



Drinking On The Job? Five Things Employers Need To Know In The Wake Of The USC Football Coach Controversy

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Football powerhouse USC (University of Southern California) fired its head football coach Steve Sarkisian on October 12, 2015, after it was widely reported that the coach had been under the influence of alcohol during several team events. His termination can teach a lesson to any employer who wonders how it should handle the sometimes-touchy situation involving possible alcohol abuse by an employee. This article presents the five things you need to know in order to navigate this problem.

Alcohol Use By Employees: Where Can You Draw The Line?

What should you do if you believe one of your employees is under the influence at work? It may come as a surprise that you do not have the unfettered right to treat employees with alcohol problems in any manner you see fit. That's because the federal Americans with Disabilities Act (ADA) and many similar state statutes consider alcoholism to be a protected disability. In other words, if you fire someone because you know or suspect they are an alcoholic, you could be walking yourself into an ADA claim.

The good news is that there are some bright line rules for you to follow in order to make sure you stay out of hot water in a situation involving employee alcohol use. Here are the five things you need to know about employee alcohol abuse:

1. The ADA specifically says that you can hold alcoholics to the same performance and conduct standards as all other employees.

The statute makes clear that you can draw a line in the sand when it comes to employee conduct in the face of alcohol abuse. Even the decidedly pro-employee Equal Employment Opportunity Commission (EEOC) recognizes that poor job performance or unsatisfactory behavior – such as absenteeism, tardiness, insubordination, or on-the-job accidents – related to an employee's alcoholism need not be tolerated if similar performance or conduct would not be acceptable for other employees.

In Guidance addressing how employers should apply performance and conduct standards to disabled employees, the EEOC points that employers who consistently enforce their rules can do so even if an alcoholic employee claims that the reason for the rules violation was the result of

drinking. However, those employers who maintain a lax attitude about certain rules but then crack down when an alcoholic worker breaks those rules will face ADA liability.

2. You can always prohibit alcohol from the workplace.

Maybe this seems like a no-brainer, but the ADA permits businesses to bar the use or possession of alcohol in the workplace. It doesn't matter that the employee claims that his alcoholism cause him to display bad judgment and bring the bottle to work, you can always lay down the law (consistently) in this regard.

3. You can steer a worker towards an Employee Assistance Program (EAP).

The EEOC provides you with the option of referring an employee you suspect has a drinking problem to your EAP for assistance. This is certainly not required, and the agency clearly states that you can respond to a performance or conduct issue by walking down the disciplinary path instead. However, if you want to help your employee and believe rehabilitation might work in both of your favors, you can go the EAP route.

Some employers may be wary to take the first step in such a situation for fear that they might end up being found to have "regarded" the employee as disabled by making an EAP suggestion. However, once the ADA Amendments Act was passed in 2008, the bar to prove disability or "regarded as" disability became incredibly low. In other words, your employee will often be able to prove "disability" no matter your actions, so this should not be your primary concern.

As long as you can show through objective, documented information that the employee appeared to be under the influence of alcohol, and you are not acting solely based on speculation or innuendo, you are putting yourself in the best possible position. Further, you could also refer the employee to an EAP without concluding why the employee is acting erratically; just make sure to document your thought process and actions.

4. You can also enter into a "last chance agreement."

Another similar option is requiring the employee to sign a last chance agreement once caught violating your policies. Again, the EEOC makes clear that this is not a requirement but an option. Generally, under such an agreement, you agree not to terminate the worker in exchange for an employee's agreement to receive substance abuse treatment, refrain from further alcohol use, and avoid further workplace problems. A violation of such an agreement usually warrants termination because the employee failed to meet the conditions for continued employment. Your employment counsel can help you draft an ADA-compliance last chance agreement.

5. You can fire an employee if he raises alcoholism for the first time in the face of impending termination.

As noted above, you can impose the same discipline that you would for any employee who fails to meet your standards or who violates a consistently-applied conduct rule. So even if the employee raises an unknown alcohol problem while you are about to terminate, you can still proceed with the action if it would have also been imposed on a non-alcoholic employee.

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However, if you intend to apply some lesser form of discipline, and the employee first raises alcoholism at that time, you should consider reasonable accommodations (after imposing the lesser form of discipline). If the employee mentions the alcoholism but makes no overt request for accommodation, you should ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the response is “yes,” or if the employee raises it of his own accord during the disciplinary meeting, you should begin an “interactive process.”

This process will help determine if an accommodation is needed to correct the problem. You can ask questions to the employee and to his health care provider (through the employee) about the connection between the alcoholism and the performance or conduct problem. You can seek the employee’s input on what accommodations may be needed. A common reasonable accommodation in these scenarios is a modified work schedule to permit the employee to attend an on-going self-help program, but the ultimate choice rests with you so long as you believe the proposed accommodation is designed to succeed.

If you have any questions about this situation, or how it may affect your business, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific developing situation and relevant EEOC Guidance. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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Richard R. Meneghello
Chief Content Officer
503.205.8044
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