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NewsFlash!

The ADA: Alcohol and Drug Abuse in the Workplace By: **Frederick M. Switzer, III**

Alcohol and drug abuse are recurrent problems in the workplace, costing the economy billions of dollars annually in lost production, lost wages, medical expense and injury. Thus employers have an economic self-interest in confronting alcohol and drug abuse. In doing so, those with 15 or more employees risk incurring substantial liability for discrimination if they fail to comply with the Americans With Disabilities Act (ADA).

The ADA protects job applicants and employees with drug and alcohol problems against discrimination in employment if they are qualified individuals with a disability. A "qualified individual with a disability" is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such person holds or desires. Under the ADA, a "disability" is: (a) a physical or mental impairment that substantially limits one or more major life activities; (b) a record of such impairment; or (c) being regarded as having such an impairment. Alcoholism and drug addiction are disabilities.

Alcohol Abuse

Alcohol is not defined as a "drug" under the ADA. Therefore, individuals with current alcohol-induced impairments are protected against discrimination, provided they can perform the essential functions of the job

effectively and safely. Individuals with past alcohol problems are also protected from job discrimination.

Tests for alcohol are medical exams under the ADA. Therefore, job applicants may not be tested for alcohol nor questioned about alcoholism until after a job offer has been made. Employees may be tested for alcohol and questioned about alcoholism only if the test or inquiry is job related and consistent with business necessity. The records of such tests and inquiries are medical records and must be collected and maintained on separate forms in confidential medical files.

Employers may establish rules prohibiting the possession or consumption of alcoholic beverages on company property, in company vehicles, at company work sites or while on duty and prohibiting employees from being under the influence of alcohol while on duty. Drug testing of employees for alcohol use or impairment is permissible under certain circumstances.

Drug Abuse

The ADA defines "illegal use of drugs" as use of any drugs, the possession or distribution of which is unlawful under the Controlled Substance Act (21 U.S.C. 812). This does not include the use of a drug taken under the supervision of a licensed health care professional or other use authorized by Federal law.

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Tests for illegal drugs (drug screens) are not considered medical examinations under the ADA. Thus, pre-job offer and post-job offer drug screening is permissible.

The ADA provides that the term “qualified individual with a disability” does not include any job applicant or employee who is currently engaged in the illegal use of drugs when the employer acts on the basis of such use. Thus, individuals who are current users of illegal drugs or who use prescription drugs unlawfully are not protected when the employer acts on the basis of such illegal use. There is no bright line standard as to the meaning of “current” drug use. The EEOC Compliance Manual on Title I of the ADA states:

“current” drug use means that the illegal use of drugs occurred recently enough to justify an employer’s reasonable belief that involvement in drugs is an on-going problem. It is not limited to the day of use or recent weeks or days, in terms of employment action. It is determined on a case by case basis.

Courts have held current use to mean “weeks” and “months” preceding a negative employment action.

Specifically protected under the ADA are individuals who have completed a supervised drug rehabilitation program, or who have otherwise been successfully rehabilitated, or who are participating in a supervised reha-

bilitation program and are no longer using drugs. Also protected are individuals who are erroneously regarded as engaging in such use, but are not. Since drug tests can produce false positive results, employers must be very careful in establishing drug screening procedures.

Employers may establish rules prohibiting the possession, use or distribution of illegal drugs or illegal distribution or use of prescription drugs on company property, in company vehicles, at company work sites or when on duty and prohibit employees from being under the influence of illegal drugs or non-prescribed prescription drugs while on duty. The employer may conduct pre-job offer and post-job offer drug screening of all applicants and post employment random and accident-related drug screening.

Conclusion

The foregoing is a brief overview of the provisions of Title I (Employment) of the ADA relating to drug and alcohol abuse.

Employers subject to the ADA should have written policies on drugs and alcohol and procedures for dealing with instances of drug and alcohol abuse, and their supervisors should be trained on how to handle these problems in compliance with the law. Legal counsel should be consulted in developing those policies and procedures and in specific situations.

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