



## Partying In The Store

Insights

3.01.14

The cost of bad behavior in the workplace can be significant and assorted. Bad behavior damages morale, results in a loss to a company's profits, jeopardizes safety, and diminishes productivity. Use of drugs and alcohol – or partying in the workplace – can greatly contribute to bad behavior.

Because an estimated 10 to 25% of the American population has been under the influence of alcohol or illicit drugs on the job, and the majority of individuals who abuse alcohol and other drugs are employed, employers need to take note. In the retail arena – where sales and profits drive success – curbing drug and alcohol related bad behavior is essential to ensure a store meets its financial objectives.

While it may seem like an easy task, limiting “partying” in the workplace is not without challenges. But, by establishing legitimate, business-related policies that apply uniformly to all employees, and by providing supervisor training and employee education, an employer can limit the consequences of partying in the workplace while also limiting its liability.

### **The Americans With Disabilities Act**

Under Title I of the Americans with Disabilities Act (ADA), an employer may prohibit use of alcohol, illegal drugs, and legal drugs used illegally (and even legal drugs used in accordance with a valid prescription in some circumstances) in the workplace. But, there are certain aspects of the ADA to remember. First, while the ADA prohibits you from discriminating against a person with a history of drug addiction, an employee who engages in the illegal use of drugs is not an “individual with a disability” when you make an adverse employment decision on the basis of that drug use.

Second, although you may ban alcohol use in the workplace, individuals who abuse alcohol *may* be considered disabled if they are an alcoholic or a recovering alcoholic. Like illegal drug use, such a “disability” is no excuse for unsatisfactory performance or behavior related to the alcoholism. To the contrary, you may always require employees who use drugs or alcohol to meet the same standards of performance or conduct that you set for other employees. That means that you are not obligated, as a reasonable accommodation, to forgive misconduct simply because it is the result of alcohol or illegal drug use.

### **The Occupational Safety And Health Act**

Discussing workplace safety obviously involves the Occupational Safety and Health Act, or OSHA, which imposes a duty on employers to provide a workplace that is free from “recognized hazards”

that could cause death or serious injury. Although the retail industry is hardly as dangerous as the agriculture or construction industries, there is certainly a unique set of hazards.

As a result, retail employers are required to abide by a variety of OSHA standards, including those that apply to fire safety, exit routes, walking or working surfaces, and medical and first aid. In fact, the Occupational Safety and Health Administration has recently increased its enforcement of those standards in the retail industry.

It doesn't take much imagination to envision the serious problems – both health and economic – that an impaired employee can cause. According to the American Council for Drug Education in New York, employees who abuse drugs are 3.6 times more likely to be involved in on-the-job incidents, five times more likely to injure themselves or other employees in the process, and five times more likely to file a workers' compensation claim.

Aside from safety concerns, these employees are also 33% less productive than their non-drug-using counterparts and ten times more likely to miss work. While OSHA does not require a drug-free workplace policy, in light of these statistics (and the fact OSHA is ramping up its recent emphasis in the retail industry), smart employers will have one in place regardless.

## **Drug Testing**

Although an employer should prohibit drug and alcohol use in the workplace, how can you be aware of when it occurs? Drug and alcohol use is a chronic problem that is not always obvious. Conveniently, the ADA, OSHA, and most state laws, permit an employer to conduct drug tests that detect illegal drug or alcohol use.

Moreover, you may require an applicant to undergo drug testing before a conditional offer of employment has been made (a drug screen is not considered to be a "medical examination"). But that's not the case for alcohol use; testing for alcohol use constitutes a medical examination. Additionally, you may also ask applicants, *after* a conditional offer of employment, about their past or present drug and alcohol use, so long as you do so for all applicants in the same job category.

If you administer a drug or alcohol test, and an employee or applicant tests positive, you may discharge, discipline, or refuse to hire. Occasionally a drug test will reveal the use of lawfully-prescribed drugs. Be cautious when taking adverse action, as that action could run afoul with the ADA. To avoid or limit possible liability, once an employee or applicant tests positive, allow them to offer possible explanations for the positive results.

In the end, there are substantial risks associated with illegal drug and alcohol use in the workplace. Not only can the using employees harm themselves, but they risk the safety of others, as well as the success of the business. In order to protect yourself, put in place legitimate, business-related policies concerning drug and alcohol use. When an employee violates a policy (or an applicant in some cases), handle discipline uniformly and in accordance with your policies.

## **Regulation Of Off-Duty Partying And Legalized Marijuana**

It's well-settled that an employer may prohibit use of alcohol and illegal use of drugs in the workplace, but what about outside the workplace? Under various circumstances, an employer may test its employees for drug and alcohol use. While some substances dissipate from an employee's system after a period of hours, others stick around for days – if not weeks. Marijuana (specifically the tetrahydrocannabinol or “THC” in marijuana) is one example. Thus, drug testing employees might reveal use of certain drugs when they were off the clock, and this revelation implicates employees' privacy rights.

Generally, an employer may avoid liability when it has implemented a legitimate policy on drug testing and applies that policy uniformly. If the employer discovers illegal drug use, it may exact discipline based on the terms of its policy. But the recent trend toward the legalization of medical and recreational marijuana use has muddied the waters in this area. To date, 20 states have legalized the medical use of marijuana and two states have legalized recreational use. Additionally, 13 additional states have pending legislation that would legalize medical usage of marijuana.

As for the states where medicinal marijuana is legal, there are often state-specific policies for employers to follow regarding the use of medical marijuana. Because the use is medical, the ADA is also triggered. Nonetheless, a majority of courts across the country agree that the medical marijuana laws serve only to protect a lawful user from criminal prosecution, not from an employer's drug-free-workplace policies.

The recreational use of marijuana comes with its own set of questions. Many states, including Colorado – one of the two states to legalize recreational marijuana use – maintain laws that prohibit an employer from punishing an employee who engages in a lawful activity. Until recently, Colorado employers were concerned that the legalization of recreational marijuana use would nullify their drug-free-workplace policies.

But, a Colorado appellate court has cleared the air by holding that an employer can terminate an employee for marijuana use despite the lawful activity statute, as marijuana use is not a lawful activity under both state and federal law. While the Obama administration has de-prioritized federal enforcement of lawful marijuana use, the fact remains that marijuana is still considered a Schedule 1 controlled substance. At least for the time being, employers need not fret making adverse employment decisions due to employees' lawful use of marijuana while off duty.

## **Our Advice**

In light of these challenges, training store managers is critical. Store managers need to not only understand the policies, but how to identify intoxication in the work place, and what steps to take or not to take if an employee is impaired. For example, telling an intoxicated employee to clock out and go home could result in liability if the employee gets behind the wheel of a car.

If your policy calls for an immediate drug test, the manager needs to know to accompany the employee. Workers' comp claims have been raised based on un-witnessed accidents between the

employee. Workers' comp claims have been raised based on an witnessed accidents between the time the employee is told to leave and actually getting to the door.

Nor is firing an employee on the spot a good idea. Not all impairment comes from the illegal use of drugs or alcohol; the apparent intoxication may be a bad reaction to lawful use of medication, or the result of a medical issue, situations for which employers generally do not want to terminate employees. Thus, knowing the right steps to take is critical.

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