

Dealing with Substance Abusers in the Workplace

By Sharon Stiller
Partner at Abrams
Fensterman Fensterman
Eisman Greenberg
Formato & Einiger LLP



Leandra's Law, which makes drunk driving with children in the car a felony, recognizes the dangers to society from substance abusers. But the issue is not so simple for employers. With the advent of protective disability legislation, many employers believe that they need to tiptoe when dealing with employees who are under the influence of drugs or alcohol at work.

The American with Disabilities Act (ADA) permits employers to prohibit the use of illegal drugs and alcohol in the workplace. Additionally, employers may hold drug or alcohol dependent employees to the same qualifications and performance standards as other employees. It is no defense to inappropriate conduct that the employee was under the influence of illegal drugs or alcohol. Similarly, while New York prohibits discrimination based upon the lawful use of consumable products off work premises, not on work time, and without using work equipment, the New York Lawful Activities Act will not excuse an employee's poor work performance while under the influence of illegal drugs or alcohol.

It is permissible, even appropriate, to have a zero tolerance policy. In addition, the Drug-Free Workplace Act of 1988 requires federal contractors and grantees to certify that they will provide a drug-free workplace. While the act does not require employers to drug test, its practical impact encourages them to do so.

Employers have a panoply of tools to achieve a substance-free workplace. First, employers can deal with substance abuse problems on the job by adopting a policy prohibiting substance abuse. The policy should prohibit both the use and possession of drugs and alcohol on the job, as well as being under the influence of an illegal substance. As with all policies, employers should make sure that the policy is disseminated to employees and should provide related training.

Employers should discipline employees for inappropriate conduct, whether or not the employer believes that the conduct stems from substance abuse. But the employer should stick to performance-related issues and not inquire further whether the employee has a substance abuse problem. An employee who self-identifies can be referred to an Employee Assistance Program.

While an employee can be disciplined or terminated for inappropriate conduct engaged in while under the influence of a substance, an employee cannot be disciplined or terminated because she is an addict. Alcohol and drug addiction are both protected disabilities under New York law.

Because of the complexity of the issues, timing is critical. It is important for an employer to discipline or terminate the employee immediately after the inappropriate act, not after the employee has entered a treatment program.

Workplace misconduct resulting from occasional excessive alcohol consumption can disqualify an employee from eligibility for unemployment insurance. However, the same misconduct will not result in disqualification when caused by alcoholism. The rationale is that alcoholism is a disease, while the occasional binge is merely a failure of judgment.

Sometimes, employers will deal with inappropriate conduct related to substance abuse by agreeing to a "last chance" agreement. Breach of a last chance agreement can constitute grounds for termination, although in an employment-at-will jurisdiction such as New York, employers should be careful not to restrict their unfettered right to terminate employees, even if this is done as part of a last chance agreement.

As with all medical information, employers must respect the confidentiality of substance abuse information, although recently a federal district court judge dismissed a breach of confidentiality claim because drug testing is not regarded as a medical examination under the ADA.

In that case, *Skinner v. City of Amsterdam*,

2010 WL 1223032 (N.D.N.Y. 2010), the employee, who was using illegal prescription drugs, heroin and crack cocaine, was terminated after failing to submit to a drug test. He argued that he was disabled because of his addiction, subjected to harassment, and ultimately terminated because of the disability. The court dismissed his complaint.



Employers can also choose to drug test to discover drug abuse. In *Skinner*, the court held that drug testing of a former drug abuser does not violate the ADA.

Some employers, such as those regulated by the Department of Transportation, are required to test in certain situations, such as when there is an accident. Those regulations also govern pre-duty use of alcohol, prohibiting drivers from performing safety-sensitive functions within four hours after using alcohol, and from performing safety-sensitive functions at work with more than 0.04 blood alcohol concentration.

Additionally, testing is mandatory for employees in certain safety-sensitive industries (e.g., nuclear plant personnel under the purview of the Nuclear Regulatory Commission). ★

Originally published in Chamber News, Sept./Oct. 2010. Reprinted by permission. www.RochesterBusinessAlliance.com

Did you know the Rochester Business Alliance is a licensed health care broker providing plans with Excellus BlueCross BlueShield, MVP Health Care and Guardian?

The Rochester Business Alliance is a specialist in the health insurance needs of businesses employing from one to 50 employees. We currently serve as health insurance administrator for more than 950 employer groups in the Rochester area.

Visit our website for more details
www.RochesterBusinessAlliance.com