

**LEMLE & KELLEHER, L.L.P.**

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**MODERN MANAGEMENT**

**ALCOHOL AND ILLEGAL  
DRUGS:  
Dealing with Use and Abuse in the  
Workplace**

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## Introduction

Every workplace in America today—regardless of size, geography or industry—has been affected by increasing use and abuse of alcohol and illegal drugs. Dealing effectively and legally with the problem of substance abuse is one of management's most challenging responsibilities.

Media attention has focused dramatically on America's problem with alcohol and drug abuse in the workplace. Almost daily, there are new reports about substance abuse among prominent sports and entertainment personalities. The average citizen has been bombarded with facts and figures showing the dangerous side effects of substance abuse on the nation's economy.

### *How Serious Is The Problem?*

Although difficult to measure precisely, recent studies show the economic loss from substance abuse is great.

- According to the Office of National Drug Control Policy, the economic cost of drug abuse to the United States in 2002 was \$180.9 billion.
- Up to 40 percent of industrial fatalities and 47 percent of industrial injuries can be linked to alcohol consumption and alcoholism.
- According to the National Clearinghouse for Alcohol and Drug Information (NCADI), the loss to companies in the United States due to alcohol and drug-related abuse by employees totals \$100 billion a year.
- Of the 17.2 million drug users, aged 18 or older, 74.8 percent were employed either full or part time.
- 8.2 percent of full time employees and 10.5 percent of part time employees are illicit drug users.
- Every man, woman, and child in America pays nearly \$1,000 annually to cover the expense of unnecessary health care, extra law enforcement, auto accidents, crime, and lost productivity resulting from substance abuse.
- Among approximately 51.1 million adult binge drinkers, 40.8 million (80 percent) were employed either full or part time.
- According to the NCADI statistics, alcohol and drug users are far less productive, use three times as many sick days, are more likely to injure themselves or someone else, and are five times more likely to file workers' compensation claims.

- Workers in the construction and mining industries reported the highest rates of past month heavy alcohol use (15.7 percent) and past month illicit drug use (12.3 percent).

### ***Effects on Health Claims and Productivity***

Not surprisingly, substance abuse has been directly linked to reduced worker productivity and increased employee health claims. Workers with drinking or drug problems are likely to have worked for three or more employers in a year, and are more likely than other employees to have skipped work days, used sickness benefits and filed workers' compensation claims. In fact, employed drug abusers cost their employers about twice as much in medical and workers' compensation claims as their drug-free co-workers.

According to the results of a study done by the United States Department of Labor ("DOL"), an estimated 14.1 percent of working adults in the United States used illicit drugs in the previous year, with 11.23 percent using enough to get high or stoned. Further, an estimated 3.1 percent of working adults actually used illicit drugs before reporting to work or during working hours in the previous year. A study by the United States Postal Service ("USPS") found that substance abusers, when compared to their non-substance abusing co-workers, are involved in 55 percent more accidents, and sustain 85 percent more on-the-job injuries. However, the substance abusers are not the only ones affected by the drug related accidents. The National Safety Council reports that 80 percent of those injured in "serious" drug-related accidents at work are not the abusing employees but non-using co-workers and others. The Office of National Drug Control Policy (ONDCP), within the Executive Office of the President, reported that the federal drug control budget has increased almost twelve-fold.

### **Policy Considerations**

#### ***Tailor the Solution to the Problem***

The choice of how to respond to substance abuse in the workplace depends in large part upon the nature of the workforce and whether a substance abuse problem actually exists and the type of work. For instance, where employees operate sophisticated equipment, management may choose to impose strict rules concerning substance abuse.

Similarly, for employees such as bus drivers and health professionals in safety-sensitive jobs, a tough policy may be appropriate. For certain safety-sensitive positions and occupations, alcohol and drug testing is mandated by federal and state law. On the other hand, an employer with a predominantly white-collar workforce in a service or financial industry may prefer a more restrained approach. Few employers will find it

appropriate to implement a policy requiring that all employees' purses, briefcases, desks and lockers are routinely searched.

Likewise, a random testing program applied to all employees may not be advisable or cost effective. A more reasonable approach may be to seek out those employees suspected to have a substance abuse problem and deal with them on a case-by-case basis.

Since no one policy or set of guidelines will apply in every situation, management must carefully select the approach most likely to have the desired effect on its employees and apply its policy consistently. An employer, who implements a strong anti-substance abuse policy only to discover later that there is little abuse among its employees, risks damaging the morale of the workforce.

A well-planned communications program about substance abuse is a suitable alternative for many employers. Raising the subject of substance abuse in the workplace through carefully planned communications can sometimes cause a minor drug problem to disappear.

### **Discipline, Discharge or Treatment**

If substance abuse is discovered, management's options range from discipline or discharge to offering rehabilitation and treatment. Some employers may choose a disciplinary approach to coincide with a strong stance against the use of drugs or alcohol of any kind in any quantity. Others may find rehabilitation a better approach, especially when the workforce is skilled and there is little turnover.

Use of the rehabilitation option requires consideration of several factors. For example, who will bear the cost of treatment and rehabilitation? This is a major question which must be addressed prior to implementing a substance abuse policy. Some employers may decide to have the cost of rehabilitation and treatment reimbursed by group health insurance, while others may prefer to establish employee assistance programs which are designed to deal with substance abuse, emotional, financial and similar personal problems. Still other businesses may require the employee to locate, and pay for, the treatment program without the employer's assistance.

Another consideration is whether to pay the employee who takes time off while undergoing treatment. Under some leave programs, absences for rehabilitation or treatment are covered.

Further, an employer selecting rehabilitation over discipline should decide how it will deal with the employee who undertakes rehabilitation but fails to complete the prescribed treatment or reverts to substance abuse at some time after completing rehabilitation. Normally, rehabilitation should be made a condition of continued employment so that if the employee does not demonstrate a good faith effort to

complete the rehabilitation program successfully, he will be terminated. Most employees will view such a policy as fair because the employer has offered the employee/abuser a second chance.

Still another policy question which management should address is whether it will vigorously investigate the possible existence of substance abuse in the workplace. Although a "wall-to-wall" search is generally not recommended for most employers, there are situations where employers must adopt an aggressive approach. In some instances, a competent and reliable security firm should be retained to discover the source of substance abuse in the workplace. The introduction of an unknown undercover investigator to the workplace, and the use of sophisticated surveillance equipment as well as other law enforcement techniques, may reveal clues which a trained consultant can use to pinpoint the source and level of substance abuse among employees.

In most locales, the employer can review his suspicions and explore available options regarding employee substance abuse with the local police or sheriff. Some employers may, on the other hand, have substance abuse problems which are so widespread or potentially life threatening that federal drug enforcement officials should be contacted for assistance because of their expertise in such matters.

### ***Collective Bargaining Obligations***

In a unionized workplace, employers must also consider the role which an incumbent union will play in the implementation of the company's substance abuse policy. Although management is usually responsible for safety and discipline in the workplace, the National Labor Relations Act ("NLRA") requires that a company bargain with an incumbent union about certain changes in working conditions, including the implementation of a substance abuse policy as it applies to those represented by a union.

In addition, employees of non-union companies may be protected by the NLRA if they act in concert with other employees to resist their employer's substance abuse policy.

### ***Off Duty Conduct***

Another issue to be considered by management in formulating a substance abuse policy is whether discipline or discharge is appropriate in certain cases involving off-duty misconduct, such as the arrest of an employee on a drug-related charge. In such cases, an employer may incur adverse publicity, or the safety and efficiency of its workplace may be compromised. For example, a defense contractor may perceive an employee's arrest for substance abuse as a threat to its contractual obligation to safeguard its top-secret work for the government. Other off-duty misconduct may be so directly related to the employee's job or the employer's reputation and customer relations, that a response

is justified, such as the arrest of a bus driver for driving his private vehicle while intoxicated.

An employee's arrest may, at the very least, alert the employer to circumstances which warrant further investigation and possible remedial action. Nevertheless, as a general rule, a decision to discharge should not be based solely upon an arrest for off-duty misconduct. Moreover, the employer should be sensitive to whether discipline based on a person's arrest record has a disproportionate impact on protected minority groups.

### **Privacy Considerations**

In selecting the correct approach to combat substance abuse, a careful balance must be struck by the employer between protecting its workplace against substance abuse and avoiding an unwarranted intrusion into its employees' reasonable expectations of privacy. Frequently, safety concerns override an employee's privacy needs. For example, a medical professional who is expected to be available for emergencies when off duty can reasonably be expected to refrain from drug use at all times. On the other hand, an employee who has several drinks over a weekend, but reports alert and ready to work on Monday, is less likely to pose a threat to the business.

While management should not condone substance abuse on or off premises, it should avoid an extreme approach so that its policy is practical under the circumstances and its ability to maintain positive employee relations will not be impaired.

While much has been said in the media about individual privacy rights, a private employer (in the absence of state or local law) does not violate an employee's constitutional rights by requiring drug testing or searching employees or their property for drugs.

Safety concerns, the desire to have a workplace free of substance abuse, and an applicant or employee's consent to be treated or searched, have defeated most legal challenges to substance abuse policies adopted by private employers. However, claims of invasion of privacy and defamation continue to be filed by applicants or employees; therefore, risks remain in conducting drug-testing programs and searches even in the private sector.

Public employers must be particularly concerned about random searches and test-related employment decisions because of court rulings which have established a right of privacy under the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures. Some courts, however, have allowed drug testing of employees in security and safety-related positions (e.g. police officers and prison guards), especially where suspicion of drug use is established.

As a practical matter, public and private employers who search or test employees or job applicants may protect themselves against invasion of privacy claims by obtaining the

consent of those to be searched or tested. An authorization to take a blood or urine specimen can be included in the employer's application form or in a separate form which is obtained during the employment process. In fact, most employers normally use urine tests as opposed to blood tests because urinalysis is less intrusive and considerably less expensive.

### **Identifying the Substance Abuser**

Detection of substance abuse is not as simple as smelling liquor on the breath or observing clear signs of intoxication. The fact remains that most substance abuse is difficult to detect without testing. Although one detection factor is a change in personality and behavior, not every such change can be traced to a drug or drinking problem. Managers and supervisors should avoid jumping to unsupported conclusions.

### ***Indications of Substance Abuse***

Several factors may indicate alcohol and drug abuse, including:

- Patterns of absenteeism (same employees absent on same days, unreported absences, late arrivals, high Monday absenteeism, or unbelievable excuses);
- Increased use of sick benefits;
- Tendency to leave work early, increased requests for time off or sudden enthusiasm for leaving the work premises;
- Unusual gatherings of employees in isolated work locations or parking lots which may include the same employees on each occasion;
- Wildly fluctuating productivity and quality of work; and
- Noticeably severe changes in mood, behavior, and interaction with others.

Alcohol abuse is often characterized by the odor of liquor on the breath, slurred speech, unsteady walking, and, in advanced stages, tremors. Drug abusers exhibit some of the same characteristics, but there are subtle differences. Cocaine users often have red or runny noses, and, when high, the user may appear more excited and energetic than usual. Stimulants cause similar effects.

Heroin addicts' arm-crooks often bear scars, known as "track marks," which are the result of repeated injections. These persons frequently wear long-sleeved clothing in all kinds of weather to cover these marks. Legitimate drug injections will generally not produce such scarring. Heroin addicts tend to be lethargic, to the point of appearing to fall asleep. Other signs of heroin use include loss of appetite and a generally poor physical condition.



Persons under the influence of PCP may engage in erratic and excited behavior and pose a threat because of the "superman" effect it creates. In contrast, a marijuana user may be lethargic or unable to assume responsibilities seriously or effectively. Sedatives and depressants tend to cause dozing, lack of concentration, and slurred speech.

### ***Legitimate Drugs***

A number of legitimate drugs can produce some of the side effects attributed to illegal drugs, both when used pursuant to prescription and when abused.

Supervisors and managers should, therefore, be cautious when dealing with workers suspected of having a substance abuse problem to avoid stigmatizing them or by falsely accusing them of using illegal drugs, and potentially running afoul of the law.

### **Protections of the ADA**

The Americans with Disabilities Act ("ADA") does not protect employees who currently use illegal drugs. However, the ADA does cover rehabilitated individuals as well as those currently undergoing rehabilitation. It also protects individuals who are erroneously regarded as having a disability.

Generally, an employer who declines a job application based on a positive drug screen ordinarily does not violate the ADA; however, an adverse employment decision based on the false perception that an applicant or employee uses illegal drugs or has used illegal drugs in the past may violate the ADA.

### ***Difficulty of Detection***

Many workers, because of the nature of their work, are difficult to identify as substance abusers. Included in this category are salespersons, and others who infrequently come into contact with supervisory personnel, as well as professors, doctors, attorneys, accountants and other professionals.

Ideally, an organization's substance abuse policy should apply to all employees in the same way. Practically, however, there are circumstances where treating all employees precisely in the same manner may not be possible or appropriate because of their work locations or the nature of their jobs.

### **Testing**

#### ***To Test or Not To Test***

Testing is one valid method of determining whether drugs or alcohol are being abused by job applicants or employees. A likely effect of testing is deterrence. In 1980, a survey of servicemen by the United States Department of Defense ("DOD") showed that

27 percent were drug users. By 2001, after drug testing was implemented, only 1.45 percent were drug users.

According to a federal government study of full-time employees who admitted that they used illicit drugs, 40 percent said they were less likely to work for a company that conducted random drug testing and 30 percent said they were less likely to work for a company that conducted pre-employment drug testing.

Workers who reported that their workplace did not test on a random basis were nearly two times as likely to say that they used an illicit drug as those workers reporting that their workplace tested on a random basis.

### ***Statutory Protections***

Before initiating a drug testing program, an employer should adopt fair and standard testing procedures. Many states have laws based on the President's Commission on Model State Drug Laws, requiring employers to establish a written policy at least thirty days prior to the start of the program. The employer must distribute the written policy to employees or ensure that it is available in a personnel handbook, manual, or posting.

Several states also provide guidelines governing the testing and sample collection procedures that employers must meet in order to receive protection from litigation. In some states, drug testing required by the employer must be scheduled during, immediately before, or immediately after a regular work period, and the time taken for testing must be considered work time for the purposes of compensation and benefits.

In addition, in most circumstances, an employer must pay the entire cost of the drug test and for reasonable transportation costs to the testing site if the test is not conducted at the employee's normal work site. Some states also require employers to conduct drug testing at a laboratory approved, or certified by, the United States Department of Health and Human Service, Substance Abuse and Mental Health Services Administration ("SAMHSA") or the College of American Pathologists, American Association of Clinical Chemists; further, the testing must comply with scientifically accepted analytical methods and procedures. The samples must be fully documented, collected, stored, and transferred in a manner reasonably designed to prevent misidentification, contamination, or adulteration. The person tested must have an opportunity to provide medical information relevant to the test, including identification of prescription and non-prescription drugs that might affect the outcome of the test.

Moreover, many states require confirmation of a positive test result by a different analytical process than that used in the first test, providing that the second, or confirmatory, test be the more expensive Gas Chromatography/Mass Spectrometry method. Positive confirmatory results must also be reviewed by a licensed physician or doctor of osteopathy, often referred to as a Medical Review Officer ("MRO"). Several states impose upon the MRO various responsibilities such as contacting employees within forty-eight hours of testing, offering to discuss positive test results, interpreting

and evaluating the test results for legal use, and reporting results caused by prescription medicine as negative results.

### ***Incumbent Worker Testing***

Testing incumbent employees, as opposed to applicants for employment, requires considering a number of factors. First, as previously noted, there are ADA implications where the employer falsely perceives that an employee is an addict or where the employee is a recovering addict. Employers should consider requiring some reasonable suspicion of substance abuse before asking an incumbent employee to submit to a test. Many employers utilize a more focused approach of testing employees involved in accidents, who come to work appearing intoxicated or who are excessively absent.

Employers may also choose to reduce costs by testing only applicants who apply for certain positions for which the selection of a substance-abusing applicant could significantly harm the business. Most companies refuse to hire any applicant who tests positive for alcohol or illegal drugs. However, because various state and federal laws regulate pre-employment testing, it is important to seek advice before embarking upon a broad testing program.

### ***Testing Accuracy***

The reliability of testing remains an important and recurring issue. The accuracy of a given drug test is determined by the technology used in the test, the chemical nature of individual drugs, the skills and abilities of the testing organization, and the procedure used to ensure proper handling and processing of samples.

To avoid taking adverse employment action for a "false positive"—a drug test which mistakenly comes out positive and is later determined to be inaccurate—employers should confirm the initial tests at a certified laboratory.

In assessing the accuracy of any test, both sensitivity and specificity should be examined. Sensitivity refers to accuracy in testing true positives; a 95 percent sensitivity rating means that if 100 samples contain drugs, the test will indicate 95 positives and 5 negatives. Specificity measures true negatives; if tests of 100 drug free samples show 90 negatives and 10 positives, the test has a 90 percent specificity rating. This last measurement is important because it means that a certain number of drug-free samples will indicate the presence of drugs. This could lead to adverse employment decisions based on erroneous data.

### ***Selecting a Testing Facility***

Most problems associated with testing can be traced to improper handling of test samples or laboratory procedures. Thus, employers should carefully examine the reputation and experience levels of several testing facilities before selecting one. The laboratory selection process should include an evaluation of the laboratory's ability to

provide a readable and understandable report of test results within a few days after the test is administered.

Further, it is important that applicants or employees being tested be treated with dignity and respect. An insensitively administered test could mushroom into a lawsuit alleging invasion of privacy or defamation.

Since the cost and accuracy of tests vary, many employers find it cost-efficient to utilize an inexpensive test followed by a more costly and more reliable test by a certified laboratory to confirm positive results. Collection should always be performed by trained personnel.

It must be noted that metabolization rates affect test results. Alcohol leaves the body in about 12 hours, while cocaine takes longer to leave the body. Marijuana is detectable for as long as several months after use. Amphetamines and barbiturates remain in the body for two to five days. Heroin and PCP can be found after two to four days.

Most testing programs look for drugs, not alcohol, because alcohol's fast metabolization rate realistically precludes testing, and it is generally easier to tell if someone is intoxicated by alcohol without the use of a test.

### ***Types of Tests***

Drug testing is primarily done by urinalysis, using or more of the tests noted below:

- Thin Layer Chromatography ("TLC") relies heavily on technician interpretation of color changes as urine is exposed to various solvents.
- Enzyme Immunoassay ("EIA") and Radio Immunoassay ("RIA") are considered more accurate for testing urine. These tests also rely on color interpretations. One EIA, marketed as EMIT, reportedly showed a false positive reading for marijuana when the actual drug in the system was an over-the-counter aspirin substitute.
- Gas Chromatography-Mass Spectrometry ("GC-MS") produces an analysis of the various drugs and quantities in a blood or urine sample. It is the most accurate and expensive test, often used as a "confirmation" test to verify the positive results of initial screens.

## **How to Design and Implement a Substance Abuse Policy**

### ***Obtain Employee Support***

Most employees safeguard their right to a safe workplace but do not realize that their safety is threatened by an alcoholic or drug-abusing co-worker. When implementing a substance abuse policy, the need for self-protection should be emphasized to employees in order to show that drug testing is in their best interests.

According to a Gallup survey, employees typically favor drug testing of workers in safety-sensitive jobs (95%), office workers (69%), health care workers (92%), and factory workers (81%). A survey of business executives underscored the benefits of drug testing from a company's perspective. For example, 77 percent of respondents said that since implementing drug testing they were seeing a better caliber of job applicants. A better public image was cited by 58 percent, while 56 percent said they were experiencing fewer workplace drug problems. Also noteworthy was that 54 percent had noticed an improvement in employee morale.

Because surveys show that employees are concerned about drug abuse at the workplace, a primary goal of a substance abuse program should be to educate employees about the various types of drugs. They should also educate them on the harmful effects of drugs and alcohol and what they and the company can do to reduce or eliminate drug abuse at the workplace.

To avoid offending the productive and dependable employee who has not been affected by substance abuse, management should make it clear to them that by raising the subject of substance abuse, the company does not intend to intrude unreasonably upon their private lives or question their off-duty activities, so long as they maintain the company's standards of performance.

Many companies prefer a treatment-oriented approach to deal with confirmed positive tests. As one manager put it, "You don't throw out a \$50,000 copy machine because you've been having trouble with it. You say, 'how can we fix it?'" Because rehabilitation programs can be expensive, the best solution is to avoid hiring the substance abuser and "weed out" employees who currently abuse drugs or alcohol.

Every substance abuse policy should be clearly communicated to employees. Supervisors and managers should be trained to respond to employee inquiries about the policy. And the company should work to maintain the confidentiality of employee information.

### ***What the Policy Should Cover***

An employer contemplating a drug and alcohol abuse policy should consider the following:

- A description of those employees subject to testing;
- The circumstances under which testing may be required;
- The substances for which tests will be conducted;
- A description of the testing methods and procedures to be used;

- The consequences of refusing to participate in testing;
- The adverse personnel action or employer response that may be taken based on the results of the testing;
- The employee's ability to obtain written test results and the employer's duty to furnish those results;
- The employee's ability to explain, upon employer's request and in a confidential setting, a positive test result;
- The employer's policy regarding the confidentiality of test results;
- The employer's policy on employee drug and alcohol abuse;
- Consequences of refusal to undergo rehabilitation and treatment;
- Education of employees about the need for a screening program;
- Whether to exempt alcohol consumption at company functions;
- Whether any distinction will be made between on-duty and off-duty substance abuse;
- Whether illegal drug activity will be reported to the appropriate authorities as well as serve as cause for disciplinary action;
- Whether abuse of prescription or over-the-counter drugs will be treated the same as use of illegal drugs; and
- Whether employees, their lockers, and belongings will be subject to searches, whether employees may be present during the search, who may witness the search, and the consequences for refusal to allow a search.

## **Conclusion**

Substance abuse in the workplace creates dangers for employers and employees alike. A substance abuse policy must be tailored to fit the needs of the employer. For further information, contact your Lemle attorney.

**About Lemle & Kelleher, L.L.P.**

Lemle & Kelleher is one of the oldest major law firms in Louisiana, tracing its origins to the late 19th century when New Orleans was experiencing a boom as the shipping and commercial center of the South. Building on that genesis, we have diversified and expanded our capabilities for more than 100 years to meet the growing needs of our clients regionally and nationally. Today, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit [www.lemle.com](http://www.lemle.com).

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