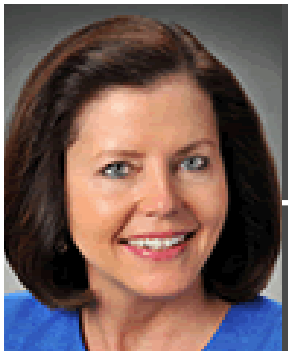

DRUG ABUSE OR DISABILITY: ARE EMPLOYEES WHO TAKE PRESCRIPTION DRUGS IN A PROTECTED CLASS?

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Addiction in the Workplace: Employers' Legal Obligations and Other Considerations When Confronting Employee Drug Habits

Ronda L. Harvey and Gabriele Wohl

It is a rare day when even the smallest of news sources does not run a story on drug-related problems or substance abuse issues that stem from the nationwide opioid crisis. That is likely because addiction is as local an issue as it is national—the overall statistics are staggering, but zooming in on those statistics reveals devastated communities, broken families, and struggling individuals.

Workplaces and employers have felt the burden of a workforce that is increasingly afflicted by addiction. Those who are themselves addicted, recovering addicts, or have family abusing substances—most of these people have jobs. Employers are more frequently facing these issues head on as their employees and prospective employees are failing drug tests, self-reporting drug use, and abusing substances on the job. The adverse effects that substance abuse and addiction can have on an employer range from the obvious, like decreased job performance and threats to employee and public safety, to the less obvious, like running afoul of labor laws and regulations and risking litigation. This article lays out the current legal landscape with respect to operating a drug-free workplace and managing employees who suffer from addiction.

I. When is addiction a disability under the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., prohibits an employer from discriminating against a "qualified individual with a disability" because of that individual's disability. See 42 U.S.C. § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

> The definition of a disability is "with respect to an individual— "
>
> (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (ii) A record of such an impairment; or
>
> (iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

29 C.F.R. § 1630.2. Applying this definition to addiction, only individuals who have a substantially limiting addiction, have a history of such an addiction (as opposed to just a history of drug use), or who are regarded as having such an addiction have an impairment under the law.

The first prong of the definition requires a substantial limitation of one or more major life activities. There is a long string of regulatory nuances constructing the term "substantial limitation," but suffice it to say for this article that the term is meant to be "construed broadly

in favor of expansive coverage" and "is not meant to be a demanding standard." 29 C.F.R. § 1630.2. Major life activities include basic physical tasks as well as mental and emotional functions such as concentrating and interacting with others. See 29 C.F.R. § 1630.2.

It is worth making explicit at this point that there is no protection under the ADA for an "employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114. As explained in more detail below, an employer has a valid and legally defensible right to terminate or discipline an employee for engaging in unlawful drug use.

A safe harbor is embedded in that exclusion for an employee who (1) "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use," (2) "is participating in a supervised rehabilitation program and is no longer engaging in such use," or (3) "is erroneously regarded as engaging in such use, but is not engaging in such use." 42 U.S.C. § 12114(b).

At present, no bright-line test exists for determining whether someone is a "current" drug user. Courts have found that "an employee illegally using drugs in a periodic fashion during the weeks and months prior to discharge is 'currently engaging in the illegal use of drugs,'" and an employee who has only abstained from drugs for six days is also considered a current user. See Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997), abrogated on other grounds by Baird ex rel. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999); Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th Cir. 2001). In other words, the employee does not have to be using drugs on the day in question to be deemed a current user. See also Baustian v. Louisiana, 910 F. Supp. 274 (E.D. La. 1996) (current user after seven weeks drug-free); Vedernikov v. West Virginia University, 55 F. Supp. 2d 518, 523 (N.D. W. Va. 1999) (current user after two months drug-free); Quinones v. University of Puerto Rico, 2015 WL 631327, at *5 (D. Puerto Rico 2015) (current user after three months drug-free); Lyons v. Johns Hopkins Hosp., No. CV CCB-15-0232, 2016 WL 7188441, at *4 (D. Md. Dec. 12, 2016), aff'd as modified, 712 F. App'x 287 (4th Cir. 2018) (current user after four months drug-free); cf. United States v. Southern Management Corp., 955 F.2d 914, 919-23 (4th Cir. 1992) (one year of abstinence not considered current use).

The District Court for the Eastern District of Pennsylvania recently offered this useful guidance:

> An employee's drug use is "current" if it occurred recently enough to justify the employer's reasonable belief that the employee's involvement with drugs is an ongoing problem. . . . In order for an employee to be "substantially limited" by her status as a recovering drug addict, she must be addicted to drugs but no longer "currently engaging" in illegal use. . . . Whether an employee is "recovering" or "currently engaging" in illegal drug use is determined on a case-by-case basis.

Suarez v. Pennsylvania Hosp. of Univ. of Pennsylvania Health Sys., No. CV 18-1596, 2018 WL 6249711 at *6 (E.D. Pa. Nov. 29, 2018) (citing EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the ADA § 8.3, § 8.5 (1992), and Salley v. Circuit City Stores, 160 F.3d 977, 980 n.2 (3d Cir. 1998)).

Recalling the safe harbor provision, this guidance on "current use" must be read with the caveat that an employee with an addiction who is participating in or has completed drug rehabilitation and is not continuing to engage in drug use may still be protected under the ADA, even if his or her most recent drug use falls within one of these "current" time limitations. "Current use" was an issue in Lyons v. Johns Hopkins Hosp., where Mr. Lyons, a social worker employed at a hospital, admitted to a cocaine addiction following a positive drug screen in December 2008. See 2016 WL 7188441, at *1. The hospital placed Mr. Lyons on a leave of absence until February 2013 and referred him to two drug treatment facilities. See id. Mr. Lyons began drug treatment but failed to complete the program. See id. When the hospital learned that he had not complied with the drug treatment program, it terminated Mr. Lyons in April 2013. See id. at *2.

Mr. Lyons pursued relief for discrimination under the ADA on the basis of his addiction. The court agreed with the hospital that, assuming Mr. Lyons had abstained from drug use from December 2012 to April 2013, he was still a "current user," and thus exempt from the protection he sought. Had Mr. Lyons completed the recommended drug treatment program, the court's analysis might have been different. Participation and completion of such a program is not dispositive of safe harbor eligibility, but it is a factor in the analysis. See id. at *5 (recognizing that "eligibility for the safe harbor 'must be determined on a case-by-case basis, examining whether the circumstances of the plaintiff's drug use and recovery justify a reasonable belief that drug use is no longer a problem.'" (quoting Mauerhan v. Wagner Corp., 649 F.3d 1180, 1188 (10th Cir. 2011))).

Determining who falls under the disability protections for

addiction requires synthesis of the definition of disability, the exclusion for current users, and the safe harbor provision. Generally, an employee who is not currently using illicit drugs, but can demonstrate a current, substantial limitation on one or more life activities due to addiction, will be protected. This could include past drug users whose addiction can satisfy the disability definition, as well as recovering drug addicts in methadone programs or other medication-assisted therapies.

II. What actions can and must an employer take with respect to an employee addicted to illegal substances?

If an employee falls into the definition of disability based on drug addiction, his or her employer must provide reasonable accommodations under the ADA. There is no precise guidance of accommodations for an addiction, but the employer must engage in the interactive process with the employee. Depending on the individual's needs, accommodations can include offering counseling where available, or providing leave for treatment. Adjustment of job duties may also be an appropriate accommodation, such as restricting a hospital or pharmacy employee's access to narcotics where the employee is a recovering addict with a demonstrated disability. See, e.g., Wallace v. Veterans Admin., 683 F. Supp. 758, 760 (D. Kan. 1988) (accommodating a nurse with a narcotics restriction in the context of a federal employer).[1]

If an employee's disability poses such a threat to others that any reasonable accommodation would not eliminate the threat, an employer can rely on the "safety of others" defense to a disability discrimination claim based on termination. The ADA does not require an employer "to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of [an] entity where such individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3). A "direct threat" is a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." Id. This defense relates particularly to jobs where an employee may have to operate machinery, vehicles, or firearms.

Regardless of the public safety threat and the nature of the job, an individualized assessment of the employee's impairments must be made before termination. This is key where an employee is protected due to his or her drug addiction, since the employee would not, by definition, currently be abusing illegal substances. Where an employee is participating in a medication-based drug treatment program, an individualized assessment must be made to determine the medications' effect on the job. This requirement also applies to employees who may be using narcotics lawfully, by prescription. See, e.g., EEOC v. Foothills Child Development Center, Inc., Civil Action No. 6:18-cv-01255 (D. S.C. May 7, 2018) (where EEOC settled with employer in lawsuit based on termination of employee participating in suboxone clinic) (see EEOC Press Release, Foothills Child Development Center Agrees to Settle EEOC Disability Discrimination Lawsuit, May 15, 2018 ("Employers should make employment decisions based on an applicant's qualifications and an employee's performance, not based on disability or participation in a medically-assisted treatment program.")).

If an employer becomes aware of an employee using opioids, either by drug test or otherwise, the employer must take care to follow up as to whether the opioids are lawfully prescribed, and, if so, conduct an individualized assessment of whether the medication will negatively impact the job or public safety. Before questioning employees about prescription opioids, an employer must have a business necessity for the question. As explained by ¶ 230 of the ADA Compliance Guide (2019),

> While drug testing does not have to be job-related or consistent with business necessity, requiring employees to answer questions about prescription drugs does. An employer that asked employees to disclose all prescription drugs they took before drug testing violated the ADA, according to a federal appeals court that found there was no business necessity for asking the question[.] It is a matter of timing. Questions after a test to provide a defense against positive results are acceptable. Questions before are not.

ADA Compliance Guide ¶230, "Examinations and Testing," 2008 WL 4817022 (citing Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1230 (10th Cir. 1997) (finding that blanket "prescription drug disclosure provisions of [employer's drug] Policy violated the ADA")).

Employers must be mindful of the potential for lawful use of medically-prescribed opioids and the impact such use may have on the performance of the job or to public safety. If an employee is using opioids pursuant to a valid prescription, the employer should weigh the effects of the drug against the job duties, and collaborate with the employee (using the interactive accommodation process) to figure out if there is a reasonable accommodation

1 Currently, medical marijuana use is not protected under the ADA, inasmuch as marijuana is still an illegal controlled substance under federal law. However, state legalization of marijuana impacts application of state human rights laws in determining whether an employer has to accommodate medical marijuana use. Employers should be familiar with their states' medical marijuana laws and refrain from inquiries that may elicit information about a disability underlying a person's medical marijuana use.

that lessen the risks to job performance or safety. If an employee is using prescription opioids without a valid prescription, under the law, the employers may take certain actions against the employees without providing accommodation.

The ADA contains a specific provision stating that employers may hold drug users "to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. § 12114(c)(4). Courts have recognized that, although the ADA protects an employee's status as a disabled addict, being addicted to drugs or alcohol "does not insulate one from the consequences of one's actions." Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1182-1183 (6th Cir.1997) (internal quotation marks omitted).

Any action taken on the basis of an employee's illegal drug use must be based on the actual drug use, and not an addiction or perceived addiction. An employer can refuse to hire someone, can discipline or fire a current employee, and can refuse to rehire a former employee because of illegal drug use, as long as the employer would do so across the board—with respect to employees who are addicted or who are one-time or recreational users. See Raytheon Co. v. Hernandez, 540 U.S. 44, 53-54 (2003) (policy of refusing to rehire worker who had engaged in drug-related misconduct was neutral and non-discriminatory).

The Court of Appeals for the Ninth Circuit explained in Lopez v. Pac. Mar. Association, that a one-strike rule against drug users did not discriminate against recovering addicts because,

> The rule eliminates all candidates who test positive for drug use, whether they test positive because of a disabling drug addiction or because of an untimely decision to try drugs for the first time, recreationally, on the day before the drug test.

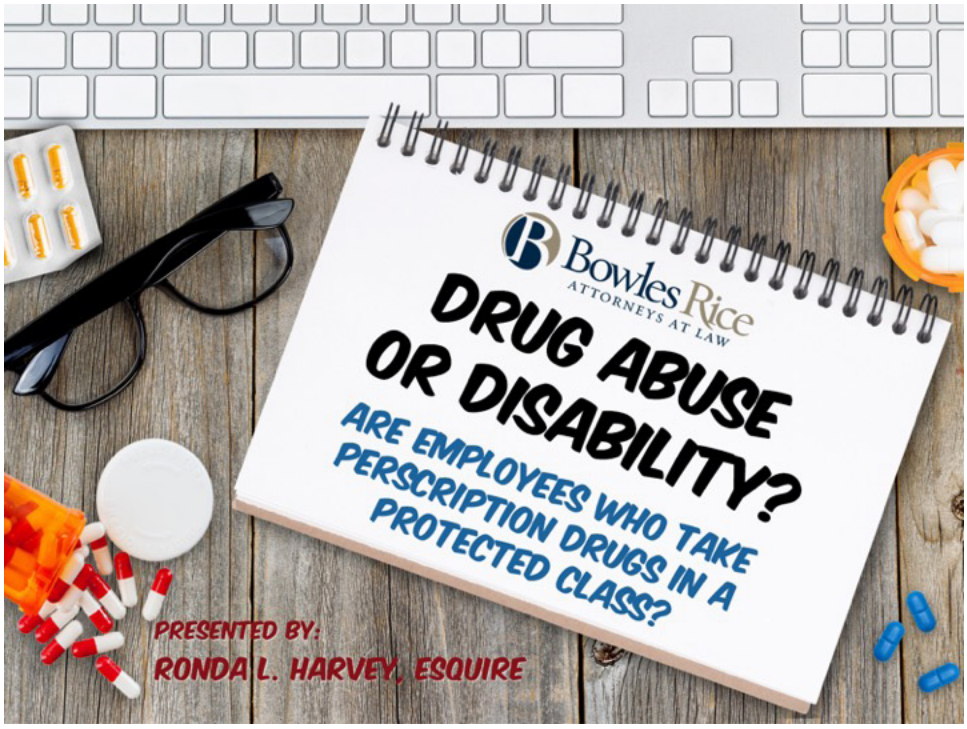
657 F.3d 762, 764 (9th Cir. 2011). See also Pernice v. City of Chicago, 237 F.3d 783, 785 (7th Cir. 2001) ("It is well-established that an employee can be terminated for violations of valid work rules that apply to all employees, even if the employee's violations occurred under the influence of a disability." (citing Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351, 352 (7th Cir.1997) (upholding termination of employee whose threats against co-workers were triggered by mental illness)).
Employers may (and should, for a variety of reasons) prohibit illegal drug use at work. Employers may also require that employees not be under the influence of or engage in the illegal use of drugs at work, require that employees comply with standards set forth in the Drug-Free Workforce Act, or other federal law relating to drug use, or require on-the-job or pre-employment drug tests. 42 U.S.C. § 12114(c). It is not discriminatory under the ADA to require employees who are former substance abusers to submit to more frequent drug tests than other employees. See Buckley v. Consolid. Edison Co. of New York, Inc., 155 F.3d 150, 155 (2d Cir.1998).

It is, however, unlawful to ask potential employees whether they are drug abusers or addicts, or if they've ever been to rehab, as that might be considered a disability-related inquiry. Those questions may have some justification with respect to an employee who has already been hired if the questions relate to the job and the information is not used to discriminate on the basis of disability. It is also not unlawful under the ADA to inquire about employees' and potential employees' current drug use.

With or without these policies, illegal drug use will always be unlawful and a valid reason for disciplinary action. Being up-front about the level of tolerance for such activity—particularly when the use is done outside of the workplace but the effects are observed on the job—will put employees on notice that drug use will be taken seriously, and help insulate the employer from any potential exposure for associating with or enabling criminal behavior. Having policies in place about substance abuse also provides a strong basis for termination when an employee violates the policies.

Employers need to know their duties and options when it comes to handling addiction in the workplace. The safest approach to addiction and drug use for employers is to focus on job performance. If an employee's job performance is declining and the employer suspects—but does not know—that it is due to narcotics abuse, then the employer can take action based on performance issues, as he or she would with any other employee. An employer may not, however, take the same action against an employee on the basis of his or her addiction, when the addiction satisfies the definition of a disability.

In addition to the policies and actions set out above, employers may consider providing avenues for addicts to get help, even if they are current drug users. Employee assistance programs and leaves of absence for self-disclosure, followed by agreed-upon monitoring, are not required accommodations under the law, but may be worthwhile in the long-term goal of preventing turnover and maintaining a healthy and able workforce.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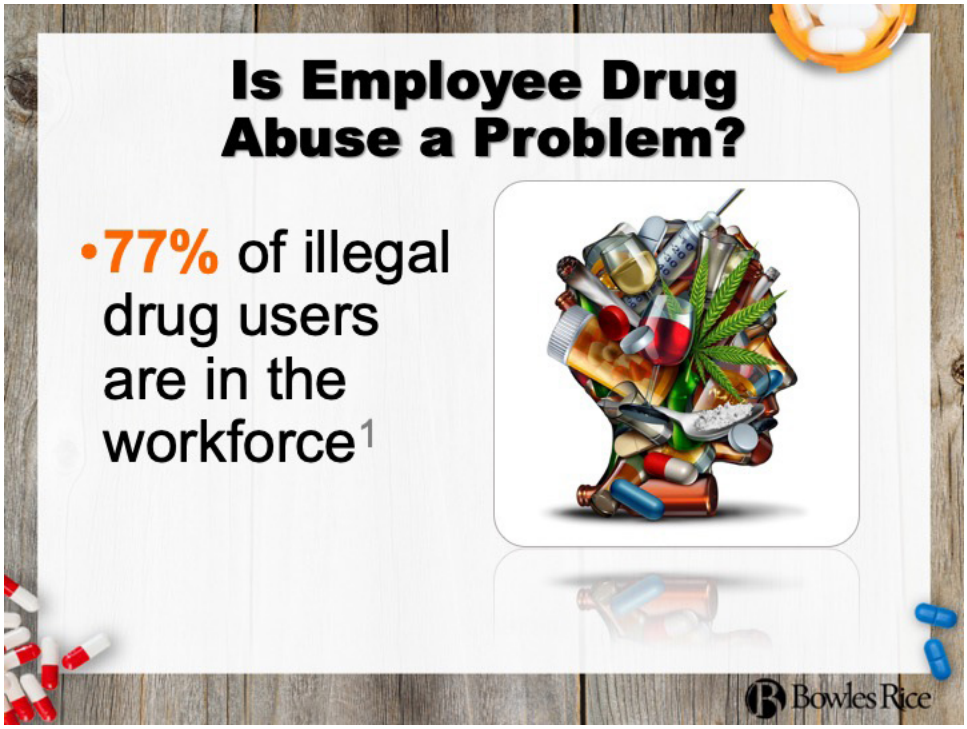
ATTORNEYS AT LAW
DRUG ABUSE OR DISABILITY?
ARE EMPLOYEES WHO TAKE PERSCRIPTION DRUGS IN A PROTECTED CLASS?
PRESENTED BY:
RONDA L. HARVEY, ESQUIRE


Is Employee Drug Abuse a Problem?
•77% of illegal drug users are in the workforce[1]
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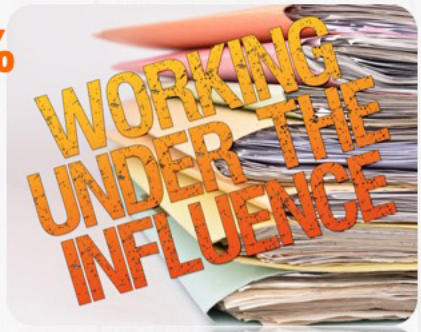
Is Employee Drug Abuse a Problem?

- **More than 60%** of adults know someone who has worked under the influence[2]



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Is Employee Drug Abuse a Problem?

- Addiction costs the economy **$190 billion** annually[3]

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Is Employee Drug Abuse a Problem?
•Nearly 16 million employees abuse drugs[4]
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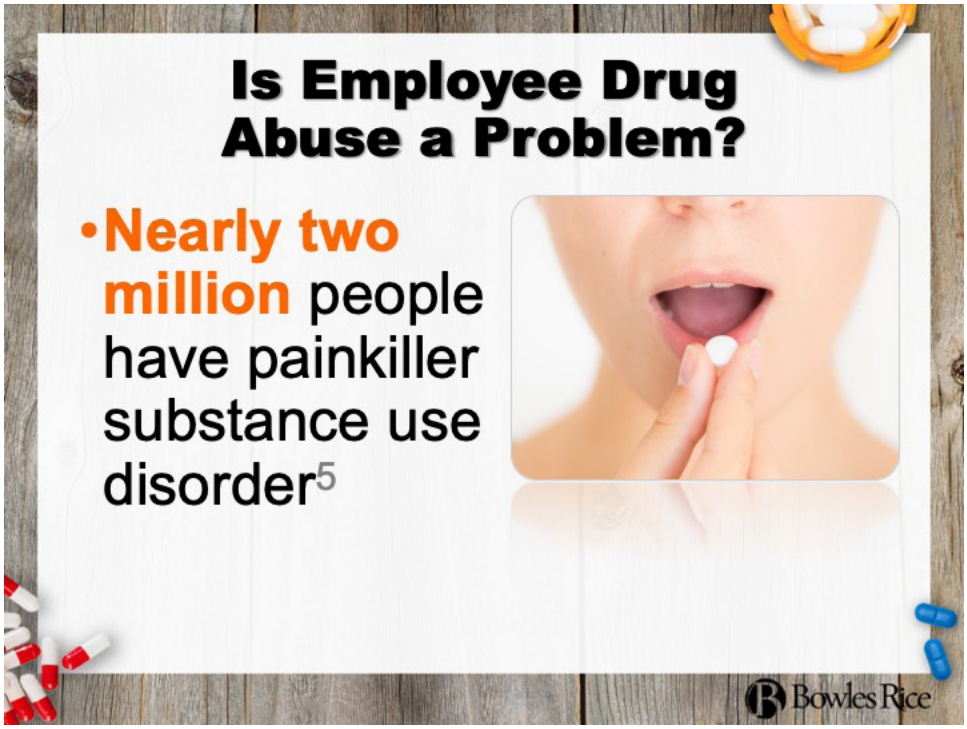
Is Employee Drug Abuse a Problem?
•Nearly two million people have painkiller substance use disorder[5]
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How Does Employee Drug Abuse Affect Employers?
•More absenteeism
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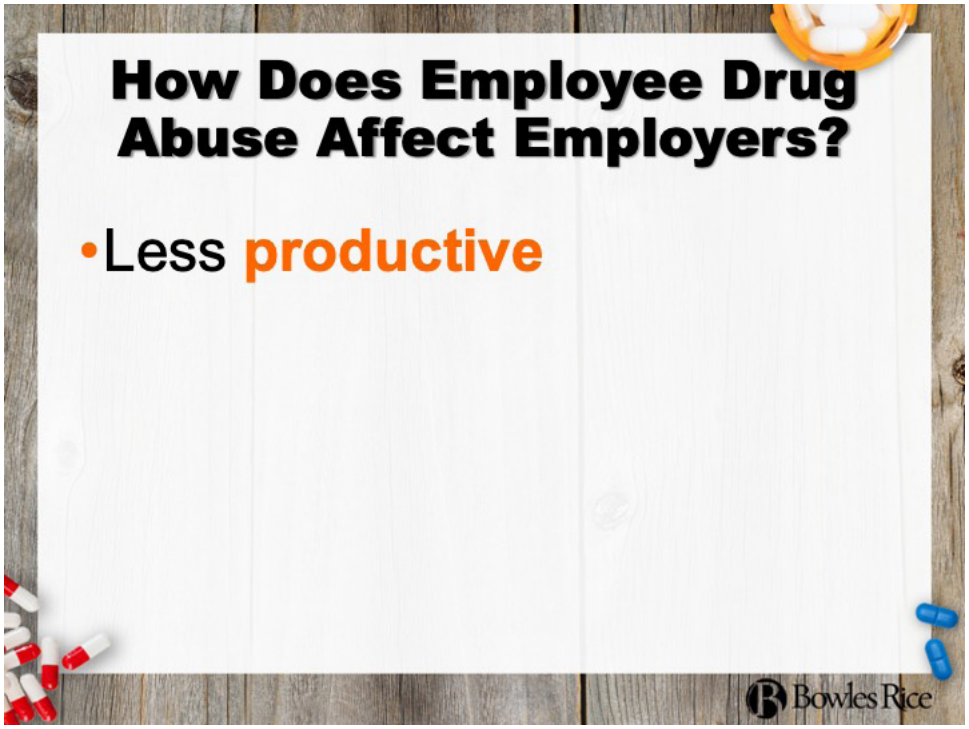
How Does Employee Drug Abuse Affect Employers?
•Less productive
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How Does Employee Drug Abuse Affect Employers?
•More likely to have a workplace accident
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How Does Employee Drug Abuse Affect Employers?
•More likely to make mistakes
OOPS!
Bowles Rice

How Does Employee Drug Abuse Affect Employers?

- Increase in **workers' compensation claims**

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Are Drug Users Protected?

- Americans with Disabilities Act – "ADA"

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Are Drug Users Protected?

- State Human Rights provisions

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Are Drug Users Protected?

- Employment contract and policies

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Is Drug Abuse a Disability?

- ADA definition – 29 CFR 1630.2

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Is Drug Abuse a Disability?

- No ADA protection for those "currently" engaging in illegal drug use.

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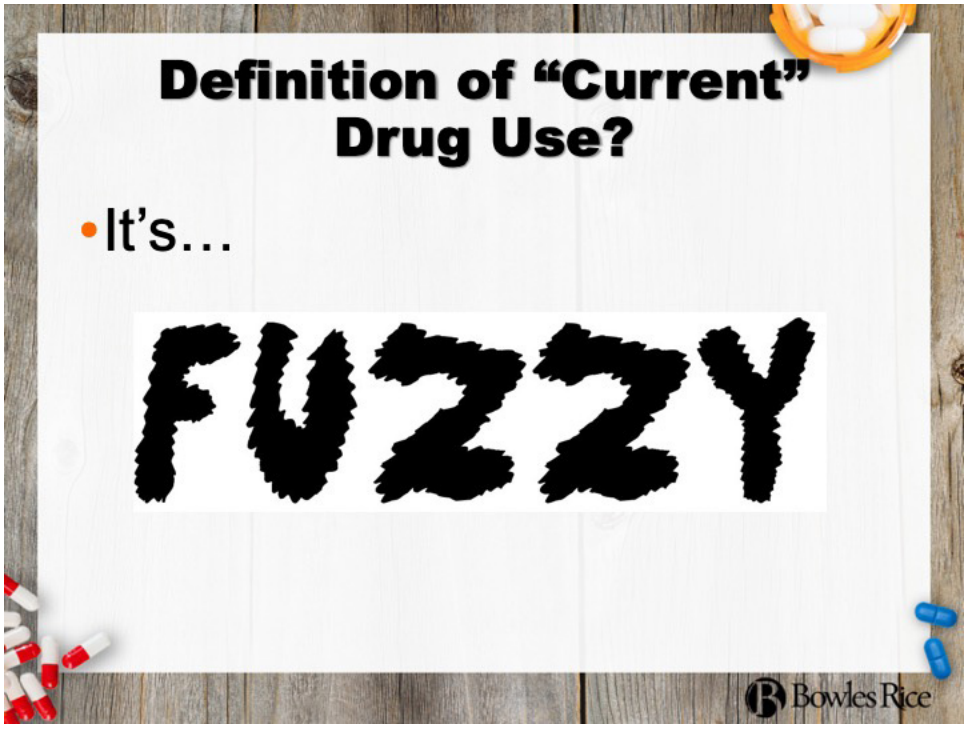
Definition of "Current" Drug Use?
• It's…
FUZZY
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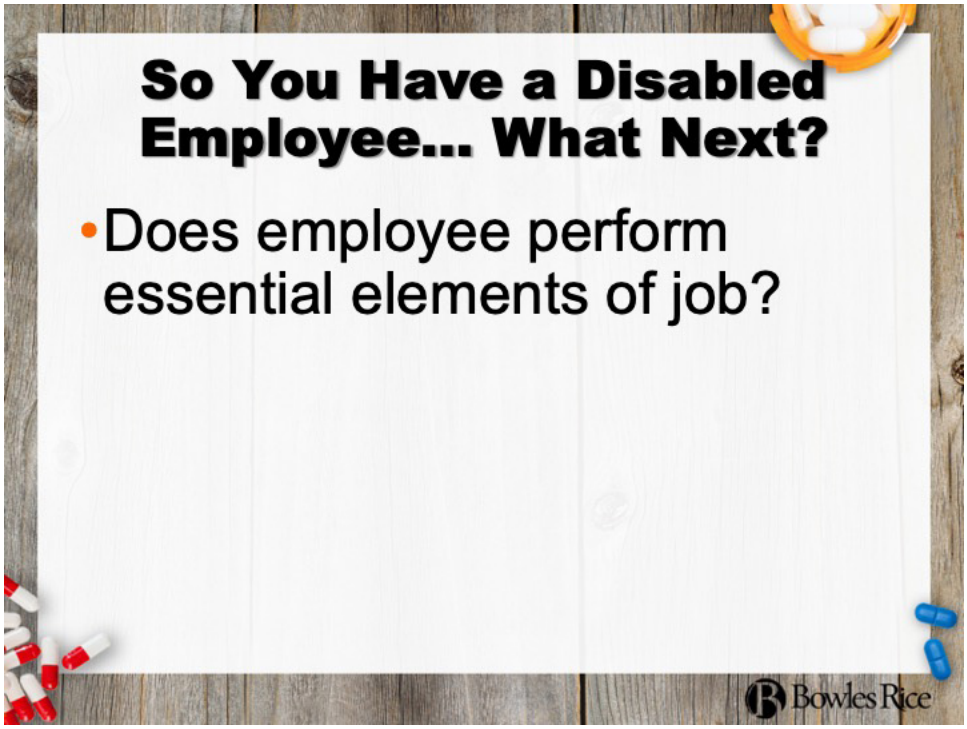
So You Have a Disabled Employee… What Next?
• Does employee perform essential elements of job?
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So You Have a Disabled Employee... What Next?

- Can employer reasonably accommodate employee's disability?

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So You Have a Disabled Employee... What Next?

- Is disability a threat to public safety?

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Discipline / Termination?

- Follow employment policies

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Discipline / Termination?

- Engage in interactive process

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Is Illegal Drug Use Protected?
NO
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Is Illegal Drug Use Protected?
•WARNING:
Employer must make sure employee is not taking legally prescribed drugs
ADDRESS:
Rx
Valium 10 mg
30
ke 1 tablet
fills: 1
Bowles Rice

References

1. The Council on Alcohol and Drugs, Inc., 2018
2. Figment Group, Inc., 2017
3. National Council on Alcoholism and Drug Dependency, 2018
4. National Safety Council, 2019
5. National Safety Council, 2019

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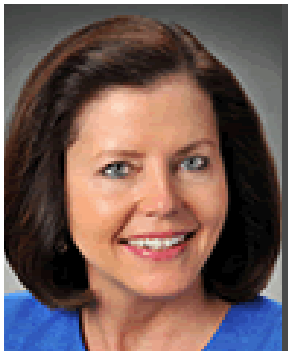
ARE EMPLOYEES WHO TAKE PRESCRIPTION DRUGS IN A PROTECTED CLASS?



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Ronda Harvey is the leader of the Bowles Rice Labor & Employment Team. She focuses her practice on employment litigation and also advises clients on human resources issues.

A significant part of Ronda's practice for the past 25 years has been defending employers in lawsuits brought by employees in both state and federal courts. She has successfully tried cases to verdict for employers, and represents them in administrative proceedings. She has successfully argued appeals to the West Virginia Human Rights Commission on behalf of employers. She currently provides representation to a state agency in claims involving retirement benefits.

Ronda works with employers in a variety of industries, including manufacturing, health care and energy. She understands that each client is unique, and works in partnership with her clients to fully understand their business and help them manage the regulatory minefield of employment issues. She frequently provides training to managers and supervisors on both human resource and safety issues.

Her experience and successful representation of employers, including Fortune 500 companies, has earned her a preeminent AV rating from Martindale Hubbell, long considered the gold standard in the legal profession. Based on feedback from her peers and clients, she also is recognized by the leading peer review organizations in the legal industry, including Chambers USA's Leading Lawyers for Business; Best Lawyers in America; and Super Lawyers for her litigation practice.

Ronda's most recent achievements include defending a large West Virginia employer in a deliberate intent trial and winning a complete defense verdict. She also has represented defendants in mass tort and complex products liability civil actions.

Practice Areas

- Labor and Employment
- Deliberate Intent and Workplace Safety
- Product Liability Defense
- Litigation
- Appellate Litigation
- Mass Tort and Toxic Tort Defense

Honors

- Recognized by 2015-2018 editions of Chambers USA: America's Leading Lawyers for Business among "Leaders in their Field" for Litigation: General Commercial
- Named to The Best Lawyers in America ® (Product Liability Litigation - Defendants), 2013-present
- Peer-Review Rated AV by Martindale-Hubbell
- Named as Super Lawyer in General Litigation
- National Academy of Jurisprudence Premier 100 Trial Attorneys of West Virginia

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