

A Conundrum: Drugs in the Workplace

Drugs permeate our society. It's on the news, in social media, and all over movies and television. It may also be in your workplace when you discover that your awesome SVP Frank Fantastic's belief-suspending prior year's sales record might be due to—or despite—a little cocaine habit combined with his daughter's ADHD meds.

Some questions you want to consider—do you know this hotshot is doing illegal drugs or abusing alcohol or prescription drugs, or do you just suspect? Is Frank's employment terminable at will or only for cause if he is a party to an employment contract? Is a substance addiction a “disability” under the Americans with Disabilities Act (“ADA”)?

While the answers to such questions depend on the particular facts in each situation, one thing we can tell you is tread lightly, navigate carefully. Situations of this kind are fraught with potential for large legal fees, company embarrassment, and major diversion of management time if you become involved in formal proceedings—even if you eventually win! You want to minimize involvement in such proceedings if at all possible by doing the following:

- **Maintain a Clear Anti-Drug Policy.** Your company should have a well-defined policy prohibiting illegal drug (and perhaps alcohol) use in the workplace. Such policy should be unequivocally stated in the employee handbook and posted along with other employment-related notices. Regardless of federal and state laws prohibiting or permitting specific substances (including state laws allowing marijuana use), with a clear anti-drug policy in your workplace, you can discipline or even terminate Frank for violating company policy and have another defensive tool in your arsenal in case of a wrongful termination suit.
- **Manage the Situation with Care.** You do not want to expose your company to a potential defamation or wrongful termination suit. Do not call Mr. Fantastic out on his suspected drug use at the company picnic. Indeed, statements suggesting someone is unfit to perform his or her job requirements or lacks integrity in the job (like calling Mr. Fantastic an addict) are likely to be considered defamatory. While generally the “qualified privilege” doctrine limits potential employer liability when discussing employee misconduct, supervisors and co-workers may all still be subject to defamation claims if they do not exercise care in these situations. In addition, you should meet with Mr. Fantastic and your Human Resources personnel. Explain your observations, performance standards, and conduct expectations as well as the anti-drug policy. Even if there is no evidence of any impairment during business hours, ensure that HR documents this meeting and any additional observations. Your documentation of the situation is paramount. Meanwhile, public companies should reach out to their securities counsel to discuss if any special disclosure obligations are associated with this situation.
- **Review Employment Agreement.** If Mr. Fantastic's employment agreement is not “at will,” his employment agreement may permit termination for “cause” if he engages in illegal activity or in otherwise inappropriate conduct. However, even demonstrably illegal conduct may not be grounds for termination if it does not impact performance although some jobs—such as airline pilots, truck or bus drivers, and maybe those handling client funds under a fiduciary obligation—may not be amenable to such a distinction.

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- Remember that the ADA Protects Recovering Addicts.** An addiction—to drugs, alcohol, gambling, sex—may not rise to the level of a disability under the ADA for a variety of reasons, and the ADA unequivocally does not protect an employee who *currently* engages in the illegal use of drugs. Nonetheless, the law does account for a *recovering* drug addict (or alcoholic, gambling addict, etc.) who is otherwise qualified to do the job. Specifically, the ADA protects employees who not only have a physical or mental impairment but who are also “qualified,” i.e., possessing the skill, experience, and education to do the job and able to perform the essential functions of a position with or without reasonable accommodation. The ADA may obligate you to provide reasonable accommodation, such as leave for medical or psychiatric treatment, if the recovering (not current) addict’s condition rises to the level of a disability. However, regardless of whether or not an employee may be construed to have a disability under the ADA, that disability does not trump an employer’s performance and conduct standards, as long as you apply them equally to all employees. The law does not require an employer to accommodate an individual who has engaged in misconduct or performed under par.
- Be Proactive in Future Employment Agreements.** Consideration should be given to what, if anything, should be said about this topic in any new employment or severance agreement to which a company becomes a party. We encourage consultation with counsel to determine an optimal course of action in each case.

FisherBroyles attorneys can help companies deal with employee substance abuse by suggesting appropriate provisions to insert into employment agreements and employee handbooks, advising on how to handle an employee who may have a substance abuse problem, interpreting termination provisions of employment contracts, and negotiating termination and severance agreements.

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