Drugs & Alcohol: Requiring Employees to Disclose their Substance Abuse Problems

Companies have traditionally relied on testing to determine if employees use alcohol, drugs and other impairing substances at work. While testing remains a crucial safety measure, many companies now ask employees to self-disclose their alcohol/drug problems, typically on a non-disciplinary basis. The idea: Recognize that substance abuse is a problem, not a form of misconduct, and get employees who come forward voluntarily the help they need. Then if employees don't take the offered amnesty and later test positive, you can discipline them.

Although a recent Canadian Supreme Court called *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 S.C.R. 591, recognizes the general legality of that approach, your policies must apply it very carefully. It comes down to a balance between your interest in workplace safety and the employee's privacy and right to accommodations.

- Rule 1: The policy must be not only necessary to ensure safety but carried out in the least privacy-intrusive way possible.
- Rule 2: The policy must accommodate employees' disabilities (remember that drug/alcohol dependency and addiction are "disabilities" under human rights laws) to the point of undue hardship.

Is Your Policy Up to Snuff?

How can you tell if your own self-disclosure policy is legal? To help you make that determination, we've looked at actual cases where courts and arbitrators applied the above rules to evaluate the legality of such policies. We then rolled the common problems that caused a policy to fail scrutiny into a fictional Model Substance Abuse Self-Disclosure Policy, a policy from hell demonstrating the pitfalls you need to avoid.

Your assignment: Look at the policy and identify as many of the problems as you can.

The Substance Abuse Self-Disclosure Policy from Hell
1. Scope: This Policy applies to all ABC Company employees regardless of job, job title or employment-status.
2. Duty to Disclose: Employees must notify their supervisors if they currently use or have used drugs, alcohol and other impairing substances in the past 6 years.
3. Independent Medical Exam (IME): Upon disclosure, employees will be removed from duty, placed on leave and required to undergo an IME conducted by an addictions specialist selected by ABC Company. If the IME finds the use is related to an addiction or dependency, the employee will be offered reasonable accommodations, medical assistance and support designed to ensure his/her return to work as quickly as possible; if the IME finds the use to be recreational, the employee will be subject to discipline in accordance with the ABC Company Discipline Policy.
4. Return To Work: Employees may return to work upon completing the following rehabilitation, treatment and monitoring conditions:
(a) Abstention from drug and alcohol use during the return to work process;
(b) Completion of a prescribed treatment program consisting of: i. attending at least ___ Alcoholics/Narcotics Anonymous meetings per week over a _____ period; ii. maintaining regular and meaningful contact with an AA/NA sponsor; and iii. completing any 12-step program the sponsor recommends.
(c) Passing random drug/alcohol tests every 2 weeks during the return to work process.
(d) Undergoing second IME that determines that the employee no longer has an addiction or dependency and is ready to return to work.
5. Last Chance Agreement: After fulfilling the above return to work conditions, the employee will be reinstated after signing a Last Chance Agreement promising to adhere to his/her treatment program, submit to random testing and agree that any further alcohol/drug violations will result in termination.
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Click here for a corrected and cleaned-up version of the Model Policy.

What's Wrong With This Policy?

While the non-disciplinary self-disclosure approach is in line with the *Elk Valley* case, almost every provision implementing the concept is problematic.

1. Covers All Employees Instead of Safety-Sensitive Ones

The red flag is the phrase "all employees." While requiring all employees to be fit for duty is perfectly appropriate and necessary safety objective, the provisions set out in this Policy are highly privacy-intrusive and justified only when limited to safety-sensitive workplaces and employees who perform safety-sensitive jobs.

2. Duty to Disclose Is Too Broad

Based on case law, there are 3 things employers may ask employees to disclose:

- Current drug/alcohol use;
- Current drug/alcohol dependency; and
- Drug/alcohol dependency in the past 6 years.

What employers can't ask about is past *use*. Explanation: Current use and dependency make workplace impairment a compelling safety risk justifying mandatory disclosure; ditto for past dependency over 6 years since scientific evidence shows that users are at heightened risk of relapse during that window. By contrast, courts have ruled that past *use* (especially going back as far as 6 years) doesn't significantly increase the risk of current use or impairment.

3. IME Requirements Are Overly Intrusive

While employers have a right to collect private health information about an employee's drug/alcohol use, they must do it in the "least intrusive" way

possible. Because they're so comprehensive and delve so deeply, IMEs are highly problematic and are generally supposed to be used only as a last resort. There are 2 things about the Model Policy's IME provisions that courts deem as overly intrusive:

- The IME (and employee's removal from the workplace) is triggered automatically after an employee discloses without consideration of the employee's individual circumstances or whether he/she has been involved in any workplace safety incidents;
- The IME is performed by a specialist selected by the employer, which flies in the face of court rulings that addiction specialists be brought in only after attempts to gather the information from the employee's primary care doctor and that the employee should have a say in which specialist does the exam.

Note: The one thing the provision does right is distinguish between addiction/dependency and recreational use and recognize that the former is a disability subject to accommodations while the latter is not.

4. Return To Work Conditions Are Overly Restrictive

Two of the return to work provisions raise red flags:

- Good News: The required treatment program (Sec. 4(b)) follows medical protocols and best practices; Bad News: The concept of prescribing *any* single program to be followed in all cases violates the rule that accommodations be tailored to the individual circumstances and needs of the particular employee.
- Requiring employees to undergo a second IME after successfully completing their rehab and treatment programs is overkill (Sec. 4(c)).

The other return to work provisions are generally acceptable and fairly standard, including the requirement that employees abstain from drug/alcohol use (Sec. 4(a)) and submit to random testing during the process (Sec. 4(d)).

5. Requiring Last Chance Agreement Is Unfair & Discriminatory

Agreements giving wayward employees one last chance to save their job provided they don't slip up again are fine for disciplinary, performance and other workplace problems, even in cases where the workplace problems were related to an employee's drug/alcohol addiction or dependency. What makes the last chance provision in the Model Policy problematic and distinct from other last chance agreements involving employees with drug/alcohol problems is the trigger, namely, the employee's self-disclosure that he/she has such a problem even if the employee hasn't created any actual workplace problems or committed any disciplinary infractions. In other words, simply having a drug/alcohol dependency or addiction is treated as an offence requiring automatic imposition of a last chance agreement instead of a disability requiring accommodation.

What the Policy Should Say

The good news is that the Model Policy's approach is sound and can be made right by some key corrections. Click Here for a cleaned-up version.