



EMPLOYERS AND LAWYERS,

WORKING TOGETHER

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What You Need to Know About Employment Drug Testing

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Agenda

- Prescription Drugs Use and Addiction
- Medical Marijuana Laws
- Key Takeaways and Best Practices

Prescription Drug Use: A National Epidemic

- Bureau of Labor Statistics – overdoses from non-medical use of drugs or alcohol while on the job increased from 165 in 2015 to 217 in 2016
- CDC – more people die every year from prescription painkillers than from heroin and cocaine combined



Prescription Drug Abuse

- Misuse of prescription drugs means taking:
 - Medication in a manner or dose other than prescribed
 - Someone else's prescription, even if for a legitimate medical complaint
 - Medication to get high
- Commonly misused medications:
 - Opioids—usually prescribed to treat pain
 - Central Nervous System (CNS) Depressants—used to treat anxiety and sleep
 - Stimulants—most often prescribed to treat attention deficit hyperactivity disorder (ADHD)

PRESCRIPTION DRUG USE AND ADDICTION



Illegal Drugs – Current v. Past Use

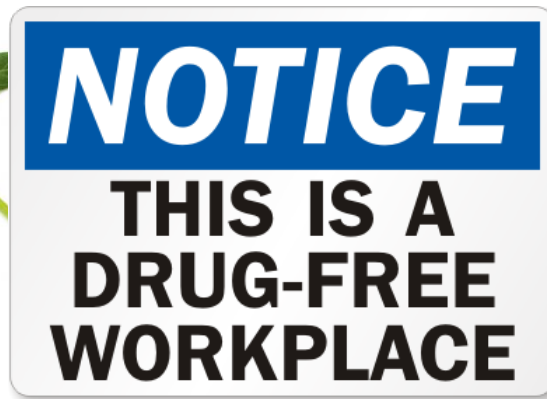
- Americans with Disabilities Act (“ADA”) does not require employers to permit current use of illegal drugs
- Employers can ask applicants/employees about illegal drug use
- Past illegal drug addiction or in rehab for illegal drug use may be a disability under the ADA

Prescription Drug Use

- Prescription drug *use* is not a disability under the ADA
- Prescription drug *addiction* may constitute a disability
- Prescription drugs are often used to treat conditions that qualify as disability



Marijuana in the Workplace



DOJ Position on Federal Marijuana Law

- Jan. 4, 2018 – Attorney General Jeff Sessions issued memorandum emphasizing that marijuana is an unlawful substance under federal law
- This conflicts with several state laws that decriminalize marijuana use.

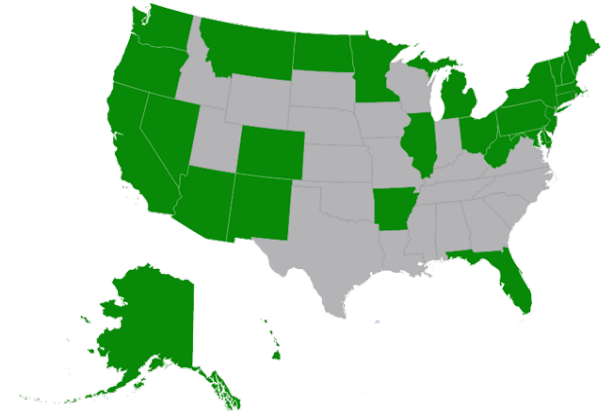
Federal Drug-Free Workplace Act

- Applies to certain federal contract/grant recipients
 - Does not require drug testing in the workplace
 - Does not require employers to fire employees for positive test
 - **Requires continuous good faith efforts to maintain drug-free workplace**

Medical Marijuana – By the Numbers

- **Medical Use Legal In:** Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Washington D.C., and West Virginia
- **Recreational Use legal In:** Alaska, California, Colorado, DC, Maine, Massachusetts, Nevada, Oregon, Vermont, Washington

29 LEGAL MEDICAL MARIJUANA STATES AND DC



Medical Marijuana Statutes and Job Protections

- 12 states have job protections for medical marijuana users: Arkansas, Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, Rhode Island, and Vermont



Disability-Related Inquiries

- Generally, employers should not ask employee:
 - whether currently taking prescription drugs
 - whether has taken prescription drugs in the past
- Generally, employers should not monitor prescription drug use



Disability-Related Inquiries

- Must be “job-related and consistent with business necessity”
- Must show reasonable belief, based on objective evidence, that:
 - Ability to perform essential job functions will be impaired; or
 - An employee will pose a direct threat

Disability-Related Inquiries

- Direct threat means significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation
- Affects public safety and nature of medication affects ability to perform essential functions of the job



Disability-Related Inquiries and Medical Exams

- Different rules for different stages of relationship
 - Pre-offer
 - Post-offer
 - Current employee
- Testing for illegal drugs not a medical examination

Pre-Hire Screening

- Pre-offer: Questions about legal drug use/current medications are impermissible
- Post-offer:
 - Uniformly implemented
 - After a drug test, employers may ask about current legal drug use that may explain a positive drug test

Drug Testing Current Employees

- Reasonable Suspicion Testing
 - Train supervisors on signs of intoxication
- Random Testing
 - Safety-sensitive positions
- Post-Accident Testing
 - Where drug use likely contributed



Drug Testing Current Employees

■ Post-Accident Testing

- Not automatic – reasonable basis for believing that drug use could have contributed to injury
- Need to apply consistent, objective criteria – i.e., fatality or injury requiring ambulance; damage to property above set dollar amount; police citation issued

Applicants/Employees Testing Positive

- Engage in individualized assessment and interactive process for prescription drug use
- Modified work schedule/leave of absence may be appropriate accommodation for prescription drug and alcohol abuse, and for past drug addiction

FMLA – Employees Testing Positive

- Substance abuse may be a serious health condition
 - Leave permitted for treatment
 - Leave not permitted for use
- Treatment for substance abuse does not prevent an adverse employment action
 - IF policy is applied in nondiscriminatory manner

Scenario #1 - Pre-Hire Drug Test

- Applicant for cashier position tested positive for hydrocodone
- Hydrocodone prescribed to treat back and neck injury
- Can the employer rescind the offer?

Scenario #2 -- Drug Rehab and Prescription

- Applicant was recovering drug addict enrolled in supervised medication-assisted treatment program
- Disclosed taking medically prescribed suboxone (used to treat opioid dependence) during post-offer physical
- Can the employer rescind the offer?

Scenario #3 – Post-accident Pot Positive

- Post-accident drug test positive for marijuana
- Employee claimed that he took medical marijuana, but he was not registered medical marijuana user
- Employee argued not under the influence at time of accident because marijuana stays in body for days
- Can the employer fire the employee?

Key Takeaways and Best Practices



Key Takeaways

- Employers are not required to accommodate intoxication, use, or possession in the workplace
- Legal marijuana/prescription drug use may or may not be a reasonable accommodation
- Duty to provide safe workplace is paramount

Best Practices

- Clear, consistently-applied drug policies
 - Uniformly applied to avoid discrimination
 - No blanket prohibition of prescribed opioids or marijuana
 - When/how drug tests will be used
 - Opportunity for medical review or interactive dialogue regarding accommodations

Best Practices

- Define and identify safety-sensitive jobs
- Train supervisors to spot signs of intoxication and addressing prescription drug/medical marijuana issues lawfully
- Filter decisions through HR and legal

Questions?

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