The Practical & Legal Issues of Dealing with Substance Abuse In The Workplace

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SUBSTANCE ABUSE
WHY WORRY?
70% of All Illegal Drug Users and 90% of All Alcoholics Are Actively Employed
Annual Cost of Substance Abuse

- **Lost Productivity**
  - Alcohol Abuse: $43.6 Billion
  - Drug Abuse: $27.4 Billion
- **4,920 Work Fatalities**
- **987,000 On-the-Job Injuries**
Typical Substance Abuser

- Tardy 3X More Than Other Employees
- Requests Early Dismissal/Time Off 2.2X More Often
- 2.5X More Absences > 8 Days
- Sick Benefits 3X More
- Workers’ Comp 5X More Likely
- 3.6X More Work Accidents
- Works at 67% of Ability
- 2X More Likely to Steal
Workplace Violence
WORKPLACE SUBSTANCE ABUSE

• 29% of Employed Adults Use Marijuana
• 13% of Employed Adults Use Cocaine
• 9.4% of Applicants Test Positive
• 20% “High-on-the-Job”
IT WILL GET WORSE
BEFORE IT GETS BETTER
Our Next Generation of Workers

- 18% of 8th & 9th Graders Use Marijuana
- 17% Have Tried Inhalants
- 8th Grade Marijuana Use: 200% Increase in 5 Years
- 8th Grade Illicit Drug Use Doubled
- 36% of 12th Graders Use Marijuana
- 40% of HS Seniors Use “Illegal Drugs”
Teen Alcohol Use

- 37% of 8th & 9th Graders Drink
- 21% Drink “Heavily”
- 33% Try Alcohol by 5th Grade
And......Worse Yet!

- 24% of 9-12 Year Olds Have Been Offered Drugs
- 22% of 12-17 Year Olds Will Use Illegal Drugs
- More 8th Graders Than 10th Graders Use Heroin & 10th Graders Use More Than 12th Graders
- 68% of 17 Year Olds Can Buy Marijuana in Less Than a Day
- Only 43% Of Teens Have Access To Treatment
“WORKERS” MOST AT RISK
ILLEGAL DRUG USE

- Full Time Workers Age 18-25
  - 40% Higher Than Age 26-34
  - 60% Higher Than Age 35-49
“HEAVY” ALCOHOL USE

• Full Time Workers Age 18-25
  • 35% Higher Than 26-34
  • 54% Higher Than 35-49
HIGHEST RISK INDUSTRIES
ILLEGAL DRUG USE

1. Eating & Drinking Places- 16.3%
2. Retail Sales-14.4%
3. Entertainment & Recreation- 13.7%
“HEAVY” ALCOHOL USE

1. Computer & Data Processing- 17.4%
2. Eating & Drinking Places- 16%
3. Construction-13.4%
4. Auto Supply & Gas Stations- 13.2%
HIGH RISK OCCUPATIONS
ILLEGAL DRUG USE

1. Construction Workers-17.3%
2. Construction Supervisors-17.2%
3. Food Preparers-16.3%
4. Waiters & Waitresses-15.4%
5. Laborers-13.1%
“HEAVY” ALCOHOL USE

1. “Other” Construction-20.6%
2. Construction Laborers-19.9%
3. Other Laborers-19.5%
4. Auto Mechanics-16.3%
5. Food Preparers-16.3%
DRUG RETENTION TIMES

- Amphetamines (Speed) 1-2 Days
- Barbiturates (Butes/Phenos) (Short Acting) 1-3 Days
- Barbiturates (Long Acting) 1-3 Weeks
- Benzodiazepines (Valium/Librium) 1-14 Days
- Cannabinoids Occasional 1-7 Days
- Cannabinoids Chronic 1-4 Weeks
DRUG RETENTION TIMES

- Cocaine: 12-48 Hours
- Methadone: 1-3 Days
- Methaqualone (Quaaludes): 1-7 Days
- Opiates (Heroin/Codeine/Morphine): 1-3 Days
- Phencyclidine (PCP): Occasional 1-8 Days
- PCP Chronic: 30 Days
- Propoxyphene (Darvon): 1-3 Days
FEDERAL LEGAL CONSIDERATIONS

- ADA
- FMLA
- NLRA
- Drug Free Workplace Act of 1988
- DOT Regulations
- DOD & DOE Contracts
- OSHA
OTHER LEGAL CONSIDERATIONS

- Invasion of Privacy
- Search & Seizure
- Drug Free Workplace Acts
- Negligent Hiring/Retention/Referral
- Defamation
- Public Employees
Federal and State Law Framework
Florida Drug-Free Workplace Act
FLORIDA DFWA

• Employers get W.C. discount
• Applicants and Employees
• Drug/Alcohol testing requirements and procedures
Denial of W.C. medical and indemnity benefits if employee injured and tests positive or refuses test.
FLORIDA DFWA

• Employers get W.C. discount and other benefits only if they adopt detailed policy, testing procedures and meet other requirements which are compliant with the statute.
ADA
ADA

• An individual who is currently engaging in the illegal use of drugs is not a covered individual with a disability when employer’s action is based upon that use
Illegal Use Defined

- Use of illegal drugs that are controlled substances
- Illegal use of prescription drugs that are controlled substances
“Current” Drug Use

- Not limited to the day or recent weeks before employment action
- Occurred recently enough to justify reasonable belief that involvement is an ongoing problem
Recovering Drug Addicts

- Persons addicted to drugs, but who are no longer using, and are receiving treatment for drug addiction or who have been rehabilitated successfully are protected by ADA

- Persons who casually used drugs illegally in the past but whom did not become addicted are not protected by ADA
Current or Recovering Alcoholics

• Can be disabled within meaning of ADA

• No distinction between former or current use
ALCOHOLISM

– Some courts - alcoholism is a *per se* disability

– Most courts - employee has to show that the alcoholism meets the definition of a disability
Reasonable Accommodation

- For alcoholic, leave to get treatment
- For recovered drug addict protected under ADA, time off to attend counseling meetings or appointments
ADA Applies to
Drug and Alcohol Testing
FMLA
FMLA
Reasons for Leave Include:

• Serious health condition of the employee
• Care for a covered family member who has a serious health condition
Serious Health Condition

- Substance abuse can be covered
- Leave may be taken for treatment
- Absence due to substance use is not covered
FMLA: Right to Restoration

- Employees returning from leave must be returned to his or her old job or to a position with equivalent pay, benefits and other terms and conditions of employment.
FMLA

- Unlawful to interfere with, restrain, or deny the exercise of any right under the FMLA.
- Also unlawful to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding related to the FMLA.
NLRA

- Mandatory Subject
- Waiver
- Current Employees
- Applicants
DOT Regulations

- Governs use of controlled substances and alcohol
- Commercial motor vehicle drivers
- Mandatory drug and alcohol testing
“Commercial Motor Vehicle”

- Gross vehicle weight > 26,001 pounds
- Vehicle transporting hazardous materials with placard
- Vehicle intended to transport 16 or more people including driver
Federal Drug-Free Workplace Act of 1988
41 U.S.C. § 701-707
Drug-Free Workplace Act of 1988

- Contractors and grantees of Federal agencies
- Provide drug-free workplace as condition to Federal contract or grant
Testing & Inquiries

- Pre-employment
- Post-offer
- Employment
PRE-EMPLOYMENT
Pre-Employment Inquiries

• **May** ask whether applicant drinks alcohol or whether currently using drugs illegally. Can’t ask how much they drink.
• **May not** ask whether applicant is a drug addict or alcoholic nor whether has been in a rehabilitation program

• **May** ask whether used illegal drugs in the past and when was the last time. Can’t ask how much used.
Pre-employment Tests Under ADA

- Drug testing -- permitted
- Alcohol testing -- not permitted
POST-OFFER
DRUG TESTING
ALCOHOL TESTING
ADA: “Applicant”

- Applied for position
- Offered employment conditioned on passing drug and alcohol test
- May have begun work pending results
EMPLOYMENT
Reasonable Suspicion

• “Reasonable suspicion” or “for cause” testing -- a reasonable belief that employee may be under the influence of drugs and/or alcohol
Reasonable Suspicion Testing

• Permissible under ADA
• Required under many state DFWAs
Reasonable Suspicion

- Employer required to detail circumstances under most DFWAs
- Copy to employee upon request
- Keep confidential
- Maintain for at least 1 year
Post Accident Testing
• EEOC has said that a showing of “job relatedness or business necessity” for testing is not established merely because employee involved in an accident or violated a personnel rule
• Additional triggering event or circumstance is necessary to justify the test
  – A supervisor’s reasonable belief, based on personal observation
  – Other relevant factor
DOT Regulations

• Post accident testing required
Random Testing
RANDOM TESTING

- ADA & most state DFWAs allow random drug testing
- ADA & state DFWAs prohibit random alcohol testing
- DOT Regulations mandate random drug & alcohol testing
Fitness for Duty Testing
Fitness for Duty Examination

• When performance has suffered or if employee may pose harm in the job

• EEOC position unclear – not sure if must show “direct threat concerns

• Job Related
TESTING PRECAUTIONS

- Privacy
- Confidentiality
- Experience
- Record Keeping
- Administration
- Sample Collection
- Chain of Custody
- Reputable Lab
- MRO
- SAP
Practical Recommendations

- Clear Comprehensive Policy
- “Zero Tolerance”
- Supervisory Training
- Employee Education
- Treatment Opportunities
- Drug & Alcohol Testing
- EAP?
- Last Chance Agreements?
POLICY

• Who is Subject to Testing?
• What Testing?
• When?
• Why?
• Refusal to Test
• Consequences of Refusal
• Disciplinary Action
• Appeal Rights/Procedures
• What Drugs?
• Alcohol
• Off Duty?
• Possession
• Use
• Influence
• Where?
• How?
• DFWPA?
TESTING

- Pre-employment
- Reasonable Suspicion
- For Cause
- Post Accident
- Random
- Routine Physicals
- Rehabilitation
- Statutory/Regulatory
- Safety Sensitive
POLICY

• Announce
• Distribute
• Post
• Handbook
• Remind
LAST CHANCE AGREEMENTS
LAST CHANCE AGREEMENT

- Termination Alternative
- Conditional Reinstatement
- Signed Agreement
- Release of Claims
- Waiver of Challenge
- Admission
- Testing
- Refusal to Test
LAST CHANCE AGREEMENT

• Leave of Absence
• Rehabilitation
• Aftercare
• Complete Abstention
• Medical Info Release
• Satisfactory Performance
• Duration
• No rehire
Federal Drug-Free Workplace Act of 1988
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Drug-Free Workplace Act of 1988

• Contractors and grantees of Federal agencies
• Provide drug-free workplace as condition to Federal contract or grant
Requirements

• Publish statement that unlawful manufacture, distribution, dispensation, possession and use of controlled substances prohibited in workplace
• Articulate penalties for violation of such policy
Requirements

- Establish drug-free awareness program
- Provide employees with the policy
- Notify employees they must notify employer of criminal drug statute conviction for workplace violations no later than 5 days after conviction
Requirements

• Employer must notify Federal agency within 10 days of notice of employee conviction

• Impose sanctions or require participation in rehabilitation program for convicted employees

• Good faith effort to comply