

# Addressing Addiction at Work with Compassion and Compliance

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# Why do employers care?

- Substance abuse causes impaired mental and physical performance
- Can lead to safety risks, decreased productivity, misconduct problems, increased absenteeism, higher medical expenses, etc.
- We care about our employees

# Agenda

- Americans with Disabilities Act
  - Who is protected?
  - Reasonable accommodation issues
  - Discipline issues
  - Drug/Alcohol testing
- Family and Medical Leave Act
  - Serious Health Condition
- Proactive steps employers can take

# “Disability” under the ADA

- Physical or mental impairment that substantially limits one or more major life activities or major bodily functions
- Record of such an impairment
- Regarded as having such an impairment

# Drugs/Alcohol and the ADA: Who is Protected?

Alcoholics: protected

Recovering alcoholics /  
drug addicts: protected

Current illegal drug users: not protected

# Drugs/Alcohol and the ADA: Who is Protected?

Individuals incorrectly regarded  
as alcoholics/drug addicts: protected

Individuals w/ a disability taking  
prescriptions for the disability as  
legally prescribed: protected

Casual illegal drug users: not protected

# Reasonable Accommodation

- Any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities
- Typically, the individual with a disability must inform the employer that an accommodation is needed
- Notice begins the interactive process

# Interactive Process



Informal

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What does  
employee need  
to enable job  
performance?

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May get input  
from doctor



# Potential Reasonable Accommodations

- Leave for treatment
- Flexible schedule to attend counseling/support meetings
- More frequent breaks
- Modification of supervisory style
- Etc.

# When is Accommodation Not Required? Undue Hardship

**Employer must have significant difficulty or expense in terms of:**

- Nature and cost of the accommodation
- Overall financial resources of the facility
- Overall financial resources of the company
- Type of operations of the employer
- Impact of the accommodation on the operation
- Availability of tax credits or deductions
- Terms of a collective bargaining agreement

# Direct Threat

- Significant risk of substantial harm to the health or safety of the individual with a disability or others that cannot be eliminated or reduced by reasonable accommodation
- Individualized assessment, based on reasonable medical judgment and/or best available objective evidence

# Disciplinary Issues

Employers can prohibit use of alcohol and illegal drugs in the workplace

Employers can hold all employees to the same performance and conduct standards, even if poor performance/conduct caused by alcohol or drug use

# Last Chance Agreements

- EEOC and courts approve
- Never required (as long as no discrimination)
- Employer agrees not to fire employee and employee agrees to receive substance abuse treatment, be subject to further testing, refrain from further substance use, and avoid further workplace problems.
- Violation of agreement typically results in termination

# Medical Inquiries/Testing

Tests for illegal drug use are not considered  
medical inquiries under the ADA

Alcohol tests are medical inquiries

# Medical Inquires/Testing

- What if drug test reveals presence of prescription drug?
  - Was drug used legally?
    - Best handled through testing facility (you don't want to learn about a disability)
    - If no, current illegal drug user = not protected
    - If yes, is there a legitimate concern w/ employee's ability to perform job safely?
      - If no, shouldn't be any issue
      - If yes, engage in interactive process to determine potential reasonable accommodations

# Safety Sensitive Jobs and Legitimate Prescription Drug Use

Employer must make an individual assessment of whether employee can:

- Perform essential job functions, with or without reasonable accommodations, and
- Without posing direct threat of harm to health or safety of employee or others



# Medical Inquires/Testing

- EEOC v. Volvo Group North America (D. Md)
- Employer made conditional offer to applicant
- During post-offer physical, applicant disclosed prior opiate addiction and current Suboxone prescription, which was part of treatment for opiate addiction
- Employer then withdrew job offer due to Suboxone use without conducting individualized assessment of applicant's ability to perform job
- Settled for \$70,000 in January 2018

# Medical Inquires/Testing

- EEOC v. Happy Jack's Casino (D. South Dakota)
- Employer withdrew employment offer to applicant based on drug test that indicated presence of prescription drug
- Employer claimed it relied on third-party testing vendor to verify whether prescription use was lawful and if so, to report test result as “negative” to employer
- Settled for \$45,000 last month

# Medical Inquires/Testing

- Random testing
  - OK to randomly test for illegal drug use
  - Random alcohol testing risky unless clear and substantial safety concerns
    - EEOC's position is that random alcohol testing violates ADA
    - Some courts disagree w/ EEOC
  - What about randomly testing for prescription medication? See Bates v. Dura Automotive Systems (6<sup>th</sup> Cir. 2014) (it depends)

# Family and Medical Leave Act

- **Qualifying reasons:**
  - ***Serious health condition of employee***
  - ***Serious health condition of immediate family member***
  - Birth or adoption of a child
  - Qualifying military exigency
  - Military caregiver

# Family and Medical Leave Act

- **Serious health condition:**
  - Illness, injury, impairment, or physical or mental condition that involves:
    - Inpatient care
    - Continuing treatment that includes
      - Incapacity of at least 3 days
      - Incapacity due to pregnancy
      - Chronic health condition
      - Incapacity due to permanent or long term health condition
      - Multiple doctor visits that would result in incapacity if untreated

# Family and Medical Leave Act

- Treatment for substance abuse may be a serious health condition if the conditions for inpatient care and/or continuing treatment are met
- FMLA leave may only be taken for substance abuse treatment provided by a health care provider or by a provider of health care services on referral by a health care provider.
- Absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.
- But see *Picarazzi v. John Crane, Inc.* (S.D. Tex. 2011)

# Family and Medical Leave Act

- An employer may not take action against an employee because the employee has exercised the right to take FMLA leave for substance abuse treatment.
- However, if the employer has a policy, applied in a non-discriminatory manner, that has been communicated to all employees, and that provides that an employee may be terminated for substance abuse, then pursuant to that policy the employee may be terminated regardless of whether he or she is taking FMLA leave.

# Family and Medical Leave Act

- An employee may also take FMLA leave to care for a family member who is receiving treatment for substance abuse



# Recovery-friendly Workplaces

- New Hampshire and Rhode Island
  - Encouragement and assistance for employees to ask for help
  - Workplace education about substance abuse
  - Assistance with treatment
- Ohio Chamber of Commerce's Employer Opioid Toolkit
- Reconsider zero-tolerance policies
- EAP w/ substance abuse counseling

# QUESTIONS?



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