

Rules of Engagement

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Disciplining Employees for Prescription Medications

Employers are seeing a rise in problems with the illegal use of prescription drugs in the workplace. Drug testing in the workplace was traditionally thought of as a way to determine whether an employee was taking street drugs such as marijuana, cocaine, or methamphetamines. Because prescription drugs are prescribed legally under physician supervision, whole new areas of complications arise. For instance, does an employee have a duty to notify the employer that he or she is taking certain medications?

In the usual circumstance, an employer is not affected if a physician believes that a prescription medication will contribute to an employee's health and overall well-being. However, an employee's use of prescription medication will occasionally affect an employer's interest in maintaining a safe and efficient workplace.

When employees are lawfully taking prescription medications, employers may be reluctant to test and inquire about the prescription drug use. Employers should be aware that the law allows for the testing and disciplinary action of employees who are taking prescription medications that affect the work environment.

It is important for an employer to have a drug policy. Employers, however, cannot discriminate in their hiring and firing practices based on an individual's use of prescription medication for legitimate medical purposes. Employers should contact their counsel to assess whether the business meets the criteria established under the Americans with Disabilities Act (ADA) and other federal or state laws for drug testing in certain situations. Moreover, a drug test result may be considered personal health information and the use of the information may fall under HIPAA. As a result, there may be restrictions on how and whether such information can be shared.

Testing for Prescription Drug Use

Under the Americans with Disabilities Act ("ADA"), an employer may inquire about and test for prescription drug use as long as two conditions are satisfied: 1) the inquiry is related to the employee's job; and 2) it is consistent with a business necessity. "Ensuring that the workplace is safe and secure" is a legitimate business necessity.

For example, if part of an employee's job duties requires driving an automobile, then an employer needs to ensure that the employee is capable of driving safely to protect the general public and to guard the employer from potential liability. In such a case, a drug screen would be proper because it is related to the employee's job of driving and necessary for the employer's business purpose of promoting safety.

If an employee tests positive for drug use, the employer should confirm the test results by asking the employee about prescription drug use or other possible explanations for the positive result. The employer may lawfully ask questions such as, "What medications have you taken that might have resulted in this positive test result? Or, are you taking this medication under a lawful prescription?"



Checking the Side Effects of the Prescribed Medication

Congress recently passed and the President signed the Defense Appropriations Act. The Act extends the eligibility period for the COBRA premium reduction for an employee to function more effectively on a daily basis. However, if the medication causes known side effects...those consequences could have a very adverse effect on the employee and those he or she may come in contact with or share the road with.

Based on the results of a positive drug test, it is imperative that an employer conduct a further medical exam in order to make an assessment on how the employee's prescription drug regime will affect the employee's ability to function effectively in his or her job. An employer's drug policy violates the ADA if it prohibits the use of all legally prescribed controlled substances without a determination that such prohibition is job-related and consistent with business necessity.

Taking Action

If the employee is taking medication that does contain adverse side effects that could affect his job-related duties, then it may become necessary for the employer to take action.

It is critical for an employer to articulate a legitimate, nondiscriminatory reason for taking action. An employer cannot simply terminate an employee for taking prescription medication if the prescribed medication would not affect the employee's job-related duties.

It is a good idea for employers to have a prescription drug use policy. Many policies require all employees who take prescription drugs that "may adversely affect judgment, coordination or the ability to perform assigned job duties" to notify their supervisors. Then, the supervisors will either allow the employee to remain at work or make other suitable arrangements. Case law shows that this type of policy is legal.

In 2008, the U.S. Court of Appeals for the Eighth Circuit held in favor of an employer who discharged an employee because the employee took medication that adversely affected his ability to perform his job safely. In that case, the employee had notified his supervisors that he was taking medication that can cause sleepiness and dizziness. However, the employer's policy stated that an employee could not take prescription drugs that affected his cognitive abilities. The employee's job duties required a significant amount of alertness and attention to detail. Because the employee's act of taking prescription medication was contrary to the company policy, the employer had a legitimate reason for termination. *Kosmicki v. Burlington Northern & Santa Fe Railway Co.*, 545 F.3d 649 (8th Cir. 2008).

Medical Marijuana as a Prescription Drug

In West Virginia, users of medical marijuana are still considered criminals. West Virginia is one of the 37 states that still criminalize patients who have been prescribed medical marijuana. Jon Gettman, Ph.D., *Marijuana in West Virginia: Arrests, Usage and Related Data*, 7 (2009). There has not been any proposed legislation to protect medical marijuana patients from arrest in this state.

However, even in states that do not criminalize patients who have been prescribed marijuana, an employer can still fire an employee when a drug test reveals marijuana use. The California Compassionate Use Act of 1996 legalized marijuana to the extent that patients have the right to possess or cultivate the drug for personal medical purposes upon the approval of a physician. In 2008, the Supreme Court of California recognized that "no state law can completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." *Ross v. Ragingwire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008).

The Ross court noted that nothing in the text or history of the California Compassionate Use Act indicates that the voters intended to articulate a policy concerning marijuana in the employment context. Thus, there is no fundamental public policy that requires employers to provide a workplace accommodation, or an exception to its drug use policy, for medical marijuana use. The court concluded that the employee could not state a cause of action against the employer based on the employee's subsequent termination.

In West Virginia, the Legislature has designated marijuana as a Schedule I controlled substance based upon a recommendation by the State Board of Pharmacy. The State Board of Pharmacy has determined that marijuana either "has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." Unless this determination is repealed, medical marijuana will likely continue to be criminalized and physicians will not be able to prescribe the drug.

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