# DRUG AND ALCOHOL TESTING OF EMPLOYEES

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## I. Background: Drug and Alcohol Issues in Employment

A. Principles of Discipline for Drug and Alcohol Use or Abuse

Possession, use, and sale of alcohol or drugs on work premises and impairment while on duty or subject to duty have long subjected employees to discipline. The rules and standards of discipline for these offenses are the same as for other offenses.

1. Employee must have notice of the prohibition

2. Employer must have proof:
   - possession: person, clothes, locker, automobile
   - identification of the substance
   - time and place of possession, use, or sale
   - observations of impairment
   - drug/alcohol tests
   - off-duty use caused impairment while on duty
   - consideration of extenuating circumstances

3. Differentiation of particular job assignments

B. Drug and Alcohol Issues in Collective Bargaining Agreements and Work Rules

The National Labor Relations Board has found that an employer policy requiring drug and alcohol testing is a mandatory subject of bargaining. 295 NLRB No. 26, 131 LRRM 1393 (1989); Delta Tube & Fabricating Corp., 323 NLRB No. 153, 155 LRRM 1129 (1997). An employer cannot implement a drug and alcohol program during the term of a collective bargaining agreement without bargaining or it will be considered an impermissible, unilateral change in working conditions under the NLRA, unless the employer's action is justified by specific contract language or the right to bargain has been clearly and unmistakably waived.
BNA Daily Labor Report, Sept. 24, 1987, ¶D-2. Many employers avoid negotiation over these issues because they are complex and divisive and prefer to resolve them through unilateral management programs, subject to grievance arbitration, relying on management rights provisions [such as the right to ensure the safe operation of the workplace and impose discipline for just cause; the right to impose work rules that are reasonably related to a legitimate objective of management] with mixed results.

C. Treatment, Rehabilitation, and Employee Assistance Programs

1. There are three approaches with how to deal with employees who have substance abuse problems:

a. Hold all employees to the same standards of conduct without regard to the nature or severity of their substance abuse problems or efforts to seek assistance, ie. progressive discipline

b. Give special consideration to employees who have acknowledged to the employer that they have a substance abuse problem and who actively seek help in resolving the problem before discharge and before selected for random test! This strikes a balance between the employer's need for a stable, productive, safe workforce and the troubled employee's claim for sympathetic understanding and the opportunity for rehabilitation. Not a viable option in situations with an employee in denial.

c. Treat substance abuse as a disease. An employer using this medical model will treat addiction as any other disease and allow leaves of absence to seek rehabilitation and treatment. Under this approach, the fact that an employee is in denial is characteristic of the disease and does not affect the process. Consider: "Last Chance Agreements", *Johnson v. Columbia Falls Aluminum Co. LLC*, 2009 MT 108 N.

2. Employers are not legally obligated to provide treatment or rehabilitation:

a. Americans with Disabilities Act, 42 U.S.C. 12101 et seq.: Current users of illegal drugs are specifically excluded from protection, but former users who are in a supervised rehabilitation program or who have successfully been rehabilitated may be protected by the Act. *See Raytheon v. Hernandez*, 124 S. Ct. 513 (2003). [See attached EEOC Guidance]

b. Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*:
The FMLA does not specifically address whether alcohol and drug use or abuse constitute a serious medical condition, however, 29 C.F.R. Section 825.112(g) provides that FMLA leave is available for substance abuse treatment if the conditions of section 825.114 are met and the substance abuse is a serious health condition. It also provides that employers cannot take adverse employment actions against an employee in these circumstances (in treatment, not abusing drugs). An employer may require a drug test for employees returning from FMLA- qualifying leave.

D. Medical Marijuana Mont. Code Ann. § 50-46-301, 320(4)(b) and (5)(a).

## II. <u>Drug and Alcohol Testing of Employees</u>

A. General considerations: conflict between employer's right and duty to maintain a safe, productive workplace and the employee's right of privacy.

1. *Skinner v. Railway Executives' Association*, 489 U.S. 602 (1989): drug testing of urine after a railroad accident constituted a search under the Fourth Amendment but under

those circumstances did not violate constitutional privacy rights due to reduced expectation of privacy in this heavily regulated industry and the overriding government interest in safety.

2. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989): the Treasury Department has the right to test employees seeking promotion to "sensitive jobs", such as jobs involving the interdiction of drugs.

B. Who is to be tested: Montana law allows testing of employees engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety or public health, driving a motor vehicle is a necessary part of work duties, or involving a fiduciary position. Mont. Code Ann. § 39-2-206 (4).\

"Hazardous Work Environment" includes DOT positions, construction, mining, working in proximity to industrial equipment, flammable materials, explosives, toxic chemicals.

C. Trigger for the test: An employer's testing program must be conducted in accordance with written policies and procedures which are adopted or modified only after giving all employees 60 days notice. For example, Employees must be informed of applicable sanctions and standards of conduct. Mont. Code Ann.§ 39-2-207(1)(a).

1. Pre-Employment: Mont. Code Ann. § 39-2-208(1)

2. Random drug testing: Mont. Code Ann. § 39-2-208(2)

3. Particularized suspicion: Mont. Code Ann. §39-2-208(4)

a. State and Federal regulations require that supervisors of employees subjected to reasonable suspicion drug and alcohol testing attend a total of two hours of training on alcohol abuse and controlled substance use. The training will assist supervisors in determining whether reasonable suspicion exists to require an employee to undergo testing. The training shall include the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

4. Post-accident: Mont. Code Ann. §39-2-208(5)

D. Testing Methodology: written policies and procedures must contain the information required by Mont. Code Ann. §39-2-207, and methodology must conform to 49 C.F.R. Part 40 or be at least that stringent.

1. Chain of custody: the employer and the testing facility must maintain the integrity of the sample throughout the testing process to preclude tampering, switching, or environmental factors affecting the test results. Mont. Code Ann. §39-2-207; 49 C.F.R. Part 40.

2. Different drugs require different tests, and reliability is always an issue because tests cannot correct defects in the manner in which the sample is obtained, lookalike chemicals will produce a false positive, tests are not always accurate in showing when the employee used the substance (chemical residue), which breaks the nexus between off-duty conduct and work. Before discipline can be taken, positive results must be reviewed and certified by a medical review officer,

and an employee must be given the opportunity to provide information to the MRO if relevant medical information that could affect the results. Mont Code Ann. §39-2-208(5).

a. Enzyme Multiplied Immunoassay Technique Test (EMIT): positive or negative for a variety of specific, identified substances (marijuana, cocaine, heroin, PCP, amphetamines, barbiturates); 95% reliable, but false positives result from cross-sensitivity to related legal and harmless drugs.

b. Gas chromatographic/mass spectrographic analysis (GC/MS): more expensive and complicated, but is more precise and identifies the level of the drug. This test is selected by the federal Department of Health and Human Services and Department of Transportation as a confirmatory test after a screening test.

c. Blood Alcohol Content Blood tests more accurate than breathalyzer.

E. Employee Responses to Drug and Alcohol Testing

1. Refusal: insubordination, violation of CBA, violation of policy or work rule, violation of state or federal law. If the employer had a right to require the employee to submit to the test, refusal is good cause for termination.

2. Consent/waiver of rights

3. Employee Request for a Test

4. Employee's Right to rebuttal Mont. Code Ann. §39-2-209 and 210.

F. Compliance with the Americans with Disabilities Act [See attached EEOC Guidance]

G. Confidentiality Considerations

- Medical information can only be shared with those individuals involved in the hiring process: EEOC Enforcement Guidance on Pre-employment Questions at 22, construing ADA. Medical information obtained about an employee during the course of permitted job entrance examination or inquiry may be used for insurance purposes under ADA, 29 C.F.R. App. §1640.l4(b). Drug testing for the illegal use of drugs is not considered a "medical examination" under the ADA, 42 U.S.C. §12114(d)(1) (no similar exemption exists for alcohol testing), and the ADA is neutral on the subject of when or how drug testing can be used. §12114(d)(2). However, a blood alcohol test is considered a medical examination and is subject to ADA limitations. EEOC Technical Assistance Manual, Vill-7 (1992).

- Mont. Code Ann. §39-2-211. But see Montana Constitution, Article II, Sections 8, 9, and 10; *See, e.g., The Billings Gazette v. City of Billings*, 2013 MT 334; *Citizens to Recall Mayor Whitlock v Whitlock*, 255 Mont. 517, 522-23, 844 P. 2d 74, 77-78 (1992)

- HIPAA, 42 U.S.C. §201 et seq.; 45 C.F.R. Parts 160 and 164.

- 42 U.S.C. §290 dd-2; 42 C.F.R. Part 2.

- Montana Uniform Health Care Information Act, Mont. Code Ann. §50-16-501 *et seq*. and 801 *et seq*.

- Federal Guidance: From the U.S. Department of Transportation. website: https://www.transportation.gov/odapc/employee

[As to DOT drug testing] Are my results confidential.
Your test results are confidential. An employer or service agent (e.g., a testing laboratory, Medical Review Officer or Substance Abuse Professional) is not permitted to disclose your test result(s) without your written consent. In certain situations, however, your test information may be released without your consent; such as, legal proceedings, grievances, or administrative proceedings brought on by you or on your behalf, which resulted from a positive, adulterated, substituted test result or refusal. When your employer releases your drug and alcohol testing records, the employer must notify you in writing.

## III. Applicable Law

A. **Montana Workforce Drug and Alcohol Testing Act,** Mont. Code Ann. §§39-2-205 through 212.

**39-2-205. Short title**. Sections 39-2-205 through 39-2-211 may be cited as the "Workforce Drug and Alcohol Testing Act".

**39-2-206. Definitions.** As used in 39-2-205 through 39-2-211, the following definitions apply:
(1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.
(2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test.
(3) "Controlled substance" means a dangerous drug, as defined in 49 CFR, part 40, except a drug used pursuant to a valid prescription or as authorized by law.
(4) (a) "Employee" means an individual engaged in the performance, supervision, or management of work in a:
(i) hazardous work environment;
(ii) security position; or
(iii) position:
(A) affecting public safety or public health;
(B) in which driving a motor vehicle is necessary for any part of the individual's work duties; or
(C) involving a fiduciary responsibility for an employer.
(b) The term does not include an independent contractor or an elected official who serves on the governing body of a local government.
(5) (a) "Employer" means a person or entity that has one or more employees and that is located in or doing business in Montana.
(b) The term includes the governing body of a local government.

(6) "Governing body" means the legislative authority of a local government.

(7) "Hazardous work environment" includes but is not limited to positions:

(a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;

(b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or

(c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar substances.

(8) "Local government" means a city, town, county, or consolidated city-county.

(9) "Medical review officer" means a licensed physician trained in the field of substance abuse.

(10) "Prospective employee" means an individual who has made a written or oral application to an employer to become an employee.

(11) "Qualified testing program" means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in 39-2-207 and 39-2-208.

(12) "Sample" means a urine specimen, a breath test, or oral fluid obtained in a minimally invasive manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of drug testing that is used to determine the presence of a controlled substance or alcohol.

**History:** En. Sec. 2, Ch. 521, L. 1997; amd. Sec. 1, Ch. 177, L. 2005; amd. Sec. 1, Ch. 315, L. 2011.

**39-2-207. Qualified testing program.** A qualified testing program must comply with the following criteria:

(1) Testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer and must be available for review by all employees 60 days before the terms are implemented or changed. Controlled substance and alcohol testing procedures for samples that are covered by 49 CFR, part 40, must conform to 49 CFR, part 40. For samples that are not covered by 49 CFR, part 40, the qualified testing program must contain chain-of-custody and other procedural requirements that are at least as stringent as those contained in 49 CFR, part 40, and the testing methodology must be cleared by the United States food and drug administration. At a minimum, the policies and procedures must require:

(a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful manufacture, distribution, possession, or use of a controlled substance;

(b) the employer's program for regularly educating or providing information to employees on the health and workplace safety risks associated with the use of controlled substances and alcohol;

(c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by employees;

(d) a description of available employee assistance programs, including drug and alcohol counseling, treatment, or rehabilitation programs that are available to employees;

(e) a description of the sanctions that the employer may impose on an employee if the employee is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test positive for the presence of a controlled substance or alcohol;

(f) identification of the types of controlled substance and alcohol tests to be used from the types of tests listed in 39-2-208;

(g) a list of controlled substances for which the employer intends to test and a stated alcohol concentration level above which a tested employee must be sanctioned;

(h) a description of the employer's hiring policy with respect to prospective employees who test positive;

(i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;

(j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:

(i) the tested employee;

(ii) the designated representative of the employer; or

(iii) in connection with any legal or administrative claim arising out of the employer's implementation of 39-2-205 through 39-2-211 or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of $1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards of conduct, an employer may require an employee who tests positive on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a condition of continued employment. An employer may require the employee to submit to periodic followup testing as a condition of the counseling, treatment, or rehabilitation program.

(3) Testing must be at the employer's expense, and all employees must be compensated at the employee's regular rate, including benefits, for time attributable to the testing program.

(4) The collection, transport, and confirmation testing of urine samples must be performed in accordance with 49 CFR, part 40, and the collection, transport, and confirmation testing of nonurine samples must be as stringent as the requirements of 49 CFR, part 40, in requiring split specimens as defined by the United States department of health and human services, requiring transport to a testing facility under the chain of custody, and requiring confirmation of all screened positive results using mass-spectrometry technology.

(5) Before an employer may take any action based on a positive test result, the employer shall have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An employee or prospective employee must be given the opportunity to provide notification to the medical review officer of any medical information that is relevant to interpreting test results, including information concerning currently or recently used prescription or nonprescription drugs.

(6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be conducted using testing equipment that appears on the list of conforming products published in the Federal Register.

(7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person to be considered as having alcohol in the person's body.

**History:** En. Sec. 3, Ch. 521, L. 1997; amd. Sec. 2, Ch. 177, L. 2005.

**39-2-208. Qualified testing program -- allowable types -- procedures.** Each of the following activities is permissible in the implementation of a qualified testing program:

(1) An employer may test any prospective employee as a condition of hire.

(2) An employer may use random testing if the employer's controlled substance and alcohol policy includes one or both of the following procedures:

(a) An employer or an employer's representative may establish a date when all salaried and wage-earning employees will be required to undergo controlled substance or alcohol tests, or both.

(b) An employer may manage or contract with a third party to establish and administer a random testing process that must include:

(i) an established calendar period for testing;

(ii) an established testing rate within the calendar period;

(iii) a random selection process that will determine who will be tested on any given date during the calendar period for testing;

(iv) all supervisory and managerial employees in the random selection and testing process; and

(v) a procedure that requires the employer to obtain a signed statement from each employee that confirms that the employee has received a written description of the random selection process and that requires the employer to maintain the statement in the employee's personnel file. The selection of employees in a random testing procedure must be made by a scientifically valid method, such as a random number table or a computer-based random number generator table.

(3) An employer may require an employee to submit to followup tests if the employee has had a verified positive test for a controlled substance or for alcohol. The followup tests must be described in the employer's controlled substance and alcohol policy and may be conducted for up to 1 year from the time that the employer first requires a followup test.

(4) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to suspect that an employee's faculties are impaired on the job as a result of the use of a controlled substance or alcohol consumption. An employer shall comply with the supervisory training requirement in 49 CFR, part 382.603, whenever the employer requires a test on the basis of reasonable suspicion.

(5) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to believe that the employee's act or failure to act is a direct or proximate cause of a work-related accident that has caused death or personal injury or property damage in excess of $1,500.

**History:** En. Sec. 4, Ch. 521, L. 1997.

**39-2-209. Employee's right of rebuttal.** The employer shall provide an employee who has been tested under any qualified testing program described in 39-2-208 with a copy of the test report. The employer is also required to obtain, at the employee's request, an additional test of the split sample by an independent laboratory selected by the person tested. The employer shall pay for the additional tests if the additional test results are negative, and the employee shall pay for the additional tests if the additional test results are positive. The employee must be provided the opportunity to rebut or explain the results of any test.

**History:** En. Sec. 5, Ch. 521, L. 1997; amd. Sec. 3, Ch. 177, L. 2005.

**39-2-210. Limitation on adverse action.** Except as provided in 50-46-320, no adverse action, including followup testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee's record and destroyed.

**History:** En. Sec. 6, Ch. 521, L. 1997; amd. Sec. 2, Ch. 315, L. 2011.

**39-2-211. Confidentiality of results.** (1) Except as provided in subsection (2) and except for information that is required by law to be reported to a state or federal licensing authority, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding.

(2) Material that is confidential under subsection (1) may be used in a proceeding related to:

(a) legal action arising out of an employer's implementation of 39-2-205 through 39-2-211; or

(b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of $1,500 when there is reason to believe that the tested employee may have caused or contributed to the accident.

**History:** En. Sec. 7, Ch. 521, L. 1997.

## B. Federal Laws

President Reagan's Executive Order No. 12564 (1986) mandated drug testing, including random testing of federal employees in "sensitive positions".

Department of Public Health and Human Services, Substance Abuse and Mental Health Services Administration: Mandatory Guidelines for Federal Workplace Drug Testing Programs: 80 Fed. Reg. No. 94 (May 15, 2015). Establishes procedures, methodology, and requirements that have become de facto standards for drug testing in the private sector as well.

Federal Highway Administration, 14 C.F.R. pt. 121, app. 1; 49 C.F.R. §391.81 et seq.

Drug-Free Workplace Act, 41 U.S.C. §§8101-8106 et seq.: requires federal contractors with contracts over $100,000 and grantees of federal grants to provide a drug-free workplace and requires covered employers to establish an employee awareness program and certify that they will make good-faith efforts to maintain a drug-free workplace, including publishing and giving to each employee an anti-drug policy statement which forbids drug use or possession in the workplace and specifies the penalties that will be imposed on violators. The Act further provides for the means of discipline and notification to the contracting agency. Drug testing is permitted but not required, and the Act and implementing regulations make it clear that they do not preempt collective bargaining agreements.

Omnibus Transportation Employee Testing Act, 49 U.S.C. App. §2717, 45 U.S.C. §431, 49 U.S.C. App. §1618a, 49 U.S.C. §§31301 NS 31306: provides for drug and alcohol testing of employees in safety-sensitive positions in the transportation industry, reaffirming the substance of the drug-testing regulations previously promulgated by the Department of Transportation and its Highway, Railroad, Mass Transit, and Federal Aviation Administrations, and expands the requirements to cover testing for alcohol as well as drug use. Implementing regulations: 49 C.F.R. Part 40.

Department of Justice guidelines for federal prosecutors in states that have enacted medical marijuana laws: http://www.justice.gov/opa/documents/medical-marijuana.pdf Note: §40.151€ does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.

Q & A: The ADA and Hiring Police Officers: http://www.ada.gov/copsg7a.htm (includes a good section regarding drug testing)

Substance Abuse Under the ADA: http://www.usccr.gov/pubs/ada/ch4.htm

Additional resources: The Institute for a Drug-Free Workplace, a nonprofit corporation, was established in 1989 as an independent private sector coalition of major employers and employer organizations. This organization publishes excellent informational materials and research.

Interesting article: Filiski, G.M. "Weed-Whacked: Employers and workers grapple with laws permitting recreational and medical marijuana use." ABA Journal (December 2015).

**Recent federal cases and cases from other jurisdictions:**

*Bates v. Dura Automotive Systems*, (6th Cir. August 26, 2014) (testing for prescription medications).

*Blazek v. City of Lakewood*, (6th Cir. 2014) (drunk snow-plow driver not protected by ADA).

*EEOC v. Grane Healthcare Co., and Ebensburg Care Center, LLC, d/b/a Cambria Care Center*, CV No. 3:10-250 (W.Dist. Pa. Mar. 6, 2014): pre-employment offer drug tests as part of illegal pre-offer medical examinations.

*Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015) (employee can be terminated for recreational or medicinal use of marijuana because it is not lawful under federal law).

# The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities

https://www.eeoc.gov/facts/performance-conduct.html

**G. Alcoholism and illegal use of drugs**

24. Does the ADA protect employees with substance abuse problems?

The ADA may protect a "qualified" alcoholic who can meet the definition of "disability." The ADA does not protect an individual who currently engages in the illegal use of drugs,[82] but may protect a recovered drug addict who is no longer engaging in the illegal use of drugs, who can meet the other requirements of the definition of "disability,"[83] and who is "qualified." As explained in the following questions, the ADA has specific provisions stating that individuals who are alcoholics or who are currently engaging in the illegal use of drugs may be held to the same performance and conduct standards as all other employees.

25. May an employer require an employee who is an alcoholic or who illegally uses drugs to meet the same standards of performance and conduct applied to other employees?

Yes. The ADA specifically provides that employers may require an employee who is an alcoholic or who engages in the illegal use of drugs to meet the same standards of performance and behavior as other employees.[84] This means that poor job performance or unsatisfactory behavior – such as absenteeism, tardiness, insubordination, or on-the-job accidents – related to an employee's alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

Example 46: A federal police officer is involved in an accident on agency property for which he is charged with driving under the influence of alcohol (DUI). Approximately one month later, the employee receives a termination notice stating that his conduct makes it inappropriate for him to continue in his job. The employee states that this incident made him realize he is an alcoholic and that he is obtaining treatment, and he seeks to remain in his job. The employer may proceed with the termination.[85]

Example 47: An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee's tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy. The supervisor's actions violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly situated workers.

26. May an employer discipline an employee who violates a workplace policy that prohibits the use of alcohol or the illegal use of drugs in the workplace?

Yes. The ADA specifically permits employers to prohibit the use of alcohol or the illegal use of drugs in the workplace.[86] Consequently, an employee who violates such policies, even if the

conduct stems from alcoholism or drug addiction, may face the same discipline as any other employee. The ADA also permits employers to require that employees not be under the influence of alcohol or the illegal use of drugs in the workplace.

Employers may comply with other federal laws and regulations concerning the use of drugs and alcohol, including: (1) the Drug-Free Workplace Act of 1988; (2) regulations applicable to particular types of employment, such as law enforcement positions; (3) regulations of the Department of Transportation for airline employees, interstate motor carrier drivers and railroad engineers; and (4) the regulations for safety sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission.[87]

27. May an employer suggest that an employee who has engaged in misconduct due to alcoholism or the illegal use of drugs go to its Employee Assistance Program (EAP) in lieu of discipline?

Yes. The employer may discipline the employee, suggest that the employee seek help from the EAP, or do both. An employer will always be entitled to discipline an employee for poor performance or misconduct that result from alcoholism or drug addiction. But, an employer may choose instead to refer an employee to an EAP or to make such a referral in addition to imposing discipline. However, the ADA does not require employers to establish employee assistance programs or to provide employees with an opportunity for rehabilitation in lieu of discipline.

28. What should an employer do if an employee mentions drug addiction or alcoholism, or requests accommodation, for the first time in response to discipline for unacceptable performance or conduct?

The employer may impose the same discipline that it would for any other employee who fails to meet its performance standard or who violates a uniformly-applied conduct rule. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for accommodation.

An employee whose poor performance or conduct is attributable to the **current illegal use of drugs** is not covered under the ADA.[88] Therefore, the employer has no legal obligation to provide a reasonable accommodation and may take whatever disciplinary actions it deems appropriate, although nothing in the ADA would limit an employer's ability to offer leave or other assistance that may enable the employee to receive treatment.

By contrast, an employee whose poor performance or conduct is attributable to **alcoholism** may be entitled to a reasonable accommodation, separate from any disciplinary action the employer chooses to impose and assuming the discipline for the infraction is not termination. If the employee only mentions the alcoholism but makes no request for accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with performance or conduct. If the employee requests an accommodation, the employer should begin an "interactive process" to determine if an accommodation is needed to correct the problem. This discussion may include questions about the connection between the alcoholism and the performance or conduct problem. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions. Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an on-going self-help program.

Example 48: An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment. The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee's drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, absent undue hardship, the employer must grant the employee's request to take leave for the next month to enter a rehabilitation program.

29. Must an employer provide a "firm choice" or "last chance agreement" to an employee who otherwise could be terminated for poor performance or misconduct resulting from alcoholism or drug addiction?

An employer may choose, but is not required by the ADA, to offer a "firm choice" or "last chance agreement" to an employee who otherwise could be terminated for poor performance or misconduct that results from alcoholism or drug addiction. Generally, under a "firm choice" or "last chance agreement" an employer agrees not to terminate the employee in exchange for an employee's agreement to receive substance abuse treatment, refrain from further use of alcohol or drugs, 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.[89]