

Employee Drinking on the Job

by Quenda Behler Story

Suppose your lead carpenter calls and says there has been an accident: One of your employees cut his finger off — and by the way, he had alcohol on his breath when it happened. What do you do? If you're like most contractors, you fire the employee and then say to yourself, "Whew! I'm glad that's over with."

Workers' Comp

But maybe it's not over with. What if the injured employee files for workers' compensation? Is he entitled to collect?

In most cases, an employee who got hurt because he was drunk is not entitled to workers' comp for the injury. The key word here is "because," which indicates that his drinking was the direct cause of the injury. Whether the

intoxicated, one of your employees backs the Bobcat into the homeowner's house — or even over the homeowner. Since the employee was drunk, you probably won't have to pay him any workers' comp, but you could have a big-time negligence lawsuit on your hands if the homeowner decides to sue you.

This is where your liability insurance policy is supposed to kick in and save you. However, when you tell the insurance company you're being sued because of a drunk driving the Bobcat, the company will probably remind you of the fine print in your policy that says you have to keep your job site drug- and alcohol-free — and since you didn't do that, it may refuse to pay. Now it's you who has to pay.

Drunk subs. How about a similar situation involving a subcontractor? Say you had reason to believe a sub had been drinking, and he drove the Bobcat over the homeowner — and his liability policy paid. Is that good news for you? No, probably not. If the sub's insurance policy pays off the homeowner, it could sue you for reimbursement because you didn't maintain a safe job site. The same would be true if the homeowner's insurance policy paid.

Spell out your company's policy on drugs and alcohol and keep careful records of your efforts to enforce it.

drinking did in fact cause the accident will be decided by the judge in the state's workers' comp court. If the judge decides that it did not, the injured worker may be entitled to collect.

But even if the judge decides the drinking *did* cause the accident, there's a chance the employee could collect workers' comp. If you knew or had reason to know he was drinking or impaired and kept him on the job anyway, the judge may decide that you consented to him working in that condition — in which case he may be entitled to workers' comp,

Liability

Workers' comp isn't the only issue you have to worry about in this situation: There's also the matter of negligence law. Let's consider a different scenario. While

ADA Considerations

Maybe hearing all of this has you concerned about a crew member who you suspect might have a drinking problem. Can you fire an employee just for being an alcoholic? Or does the employee have rights under the Americans with Disabilities Act (ADA) that could interfere with such a dismissal?

First, let's make one point clear: There is nothing in the ADA that requires you to tolerate or continue to employ someone who is drunk or drinking during work hours. Nor is there anything that requires you to keep him after his drinking has caused serious problems on the job site.

But you can't fire someone just for being an alcoholic, because alcoholism is a recognized medical condition covered by the ADA. You can only fire someone for his behavior — if he shows up drunk or is found to be drinking on site. Do it promptly, though; if you wait, things can

Legal | Employee Drinking on the Job

get complicated. For instance, suppose the Bobcat accident happened a week ago and you did not fire the driver on the spot. Today he comes in and announces that he's going into rehab and wants some time off. Is he entitled to that time? Most of the time, yes, because the ADA requires employers to make "reasonable accommodation" for disabled employees to get rehabilitation.

What if you don't believe the employee when he says he's going to rehab? Could you refuse to give him time off — or even fire him? Yes, you could, but I would advise against it because then you'd have to prove that he wasn't really an alcoholic.

Drug abuse. Drug abuse is closely related to alcohol abuse but is more complicated, primarily because alcohol is legal and drugs are not. A drug addict who is receiving treatment (and is not using illegal drugs) or who has successfully completed treatment for the addiction is considered disabled under the terms of the ADA. Someone who is presently using illegal drugs, though — whether as an addict or a casual user — is not.

What You Can Do

There are steps you can take to protect yourself ahead of time. The most important is to write a policy about alcohol and drug use on your job sites. Be sure your policy covers not only your employees but also your subcontractors and their employees — and that every one of your employees and subs receives a copy of it.

Your policy should spell out the consequences for using drugs or alcohol — or being drunk or high — on site. You might want to consider putting a warning system

You can't fire someone for being an alcoholic, because alcoholism is a medical condition covered by the ADA.

into place. If you choose to go this route, keep a record of those warnings — every single one of them, even casual interactions like asking someone why there are empty beer cans in the back of his truck. (By the way, if it's a company truck and you think he was drinking while he was using it, don't let him drive it ever again. That's a disaster waiting to happen.)

Here's an example of the kind of language concerning alcohol use that you might want to put in your policy:

X Construction Co. prohibits the consumption or possession of — or intoxication by — alcoholic beverages during working hours or on our job sites at any time. Employees shall not report to work under the influence of alcohol. Employees suspected of consuming alcohol, being under the influence of alcohol, or being in possession of alcohol while working or being present on an X Construction Co. job site will be subject to disciplinary action up to and including termination.

Your policy could also address the use of illegal drugs, with language similar to this:

X Construction Co. has adopted the following rules to be followed by all employees.

Any illegal use, sale, and/or possession of narcotics, drugs, or controlled substances or drug paraphernalia while on X Construction Co. job sites or premises will be grounds for immediate termination. Any illegal substance found will be turned over to the appropriate law-enforcement agency.

Off-the-job illegal drug use — which could adversely affect an employee's job performance and safety as well as the safety of other employees, the general public, and equipment — will be considered cause for disciplinary action up to and including termination.

Employees who are arrested and convicted of off-the-job drug activity will be subject to disciplinary action up to and including termination.

The term "illegal drug" as used in this policy refers to any substance defined as illegal under federal, state, or local laws or any substance required by law to be prescribed by an authorized medical practitioner.

If your policy involves a warning system, be sure to include an exception whereby you can instantly fire someone who is putting people or property at immediate risk of harm; that way, if he's under the influence and playing Wyatt Earp with the nail gun, you don't have to go through a warning process to get rid of him.

There are a lot of good reasons to spell out your company's policy on drugs and alcohol and to keep a record of your efforts to enforce it — starting with the fact that everything will be so much easier for you if your insurance company tries to deny a claim for a drug- or alcohol-related injury.

Quenda Behler Story has practiced and taught law for more than 25 years.