legal challenge on this issue.

- 49 If you agree and wish to receive further advice on undertaking legislative change, this work could be added to the Policy work programme to progress.
- 50 These amendments would be within the scope of the *Social Assistance (Remedial and Other Matters) Amendment Bill*, for which you have an approved legislative bid

Section 9(2)(f)(iv) Active Consideration

## **We will undertake retrospective reviews for the two affected clients, although we may have difficulty obtaining the relevant information from employers**

### *Legal advice*

- 51 Section 9(2)(h) Legal professional privilege

### *Assessment and approach*

- 52 MSD will undertake a retrospective review, noting that it may be difficult to access the relevant information from employers.
- 53 In terms of administrative convenience, the cost of undertaking a retrospective review for two clients would be minimal, and could be absorbed into baseline costs. A client could receive up to \$120, the maximum reimbursement rate for an evidential drug test, if a retrospective review found in their favour.
- 54 The challenge of a retrospective review is the difficulty in determining whether the identified clients are affected. This is because:
- MSD does not request information from clients or employers about whether a client waived the need for evidential testing
  - MSD would be relying on employers having retained a copy of the waiver form to verify whether the need for evidential testing was waived
  - MSD cannot guarantee that it could access the information needed to carry out an accurate and fair retrospective review.

## **Consultation**

- 55 Crown Law were consulted on the contents of this report.

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