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10

Employee Handbooks

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§10.35 e. Use of Drugs and Alcohol

Most employers have some sort of prohibition against drug or alcohol use and possession by employees. They have found that strategies that reduce such activity can lower employment costs in workers' compensation, medical benefits, time lost to absenteeism, inefficiencies caused by poor performance, and the waste and theft of the employer's resources. Stating the employer's drug and alcohol policies in its handbook is important in helping to eliminate on-the-job drug and alcohol use by employees.

Various state and federal laws require employers to be proactive in dealing with drug and alcohol use by employees. See, *e.g.*, 41 USC §§8101–8106 (Drug-Free Workplace Act of 1988); 49 CFR §§382.101–382.605 (Federal Department of Transportation drug-testing regulations); Govt C §§8350–8357 (California Drug-Free Workplace Act of 1990). Any treatment of drug and alcohol problems, however, must be addressed in light of the Americans with Disabilities Act (42 USC §§12101–12213), the Rehabilitation Act (29 USC §§701–796), and the Fair Employment and Housing Act (Govt C §§12900–12996), all of which prohibit discrimination against, and require employers to offer reasonable accommodation to, qualified individuals with disabilities. Although current illegal drug use is not protected, recovering alcoholics and drug addicts may be protected individuals with disabilities. See Govt C §§12926(j), (l)(6), 12926.1, 12940(a), (m); 42 USC §§12112(a), 12114(a)–(b); *Hernandez v Hughes Missile Sys. Co.* (9th Cir 2004) 362 F3d 564 (summary judgment for employer reversed when triable issue of fact existed regarding whether employee terminated after failed drug test was denied rehire on the basis of his former substance abuse (a protected disability), or employer's unwritten policy of not rehiring employees who violate company's code of conduct prohibiting illegal drug use).

Even practicing alcoholics may be considered persons with a disability under the ADA and FEHA. See Govt C §§12926(j), (l), 12926.1, 12940(a), (m); 42 USC §§12112(a), 12114; 29 CFR §1630.16(b); 29 CFR pt 1630, App §1630.16(b); EEOC Technical Assistance Manual §8.4. According to the EEOC, individuals who are disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities under the ADA. 29 CFR pt 1630, App §1630.16(b). However, an employer may discipline, discharge, or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct, and an employer may prohibit the use of alcohol in the workplace and require that employees not be under the influence of alcohol at the workplace. 42 USC §12114(c); 29 CFR §1630.16(b). See Lab C §1025.

NOTE► An employer need not accommodate an employee’s off-duty use of marijuana to treat symptoms of a disability (chronic back pain) even when the employee is authorized to use marijuana for medicinal purposes under California’s Compassionate Use Act (Health & S C §11362.5). *Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920.

California law also requires employers with at least 25 employees to provide reasonable accommodation to any employee who chooses to voluntarily participate in a rehabilitation program. Lab C §1025.

Because of privacy protections in Cal Const art I, §1, if an employer wants to be able to require an employee to submit to a drug or alcohol test in circumstances where the employer has a reasonable suspicion that the employee is intoxicated, or when an employee is involved in a workplace accident, the employer should include a written drug-testing policy in its handbook. The policy should inform employees of the situations in which they will be required to submit to an alcohol or drug test. It should also state that the employee’s refusal to consent to testing in such circumstances, or interference with the accuracy of such testing, will result in discharge.

For a detailed discussion of applicable law and a sample drug and alcohol policy, see §§13.59–13.70.



For further discussion, see [Advising California Employers and Employees](#); Employee Handbooks, chapter 10 (Cal CEB). Available in print and through [OnLaw](#).

Be ready to deal with virtually any workplace issue your clients may face. Amongst the many topics discussed in this manual:

- Hiring guidelines and employment contracts
- Wages and hours; family and medical leave
- Employee handbooks
- Privacy issues in the workplace
- Wrongful termination; reductions in force