

# Opioids in the Workplace: Strategies for Managing an Epidemic

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## Initial Questions

- What do you do if you believe one of your employees is under the influence?
- Can you test that person?
- Can you fire that person?
- What if it's off the clock?
- Do you have to work through the issues with them?
- If you don't discipline that person, are you creating additional liability for yourself?



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## Today's Alphabet Soup Menu

- ADA
- WFEA
- FMLA
- WFMLA
- OSHA
- WCA



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## Addiction as a Disability

- Definition of Disability
  - ADA: Physical or Mental Impairment that Substantially Limits a Major Life Activity
  - WFEA: an individual who has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work

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## Addiction as a Disability

- When is an alcoholic a disabled addict?
  - A drinking or alcohol abuse problem may or may not be a disability, depending on whether it has progressed to the state that it is non-volitional, as supported by competent medical evidence.
  - Just an OWI is not enough
- When is a drug user a disabled addict?
  - drug use must reach the level of addiction or dependency or that use of an illegal drug had otherwise been non-volitional
  - Positive drug test is not enough
- Still need a medical certification that use of either rises to the level of addiction




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## Reasonable Accommodation for the Addict

- Duty to engage in the interactive process and discuss reasonable accommodation
- Ask the employee if he/she thinks an accommodation would make a difference
- Medical certification
- Must be a "qualified" individual
  - Same performance standards as non-addicts
  - Not currently using
  - Seeking recovery/in recovery
  - Reasonable assurance that use has stopped




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### Reasonable Accommodation for the Addict

- Recovery status depends on . . .
  - Length of time drug-free
  - Probability of relapse
  - Severity of addiction
  - Level of responsibility entrusted to employee
  - Job/performance requirements of position
  - Level of competence required for position
  - Employee's past performance record




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### What Is Not An Accommodation

- Excuse from drug-free workplace policies—zero tolerance policies are fine
- Excuse from testing policy
- Excuse from post-accident discipline
- Excuse from application of the Drug-Free Workplace Act (federal contractors)
- Attendance policies
- Modified work schedule




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### What Might Be An Accommodation

- Time off for meeting
- Time off for rehab
  - Combine with LCA
- EAP referral




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## Legally-Prescribed Drugs

- How does this change with use of legally-prescribed drugs?
- Reporting of lawfully prescribed narcotic use to determine effect on duties
- Lawfully prescribed doesn't mean lawfully used
- If impaired, still subject to your drug testing policies

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## How Do We Handle Marijuana and Its Derivatives?

- Recreational marijuana is legal in nine states and Canada, and medical marijuana is legal in 30 states
- Advisory referendum questions on ballot for 16 counties Nov. 6
- If ultimately legalized, how will we handle it in the workplace?
- Still illegal under federal law
- Intersection with WFEA: use of lawful products off work time?
- Current intersection with WFEA: use of products that are lawful if in a legalized state?

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## OSHA's Position On THC Testing

- Prohibits employers from enforcing policies requiring mandatory drug testing after a workplace accident or other incident.
  - an unlawful "adverse employment action."
- Employers are only permitted to perform incident related drug tests when:
  - there is reason to believe that an employee's potential drug use was likely a contributing factor to the incident, and;
  - the drug test can accurately identify the impairment caused by drug use.
- Unreasonable for employer to provide post incident drug testing for the following sort of problems: bee stings, repetitive strain injuries, lack of machine guarding, or machine malfunction.

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## Drug Testing Policy

- Drug tests are not medical examinations under the ADA
- Pre-employment (but post-offer)
- Reasonable Suspicion
- Random
- Periodic
- Post-Incident




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## Drug Testing Procedure

- What are you testing for?
- Diluted samples
- Low temp samples
- Transportation to/from testing site
- HIPAA waiver
- Ability to dispute/appeal




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