

Employment Practices

Alcohol and drug use among employees can be an expensive problem for business, with issues ranging from lost productivity, absenteeism, injuries, fatalities, theft and low employee morale, to an increase in health care, legal liabilities and workers' compensation costs.



Consider Your Position

Substance abuse and its impact on the American workplace continues to be a growing problem. Dominating headlines is the threat of opioid addiction and legalization of marijuana.

Marijuana is the most commonly used and abused drug by employees, followed by cocaine, with prescription drug use steadily increasing according to The National Council on Alcoholism and Drug Abuse. Currently nine states and Washington D.C have passed recreational marijuana laws, and 32 states have legalized medical marijuana use. However, under federal law, cannabis and most cannabis related products are still categorized as a prohibited Schedule 1 illegal drug.

The conflict between federal and state laws regarding marijuana may make it difficult for credit unions as employers to develop policies and procedures addressing usage. Addressing and managing drug use and drug testing will remain one of the most challenging issues for employers who are tasked with making sure their workforce is efficient and operating safely and productively.

Questions related to the need to maintain a safe workplace, the granting of reasonable accommodations under ADA guidelines, talent management in regard to off duty use, and reputational balance within the community are all issues credit union management and human resource departments must be prepared for.

Applicant Screening

Traditionally, credit unions have adopted zero-tolerance policies when it comes marijuana. Employers in several states have reported significant increases in positive tests following the passage of recreational marijuana laws. Nevada, Massachusetts, and California saw increases of 43 percent, 14 percent, and 11 percent according to the National Law Review (May 17, 2018).

This has forced some employers to discontinue testing for marijuana. Others have adopted a more lenient approach, disclosing the fact that marijuana will be tested for and discussing positive test results with an applicant.

Additionally, credit unions with zero-tolerance policies risk that their screening programs may be found discriminatory in some states. Several lawsuits have been filed alleging these policies discriminate against marijuana users under the federal Americans with Disabilities Act (ADA). The ADA excludes protection for an individual who is currently engaging in the illegal use of drugs. However, given the variety of state laws, credit unions should have current drug screening policies and procedures reviewed by legal counsel familiar with individual state laws.

Note: Drug testing is not required from a CUNA Mutual Group Bondability standpoint.

Usage in the Workplace

Every state that has passed a recreational marijuana law does have language regulating usage. In many cases, open public and most importantly on-the-job usage is strictly prohibited. However, credit unions will need to prepare to identify recreation marijuana in new forms. The proliferation of oils, creams, and different types of edibles may make identification and enforcement challenging.

Credit unions should not tolerate on-the-job intoxication of any sort. Policies should treat recreational marijuana much the same way as a recreational alcohol.

For example, while it may be legal in certain states to carry small amounts of recreational marijuana in public; a credit union can determine if its presence is permissible at the workplace, regardless of intent of consumption. With marijuana still being illegal under federal law, it is recommended credit union workplaces should be maintained as drug-free zones.

Consider your position as the pendulum continues to swing towards marijuana legalization in various forms.

Medical Marijuana

It has also become difficult for employers to reconcile traditional zero-tolerance drug policies with state laws permitting usage for medicinal needs. This is particularly burdensome when reconciling the use of medically-prescribed marijuana with disability discrimination laws.

The Americans with Disabilities Act (ADA), prohibits covered employers from discriminating against qualified individuals on the basis of a disability. It also requires employers to provide reasonable accommodations to employees with disabilities so that they can perform the essential functions of their role, provided the accommodation does not impose an undue hardship.

Medical marijuana is often prescribed to individuals whose disabilities are typically recognized by courts under the ADA. This may include seizure disorders, Crohn's disease, and certain nerve-related disorders. The use of medical marijuana can be essential to an employee's ability to perform his or her job and may be the only feasible accommodation for the employee.

However, Section 12114(a) of the ADA, states that "a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs." Because of marijuana's classification as a Schedule I substance, some courts have generally found that employers are not required to accommodate the use of medical marijuana under the ADA or similar model state statutes.

However, some states have enacted laws which may require credit unions to provide an accommodation that would not impose an undue burden. Additionally, credit unions in some states are prohibited from taking any adverse employment action based on an individual's status as a Medicinal marijuana cardholder.

It is important for credit unions to carefully review the anti-discrimination laws in all states in which they are an employer, and it should be clear that no adverse employment action will be taken based on a positive test for medicinal marijuana used in accordance with applicable state laws.



Employers should continuously consult with their attorneys to make sure they account for this changing landscape.



Impairment

All credit unions should have clearly defined criteria for determining impairment while employees are in the workplace.

In deciding whether to conduct drug or alcohol testing in the workplace; your credit union must consider a variety of factors including safety, privacy, regulatory and state law requirements, as well the level of supervision available in the workplace. Training should be provided for supervisors and employees on the impact of impairment and how to recognize and respond to possible signs of impairment.

The American College of Occupational and Environmental Medicine states, “employees who appear to be impaired in the workplace should always be assessed according to employer policies...all assessments should include an overall evaluation of impairment.”

Therefore, credit unions must rely on good faith observation to determine possible impairment. A noticeable change in behavior that could lead to the risk of injury, loss of privacy, or other incident to that person or the credit union environment.

Credit unions should consider if there is a risk to the individual’s safety or the safety of others. For example, you may consider these questions to test for impairment:

- Can the employee perform the job or tasks safely (e.g., driving, moving of office equipment, or facility work)?
- Is there an impact on cognitive ability or judgement?
- Are there other side effects from the usage or loss of cognitive ability that may require medical attention?

Due to varying levels of sensitivity, individuals should be assessed on a case-by-case basis. It is highly recommended that credit unions seek legal advice before implementing a substance testing program. Guidance should also be sought from state occupational health and safety agencies.

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