

# Louisiana Employment Law Letter

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## Q & A

### You've got questions? We've got answers!

*Extra! Extra! Read all about it! Your questions answered here! This month we're starting a brand new feature in Louisiana Employment Law Letter in which we'll answer specific questions put to us by our faithful readers. This month we're addressing three questions about the best way to handle employees with drug or alcohol problems — a growing concern in the workplace.*

#### ***Smaller businesses especially vulnerable***

The National Drug-Free Workplace Alliance estimates that the overall cost of illicit drug abuse in the year 2000 was approximately \$160.7 billion and that 69 percent of that cost resulted from productivity losses caused by drug-related illnesses and deaths. The alliance reports that marijuana and cocaine are the drugs most commonly abused by employees.

Small and medium-sized businesses bear the greatest burden caused by substance abuse. Apparently, employees seek out those businesses because they usually don't have drug-testing programs. Some of the problems caused by substance abuse in the workplace include:

- increased accidents — 38 to 50 percent of all workers' compensation claims are related to substance abuse, and employees under the influence of drugs are nearly four times more likely to be involved in workplace accidents and five times more likely to file workers' comp claims; and
- employee theft — the alliance also reports that 80 percent of substance abusers steal from their workplace for the purpose of supporting their substance abuse.

Alcohol abuse also is a problem for employers. According to the alliance, alcoholism and drinking problems cause employees to be absent from work four to eight times more often than normal. Productivity losses caused by alcohol-related problems were estimated at \$119 billion in 1995.

#### ***Must we 'help' employees get better?***

The following three questions were submitted by readers like you who deal with those issues in their workplaces. Hopefully, this article will arm you with some useful information to handle similar situations in your workplace.

Q: I have an employee who's suspected of drinking before work. We don't test, so how do I determine if the allegations are true? I also just discovered that she's going to Alcoholics Anonymous (AA) meetings. How do I handle that? Do I have to keep her employed? Am I under an obligation to "help" her get better? The Americans with Disabilities Act (ADA) is also on her side, isn't that correct?

A: First, let's talk generally about alcoholism and the ADA before we get to the specifics of the question. Although alcoholism is a disability under the Act, you can prohibit alcohol use at work and require employees not to come to work under its influence. In fact, you can hold alcoholic employees to the same job performance standards as all other employees, even if the alcoholic employee's unsatisfactory performance or behavior is related to the alcoholism.

For example, if the employee often shows up late for work (or doesn't show up at all), you can take disciplinary action against her — the same as you would any other employee. You are *not* required to provide her with an opportunity for rehabilitation instead of discipline or discharge. Of course, the key is that you treat her the same as you would treat a nondisabled employee. For example, you can't fire the alcoholic but only issue a written warning to a nonalcoholic employee who commits the same number of punctuality and/or attendance infractions.

You may have to provide a reasonable accommodation to an alcoholic employee who's seeking rehabilitation, such as (1) modifying a rule prohibiting personal phone calls at work so she can talk with her AA sponsor as needed or (2) allowing the employee to leave work early to attend AA meetings. But you can still hold her accountable for complying with your workplace rules.

So what to do with the employee in this first question? You *think* she's coming to work under the influence, but you're not sure. It isn't clear from the question exactly what the employee is doing to raise suspicion. If she's coming in late or not completing job assignments, you can discipline or fire her according to your company policy and practice.

On the other hand, if she's continuing to do her job well but smells like alcohol when she arrives at work or often looks like she's suffering from a hangover, you can ask her if she's been drinking. If she says yes and you have a company policy prohibiting employees from coming to work under the influence of alcohol, you can discipline or fire her in accordance with that policy. You don't have to "help her get better" if she has violated your work rules — unless you have a policy or practice of providing rehabilitation sources.

The ADA doesn't require you to treat disabled employees *better than* nondisabled employees. If you would discipline or fire another employee in the same situation, you can dismiss the alcoholic/disabled one. On the other hand, if you would typically refer employees to an employee assistance program or give them some time off to seek rehabilitation services, you should be consistent.

Q: Does the ADA protect individuals who have an addiction to illegal drugs? I know that alcoholism is covered, but what about individuals who are using chemical substances that are illegal?

A: That seems like a simple question, doesn't it? Unfortunately, there's usually no such thing as a simple answer when you're dealing with federal employment laws. The answer is yes *and* no.

The ADA does *not* protect *current* illegal drug users. It *does* protect drug addicts who have been rehabilitated and aren't currently using drugs. Confused? Let us explain.

The regulations interpreting the ADA clearly exclude individuals *currently* engaging in illegal drug use. That includes the use of illegal drugs and the illegal use of prescription drugs that are "controlled substances." For example, if an employee doesn't have a prescription for but is currently using amphetamines — a prescription drug that's also a controlled substance — he's using the drug illegally and isn't entitled to the ADA's protection.

What does it mean to be "currently" engaging in the illegal use of drugs? According to the Equal Employment Opportunity Commission, which enforces the ADA, "current" drug use means that it occurred recently enough to justify an employer's reasonable belief that the employee's involvement with drugs is an ongoing problem. It isn't limited to use on that particular day — or even in recent weeks or days. It's determined on a case- by-case basis.

But what if your current employee is a *former* illegal drug user? Is he protected by the ADA? Yes — *if* he (1) has successfully completed supervised drug rehabilitation and is no longer engaging in illegal drug use or (2) is *currently* participating in a supervised drug rehab program and no longer engaging in illegal drug use.

The ADA allows you to either refuse to hire an applicant or fire a current employee who's illegally using drugs. Testing applicants and employees for illegal drugs is also permitted. Testing for illegal drugs isn't considered a medical examination under the ADA. Therefore, you can conduct those tests on applicants and make employment decisions based on the results.

Don't be confused, however, about testing for alcohol. Testing for blood alcohol level is considered a medical exam under the ADA and shouldn't be done at the preemployment offer stage. So if your "drug-testing" program includes alcohol testing, make sure you don't administer the test to applicants.

Q: We have an employee who we think is taking methadone as part of a drug rehab program. She "nods off" fairly regularly but still manages to perform her job duties to an acceptable level. We asked her about the problem months ago, and she brought us documentation from a doctor stating that she takes a prescribed medication that may make her drowsy during the workday. She works a phone job, so neither she nor her co-workers are in any danger because of the problem. My problem is that other employees are commenting on the fact that she seems to be falling asleep, and they don't think it's right. Since we already have documentation from her doctor explaining why she is like this, is there any other avenue we should explore, or would she be protected under the ADA? Can we ask what the medication she is taking is and what it's for in order to determine if she's protected under the Act?

A: If you've read the answer to the previous question, you know that we just discussed the fact that rehabilitated drug users are protected by the ADA. If your employee has undergone a supervised drug rehab program and is taking methadone as part of that treatment, she may be a qualified individual with a disability and entitled to a reasonable accommodation.

Now, as far as the "nodding off" is concerned, the question states that the employee is still performing all of her job duties at an acceptable level and that her nodding off doesn't impose a threat to the safety of herself or her co-workers. But the fact that employees can literally do their job while sleeping (or between power naps) isn't good for morale.

What can you do about the snoozing? Tell the employee that part of doing her job is staying awake while she's doing it. Also, the ADA allows you to ask current employees about their medication and/or medical condition as long as the inquiry is job-related and justified by

business necessity. That means you should be able to demonstrate that you have some concern about the employee's job performance or safety.

Also, your questions must be relevant to the employee's specific job. For example, if the employee is a laborer with a back problem who has problems lifting heavy equipment, you could ask him to be examined by an orthopedist. But you couldn't ask him to submit to an HIV test since that kind of a test isn't related to his essential job functions or the impairment.

So you could sit down with your sleepy employee, explain that her nodding off at work is a performance issue, and ask her about her prescription and/or medical condition. Also, since you already have a note from the doctor stating that she's taking prescribed medications, you might consider sending the doctor a letter asking for more information. Specifically, your letter should explain the problem (nodding off), and you should enclose a job description or letter describing the essential job functions, asking the doctor whether the employee can perform those functions in an awake and alert manner while taking her prescription medication.

If the employee's medical condition qualifies as a disability (*i.e.*, as a rehabilitated drug user), you should begin the interactive process of trying to find a reasonable accommodation that would allow her to perform the essential job functions — perhaps a leave of absence to adjust to the medication, a later start time, or longer break periods. Of course, if the condition isn't a disability, you don't have to make an accommodation under the ADA.

#### ***One last note: Consider the FMLA***

We've talked a lot about the ADA in this article, but what about the Family and Medical Leave Act (FMLA)? Does it apply to substance abusers? Again, the answer is yes *and* no. If an employee is eligible for FMLA leave (she's been working for you for at least 1,250 hours in the last 12 months, and you have 50 or more employees within a 75-mile radius of the facility at issue), you may be required to provide her with up to 12 weeks of unpaid FMLA leave to allow her to seek treatment for substance abuse as long as the substance abuse meets the definition of a "serious health condition" under the Act.

An employee's treatment for substance abuse, however, does *not* prevent you from taking employment action against her. Of course, you may not take action against her *because* she asked for or took FMLA leave for substance abuse treatment. But if you have an established policy that's applied in a nondiscriminatory manner and has been communicated to all employees providing that employees may be fired for substance abuse under certain circumstances, then she may be discharged.

*Word of caution:* This is a narrow exception and can be tricky. You should undertake a thorough review of your company policies to make sure they've been enforced consistently, check all applicable local, state, and federal laws (for example, those regarding drug testing), and consult with your human resources specialist and/or an employment law attorney before making the decision to fire an employee instead of providing her with FMLA leave to seek treatment.

Keep in mind that the FMLA doesn't modify or affect your rights or responsibilities as an employer under the ADA, state workers' comp laws, state and federal drug-free workplace laws, or leave and drug-testing laws specific to public employers. You must be in compliance with all of them.

If you're confused, you aren't alone. The myriad of employment laws that touch on workplace substance abuse problems can be hard to decipher. Every situation is different, and a number of

factors come into play when you're deciding whether to discipline or fire an employee or whether you're required to or should offer an employee an ADA accommodation or FMLA leave. It would be wise to contact an employment lawyer to help guide you through the decisionmaking process.

*All statistics cited in this article were obtained from the National Drug-Free Workplace Alliance's website, [www.ndfwa.org](http://www.ndfwa.org). You can also find more information about the ADA and workplace substance abuse in the subscribers' area of [HRhero.com](http://HRhero.com), which is the website for Louisiana Employment Law Letter. You have access to an in-depth HR Executive Special Report on the subject: "ADA from A to Z: Everything You Need to Know About the Americans with Disabilities Act." Simply log in and scroll down to the link for all the Special Report titles. If you need help or have lost your password, call customer service at (800) 274-6774.*

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