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Labor and Employment Law: Know The Appropriate Statutes And Policies Regarding Drug-Related Issues (4/06)

By Nicholas J. D'Ambrosio, Jr., *Capital District Business Review*, April 21-27, 2006

One of your managers just reported that a recent hire admitted to using drugs in the past. Although this employee has been a good performer so far, you are concerned about keeping him on if he has ongoing drug problems. Can you terminate his employment based on his admission that he used drugs in the past? Can you require a drug test?

Dealing with drug-related issues can be more complicated than one might think because federal and state anti-discrimination law may protect former drug users from adverse employment action. This article addresses some common questions relating to employee drug use and drug testing.

Can I discharge or refuse to hire someone because of drug use?

The answer to this question depends on whether the individual is a current user of illegal drugs or a rehabilitated drug addict. The federal Americans with Disabilities Act protects qualified individuals with disabilities against discrimination based on their disability status and also requires reasonable accommodation of their known physical and mental disabilities. The New York Human Rights Law provides similar protections.

The ADA specifically excludes current users of illegal drugs from the definition of qualified individuals with disabilities. In other words, a current user of illegal drugs is simply not protected under the ADA. The state Division of Human Rights has issued regulations indicating that current users of illegal drugs are likewise not protected under state law. As individuals who currently use illegal drugs are not protected by federal or state law, the employer may discharge or refuse to hire an individual based on his or her current drug use.

On the other hand, rehabilitated drug addicts are protected under both federal and state law. Someone who is not a current user of illegal drugs and is a rehabilitated drug addict may be protected under both federal and state law as an individual with a disability or an individual perceived to have a disability. Consequently, employers may not discharge, refuse to hire or take other action against an individual because of his or her status as a rehabilitated drug addict.

Individuals who do not currently use drugs but used them in the past are not automatically protected as rehabilitated drug addicts. For example, casual users who never became addicted would not be protected as rehabilitated addicts. Employers should be cautious when taking action based on past drug use. Casual users may be protected if the employer perceives the individual as having a disability. Also, it may be difficult to distinguish between casual users and former drug addicts. Consequently, employers should consult with employment-law counsel when determining appropriate action in these situations.

Can I require employees or applicants to submit to drug tests?

Yes. An individual who tests positive for illegal drugs is in fact a current user within the meaning of the ADA or state law and is not protected under either statute. Employers are permitted to drug test under the ADA and state law and are also permitted to take adverse employment action based upon the results of a positive drug test. It is permissible for an employer to drug test under both federal and state law and take an adverse action, such as termination of employment, based upon the positive drug test results.

Do I need a drug-testing policy or procedure?

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Although drug testing itself is legal, inconsistent or inappropriate drug testing can create potential liability for employers. Employers may not discriminate on the basis of past drug addiction--even with respect to drug testing. Employers must ensure that drug testing is not applied in a discriminatory fashion, based on any other protected status, such as race, national origin or gender.

To ensure that drug testing is required in a consistent and non-discriminatory fashion, it is important that an employer promulgate and follow policies with respect to drug use and positive drug tests. Drug policies should set forth the bases for requiring a drug test and also provide clear disciplinary and remedial measures. Additionally, employers should train supervisors to ensure the policy is enforced in a consistent manner.

So, in our hypothetical above, the employer should review its drug-testing policy to determine when drug testing is authorized by the policy. The employer should also talk to the supervisor to get more facts: did the employee disclose that he is currently using drugs? Did he say how recently this drug use took place? Has the supervisor observed any behavior that suggests the employee has reported to work under the influence or used drugs while on duty or on the employer's premises?

Keeping in mind that the employee may be protected by federal and state law as a rehabilitated drug addict, the employer should exercise caution in requiring a drug test without good evidence of current drug use or an independent and non-discriminatory reason for testing (such as a post-accident drug test pursuant to the employer's policy).

As the determination to require a drug test is fact-driven, employment-law counsel may provide additional guidance on whether drug testing is appropriate based on the information provided by the employer. If drug testing is not appropriate, the employer should, at a minimum, remind the employee of the employer's substance-abuse policies.

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