



Webinar 14 - July 24, 2024

Drug and Alcohol Policies and Key Updates: What Employers Should Know

WEBINAR OUTLINE

INTRO/SETTING THE STAGE

AN OVERVIEW OF FEDERAL LAWS GOVERNING DRUGS AND ALCOHOL IN THE WORKPLACE

NEW YORK STATE LAWS GOVERNING DRUGS AND ALCOHOL IN THE WORKPLACE

WHAT TO DO WHEN THERE IS A REASONABLE SUSPICION THAT AN EMPLOYEE IS UNDER THE INFLUENCE

WHAT TO INCLUDE IN YOUR SUBSTANCE ABUSE POLICY

HRtelligence TIPS

INTRO/SETTING THE STAGE

What Employers Should Know

When it comes to drug and alcohol use and testing in the workplace and the ever-changing landscape relating to marijuana use, it is important for employers to be well-advised in this area of law. Employers should know how to address the following:

- whether to test applicants or employees for drug and alcohol use
- what to include in policies that govern drug and alcohol use in the workplace
- when to offer accommodations to drug and alcohol users
- what disciplinary measures are appropriate for an individual found to be abusing drugs or alcohol.

AN OVERVIEW OF FEDERAL LAWS GOVERNING DRUGS AND ALCOHOL IN THE WORKPLACE

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

- Drug-Free Workplace Act of 1988
- Americans with Disabilities Act of 1990 (ADA)
- Family and Medical Leave Act of 1993 (FMLA)
- National Labor Relations Act of 1935 (NLRA)
- Omnibus Transportation Employee Testing Act of 1991

Drug-Free Workplace Act of 1988

On November 18, 1988, Congress enacted the Drug-Free Workplace Act requiring Federal agency contractors and grantees to certify that they will provide a drug-free workplace as a pre-condition of receiving a contract or a grant from a Federal agency after March 18, 1989.

Among other requirements, as a pre-condition to receiving a grant, the grantee must certify that it will maintain a drug-free workplace by:

- (a) Publishing and distributing to each employee a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace, and specifying the action that will be taken against employees for violation of such prohibition.

(b) Establishing an on-going drug-free awareness program to inform employees about (1) the dangers of drug abuse in the workplace, (2) the grantee's drug-free workplace policy, (3) any available drug counseling, rehabilitation, and employee assistance programs, and (4) the penalties for drug-abuse violations occurring in the workplace.

ADA

The ADA prohibits all U.S. employers with 15 or more employees for each working day from discriminating against qualified job applicants or employees because of a disability.

- 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.
- 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.

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.

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.

However, employers may generally implement pre-employment testing programs without bargaining.

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.

Accommodations and Leaves of Absence for Drug or Alcohol Treatment

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."

Additionally, psychoactive substance use disorders resulting from current, illegal drug use are not a covered disability under the ADA.

Safe Harbor Provision Under the ADA

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

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.

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

The Job Accommodation Network (JAN), a service of the Department of Labor's Office of Disability Employment Policy suggests questions to consider when developing accommodations for employees recovering from alcohol abuse.

Among the questions:

- What limitations is the employee experiencing?
- How do these limitations affect the employee and the employee's job performance?
- What specific job tasks are problematic as a result of these limitations?
- What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
- Once accommodations are in place, would it be useful to meet with the employee to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
- Do supervisory personnel and employees need training?

JAN also offers various accommodation ideas, such as frequent breaks and flexible scheduling to enable the employee to attend counseling.

Unlawful Discrimination

Employers also cannot discriminate against such individuals on the basis of their alcoholism or past addiction to drugs or alcohol.

Examples of such unlawful discrimination include:

- Refusing to hire someone solely because they are 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.

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.

NEW YORK STATE LAWS GOVERNING DRUG AND ALCOHOL IN THE WORKPLACE

The New York State Human Rights Law does not require an employer to provide a reasonable accommodation to an employee who is currently using illegal drugs or abusing alcohol. 9 NYCRR § 466.11(h)(1).

However, an employer is required to offer a reasonable accommodation to an employee who is a recovered/recovering drug addict or alcoholic if it is necessary for them to perform the essential requirements of their job. 9 NYCRR § 466.11(h)(1)

Notes:

For example, an employer terminated an employee, who was seeking treatment for his alcoholism, shortly after he confided in his supervisor that he suffered from alcoholism, despite his record as an excellent employee. [Grullon v. South Bronx Overall Economic Dev. Corp., 185 Misc. 2d 645, 647-48 \(N.Y. City Civ. Ct. 2000\)](#). The court held he made out a prima facie case for disability discrimination under the NYSHRL because he was terminated by his employer for having or being regarded as having a disability. [Grullon, 185 Misc. 2d at 649 \(N.Y. City Civ. Ct. 2000\)](#).

The administrative regulations encourage an employer who knows of current drug use or observes that an alcoholic or drug addict's job performance falls below acceptable standards to give the employee a leave of absence and require attendance at a rehabilitation program before disciplining or terminating an employee for the performance problems. 9 NYCRR § 466.11(h)(5).

Use of Marijuana

The Marijuana Regulation & Taxation Act (MRTA) was signed into law on March 31, 2021 legalizing the recreational use of cannabis (marijuana) for adults 21 years of age and older.

The MRTA amended New York Labor Law § 201-d to prohibit employers from disciplining or discriminating against employees who recreationally use or consume marijuana outside of work hours, off an employer's premises, and without using an employer's equipment or property.

An individual who is certified to use medical marijuana is considered an individual with a disability for purposes of the New York Human Rights Law. However, employers may have and enforce policies that prohibit employees from performing their duties while impaired by a controlled substance, including medical marijuana.

Thus, employers cannot refuse to hire or otherwise discriminate against applicants or employees for perceived or actual medical marijuana use, but they are not required to permit medical marijuana use on the job.

Under New York labor law, employers cannot refuse to hire applicants for the legal use of marijuana occurring outside of work hours and off the employer's premises.

Employers MAY take employment action or prohibit employee conduct where:

- An employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate
- The employer would be in violation of federal law
- The employer would lose a federal contract or federal
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of the employee's tasks or duties
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws
- An employer is not prohibited from taking employment action against an employee if the employee is impaired by cannabis while working (including where the employer has not adopted an explicit policy prohibiting use), meaning the employee manifests specific articulable symptoms of impairment that:
- Decrease or lessen the performance of their duties or tasks

- Interfere with an employer’s obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws

Employers are within their rights to prohibit drugs of any kind in the workplace, including cannabis. Such a policy means employees are not permitted to use (smoke, ingest, consume) cannabis during work hours, nor are they allowed to bring cannabis products into the workplace. Employees who drive company vehicles or work remotely should extend this rule to their workplace, be it a car or home office.

Employers with a drug free workplace policy may take action, including discipline, against an employee found with cannabis products on their person in the workplace or when the employee appears impaired by cannabis use while at work. This must be manifested by “specific articulable symptoms” that decreases the employee’s work performance or interferes with workplace safety obligations.

What Constitutes Specific Articulable Symptoms?

The [New York State Department of Labor](#) (NYS DOL) does not provide a list of symptoms, but instead says that there is “no dispositive and complete list of symptoms of impairment,” and any such symptoms must be “objectionably observable indications that the employee’s performance of the duties of the position are decreased or lessened.”

For example, the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment.

The DOL goes on to give examples of what would NOT constitute “objectionably observable indications,” which includes noticeable odor on its own and observable signs of use that do not indicate impairment on their own.

Usage During Sanctioned Breaks or Mealtimes

Can employers prohibit use of cannabis during meal or break periods?

Yes, employers may prohibit cannabis during “work hours,” which for these purposes means all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work.

Such periods of time are still considered “work hours” if the employee leaves the worksite.

Can employers prohibit use of cannabis during periods in which an employee is on-call?

Yes, employers may prohibit cannabis during “work hours,” which includes time that the employee is on-call or “expected to be engaged in work.”

Usage While Using Company Equipment or Property

Employers may prohibit employees from bringing cannabis onto the employer’s property, including leased and rented space, company vehicles, and areas used by employees within such property (e.g., lockers, desks, etc.).

Employers are permitted to prohibit use in company vehicles or on the employer’s property, even after regular business hours or work shifts.

Remote Workers

The Department of Labor does not consider an employee’s private residence being used for remote work a “worksite” within the meaning of Labor Law Section 201- D. However, an employer may take action if an employee is exhibiting articulable symptoms of impairment during work hours as described above and may institute a general policy prohibiting use during working hours.

WHAT TO DO WHEN THERE IS A REASONABLE SUSPICION THAT AN 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, it should consider taking the following steps:

- (1) Ensure there is a written drug and alcohol testing policy. 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.
- (2) Gather and document all information. 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. 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. 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 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 may state that it will need to send the employee for a test in order to rule out the possibility.

New York – Drug and Alcohol Testing Laws

Although marijuana is legal for both medical and recreational purposes in New York, employers are permitted to take disciplinary action against employees who use or are under the influence of drugs at work. In practice, however, it is difficult for employers to prove an employee's on-duty marijuana use without a drug test.

According to the New York State Department of Labor, an employer must show that a particular worker "manifests specific articulable symptoms of impairment" before discipline can be imposed.

New York Workplace Testing Laws for Drugs Other Than Marijuana

New York has no law addressing testing for drugs other than marijuana in private employment. This means that drug testing is not prohibited or restricted, unless it violates other legal provisions.

Being that alcohol is not illegal, New York employers must have a legitimate reason pertaining to workplace concerns to conduct alcohol testing. However, an employer can conduct alcohol testing as a condition of work return following the completion of a substance rehabilitation program requested by the employer.

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.

Notes:

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.

Legal Claims for Drug Testing

Employers can also run into legal trouble if they conduct tests for other drugs in a manner that violates the law. Here are some examples:

- Disability and other discrimination claims. The ADA protects an applicant or employee who is taking medication for a disability. Some prescribed medications can result in a positive result on a drug test, and some drugs that would otherwise be illegal (such as opiates) are legitimately prescribed for certain conditions. If an applicant is turned down because of a positive drug test, and the applicant's medication was legally prescribed for a disability, the company could be liable.

An employer who singles out certain groups of employees—for example, by race, age, or gender—for drug testing could face a discrimination claim.

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.

- Invasion of privacy. Even an employer that has a legitimate reason to test might violate employee privacy in the way it conducts the test.

WHAT TO INCLUDE IN YOUR SUBSTANCE ABUSE POLICY

You may want to consider having a written policy about drugs and alcohol in the workplace and you may be required to have one in certain instances. There are two types of policies you can have:

- One that indicates that you will not tolerate drug and alcohol abuse in the workplace, but which does not provide for drug testing.
- One that does provide for drug testing.

Should you desire or be required to have a policy, consider including the following elements:

- the unacceptability of drug or alcohol use on the job
- what constitutes an infraction of work policy and rules regarding substance abuse
- the consequences if an employee is found to be engaged in substance abuse
- information on the availability of treatment and rehabilitation services, if any
- your policy on the use of alcohol at company nonwork activities (such as parties and picnics)
- your position on drug testing and, if you test, the consequences of a positive test result
- acknowledgment that any problems with substance abuse are considered medical in nature and will be treated as such (i.e., confidentially)
- recordkeeping procedures that assure confidentiality

Source: <https://www.wolterskluwer.com/en/expert-insights>



- **Be attentive to performance issues and address them thoroughly and promptly.** A well-defined corrective action process that consistently identifies and addresses poor performers can eliminate many drug/alcohol abusers through the process without ever resorting to other means such as drug testing. However, supervisors must understand their heightened responsibilities under this form of corrective action and be willing to consistently enforce, without exception, job standards and work rules.
- **Ensure that your company has a zero-tolerance policy prohibiting substance abuse.** While not the only method of minimizing the effects of drugs and alcohol in the workplace, a policy prohibiting use, possession, sale, or being under the influence is a great start to maintaining a safe, productive work environment.
- **Educate your employees regarding policies and programs.** To educate your employees about your business's stance on substance abuse and any program you may have, you should:
 - Tell new hires about the policy (orientation is a good place for this).
 - Periodically remind current employees about your commitment to making the program work.
- **Implement an education and awareness program.** Explain your policy to your employees and the consequences of using drugs, on or off the job.
 - Tell your employees how to get help with their drug and alcohol problems.
 - Inform employees on how drugs and alcohol actually affect the productivity of your business, product quality, absenteeism, health care costs, and on-the-job injury rate.
 - Explain testing procedures, if you have any, with special attention to the consequences of testing positive and procedures for ensuring accuracy and confidentiality.