

Employee Substance Abuse

by Quenda Behler Story

Substance abuse contributes dramatically to job injuries. Suppose you have an employee with a drug or alcohol problem. If he injures himself because he's drunk or high and can't control his power saw, would his injury be covered by worker's compensation? Yes indeed. Even if he was so blind drunk that he caused the injury by passing out onto a table saw, he's still covered. This is why your worker's comp insurance carrier gets so huffy about substance abuse on the job.

Suppose your drunk or high employee injures another employee. Could the injured employee get worker's comp money from you? If he gets himself a good lawyer, he may be able to do better than that.

Gross Negligence

Normally, the worker's comp laws limit an injured employee's compensation to part of his lost wages and his medical bills. If you have been "grossly negligent," however, and your gross negligence caused or substantially contributed to your employee's injury, that employee may be entitled to more than worker's comp damages.

What is "grossly negligent"? It depends on the facts. For example, suppose you knew that your lead carpenter was going to his truck every couple of hours to knock back a few beers and smoke some funny cigarettes, and you did nothing about it. That's probably gross negligence, so when that carpenter injures another employee because he's too intoxicated to know what he's doing, you might be sued for that.

What if you only suspected that's what your lead carpenter was doing in his truck? Are you still considered negligent when he injures another

employee because you didn't investigate? Maybe. What's definite in that case is that it's time to call your \$200-an-hour lawyer.

Nonemployees

If the injured person is a homeowner, delivery person, electrical subcontractor, footings inspector, or passing stranger, that person doesn't have to worry about getting past the worker's comp barrier to sue you because he isn't your employee. (Your worker's comp policy doesn't cover nonemployees — that's what your liability coverage is for.)

Worse yet, suppose your substance abuser is out on the highway in a company truck and injures a nonemployee in an auto accident. We're talking about a lawsuit that will make your liability insurance carrier very, very mad at you. You may even find that your insurance company has written the policy so that if you're grossly negligent, you aren't covered at all.

Even if you are covered, if you have a million dollars in public liability coverage and the injured person gets a two-million-dollar verdict, guess who gets to pay the second million. That's right, you do.

Taking Action

So now you decide that you've got to get rid of your substance abuser before he gets you into trouble that could put you out of business. Can you just tell the guy that the next time he heads for his truck in midday, he should put it in gear and start driving for home?

Well, that would probably be better than having to pay the aforementioned second million, but as an attorney, I'd be nervous about a wrongful termination lawsuit.

Let's assume at this point that we're talking about a long-time employee, because if it was a new hire, you would find it much easier to discharge him immediately.

What you should do is begin by documenting every suspicion you have and what it's based on. If your employee comes into work smelling like a brewery, write that down in your records and include the date. If he staggers or falls asleep on the job, write the incident down and date it. But when the evidence starts to accumulate, *take action*. Otherwise, all you've done is create evidence that you had reason to know this employee was a substance abuser and didn't do anything about it.

Lifestyle Laws

One reason you need to be careful about termination procedures is that a number of states have laws prohibiting employers from penalizing employees for their lifestyle.

Alcohol consumption is a lawful activity, so if that's the problem, limit the evidence you use for making a termination decision to what happens on the job site. Evidence of behavior that occurs off the job site should be used only when that behavior affects the job.

For example, if your employee gets drunk in the local bar before he goes home at night, you shouldn't include it in your list of evidence. But if he drinks his lunch in the local bar and then comes staggering back to the job site, that's affecting the job. It doesn't matter that he did his drinking elsewhere. What matters is that his ability to work was impaired by that drinking.

However, if your employee is arrested or is too drunk to come to work, you can use that as evidence that he has a substance abuse problem.

■ Legal Adviser


What about drug use? Except for prescription medicines, drug consumption is, illegal, period, but to use it as the basis for job termination, you should still look for reasonable evidence of its effect — or at least its use — on the job.

Drug Tests

Can you ask your employee to take a drug test? Remember that I'm talking about an existing employee here, not a new hire. You *can* ask an existing employee to take a drug test, but in most states, you need to base that request on reasonable suspicions, such as red and watering eyes, an inability to concentrate, or bizarre behavior at work. You can also ask an employee to take a drug test if his job carries a high risk of injury.

Federal law prohibits asking your employee to take a lie detector test.

Americans With Disabilities

Is there a situation where you might not be able to fire a drug addict or an alcoholic? Yes, there is. If your employee is a *recovering* alcoholic or drug addict, is not currently using alcohol or drugs, and is in a treatment program, he may be protected from termination under the Americans With Disabilities Act. So don't assume that you can fire him just because you have discovered that he has a drug or alcohol problem. You need evidence of on-the-job abuse or impact. 

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