

Legal Considerations

By addressing substance use and impairment in the workplace, an employer can positively impact their employees' lives while also protecting their business. As with many workplace interventions, there are also legal considerations. Employers should familiarize themselves with relevant laws, consult their labor and employment attorney, and if relevant, their labor relations team. The backbone of legally protecting any employer or employee are well-developed, compliant drug and alcohol and return-to-work policies. Careful and informed development of these policies in partnership with an employment attorney can help ensure policies comply with lawful guidelines and are fitting for the workplace. For a basic foundation for compliance, the Substance Abuse and Mental Health Services Administration provides 10 Steps for Avoiding Legal Problems at <https://www.samhsa.gov/workplace/legal/avoiding-problems>.

Substance use disorders (SUDs) are chronic health conditions. Similar to other chronic health conditions such as epilepsy, cancer, or diabetes, SUD fluctuates between exacerbation and remission. In the workplace, they should be treated in a similar fashion. Employers should keep in mind that symptoms of SUD can often mimic other health conditions.

What laws should employers be aware of?

- ➔ **Health Insurance Portability and Accountability Act (HIPAA)**
- ➔ **Americans with Disabilities Act (ADA)**
- ➔ **Family and Medical Leave Act (FMLA)**
- ➔ **Mental Health Parity and Addiction Equity Act (MHPAEA)**

Identification and Disclosure

In many cases, employers may be unaware of their employees' substance use behaviors, whether they are past or present. Employees may access EAP services, support groups, or consult their healthcare providers privately without any needed intervention from or disclosure to their employer. In these cases, the employer's role does not extend beyond ensuring that their health plan benefits and workplace policies are supportive for employees facing any chronic disease or health issue, including SUD. In other cases, employers may be made aware of an employee's substance use behaviors. Multiple laws and regulations exist that determine the nature of these occurrences and how each entity can proceed so that all parties' best interests are secured.

If an employee is suspected of being impaired in the workplace, employers should not immediately terminate or remove the employee from their position without a thorough assessment of the facts. A conversation with the employee can yield further information that will determine the next steps an employer may need to take. Employers may want to consider accommodations to protect their workforce and community. In some cases, this may involve reassigning an employee to another position for the day, and in others, it may involve taking further action. To confirm suspicion of impairment, employers should consider the objective

evidence and, if legally permitted, require drug testing. Consider that impairment in the workplace could be a result of legal and illegal drug use.

If an employee is suspected of having an SUD or ongoing addiction issue, it is important to proceed cautiously. Employees can have a substance use issue but never violate a written substance use policy, which is why it is crucial that employers focus on performance or behavior issues rather than perceived health condition symptoms. Despite any suspicions an employer may have, the Americans with Disabilities Act (ADA) does not allow employers to make disability-related inquiries or medical examinations of their employees unless they are “job-related and consistent with business necessity.” For example, questions about past drug use and rehabilitation or current prescription drug use are not permitted, except in specific situations during the post-offer, pre-hire phase before employment commences. Current illegal drug use is not a covered disability under the ADA.

If an employee self discloses that they have an SUD, employers ordinarily cannot fire the employee only based on that disclosure without an interactive dialogue and weighing of all relevant facts and regulations. Employers should maintain confidentiality and assist the employee in accessing the services necessary to support their recovery based on the employee’s requests and interactive processes.

Intervention and Confidentiality

When an employee has violated a substance use policy or self disclosed an SUD, employers should act in the best interest of the employee, as well as their business.

Generally, intervening with an employee who is suspected of misusing substances should focus on the effect their misuse has had on performance or behavior, rather than the act of using itself. Employers should always consider if the same discipline would be imposed on an employee who is not suspected of addiction or substance abuse versus those who are. The same processes should apply.

Employers are not required to terminate employees if workplace impairment or a violation of substance use policy has been identified. They can help their employees access appropriate treatment and support their recovery, so they can maintain their employment status. However, an employer may consider terminating an employee who is provided this opportunity under these circumstances, continues to violate workplace policies, and exhibits performance deficiencies.

Employees who are in treatment may have concerns about confidentiality. Again, in many cases, employees may get the help they need without the employer ever being made aware of their condition. In cases where the employer is made aware, employees’ confidentiality should be a priority. The ADA and FMLA limit the information that employers have access to regarding an employee’s disability or serious health condition. Additionally, certain entities covered under the Health Insurance Portability and Accountability Act (HIPAA) limits how personal health information is disclosed, secured, and used. Each of these regulations have specifications that are situationally based. In general, employers should limit the amount of information to the minimum necessary to administer sick leave and similar HR benefits. Employers should refer to their administrators as much as possible in handling workers’ compensation, wellness programs, or health plan processes. It is a best practice to obtain employee consent for any release of medical information as it applies to these decisions. When in doubt, consult legal counsel to ensure full compliance to all laws.

Discrimination and Reasonable Accommodation

Employees who are entering treatment or are in recovery, or who have family members in treatment, may be entitled to reasonable accommodations in the workplace. Accommodations may include the use of paid or unpaid leave, flexible scheduling, or modification of workplace duties.

The Americans with Disabilities Act (ADA) requires employers to provide equal opportunities and accommodations for employees with disabilities. When applied to substance use, current illegal drug users are not protected. However, individuals who have successfully completed a treatment program and are in recovery do qualify. Employees who are legally using prescribed or over-the-counter drugs as part of a disability may also be protected. Employers may be required to accommodate protected employees' job restrictions so that they can work safely and effectively. Furthermore, employers cannot fire, refuse to hire, or refuse to promote protected employees because of a disability.

In some cases, employees may need to take extended leave. The Family and Medical Leave Act (FMLA) permits these employees to go on unpaid leave for up to 12 weeks per year. Under the FMLA, treatment for substance use qualifies as a serious health condition, thus employees who are eligible must be granted a leave of absence.

Special Industry Considerations

Under federal and state guidelines, some industries may have specific regulations that apply to what they are required, able, or unable to do when addressing substance use in their workforce.

Employer Size and Type | These characteristics affect compliance with the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA.)

Safety- and Security-Sensitive Industries | These organizations are subject to drug-testing regulations from the U.S. Department of Transportation (DOT), U.S. Department of Defense (DOD), and Nuclear Regulatory Commission (NRC).

Labor Unions | Unions can play a major part in what actions employers can take in addressing substance and opioid use, per the National Labor Relations Act of 1935. Collective bargaining is an opportunity for employers and labor to come together to agree on benefits and policies for the union represented workforce.

Federal Agencies, Contractors, and Grantees | These entities are required to implement a drug-free workplace program under the Drug-free Workplace Act of 1988.

References

- ¹American Psychiatric Publishing (2013, May 18) Diagnostic and Statistical Manual of Mental Disorders: DSM-5
- ²American Society of Addiction Medicine (2013, July) Terminology Related to Addiction, Treatment, and Recovery. Retrieved from <https://www.asam.org/docs/default-source/public-policy-statements/1-terminology-atr-7-135f81099472bc604ca5b7ff000030b21a.pdf?sfvrsn=0>
- ³Attridge, M., Amaral, T., Bjornson, T., Goplerud, E., Herlihy, P., McPherson, T., Paul R., Routledge, S., Sharar, D., Stephenson, D., & Teems, L. (2009). EAP effectiveness and ROI. EASNA Research Notes, Vol. 1, No. 3. Retrieved from <http://www.easnsa.org>.
- ⁴B2B International (2017, January) National Employer Survey Prescription Drugs & The US Workforce [Powerpoint Slides]. Retrieved from <https://www.nsc.org/Portals/0/Documents/NewsDocuments/2017/National-Employer-Addiction-Survey-Methodology.pdf?ver=2018-07-05-105114-883>
- ⁵Bureau of Labor Statistics (nd.) Civilian Unemployment Rate. Retrieved from <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm>
- ⁶Centers for Disease Control and Prevention (2016, March 16) Opioid Prescribing. Retrieved from <https://www.cdc.gov/features/opiod-prescribing-guide/index.html>
- ⁷Dahlhamer J, Lucas J, Zelaya, C, et al. Prevalence of Chronic Pain and High-Impact Chronic Pain Among Adults — United States, 2016. MMWR Morb Mortal Wkly Rep 2018;67:1001–1006. DOI: <http://dx.doi.org/10.15585/mmwr.mm6736a2>
- ⁸Integrated Benefits Institute (2019, April) Opioids, Pain, and Absence: Productivity Implications Among US Workers. Retrieved from <https://www.ibiweb.org/opioids-pain-and-absence/>
- ⁹National Safety Council (n.d.) Drugs at Work. Retrieved from <https://www.nsc.org/home-safety/safety-topics/other-poisons>
- ¹⁰National Quality Partners (2018) National Quality Partners Playbook: Opioid Stewardship
- ¹¹Schroeder AR, Dehghan M, Newman TB, Bentley JP, Park KT. (2018, December 3) Association of Opioid Prescriptions From Dental Clinicians for US Adolescents and Young Adults With Subsequent Opioid Use and Abuse. JAMA Intern Med. 2019;179(2):145–152. doi:10.1001/jamainternmed.2018.5419
- ¹²Society for Human Resource Management (2017, December) 2017 Talent Acquisition Benchmarking Report. <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2017-Talent-Acquisition-Benchmarking.pdf>
- ¹³Substance Abuse and Mental Health Services Administration (SAMHSA) (2011, April 1) Screening, Brief Intervention, and Referral to Treatment (SBIRT) in Behavioral Healthcare, https://www.samhsa.gov/sites/default/files/sbitwhitepaper_0.pdf.
- ¹⁴Substance Abuse and Mental Health Services Administration (2019, January 1) Recovery and Recovery Support. Retrieved from <https://www.samhsa.gov/find-help/recovery>
- ¹⁵Substance Abuse and Mental Health Services Administration (2016, March 7) Common Comorbidities. Retrieved from <https://www.samhsa.gov/medication-assisted-treatment/treatment/common-comorbidities>

¹⁶Substance Abuse and Mental Health Services Administration. (2017, November) Words Matter: How Language Choice Can Reduce Stigma. Retrieved from <https://www.samhsa.gov/capt/sites/default/files/resources/sud-stigma-tool.pdf>

¹⁷Syda K, Zhou J, Rowan S, McGregor, J, Perez R, Evans C, Gellad W, Calip G., (2020, February 3) Overprescribing of Opioids to Adults by Dentists in the U.S, 2011-2015. *American Journal of Preventative Medicine*. 2020;58:473-486. <https://doi.org/10.1016/j.amepre.2019.11.006>

¹⁸United States Surgeon General (n.d) Surgeon General's Advisory on Naloxone and Opioid Overdose. Retrieved from <https://www.surgeongeneral.gov/priorities/opioid-overdose-prevention/naloxone-advisory.html>

¹⁹U.S. Department of Health and Human Services (HHS), Office of the Surgeon General. (2016, November) Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health. Washington, DC: HHS.

²⁰U.S. Department of Health and Human Services. Substance and Mental Health Services Administration. (2018) Tip 63: Medications for Opioid Use Disorder. HHS Publication No. (SA) 18-5063FULLDOC

²¹U.S. Department of Health and Human Services (2019, May). Pain Management Best Practices Inter-Agency Task Force Report: Up-dates, Gaps, Inconsistencies, and Recommendations. Retrieved from U. S. Department of Health and Human Services website: <https://www.hhs.gov/ash/advisory-committees/pain/reports/index.html>

²²Wide-ranging online data for epidemiologic research (WONDER). Atlanta, GA: CDC, National Center for Health Statistics; 2017

²³White House Council of Economic Advisors (2017, November) The Underestimated Cost of the Opioid Crisis. Retrieved from <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf>