

# Confronting substance abuse in the workplace

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While testing employees for drug and alcohol use is largely state-regulated, employers covered by the Americans with Disabilities Act (ADA) must take care that their drug- and alcohol-testing policies, and the enforcement of those policies, don't violate the ADA. The ADA gives you great latitude in implementing drug- and alcohol-testing policies to ensure an alcohol- and drug-free workplace. And, most of the time, drug testing won't raise ADA implications. But when it does, will you be ready to address the issues properly?

## *Alcohol, drugs—a distinction*

The ADA sets out a clear distinction between alcoholism and illegal drugs. While a test for illegal drugs is not considered a medical examination under the ADA, a test for alcohol is. Thus, alcohol testing is permissible only in limited situations in which it is job-related and consistent with business necessity or when the employer has a reasonable suspicion of abuse. Drug testing for preemployment screening, reasonable suspicion, random screening, or investigation of a workplace incident is permissible, however, as long as the policy and testing procedure comply with state law.

Another distinction is that a person who currently abuses alcohol is not automatically denied ADA protections simply because of her current use. By contrast, illegal drug use, including abuse of over-the-counter or prescription drugs, is never protected.

## *Alcoholism as a disability*

Alcoholism is considered a disability under the ADA, which generally entitles an alcoholic employee to a reasonable accommodation, such as a leave of absence to participate in a rehabilitation

program or a modified work schedule to allow attendance at an outpatient treatment program or Alcoholics Anonymous meetings. Thus, an employer notified of an employee's alcohol abuse and need for treatment must be aware of the requirement for a dialogue about reasonable accommodations.

While you cannot discriminate against individuals with alcoholism, you may discipline, discharge, or deny employment to an alcoholic whose use of alcohol adversely affects her job performance or conduct. For example, if you have a consistently applied attendance policy that would generally result in termination after a certain number of absences within a short period, you may fire an employee for violating the policy due to her alcoholism. However, you may not fire an employee if her absences are related to obtaining treatment. That distinction is critical.

## *Drug abuse unprotected*

As noted above, unlike the use of alcohol, an employee's current use of illegal drugs is not protected under the ADA. However, the ADA does offer protection to employees or job applicants who have stopped using illegal drugs and have successfully completed, or are participating in, a rehabilitation program. Of course, what constitutes "current use" can be difficult to determine on the basis of a drug test alone.

The Equal Employment Opportunity Commission (EEOC) defines current drug use as "the illegal use of drugs that has occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem." In Arizona, employers must also be sure not to run afoul of the Arizona Medical Marijuana Act when you're dealing with a cardholder, even though the ADA may not offer similar protections.

## *Have I mentioned . . .*

Your drug-testing policy should clearly state when employees will be subject to testing (e.g., preemployment, reasonable suspicion) and the type of collection method that will be used.

Implementing policies that expressly prohibit certain conduct and consistently applying those policies (i.e., demonstrating fair treatment) will safeguard you when you discipline employees for alcohol or substance abuse. Be cognizant of the interplay between state drug-testing statutes, medical marijuana statutes, the Family and Medical Leave Act (FMLA), and the ADA. Finally, carefully review each individual case before making a decision, and consult with counsel if you have any doubts about how to proceed.

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