



jackson|lewis
all we do is work

Mike Padgett
Indianapolis Office
Jackson Lewis P.C.
padgettm@jacksonlewis.com
(317) 489-6936

Substance Abuse In The Workplace

Substance Abuse in the Workforce

- According to the National Drug-Free Workplace Alliance, of the **17.4 million** current illicit drug users aged 18 and over, more than 75% were employed.
- Of the **20.4 million** adults classified with substance dependence or abuse, over 60% were employed full-time.
- Of the **55.3 million** adult binge drinkers, nearly 80% were employed – **16.4 million** of these employees classified themselves as heavy drinkers.

Disability-Related Inquiries and Medical Examinations

Title I of the Americans with Disabilities Act of 1990 limits an employer's ability to make disability-related inquiries or require medical examinations of applicants or employees.

Disability-Related Inquiries and Medical Examinations

Disability-related inquiries and medical examinations must be "job-related and consistent with business necessity."

The ADA states in relevant part:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

See 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c)

“Disability-Related Inquiry”

A “disability-related inquiry” is a question that is likely to elicit information about a disability.

Disability-related inquiries may include the following:

- asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability;
- asking an employee to provide medical documentation regarding his/her disability;
- asking an employee's co-worker, family member, doctor, or another person about an employee's disability;
- asking about an employee's genetic information;

“Disability-Related Inquiry” (Cont’d)

- asking about an employee’s prior workers’ compensation history;
- asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and
- asking an employee a broad question about his/her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?)

“Disability-Related Inquiry” (Cont’d)

Questions that are *not* likely to elicit information about a disability are *not* disability-related inquiries and, therefore, are not prohibited under the ADA.

Questions that are permitted include the following:

- asking generally about an employee's well being (e.g., How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;
- asking an employee whether s/he can perform job functions;

“Disability-Related Inquiry” (Cont’d)

- asking an employee whether s/he has been drinking; and
- asking an employee about his/her current illegal use of drugs;

“Medical Examination”

A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health.

See Preemployment Questions and Medical Examinations *supra* note 2, at 14, 8 FEP at 405:7197.

“Medical Examination” (Cont’d)

There are a number of procedures and tests employers may require that generally are *not* considered medical examinations, including:

- tests to determine the current illegal use of drugs;
- physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (e.g., measuring heart rate or blood pressure);
- tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;

“Medical Examination” (Cont’d)

- psychological tests that measure personality traits such as honesty, preferences, and habits; and,
- polygraph examinations.

“Job Related and Consistent With Business Necessity”

- *Any disability-related inquiry or requirement for a medical examination must be “job-related and consistent with a business necessity.”*

“Job Related and Consistent With Business Necessity”

Generally, a disability-related inquiry or medical examination of an employee is "job-related and consistent with business necessity" when an employer has 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.

Disability-related inquiries and medical examinations following a request for reasonable accommodation are generally also job-related and consistent with business necessity. In addition, periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity.

“Job Related and Consistent With Business Necessity”

"Direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.

To determine whether an employee poses a direct threat, the following factors should be considered: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and, (4) the imminence of the potential harm.

See 29 C.F.R. §1630.2(r)

Alcoholism Under the ADA

Question #1: Is an employee who is an alcoholic have a "disability" under the ADA?

Alcoholism is a disability under the ADA

Question #2: Is there a duty to reasonably accommodate an alcoholic employee?

An employer is not required to accommodate an employee's intoxication or the adverse effects of excessive alcohol use.

BUT, the employer may be required to accommodate the employee's efforts to obtain treatment for the alcoholism.

Alcoholism Under the ADA (Cont'd)

Question #3: Can an employer discipline an alcoholic employee for poor performance or workplace misconduct related to alcoholism?

Yes. An alcoholic employee may not use his alcoholism as an excuse for poor performance or workplace misconduct.

The ADA provides that an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." See 42 U.S.C. s.12114.

Illegal Drug Use

The following is an overview of the current legal obligations for employers and employees:

- An individual who is currently engaging in the illegal use of drugs is not an “individual with a disability” when the employer acts on the basis of such use.
- An employer may not discriminate against a person who has a *history* of drug addiction but who is not currently using drugs and who has been rehabilitated.
- An employer may prohibit the illegal use of drugs at the workplace.
- It is not a violation of the ADA for an employer to test for the illegal use of drugs.

Illegal Drug Use (Cont'd)

- An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.
- Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by federal agencies pertaining to drug and alcohol use in the workplace.

See Equal Employment Opportunity Commission, Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act § 8.2, January 1992 (hereafter cited as EEOC Technical Assistance Manual on the ADA).

Illegal Drug Use and the ADA's Safe Harbor Provision

- The terms disability and qualified individual with a disability may not exclude one who:
 - Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs; or
 - 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.

Safe Harbor Provision

- *Shirley v. Precision Castparts Corp.* (S.D. Tex. 2012)
 - Those who fail to refrain from the use of illegal use of drugs for a sufficient period of time may not invoke the safe harbor provision.
 - To use the safe harbor provision, there must be evidence that the employee has reached a stable state in his/her recovery.
 - Mere participation in a rehabilitation program is not enough to invoke the safe harbor provision.

Currently Engaging in the Illegal Use of Drugs

- *Schafer v. Preston Memorial Hospital* (4th Cir. 1997)
 - “[C]urrently” means a periodic or ongoing activity in which a person engages (even if doing something else at the precise moment) that has not yet permanently ended.
 - An employee illegally using drugs in a periodic fashion during the weeks and months prior to discharge is “currently engaging in the illegal use of drugs.”
 - Thus, employer did not violate the ADA in terminating employee for illegal drug use even though employee entered a rehabilitation program after getting caught.

“Casual” Drug Users

According to the EEOC Technical Assistance Manual on the ADA, a former *casual* drug user is not protected:

[A] person who casually used drugs illegally in the past, but did not become addicted is not an individual with a disability based on the past drug use. In order for a person to be “substantially limited” because of drug use, s/he must be addicted to the drug.

See EEOC Technical Assistance Manual on the ADA § 8.5.

Reasonable Accommodation For Drug Addicts

If a recovering drug addict is not currently illegally using drugs, then he or she may be entitled to reasonable accommodation.

This would generally involve a modified work schedule so the employee could attend Narcotics Anonymous meetings or a leave of absence so the employee could seek treatment.

See 42 U.S.C. § 12111(9) (1994); 29 C.F.R. § 1630.2(o)(2).

Policy on Drug and Alcohol Testing

- Reserves the right to conduct testing.
- When does the employer test? Random, post-accident, reasonable suspicion?
- Whenever there is reason to suspect an employee has or may have used drugs or alcohol in violation of the policy.
 - Remember: Any use of drugs or alcohol while at work is a violation of policy, unless it is at a Company-sanctioned event where alcohol is being served.

What is “Reasonable Suspicion”?

- Definition can vary depending on the state law, but generally it means the employer has reason to believe the employee has or may have used drugs or alcohol in violation of the employer’s policy.
- Key Question: **How** is the employee’s appearance, behavior, speech, breath/body odor different **today** from the way the employee **typically** appears, behaves, speaks, smells?

What Do You Do If There Is Reasonable Suspicion?

- If testing based on reasonable suspicion, remember:
 - **Document the reasons for testing**
 - Timing of the test is critical – you can't wait!
 - Escort the employee to the collection site
 - Do not let the employee drive
 - Do not let the employee delay or make excuses
 - Refusal to test should lead to termination

What Do You Do If There Is Reasonable Suspicion? (Cont'd)

- What **NOT** to do:
 - Accuse the employee of being an addict or an alcoholic
 - Diagnose the employee with abuse or addiction
 - Guess as to the possible substances being used or abused
 - Make recommendations for treatment
- Remember: the employee may respond with denial, anger and/or excuses. Stay calm, focus on the issues, uphold the policy. Remind the employee: it's about safety.

What Do You Do If There Is Reasonable Suspicion? (Cont'd)

- What if you have reasonable suspicion, but the test comes back negative?
- Something about the employee's behavior made you concerned. Take action based on your observations about the employee's job behavior, his/her job duties and potential danger. Could include:
 - Temporary removal from job duties until issue is resolved
 - Confronting the employee to get an explanation for the behavior(s)
 - Fitness-For-Duty medical evaluation, including "Direct Threat" assessment
 - Possible disciplinary action, depending on the circumstances

What Do You Do When You Suspect An Employee Has A Substance Abuse Problem

- What if you think an employee has a substance abuse problem, but the employee hasn't necessarily violated your policy (i.e., he/she has not come to work under the influence, etc.)?
- If the employee has not *volunteered* a substance abuse problem, do not accuse or speculate (could lead to an ADA claim)
- Focus on objective observations of behavior and performance issues.
DOCUMENT:
 - Attendance
 - Quality and accuracy of work
 - Interactions with customers, supervisors and co-workers
- Administer discipline when appropriate, in accordance with your policies and past practices.

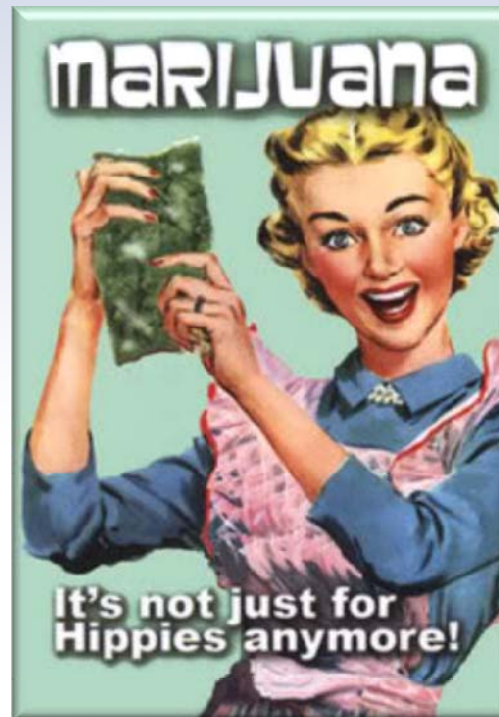
Self-Identification

- Employees cannot voluntarily self-identify as a substance abuser to excuse misconduct or policy violations. Self-identification cannot be used to avoid a drug or alcohol test.
- Generally, employees who self-identify want “help.” It’s the first step on the road to recovery – the employee should be treated as disabled.
- Treat the employee like any other employee who has revealed that he or she has an illness.

Self-Identification (Cont'd)

- Consider reasonable accommodations
 - FMLA/Leave of absence
 - Modified work schedule to attend Alcoholics Anonymous or Narcotics Anonymous
 - Temporary reassignment
- Essentially: engage in the interactive process.

Marijuana in the Workplace



- Cannabis (“marijuana”) is the 3rd most-used drug in U.S. (behind alcohol and tobacco)

States that Allow Medical Marijuana

- Alaska
- Arizona
- California
- Colorado (also recreational use)
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- Ohio
- Oregon
- Pennsylvania
- Rhode Island
- Vermont
- Washington (also recreational use)

Criminalization Under Federal Law

- *Raich v. Gonzales*: In 2005, the U.S. Supreme Court confirmed that marijuana is still an illegal drug under federal law and that federal law trumps state law. Case involved the California Compassionate Use Act.
- Under the Commerce Clause, Congress may criminalize the production and use of marijuana even where states approve it for medicinal purposes.

If Illegal, Why Do States Allow It?

- 99 out of every 100 marijuana-related arrests in the United States are under state, as opposed to federal, law.
- States are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law.
- In 2013, the U.S. Department of Justice announced its position that it will not use its limited resources to enforce federal law with respect to marijuana.

Transportation Workers

- DOT **expressly prohibits** marijuana use, even where state law conflicts
- “Sensitive Transportation Employees” = pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit, armed security personnel, ship captains, and pipeline emergency response personnel
- See 2012 DOT notice. Copy available at:
<https://homeport.uscg.mil/mycg/portal/ep/programView.do?channelId=-18374&programId=91342&programPage=%2Fep%2Fprogram%2Feditorial.jsp>.
- “We want to make it perfectly clear that the **state initiatives will have no bearing** on the [DOT’s] regulated drug testing program. The [DOT’s] Alcohol Testing Regulation – 49 CFR Part 40 – does not authorize the use of Schedule I drugs, including marijuana, for any reason.”

State or Federal Law?

Marijuana and the ADA:

- The federal Controlled Substances Act states that marijuana is illegal and has “no accepted medical use.”
- The ADA expressly excepts illegal drug use from coverage – employers do not need to accommodate illegal drug use.
- James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012)

“Congress has made clear... that the ADA defines ‘illegal drug use’ by reference to **federal**, rather than state, law, and federal law does not authorize the plaintiff’s medical marijuana use. We therefore necessarily conclude that the plaintiff’s medical marijuana use is not protected by the ADA.”

State or Federal Law?

Marijuana and the ADA:

- Therefore, terminating an employee for medical marijuana use generally should not implicate federal anti-disability discrimination law.
- Medical marijuana lawsuits have been dismissed in CA, CO, MI, MT, and OR.

State or Federal Law?

- **Roe v. Teletech**, 171 Wn.2d 736 (2011)
- Medical marijuana user's employment terminated after failed drug test
- Washington Supreme Court held that:
 - MUMA (1998) **only** provides criminal defense
 - Does not require employers to accommodate an employee's use of medical marijuana if drug free workplace
 - Does not prohibit an employer from discharging an employee for failing a required drug test

Recreational Marijuana – Guidance from *Roe*

- Roe should be persuasive authority concerning recreational use.
- Roe further noted that MUMA's purpose was to provide protection from criminal prosecution, not a remedy for employment terminations.
- The law has no express employment protections for marijuana users.

State or Federal Law?

Balancing state and federal laws:

- So far, no court has concluded that any state anti-disability discrimination law requires employers to accommodate medical marijuana use.
 - CA, CO, MI, MT, OR, WA.
 - AK, CO, D.C., HI, NH, NJ, NV, RI, laws expressly allow employers to prohibit marijuana use or affirmatively state no duty to accommodate.
 - OR permits federal contractors to prohibit marijuana use

State or Federal Law?

Balancing state and federal laws:

- Newer medical marijuana laws contain anti-discrimination language that may pose risk under certain state laws:

Arizona	Connecticut
Delaware	Illinois
Minnesota	Nevada
New York	

- AZ, CA, CT, DE, IL, MA, MI, ME, MN laws allow employers to penalize employees if impaired during work hours.

States' Legalization of Medical Marijuana

- Medical marijuana laws vary by state – there is no “one size fits all” answer.
- Some states provide more protections to medical marijuana users than others.

Pre-employment Drug Testing

- Laws permitting employers to prohibit marijuana use at work are not helpful in the pre-employment context
- In certain states, a refusal to hire a medical-marijuana user based on a positive drug test for marijuana technically violates state law.

Medical Marijuana

Best practices for employers:

- Communicate your policy to your workforce
 - Employees think they have a right to use!
- Consider whether you are prohibited from accommodating medical marijuana if state law is silent
 - Determine whether you are a recipient of any federal funds, or subject to the Federal Drug Free Workplace Act.
 - If you are subject to federally-regulated safety standards, i.e. employ drivers subject to DOT regulations, you cannot accommodate medical marijuana regardless of the law.

Thank You!



All we do is
work

Workplace law. In five time zones and 55 major locations coast to coast.

jackson|lewis

Preventive Strategies and
Positive Solutions for the Workplace®