Drug and Alcohol Use, Testing, and Accommodation: Key Employment Law Issues

A Lexis Practice Advisor® Practice Note by Deborah Yoon Jones and Lisa Garcia, Alston & Bird LLP

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This practice note discusses the legal authority and best practices for employers pertaining to drug and alcohol use, testing, and accommodations in the workplace. This note discusses both federal and state law. It is intended for private employers but does address some consideration for federal employees and contractors.

Given the extensive federal and state legal authority governing drug and alcohol use and testing in the workplace and the ever-changing landscape relating to cannabis use, it is important for employers to be well-advised in this area of law, including understanding (1) whether to test applicants or employees for drug and alcohol use, (2) what to include in policies that govern drug and alcohol use in the workplace, (3) when to offer accommodations to drug and alcohol users, and (4) what disciplinary measures are appropriate for an individual found to be abusing drugs or alcohol.

This note is divided into the following sections:

- Federal and State Laws Governing Drugs and Alcohol in the Workplace
- Employer Screening of Job Applicants and Employees for Alcohol and Drug Use
- Prohibiting the Use of Alcohol and Drugs in the Workplace
- Accommodations and Leaves of Absence for Drug or Alcohol Treatment under Federal and State Laws
- What to Do When an Employer Suspects or Discovers Impermissible Drug or Alcohol Use – Best Practices

For additional guidance on drug and alcohol use, testing, and accommodation, see Interviewing and Screening Job Applicants — Conducting Drug and Alcohol Testing When Screening Employees, Drug- and Alcohol-Testing Policies: Key Drafting Tips, Substance Use and Abuse Policies: Key Drafting Tips, Americans with Disabilities Act: Guidance for Employers — What Workers Are Covered?, Drug and Alcohol Testing Employees Under the ADA Checklist, and Checklists for Substance Abuse Testing Program, Employment Law Deskbook, 20.09.

For more information on marijuana laws, see Cannabis Resource Kit, Medical and Recreational Marijuana State Law Survey, and Negligent Hiring, Retention, and Supervision Claims: Best Practices for Prevention and Defense — Impact of Marijuana Legalization Laws on Negligent Hiring and Retention Claims.

For more information on state laws concerning drug and alcohol testing, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Practice Notes Chart.

For model non-jurisdictional and state drug testing policies and authorizations, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Expert Forms Chart. For a model substance abuse policy, see Substance Use and Abuse Policy.

Federal and State Laws Governing Drugs and Alcohol in the Workplace

There are a number of federal and state laws that govern alcohol and drug testing and their use in the workplace. These laws generally protect employees and set limits on an employer's ability to investigate, test, and take disciplinary actions based on an employee's alcohol or drug use. Employers should keep these laws in mind when deciding whether to drug test job applicants or employees and when taking disciplinary action against employees on the basis of substance abuse.

Federal Laws

Key federal laws governing drug and alcohol testing and use in the workplace include the following:

- Drug-Free Workplace Act of 1988, 41 U.S.C. § 8101 et seq.
- Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.
- Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 et seq., 29 C.F.R. pt. 825
- National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151–169
- Omnibus Transportation Employee Testing Act of 1991, 49 C.F.R. pt. 40 et seq. and 49 C.F.R. pt. 382 et seq.

The Drug-Free Workplace Act of 1988

The Drug-Free Workplace Act applies to federal contractors who enter into federal contracts valued at $100,000 or more or who receive a federal grant. 41 U.S.C. §§ 8102–8103. The act applies to any sub-grantees as well. Under the law, a covered employer must certify that it has established a drug-free workplace for every employee who will be working under the federal contract or grant. It must also agree that for the duration of the contract, it will not produce, distribute, dispense, possess, or use any controlled substance. 41 U.S.C. § 8101(a)(6).

Additionally, the employer must create (1) a drug-free awareness program designed to educate its employees about drug abuse, (2) a drug-free policy, and (3) a counseling and rehabilitation program. Employers covered by the act must inform their employees about the disciplinary action that results from violations of the drug-free policy. 41 U.S.C. § 8102(a)(1).

Employees convicted of criminal drug use must inform their employer within five days about the conviction and participate in a drug rehabilitation program. 41 U.S.C. § 8102(a)(1)(D).

ADA

The ADA prohibits all U.S. employers with 15 or more employees from discriminating against qualified job applicants or employees because of a disability. 42 U.S.C. §§ 12111(5)(A), 12112. The ADA does not protect someone who uses illegal drugs or uses alcohol at the workplace nor does it prohibit an employer from having a drug-free workplace policy. 42 U.S.C. § 12114(a), (c); 29 C.F.R. § 1630.16(b). However, the ADA does protect employees who are recovering alcoholics or who have obtained treatment for a drug addiction. The ADA also prohibits employers from firing, refusing to hire, refusing to promote, or taking other adverse actions against an employee because the employee is enrolled in a drug or alcohol rehabilitation program. The law also protects an employee who is erroneously regarded as engaging in drug or alcohol use. 42 U.S.C. § 12114(b).

Additional information on employer requirements regarding drug and alcohol testing, use, and accommodations under the ADA are discussed throughout this practice note. See also Americans with Disabilities Act: Guidance for Employers — What Workers Are Covered? and Drug and Alcohol Testing Employees Under the ADA Checklist.

FMLA

The FMLA allows qualifying employees who work for an employer with at least 50 employees to take job-protected family and medical leave to obtain treatment for a drug or alcohol addiction or any resulting physical illness, as well as to care for a close family member who is getting treated for drug or alcohol abuse. 29 U.S.C. §§ 2601, 2611(4); 29 C.F.R. § 825.110. For more information, see "Leave for Drug and Alcohol Treatment under the FMLA" in Accommodations and Leaves of Absence for Drug or Alcohol Treatment under Federal and State Laws below.

NLRA

The NLRA provides that in unionized workplaces, employers must negotiate and agree on drug and alcohol testing programs with the union through a formal collective bargaining process. See Johnson-Baleman Co., 295 N.L.R.B. 180, 182 (1989). However, employers may generally

implement pre-employment testing programs without bargaining. See RCA Corp., 296 N.L.R.B. 1175 (1989).

The Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act applies to all safety-sensitive transportation employees in aviation, trucking, railroad, mass transit, pipeline, and other transportation industries. While different agencies oversee the act with respect to each industry, the following requirements are universal:

- Employers must test employees for drugs and alcohol if there is a "reasonable cause or suspicion" that an employee might be under the influence of drugs or alcohol on the job (49 C.F.R. § 382.307) or if the employee is involved in a work-related accident (49 C.F.R. § 382.303).
- Employers must implement a random drug testing program. 49 C.F.R. § 382.305.
- Drug testing must be carried out by a certified laboratory recognized by the Department of Health and Human Services (49 C.F.R. § 40.81) and alcohol testing must be performed by screening test technicians and breath alcohol technicians (49 C.F.R. § 40.211).
- Labs must test for marijuana, metabolites, cocaine metabolites, amphetamines, opiod metabolites, and PCP. 49 C.F.R. § 40.85.
- DOT policies and procedures must be strictly adhered to when testing for alcohol abuse.
- A qualified medical review officer must review all tests, and the employee must be given the opportunity to consult with that officer before the results are provided to the employer. 49 C.F.R. § 40.121 et seq.
- All employees must receive drug and alcohol awareness training and education. 49 C.F.R. § 382.601.
- All supervisors must receive at least two hours of training in substance abuse detection, documentation, and intervention, with half of the training devoted to drug use and the other half devoted to alcohol use. 49 C.F.R. § 382.603.
- Employers must refer any employee determined to have a substance abuse problem to a trained substance abuse professional who will evaluate treatment needs and assess the employee's ability to return to work. See 49 C.F.R. § 40.281 et seq.

See U.S. Dept. of Health & Human Servs., SAMHSA, Considerations for Safety- and Security-sensitive Industries.

State Laws

Some states have enacted laws that provide greater protections than federal law to employees who suffer from alcohol or drug addiction.

In California, for example, the Fair Employment and Housing Act (FEHA), which applies to businesses with five or more employees, protects an employee who has an impairment that limits a major life activity. Cal. Gov. Code §§ 12900–12996. That impairment can be caused by alcohol or drug abuse. That said, there is no protection in California for an employee who is found to be using illegal drugs or alcohol at work or who has failed a drug test.

Thus, in addition to federal laws governing alcohol and drug use in the workplace, be sure to check the applicable state's laws for additional employee protections. For more information on state laws concerning drug and alcohol testing, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Practice Notes Chart.

Employer Screening of Job Applicants and Employees for Alcohol and Drug Use

Employers must be cautious not to ask applicants and employees unlawful questions about drug or alcohol use or conduct impermissible drug and alcohol testing, else they risk running afoul of the ADA and state disability laws. Recent state and local marijuana laws have created additional land mines for employers. Review this section to understand the relevant law and practical considerations for employers surrounding screening job applicants and employees for alcohol and drug use.

For more information on best practices for drug and alcohol screening under the ADA, see Drug and Alcohol Testing Employees Under the ADA Checklist.

Permissible Inquiries about Drug and Alcohol Use

An employer may ask questions about illegal drug use but should be careful about obtaining information regarding a disability. Permissible questions under the ADA include inquiries relating to whether an individual has previously used or currently uses illegal drugs, such as cocaine or marijuana (but be sure to consider state and local laws on marijuana—see "Screening for Marijuana Use" below). Employers should avoid questions regarding prior drug addictions or prior treatment for a drug addiction. Questions about the frequency of past illegal drug use should also be avoided.

An employer may also face an ADA claim if it asks an applicant questions about legal prescription drug use. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 27, 2000) (EEOC Enforcement Guidance on Disability-Related Inquiries), Question 1. Thus, employers should avoid asking such questions in the hiring process or when launching a drug-free workplace program in the absence of a positive drug test that could be excused on account of prescription drug use.

Drug and Alcohol Testing of Job Applicants

Federal Law

Under the ADA, different rules apply depending on when the employer administers the drug testing.

At the pre-offer stage of the application process, the ADA prohibits employers from conducting a medical examination. 42 U.S.C. § 12112(d)(2). However, employers may administer a drug test for current, illegal drug use, which is not deemed a medical examination under the ADA, and they may decline to make a job offer on the basis of a failed test. 42 U.S.C. § 12114(d)(1). Note, however, that testing for trace amounts of drugs can be problematic as they may indicate past usage, which is protected under the ADA. See Accommodations and Leaves of Absence for Drug or Alcohol Treatment under Federal and State Laws. Additionally, testing for alcohol is prohibited at the pre-offer stage. EEOC Enforcement Guidance on Disability-Related Inquiries, Question 2. If a drug test reveals information about an applicant's medical condition, the employer must treat this information as confidential and not consider it when making employment decisions. 29 C.F.R. § 1630.16(c)

Once an employer has made a conditional job offer, in addition to testing for illegal drugs, it may conduct both alcohol and other medical testing that the ADA prohibits at the pre-offer stage. However, employers must conduct medical testing of all applicants in the same job category and must keep all results confidential, except in limited, specified circumstances. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b). An employer may withdraw its conditional offer of employment only if the test results show that the applicant cannot perform the essential functions of the job or would constitute a direct threat to himself or herself or others. 29 C.F.R. § 1630.14(b)(3); EEOC Enforcement Guidance on Disability-Related Inquiries, Question 5. (An employer may withdraw a conditional offer based on a positive test for current, illegal drug use without making such a showing.) Employers may also deny employment to applicants who refuse to participate in a lawful medical examination. See 42 U.S.C. § 12112(d)(3) (permitting an employer to require a conditional offer medical exam).

While the Drug-Free Workplace Act requires certain federal contractors and grantees to prohibit drug and alcohol use in the workplace, it does not address drug and alcohol testing of job applicants and employees.

State Law

Many states impose additional restriction on testing job applicants or employees for drugs and alcohol. However, state drug testing laws vary widely. For instance, some states allow employers to drug test job applicants only on the condition that the employer informs applicants that the testing will be part of the interview process for all individuals. In other states, employers are permitted to drug test an applicant only after offering him or her a conditional position of employment.

Employers must be careful about selectively testing only certain job applicants. In California, for example, courts have found that although an employer may require applicants to pass a drug test as a condition of employment, the employer must test all applicants for the particular job position/class and cannot single out certain applicants based on protected characteristics.

Several states also require drug testing of applicants in certain safety-sensitive fields, such as healthcare workers and school bus drivers.

For more information on state laws concerning drug and alcohol testing of job applicants, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Practice Notes Chart.

Drug and Alcohol Testing of Current Employees

Federal Law

There is no general federal law regulating employee drug testing in most private workplaces. Marijuana Regulation § 5.04 (2018). However, employers must be aware of the stringent requirements under the ADA that pertain to testing current employees for drugs and alcohol.

Under the ADA, an employer cannot make medical inquiries or conduct any medical examinations unless they are "job-related and consistent with a business necessity." 42 U.S.C. § 12112(d)(4)(A). To satisfy this requirement, the employer must have a reasonable belief based on objective evidence that (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employee will pose a direct threat due to a medical condition. EEOC Enforcement Guidance on Disability-Related Inquiries, Question 5.

As mentioned above, testing for illegal drug use is not considered a medical examination under the ADA.

Accordingly, employers can randomly test for illegal drug use without needing to demonstrate that the testing is job-related and consistent with business necessity. However, the testing must be focused on and limited to the employee's use of illegal drugs. For instance, unless the testing protects against a direct threat to public safety, employers should not randomly test for legally obtained prescription drugs, which could reveal an employee's disability. EEOC Enforcement Guidance on Disability-Related Inquiries, Questions 2, 8.

Alcohol testing, on the other hand, is considered a medical examination under the ADA. Thus, employers may not conduct random alcohol testing unless the test is job-related and consistent with business necessity (e.g., periodically testing a city bus driver alcohol intoxication after he or she completes an alcohol rehabilitation program). EEOC Enforcement Guidance on Disability-Related Inquiries, Questions 2, 19.

Employers may also engage in "reasonable suspicion" drug and alcohol testing based on specific, contemporaneous, and articulable observations of employee conduct, behavior, appearance, or body odors. See, e.g., 49 C.F.R. § 382.307. To protect against discrimination claims, be sure the employer has a written, established, and properly implemented process in place for reasonable suspicion testing. Properly documenting each of the steps the employer follows when conducting reasonable suspicion testing is also critical to protecting employers from liability.

Finally, as discussed above, employees in certain federally regulated, safety-sensitive transportation jobs must be tested pursuant to the Omnibus Transportation Employee Testing Act.

State Law

Numerous states (and some cities) have laws that regulate employee drug and alcohol testing in private, nonregulated workplaces that employers must follow. Before considering testing, an employer needs to determine what its state laws are to ensure compliance.

In most states, employers may conduct reasonable suspicion drug testing of employees. However, reasonable suspicion is not broadly construed. To conduct reasonable suspicion testing, the employer generally must have a genuine reason to believe that an employee has been taking drugs that is based on facts and knowledge. Reasonable suspicion should not be based on a guess or a report from another employee who has retaliatory motives. For best practices on responding to a reasonable suspicion that an employee is using drugs, see What to Do When an Employer Suspects or Discovers Impermissible Drug or Alcohol Use – Best Practices below.

Random employee drug testing is more tightly regulated, as many jurisdictions prohibit or limit random testing.

Research the law in your jurisdiction before implementing any employee drug testing programs, as each state's laws have their own nuances. In California, for example, employees have a constitutional right to privacy that can impede an employer's ability to drug test them absent a legitimate interest to do so. Accordingly, reasonable suspicion drug testing is more likely to be upheld by courts in California than random drug testing (except for jobs that are safety- or security-sensitive or where random testing is required by federal law). California employers would thus be wise to limit drug and alcohol testing in most cases to instances in which the employer has a reasonable suspicion that the employee is under the influence of drugs or alcohol at work.

For more information on state laws concerning drug and alcohol testing of current employees, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Practice Notes Chart.

Methods for Drug and Alcohol Testing

Employers that decide to conduct testing may also have to follow certain protocols. At minimum, employers should adhere to the Revised Mandatory Guidelines on Federal Workplace Testing, which establish procedures for collecting urine, transmitting samples, using testing laboratories, testing methods, evaluating test results, and maintaining quality control. See U.S. Department of Health and Human Service (HHS), 82 Fed. Reg. 7929 (Jan. 23, 2017).

Employers may also have to adhere to state law protocols. In Alaska, for example, an employer that implements a drug testing program must adhere to specific procedures when testing job applicants and employees. See Alaska Stat. § 23.10.600 et seq.

Public employers must also consider constitutional limitations on drug testing procedures. The U.S. Supreme Court in Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) addressed whether blood and urine collection would be harmful to job applicants and employees, holding that these procedures are "minimally intrusive" where the applicant does not have to provide the urine sample while other people in the room are watching. Thus, if a public employer wishes to test a job applicant for drug or alcohol use, it should test all applicants for a specific position in a consistent manner that does not be invade to a person's privacy (i.e., allowing them to urinate in private).

Note that certain jurisdictions have specifically prohibited observed collection of samples for testing, including

Connecticut, Maine, Rhode Island, Vermont, and Boulder, Colorado. For more information on state laws concerning drug and alcohol testing methods, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Practice Notes Chart.

Screening for Marijuana Use

Even though marijuana use remains illegal under federal law, many state laws have legalized marijuana for recreational use and/or medical use. Because many of these laws prevent employers from discriminating against marijuana users, they can be a complicating factor when considering drug testing in the workplace.

In New York, for instance, certified medical marijuana users are considered disabled under the New York State Human Rights Law. N.Y. Pub. Health Law § 3369. Thus, New York employers should generally refrain from asking job applicants about marijuana use in applications or interviews or taking adverse action against medical marijuana patients who test positive for marijuana.

In California, where recreational and medical marijuana is legal, employers may only test applicants for **illegal** drug use. However, because marijuana remains illegal under federal law, California employers may generally deny employment to applicants who test positive for marijuana use. See Ross v. RagingWire Telecomms., Inc., 174 P.3d 200, 202 (Cal. 2008).

Cannabis laws differ significantly across jurisdictions, so be sure to investigate these laws in any state in which the employer has employees. For more information, see Medical and Recreational Marijuana State Law Survey.

You should research local laws, as well, which may also restrict employers' ability to screen employees for marijuana use. In New York City, for example, employers are prohibited from testing job applicants for marijuana as a condition of employment, effective May 10, 2020. NYC Administrative Code 8-107, subd. 31 (effective May 10, 2020).

Practical Considerations regarding Drug and Alcohol Screening

- Employers should adhere to the following best practices when establishing a drug or alcohol testing program:
- Limit drug and alcohol testing of applicants to the conditional offer stage and inform all applicants at the outset that testing will be part of the interview process.
- Generally, employers should only drug and alcohol test current employees upon a reasonable suspicion that the employee is under the influence. However, random drug and alcohol testing may be merited in safety- and security-sensitive positions.
- When choosing which unlawful drugs to test for, focus on the ones that are likely to adversely affect the test subject's ability to perform the essential functions of the job or pose a direct threat to the safety of the test subject or others. The most commonly tested for drugs include amphetamines, THC, cocaine, opiates, and phencyclidine.
- Avoid testing for prescription drugs unless their use could cause a direct threat to public safety or they could explain a positive test for illegal drugs.
- Develop and implement a written policy informing employees that the employer will conduct drug and alcohol testing if the employer has a reasonable suspicion that an employee is under the influence of drugs or alcohol. The policy should include the consequences, if any, of refusing a drug test based on reasonable suspicion and of a positive drug test. For additional information, see Drug- and Alcohol-Testing Policies: Key Drafting Tips. For model non-jurisdictional and state drug testing policies, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Expert Forms Chart.
- If there is reasonable suspicion of drug or alcohol use, obtain written consent from employees before conducting any drug test. For model non-jurisdictional and state drug testing authorizations, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Expert Forms Chart.
- Ensure that supervisors are trained in the signs of drug usage and know to whom they should report any reasonable suspicions of substance abuse.
- Use a reputable third-party company to conduct drug testing. Partnering with an experienced drug testing provider will help ensure that all tests are performed legally and accurately.
- Take every step possible to ensure that all drug test results are kept confidential. See EEOC Technical Assistance Manual, § 8.9; 29 C.F.R. § 1630.16(c)(3).

Prohibiting the Use of Alcohol and Drugs in the Workplace

Employers should strongly consider having a policy that prohibits employees from being under the influence of illegal drugs (including marijuana) or alcohol while working. Employers can require their employees to report to work fit for duty and free of any adverse effects of illegal substances.

A drug- and alcohol-free workplace policy should:

- Notify employees that the use, possession, or sale of illegal drugs and alcohol during the workday or while on company property is prohibited
- Contain a carve-out for prescription drugs that employees use in accordance with a doctor's instructions
- Contain a carve-out for consuming alcohol responsibly at company events, if applicable
- Include the consequences for violating the policy, including the disciplinary process, which could range from a verbal or written warning to immediate termination of employment –and–
- Contain the option to send an employee to counseling and/or a rehabilitation program (This section should clearly detail the process of sending an employee to counseling or rehab and the consequences for any subsequent violations after the counseling or rehab concludes.)
- Contain a dated acknowledgment that the employee received a copy of the policy (or the employee handbook in which it is contained), read it, and understood its contents
    - If possible, obtain a dated, handwritten signature from the employee, and a countersignature of a company representative, and do not have the employee sign this document electronically, as it can be difficult to prove that an electronic signature is attributable to the employee.

Employers should train all supervisors about the policy and how to report suspected violations.

Additionally, consider whether there are any applicable laws or regulations in a specific state that affect the policy.

For more information on drafting drug- and alcohol-free workplace policies, see Substance Use and Abuse Policies: Key Drafting Tips. For a model substance use and abuse policy, see Substance Use and Abuse Policy.

For information on the Drug-Free Workplace Act, which mandates drug-free workplaces and policies for federal contractors, see Federal and State Laws Governing Drugs and Alcohol in the Workplace above.

Legal Marijuana Use in the Workplace

Employers should clearly state their position on the use of marijuana in the workplace in their substance use and abuse policy. Note that even in states that have legalized medical and/or recreational marijuana, employers do not have to tolerate on-the-job marijuana consumption or intoxication. Employers in such states generally may continue to maintain workplace policies prohibiting the use of marijuana in the workplace and on company property, much in the same manner as they may prohibit alcohol intoxication at work or during working hours.

For example, California's Proposition 64, or the Adult Use of Marijuana Act (Prop 64), legalized recreational marijuana use for adults 21 years or older. However, even though adults may now legally use marijuana for medicinal and recreational purposes, employers in California may continue to maintain workplace policies prohibiting marijuana use or intoxication.

For information on medical and recreational marijuana laws in all 50 states plus Washington, D.C., see Medical and Recreational Marijuana State Law Survey.

Accommodations and Leaves of Absence for Drug or Alcohol Treatment under Federal and State Laws

As discussed below, the ADA and many state anti-discrimination laws require employers to provide reasonable accommodations to employees who suffer from drug addiction or alcoholism if their addiction qualifies as a "disability." Additionally, the FMLA and many state leave laws permit employees to take leaves of absence to obtain treatment for drug or alcohol addictions.

Protections for Drug and Alcohol Addiction under the ADA

Which Employees Qualify for Protections

Under the ADA, only qualified individuals with disabilities are entitled to the law's protections, including freedom from discrimination and entitlement to reasonable accommodations. The ADA defines a protected disability to include impairments that "substantially limit" an employee's major life activity. Alcoholics and recovering alcoholics may be considered "disabled" if their condition limits a major life activity.

The ADA specifically excludes from the definition of qualified individual "any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a). Additionally, psychoactive substance use disorders resulting from current, illegal drug use are not a covered disability under the ADA. 29 C.F.R. § 1630.3(d).

However, the ADA provides a "safe harbor" for an individual who:

- Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs
- Is participating in a supervised rehabilitation program and is no longer engaging in such use –or–
- Is erroneously regarded as engaging in such use, but is not engaging in such use

42 U.S.C. § 12114(b).

Reasonable Accommodations

If employees who are recovering from an addiction to drugs or alcohol are covered under the ADA, employers must grant them reasonable accommodations that allow them to perform the essential functions of their jobs. 42 U.S.C. § 12112(b)(5). Examples of reasonable accommodations may include:

- Time off to attend a rehabilitation program
- Time off to attend counseling meetings or other support groups
- Flexible scheduling
- Removal of environmental triggers
- Use of support animals

Unlawful Discrimination

Employers also cannot discriminate against such individuals on the basis of their alcoholism or past addiction to drugs or alcohol. 42 U.S.C. § 12112. Examples of such unlawful discrimination include:

- Refusing to hire someone solely because he or she is an alcoholic
- Demoting an employee upon learning that he or she attended rehab for a drug addiction
- Harassing an employee because of his or her participation in Alcoholics Anonymous
- Firing an employee because of his or her alcoholism or past drug or alcohol addiction

However, alcoholism does not protect an employee against being disciplined for misconduct. While it is unlawful for an employer to discriminate against an employee solely because he or she is an alcoholic, an employer may discipline or fire an employee for unacceptable behavior (even if the behavior is caused by alcoholism).

Leave for Drug and Alcohol Treatment under the FMLA

Employers may also have to provide employees who are addicted to drugs or alcohol time off under the FMLA. Specifically, the FMLA allows qualifying employees who work for an employer with at least 50 employees to take unpaid, job-protected leave to obtain treatment for a drug or alcohol addiction or any resulting physical illness, as well as to care for a close family member (i.e., a spouse, parent, or child) who is getting treatment for drug or alcohol abuse. 29 C.F.R. § 825.119. A qualifying employee for purposes of FMLA protection is one who has worked at least 1,250 hours in the past 12 months. 29 C.F.R. § 825.110(a). The FMLA also protects the employee from retaliation for taking leave or exercising other rights under the act. 29 U.S.C. § 2615(a).

However, treatment for substance abuse does not prevent an employer from taking employment action against an employee. If an employer has an established policy, applied in a nondiscriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. 29 C.F.R. § 825.119(b).

State Law Protections

Certain state laws also address whether employers must reasonably accommodate or provide protected leave to employees addicted to drugs or alcohol. In California, for example, the FEHA, like the ADA, does not consider a current addiction to illegal drugs to be a mental or physical disability that is protected under the law. Cal. Gov. Code § 12926(j)(5) and (m)(6). Nor does the law require employers to accommodate an employee's marijuana use, despite being legal in California for both medical and recreational use. See Cal. Health & Saf. Code § 11362.45(f); see also Ross, 174 P.3d at 202.

However, California's Labor Code requires a private employer with 25 or more employees to accommodate an employee who voluntarily requests to enter and participate in an alcohol or drug rehabilitation program. An employer may deny such a request only if it would impose an undue hardship on the employer. Cal. Lab. Code §§ 1025–1028. Extended leaves of absence might also be required as a reasonable accommodation under the FEHA.

For more information on state laws concerning accommodations for individuals addicted to drugs and alcohol, see the section entitled "Disability-Related Protections" in the state Discrimination, Harassment,

and Retaliation practice notes and the state Disability Comparison Chart practice notes in the Discrimination, Harassment, and Retaliation State Practice Notes Chart.

What to Do When an Employer Suspects or Discovers Impermissible Drug or Alcohol Use – Best Practices

Although employers can have policies that prohibit drug and alcohol use in the workplace, the line between having a protected disability and engaging in unprotected conduct is not always clear. Follow the steps outlined below to ensure compliance.

When the Employer Has a Reasonable Suspicion That Its Employee Is under the Influence

When an employer has a reasonable suspicion that an employee is under the influence of illegal drugs or alcohol at the workplace (as discussed in "Drug and Alcohol Testing of Current Employees" under Employer Screening of Job Applicants and Employees for Alcohol and Drug Use above), it should consider taking the following steps:

(1)**Ensure there is a written drug and alcohol testing policy.** First, employers should have a clearly written drug and alcohol policy that explicitly states that the company conducts drug and alcohol testing based on reasonable suspicion. For additional information, see Drug- and Alcohol-Testing Policies: Key Drafting Tips. For model non-jurisdictional and state drug testing policies, see the Pre-employment Inquiries and Testing column of Screening and Hiring State Expert Forms Chart.

(2)**Gather and document all information.** Second, if the employer receives information that an employee may be using drugs or alcohol on the job, it should document that information and where it came from. If a co-worker brings such information to the employer, it should obtain all relevant details and ask if there are any other people who might have witnessed anything or have additional information. While an employer should not subject an employee to testing based on co-worker gossip or hearsay, it should nevertheless document all such statements.

(3)**Observe the employee.** Third, the employer should observe the employee as soon it becomes aware of any concerns. The employer should also note and document any signs of intoxication or drug or alcohol use, such as smell, eye dilation, inability to walk or stand, slurred speech, or other abnormal behavior. If the employee appears to be under the influence and is in a safety-sensitive position, the employer should immediately remove the employee from the work area to remove any possibility of safety hazards. However, avoid taking other adverse actions at this time. An employee's signs of drug or alcohol use (e.g., slow speech or lack of coordination) might in fact be the result of another serious disability or medical condition. If the employer treats this employee differently than others or assumes the employee cannot handle a more difficult task or position—and the symptoms are not the result of current drug or alcohol use—the employer may be subject to an ADA discrimination claim.

(4)**Determine an appropriate response.** Fourth, after the employer gathers all relevant information, it should assess what to do with the employee. If, after reviewing all of the information, the employer concludes that no reasonable suspicion of illegal drug or alcohol use exists, it need not take any action with respect to the employee, but it should retain all documentation related to the investigation.

(5)**If reasonable suspicion exists, send the employee for testing.** If the employer believes that the information and observations support the suspicion, it should immediately meet with the employee, where it should explain the observations. If the employee does not admit to drug and/or alcohol use, the employer should state that it will need to send the employee for a test in order to rule out the possibility. If the employer has not obtained a drug testing authorization previously, it should ask the employee to sign the authorization form. If the employee refuses to be tested, the employer should refer to its drug and alcohol policy. A policy can state that a refusal to submit to testing will be treated as a positive drug test result or will result in immediate termination of employment. Once the employer has obtained consent, it should immediately send the employee for drug and alcohol testing and arrange the transportation to and from the facility. Adhere to any testing protocols required in your jurisdictions. See "Methods for Drug and Alcohol Testing" in Employer Screening of Job Applicants and Employees for Alcohol and Drug Use.

(6)**Obtain the testing results and take action.** The company policy, in accordance with applicable law, should address what the employee should do while waiting for test results, as well as the circumstances

in which the employer must pay for this time. If the test results come back negative, the employer should contact the employee and inform the employee that he or she should return to work as soon as possible. If the employer did not pay the employee while awaiting the test results, and the test results come back negative, the employer should retroactively pay the employee for all work shifts and hours missed while waiting for the test results. For guidance on responding to positive drug tests, see the following section.

When the Employer Receives a Positive Drug Test

If the drug and alcohol test comes back positive (or the employee admits to being under the influence of drugs or alcohol at work), the employer should first determine whether there are circumstances that excuse the positive test. Did the test come back positive for drugs that have been prescribed by a doctor for a medical condition? Did the test detect marijuana in a jurisdiction where off-duty marijuana use is protected? Were appropriate testing protocols followed?

If discipline is merited, adhere to the disciplinary procedures outlines in the company's written policies. Discipline can range from an oral reminder to immediate termination. There may be different levels of discipline depending on whether this was an isolated or repeated offense (e.g., a first offense gets a written warning, a second results in a suspension, a third results in termination). Depending on the policy and the nature of the employee's offense, the employer may also choose to offer the employee the opportunity to seek counseling and/or treatment and return to work. If it does so, the employer should document the consequences of any subsequent violation by the employee after completing treatment.

To avoid discrimination claims, ensure that disciplinary action is consistent in type and severity with that taken against other employees who committed similar violations. As with any violation, document the disciplinary or termination process completely.

For additional guidance on investigations, discipline, and terminations, see the guidance in the Investigations, Discipline, and Terminations task.

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