

Legal Issues of a Drug-Free Workplace

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This presentation is for educational purposes only and is not intended as a substitute for legal advice. Any employer confronted with a specific issue pertaining to drug use in the workplace is strongly advised to obtain and consult with competent counsel experienced in this field.

Disability Laws and the Drug-Free Workplace

Drugs Other than Alcohol

- Current use is NOT a protected disability.
- NJ law is now the same: current drug use is not a protected disability.
- Cannot discriminate against those with a history of drug use.
- Under FMLA: absences for drug treatment are protected, absences caused by drug use are not.

Alcohol Abuse

- Alcoholism is a protected disability, but alcohol related misconduct is neither protected nor excused.
- Rules prohibiting intoxication at work are enforceable.
- May hold alcoholic employees to the same standards of performance that apply to others.

Alcohol Abuse

- A blanket policy requiring all employees returning from alcohol treatment to agree to undergo follow-up alcohol testing, and face termination if they test positive, constituted unlawful disability discrimination when applied to a long-term employee who had voluntarily disclosed her alcoholism and undergone rehabilitation.
- Avoid "one size fits all" approach to follow-up testing and last chance agreements.
- Tailor to facts and circumstances of each specific case.

“Regarding” and the ADA

- Under ADA and NJ LAD – it is unlawful to take adverse action against an employee who is erroneously believed to be disabled, including current alcoholism or drug use.
- An employer presented with a positive drug/alcohol test from a reliable laboratory cannot be held liable under a “regarding” theory if the test is later shown to be inaccurate.
- “Forcing” an employee to admit to alcoholism or addiction can be deemed unlawful “regarding.”

ADA and Drug Testing

- Tests for illegal use of drugs are not considered “medical examinations” under the ADA and are not subject to the ADA’s restrictions on medical examinations.
- Alcohol tests – allowed when job related and consistent with business necessity.
- Tests for illegal drugs are not subject to HIPAA.

ADA and Prescription Drugs

- Cannot ask employees to disclose the medications they are taking.
- In safety-sensitive environments, can ask employees to disclose whether they are taking medication that may impair them (but no specifics).
- Pre-employment: May explain that being unimpaired is an essential function and ask if the applicant is able to meet this requirement. But no specifics unless the applicant volunteers them.

ADA And Medical Marijuana

- Doctor-supervised marijuana use is federally prohibited use of drugs that is not covered by ADA.
- Neither ADA's supervised use exception nor exception for drug use "authorized by other provisions of Federal law" applies to medical marijuana; thus, exception did not protect medical marijuana users who claimed to face discrimination on basis of their marijuana use

How to Deal with Suspected Abuse

- In the absence of proof of use or intoxication, do not assume a substance abuse problem. Deal with the performance or conduct.
- Allow employee to raise the issue of dependency or addiction. Never force the employee to “admit” to being addicted or dependent.
- Consider offering treatment or evaluation as part of a voluntary settlement in lieu of discipline for the performance/conduct issues.

Drug Testing in New Jersey

Drug Testing in New Jersey

Random Testing:

- Permitted in both the private and public sector for employees who hold safety-sensitive positions where the need to function safely is clear.
- “Random” means truly at random.
- Mandatory for CDL holders under federal law.

Drug Testing in New Jersey

Reasonable Suspicion Testing:

- Permitted in both the private and public sectors for all employees.
- Objective facts which, with inferences, would lead a reasonable person to conclude that a particular individual is involved in drug-related activity that is taking or has taken place.
- Mandatory for CDL holders under federal law.

Drug Testing in New Jersey

Testing of Job Applicants:

- Permitted in the private sector when all applicants are tested pursuant to an announced and established policy that is made known to the applicant.
- Permitted in the public sector for employees who hold safety-sensitive positions, or who work in highly-regulated fields, e.g., law enforcement.
- Mandatory for CDL holders under federal law.

Drug Testing in New Jersey

Testing in Conjunction with Annual Physicals:

- Permitted in both the private and public sectors for employees who hold safety-sensitive positions where the need to function safely is clear.
- The annual physical must be “job related and consistent with business necessity.”

Drug Testing in New Jersey

Return to Duty Testing:

- Testing of an employee, prior to return to work, who has previously tested positive or has otherwise been found to have abused substances.
- Permitted in both the private and public sectors, especially where there is a “last chance” agreement.
- Mandatory for CDL holders under federal law.

Drug Testing in New Jersey

Follow-Up Testing:

- Testing of an employee who has previously tested positive or has otherwise been found to have abused substances *after* return to work.
- Permitted in both the private and public sectors, especially where there is a “last chance” agreement, with respect to controlled substances.
- Mandatory for CDL holders under federal law.

Drug Testing in New Jersey

Follow-Up Testing and Alcohol:

- Blanket requirement of follow-up testing constitutes potential unlawful discrimination.
- Requires an individualized assessment of the employee, the position the employee holds, and whether there is an objectively reasonable belief that the employee will pose a direct threat to health or safety without testing.
- But still mandatory for CDL holders under federal law.

Drug Testing in New Jersey

Post Accident Testing:

- Testing of an employee immediately following an accident in which the employee was involved or which the employee caused.
- Mandatory for CDL holders under federal law.
- In non-CDL setting, need reasonable suspicion of substance use, safety-sensitive position, or established policy.

Drug Testing in New Jersey

Privacy in Drug Testing:

- New Jersey rule: Testing must be conducted in a manner that protects the privacy, confidentiality and dignity of the subject.
- Direct observation: Allowed in limited circumstances where there is evidence of providing false/adulterated samples.
- Direct observation now mandatory for CDL holders under federal law for return to duty and follow-up testing. Will New Jersey follow?

Alcohol Testing

- Considered a medical examination under the ADA.
- Can be administered pre-hire only after a conditional offer of employment has been extended.
- Post-hire: allowed only when job related and consistent with business necessity.

The “New Jersey Compassionate Use of Medical Marijuana Act” *Implications for Employers*

What Does the Law Provide?

Of Specific Note for Employers:

- Government medical assistance programs and private health insurers ARE NOT REQUIRED to reimburse a person for costs associated with the medical use of marijuana.
- The Act expressly states that employers are not required to accommodate the medical use of marijuana in any workplace.

Medical Marijuana and the Drug-Free Workplace

Employers who have drug-free workplace policies will still be able to enforce them against medical marijuana users.

Caution I

Medical marijuana is still a federal crime, and marijuana use for medical reasons enjoys no protection under federal law.

Caution II

USDOT drug and alcohol testing (e.g., CDL holders) – medical marijuana is not considered a legitimate reason for a positive drug test. All USDOT penalties apply to medical marijuana.

Caution III

All federal grantees , and certain federal contractors , must comply with the requirements of the Drug-Free Workplace Act of 1988, even with regard to medical marijuana.

Caution IV

Federal grantees and contractors must be alert for potential conflicts with federal law, regulation, contract and grant requirements – seek legal counsel when issues arise.

Drug Free Workplace Policies

What Should a Policy Contain?

- Identify prohibited conduct
- Identify consequences for engaging in prohibited conduct
- Periods when prohibitions apply
- Who will be subject to drug testing

What Should a Policy Contain?

- Discussion of testing procedures to be used
- Discussion of effects of intoxicants, signs and symptoms of substance abuse, and where to seek assistance for substance abuse issues

What Should a Policy Contain?

For CDL holders, must distinguish between policies required by federal law, and policies adopted at the employer's discretion.

Employee Education

- Substance abuse not tolerated at work.
- Effects of substance abuse and how it affects employee's health and work.
- How the employer will respond to work-related substance abuse.
- Where employees can voluntarily obtain assistance for substance abuse issues.

Thank You

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