DEALING WITH THE IMPAIRED EMPLOYEE

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Presented by:
Renee Mattei Myers
and
Kevin M. Skjoldal
rmyers@eckertseamans.com
kskjoldal@eckertseamans.com

*No statements made in this seminar or in the written materials/power point should be construed as legal advice pertaining to specific factual situations.*
Defining the Problem—Alcohol And Drug Use

- Tardiness/sleeping on the job
- After-effects of substance use (hangover, withdrawal) affecting job performance
- Poor decision making
- Loss of efficiency
- Theft
- Lower morale of coworkers
- Increased likelihood of having trouble with coworkers/supervisors or tasks
- Preoccupation with obtaining and using substances while at work, interfering with attention and concentration
- Illegal activities at work including selling illicit drugs to other employees
- Higher turnover
- Training of new employees
- Disciplinary procedures
Approximately 58 million Americans, one in four adults, experience a mental health impairment in a given year (National Alliance on Mental Illness, 2007).

One in seventeen individuals lives with a serious mental health impairment, such as schizophrenia, major depression, or bipolar disorder (National Institute of Mental Health, 2008).

About one in ten children have a serious mental or emotional disorder (U.S. Department of Health and Human Services, 1999).
The DSM-IV, the most recent version of the Diagnostic and Statistical Manual of Mental Disorders (DSM), which is published by the American Psychiatric Association (APA), provides diagnostic criteria for mental health impairments. According to the DSM-IV (APA, 1994), a mental health impairment is:

*a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress or disability or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one.*
Bipolar disorder, sometimes referred to as manic depression, "is a medical illness that causes extreme shifts in mood, energy, and functioning. Bipolar disorder is a chronic and generally life-long condition with recurring episodes of mania and depression that can last from days to months that often begin in adolescence or early adulthood, and occasionally even in children."

- Estimates indicate there are 10 million American adults diagnosed with bipolar disorder.
Major depression is "persistent and can significantly interfere with an individual's thoughts, behavior, mood, activity, and physical health. Among all medical illnesses, major depression is the leading cause of disability in the United States and many other developed countries."

- Estimates indicate there are 15 million American adults with major depression.
Borderline personality disorder (BPD) is "an often misunderstood, serious mental illness characterized by pervasive instability in moods, interpersonal relationships, self image, and behavior. It is a disorder of emotional dysregulation. This instability often disrupts family and work, long-term planning, and the individual’s sense of self-identity."

- Estimates indicate that 1-2% of American adults have BPD.
Obsessive compulsive disorder (OCD) "occurs when an individual experiences obsessions and compulsions for more than an hour each day, in a way that interferes with his or her life."

- Estimates indicate that 2% of American adults have OCD.
Panic disorder occurs when a person "experiences recurrent panic attacks, at least one of which leads to at least a month of increased anxiety or avoidant behavior. Panic disorder may also be indicated if a person experiences fewer than four panic episodes but has recurrent or constant fears of having another panic attack."

- Estimates indicate that 2 to 5 percent of American adults have panic disorder.
Post traumatic stress disorder (PTSD) is "an anxiety disorder that can occur after someone experiences a traumatic event that caused intense fear, helplessness, or horror. While it is common to experience a brief state of anxiety or depression after such occurrences, people with PTSD continually re-experience the traumatic event; avoid individuals, thoughts, or situations associated with the event; and have symptoms of excessive emotions. People with this disorder have these symptoms for longer than one month and cannot function as well as they did before the traumatic event. PTSD symptoms usually appear within three months of the traumatic experience; however, they sometimes occur months or even years later."

- Estimates indicate that 2-9% of American adults have PTSD; this includes 15-30% of veterans.
Schizophrenia "often interferes with a person's ability to think clearly; to distinguish reality from fantasy; and to manage emotions, make decisions, and relate to others."

- Estimates indicate there are two million American adults with schizophrenia.
Seasonal affective disorder (SAD) is "characterized by recurrent episodes of depression – usually in late fall and winter – alternating with periods of normal or high mood the rest of the year."

- Note: SAD is not regarded as a separate disorder by the DSM-IV (APA, 1994), but it is an added descriptor for the pattern of depressive episodes in patients with major depression or bipolar disorder.
Supervisors should be on the lookout for—and document—the following signs in employees that may be indicative of mental health impairment:

- memory loss
- difficulty in planning
- communication problems
- confusion over times and places
- issues with visual perception
- mood changes
Supervisors should be on the lookout for—and document—the following signs in employees that may be indicative of drug or alcohol impairment:

- Change in behaviors
- Sudden swift mood changes
- Easily angered
- Absent from work
- Away from job site
- Inability to explain reasons for doing something
- Things turn up missing
- Frequent accidents/injuries
- Tired all the time
The supervisors must **see the impaired employee for themselves.** They should not make a determination to test based on another employee’s testimony.

The supervisor must **gather the facts of the case only.** What is known to be occurring right now? He/she must seek the truth and leave out his/her opinion. There is a big difference between calling an employee drunk and stating objectively that they smell like alcohol and have slurred speech. The employee may be a diabetic with low blood sugar.

Stick to the facts and never accuse the employee of anything; because until the test results prove otherwise, the exact causes may not be known.
Most common reasons why supervisors do not report impairment or reasonable suspicion cases:

1) Afraid of mislabeling an employee
2) Projecting own use
3) Concerned it will ‘turn ugly’
4) Don’t have enough time
5) Lack competency/proper training
6) The employee is their friend
7) The employee is too nice
8) The employee is productive
9) One’s business is their own
10) Company will not support decision

Spotting Impairments At Work
Afraid Of Mislabeled An Employee – Never accuse. Your job is to spot potential impairment that may cause a safety hazard to the employee, other staff, and constituents. Stick to the facts, and let the employee know what the facts are.

Project Their Own Use – Yes, 90 percent of alcohol and other substance users (i.e. medicinal users) do not have, nor will they develop a drug and alcohol problem. That still leaves 1 out of 10. Remember, employees generally put their best foot forward when showing up for work. When you see impairment, you are seeing the employee at their attempted best. Also, not everyone that tests positive for an illicit substance needs inpatient rehab. We all make mistakes, but our mistakes should not put the company we work for and the lives of those around us in jeopardy.
Concerned It Will ‘Turn Ugly’ – Indeed the confrontation may turn ugly, especially if the person is guilty of impairment. While you cannot necessarily prevent an ‘ugly’ confrontation, you can take steps to mitigate the severity. You are armed with objective facts – stick to them. It’s not about you liking or not liking the employee, it’s about your responsibility to protect the safety of the employee in question, other employees, residents, and your facility. Period.

Don’t Have Time – Impairment/reasonable suspicion cases will rarely present themselves when you are twiddling your fingers with nothing to do. They are not on our to-do-list and, thus, are commonly perceived as an inconvenience to our daily tasks. Responding to potential safety hazards should be a supervisor’s utmost priority. Supervisors may think they don’t have time now, but definitely will not have time when the employee injures themselves, another individual, or company property, because of our failure to respond.
Lack Competency / Proper Training – This responsibility should primarily fall on the shoulders of leadership, but supervisors should also seek out the knowledge themselves. Comfort follows competency. The more comfortable supervisors are with impairment/reasonable suspicion cases, the more likely they will be to take action when the time calls for it.

The Employee Is Their Friend – Workplace friendships are great. A wide body of research suggests that the most productive and happy employees are those who have an abundance of workplace friendships. However, supervisors must not let their feelings toward a friend interfere with their job to prevent safety incidents. Friends don’t let friends drive drunk, right? Plus, wouldn’t a friend want to protect the safety and integrity of their friend? Wouldn’t a friend want to keep a situation from spiraling out of control?
The Employee Is Too Nice – Substance abuse and addiction can certainly affect the mood of the user – in both good and bad ways. Not every user will experience severe moods swings, be irritable or angry. In fact, many will be happy because they get to do two things they love at the same time - make money and get high. Do not assume that an impaired employee can’t be nice. Absolutely they can be.

The Employee Is Productive – The response here is similar the one above. Some employees use illicit drugs to become more productive, but most use to alter their state of mind to a better place. Happy employees tend to work harder than unhappy employees. Think about it. One can be impaired and highly productive, especially if using stimulants or if using for a long time to feel ‘normal.’
One’s Business Is Their Own – While this may be true outside of the workplace, certain rights are given up when a person reports for work duty. Anytime an employee’s safety is called into question, it becomes the business of every person involved, especially the business of the organization. Employees must be informed by leadership that unsafe behaviors, influenced by a substance or not, will be dealt with immediately.

Company Will Not Support Decision – It is the company’s responsibility to uphold it’s mission and core values, which should include a drug-free workplace. Leadership must know the D&A policy, and be prepared to explain the policy to all employees. Most importantly, leadership must always support supervisors who take appropriate action, even if the drug screen results are negative.
Analyzing MH Issues Under the ADA
The ADA prohibits discrimination against "qualified individuals with disabilities" who are individuals with disabilities who meet the skill, experience, education, and other job-related requirements of a position held or desired and who, with or without reasonable accommodation, can perform the essential functions of a job.

The definition of disability in the ADA includes people with mental illness who meet one of these three definitions: "(1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment."

A mental impairment is defined by the ADA as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."
The ADA rule defines "mental impairment" to include "[a]ny mental or psychological disorder, such as . . . emotional or mental illness."

Examples of "emotional or mental illness[es]" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders.
Not all conditions listed in the DSM-IV, however, are disabilities, or even impairments, for purposes of the ADA.

For example, the DSM-IV lists several conditions that Congress expressly excluded from the ADA's definition of "disability." While DSM-IV covers conditions involving drug abuse, the ADA provides that the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of that use.
The DSM-IV also includes conditions that are not mental disorders but for which people may seek treatment (for example, problems with a spouse or child). Because these conditions are not disorders, they are not impairments under the ADA.

Even if a condition is an impairment, it is not automatically a "disability." To rise to the level of a "disability," an impairment must "substantially limit" one or more major life activities of the individual.
No.

Traits or behaviors are not, in themselves, mental impairments.

For example, stress, in itself, is not automatically a mental impairment.

Stress, however, may be shown to be related to a mental or physical impairment. Similarly, traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.
An impairment must substantially limit one or more major life activities to rise to the level of a "disability" under the ADA.

The major life activities limited by mental impairments differ from person to person. There is no exhaustive list of major life activities. For some people, mental impairments restrict major life activities such as learning, thinking, concentrating, interacting with others, caring for oneself, speaking, performing manual tasks, or working. Sleeping is also a major life activity that may be limited by mental impairments.
No.

The first question is whether an individual is substantially limited in a major life activity other than working (e.g., sleeping, concentrating, caring for oneself).

Working should be analyzed only if no other major life activity is substantially limited by an impairment.
Under the ADA, an impairment rises to the level of a disability if it substantially limits a major life activity. "Substantial limitation" is evaluated in terms of the severity of the limitation and the length of time it restricts a major life activity.

The determination that a particular individual has a substantially limiting impairment should be based on information about how the impairment affects that individual and not on generalizations about the condition.
An impairment is sufficiently severe to substantially limit a major life activity if it prevents an individual from performing a major life activity or significantly restricts the condition, manner, or duration under which an individual can perform a major life activity, as compared to the average person in the general population.

An impairment does not significantly restrict major life activities if it results in only mild limitations.
No.

The ADA legislative history unequivocally states that the extent to which an impairment limits performance of a major life activity is assessed without regard to mitigating measures, including medications. Thus, an individual who is taking medication for a mental impairment has an ADA disability if there is evidence that the mental impairment, when left untreated, substantially limits a major life activity.

Relevant evidence for EEOC investigators includes, for example, a description of how an individual's condition changed when he/she went off medication or needed to have dosages adjusted, or a description of his/her condition before starting medication.
How Long Does A Mental Impairment Have To Last To Be Substantially Limiting?

An impairment is substantially limiting if it lasts for more than several months and significantly restricts the performance of one or more major life activities during that time.

It is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity.

Whether the impairment is substantially limiting is assessed without regard to mitigating measures such as medication.
Can Chronic, Episodic Disorders Be Substantially Limiting?

Yes.

Chronic, episodic conditions may constitute substantially limiting impairments if they are substantially limiting when active or have a high likelihood of recurrence in substantially limiting forms.

For some individuals, psychiatric impairments such as bipolar disorder, major depression, and schizophrenia may remit and intensify, sometimes repeatedly, over the course of several months or several years.
An impairment substantially limits an individual's ability to interact with others if, due to the impairment, he/she is significantly restricted as compared to the average person in the general population.

Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others.

An individual would be substantially limited, however, if his/her relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary. These limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.
An impairment substantially limits an individual's ability to concentrate if, due to the impairment, he/she is significantly restricted as compared to the average person in the general population.

For example, an individual would be substantially limited if he/she was easily and frequently distracted, meaning that his/her attention was frequently drawn to irrelevant sights or sounds or to intrusive thoughts; or if he/she experienced his/her "mind going blank" on a frequent basis.

Such limitations must be long-term or potentially long-term, as opposed to temporary, to justify a finding of ADA disability.
An impairment substantially limits an individual's ability to sleep if, due to the impairment, his/her sleep is significantly restricted as compared to the average person in the general population. These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability.

For example, an individual who sleeps only a negligible amount without medication for many months, due to post-traumatic stress disorder, would be significantly restricted as compared to the average person in the general population and therefore would be substantially limited in sleeping.
Similarly, an individual who for several months typically slept about two to three hours per night without medication, due to depression, also would be substantially limited in sleeping.

By contrast, an individual would not be substantially limited in sleeping if he/she had some trouble getting to sleep or sometimes slept fitfully because of a mental impairment.

Although this individual may be slightly restricted in sleeping, he/she is not significantly restricted as compared to the average person in the general population.
When Does An Impairment Substantially Limit An Individual's Ability To Care For Himself/Herself?

An impairment substantially limits an individual's ability to care for himself/herself if, due to the impairment, an individual is significantly restricted as compared to the average person in the general population in performing basic activities such as getting up in the morning, bathing, dressing, and preparing or obtaining food.

These limitations must be long-term or potentially long-term as opposed to temporary to justify a finding of ADA disability. Some psychiatric impairments, for example major depression, may result in an individual sleeping too much. In such cases, an individual may be substantially limited if, as a result of the impairment, he/she sleeps so much that he/she does not effectively care for himself/herself. Alternatively, the individual may be substantially limited in working.
An employer may not ask questions that are likely to elicit information about a disability before making an offer of employment. Questions on a job application about psychiatric disability or mental or emotional illness or about treatment are likely to elicit information about a psychiatric disability and, therefore, are prohibited before an offer of employment is made.

An employer may ask an employee objective questions that help the employer decide whether a potential employee can perform essential duties of a job.

An employer may ask an employee about his or her ability to meet the physical standards for jobs involving physical labor, his or her ability to get along with people, or his or her ability to finish tasks on time and to come to work every day.
Application Stage - Employers are prohibited from asking disability-related questions before making an offer of employment.

An exception, however, is if an applicant asks for reasonable accommodation for the hiring process. If the need for this accommodation is not obvious, an employer may ask an applicant for reasonable documentation about his/her disability. The employer may require the applicant to provide documentation from an appropriate professional concerning his/her disability and functional limitations.
A variety of health professionals may provide such documentation regarding psychiatric disabilities including primary health care professionals, psychiatrists, psychologists, psychiatric nurses, and licensed mental health professionals such as licensed clinical social workers and licensed professional counselors.

An employer should make clear to the applicant why it is requesting such information, i.e., to verify the existence of a disability and the need for an accommodation. Furthermore, the employer may request only information necessary to accomplish these limited purposes.
Although an employer may not ask an applicant if he/she will need reasonable accommodation for the job, there is an exception if the employer could reasonably believe, before making a job offer, that the applicant will need accommodation to perform the functions of the job.

For an individual with a non-visible disability, this may occur if the individual voluntarily discloses his/her disability or if he/she voluntarily tells the employer that he/she needs reasonable accommodation to perform the job.

The employer may then ask certain limited questions, specifically: whether the applicant needs reasonable accommodation; and what type of reasonable accommodation would be needed to perform the functions of the job.
After making an offer of employment, if the employer requires a post-offer, pre-employment medical examination or inquiry.

After an employer extends an offer of employment, the employer may require a medical examination (including a psychiatric examination) or ask questions related to disability (including questions about psychiatric disability) if the employer subjects all entering employees in the same job category to the same inquiries or examinations regardless of disability.

The inquiries and examinations do not need to be related to the job.
During employment, when a disability-related inquiry or medical examination of an employee is "job-related and consistent with business necessity."

This requirement may be met when an employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.
Thus, for example, inquiries or medical examinations are permitted if they follow-up on a request for reasonable accommodation when the need for accommodation is not obvious, or if they address reasonable concerns about whether an individual is fit to perform essential functions of his/her position.

In addition, inquiries or examinations are permitted if they are required by another Federal law or regulation.

In these situations, the inquiries or examinations must not exceed the scope of the specific medical condition and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.
Yes.

Employers must keep all information concerning the medical condition or history of its applicants or employees, including information about psychiatric disability, confidential under the ADA.

This includes medical information that an individual voluntarily tells his/her employer. Employers must collect and maintain such information on separate forms and in separate medical files, apart from the usual personnel files.

There are limited exceptions to the ADA confidentiality requirements: 1) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; 2) first aid and safety personnel may be told if the disability might require emergency treatment; and 3) government officials investigating compliance with the ADA must be given relevant information on request.
If employees ask questions about a coworker who has a disability, the employer must not disclose any medical information in response.

Apart from the limited exceptions, the ADA confidentiality provisions prohibit such disclosure. An employer also may not tell employees whether it is providing a reasonable accommodation for a particular individual.

A statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability because only individuals with disabilities are entitled to reasonable accommodation under the ADA. In response to coworker questions, however, the employer may explain that it is acting for legitimate business reasons or in compliance with federal law. As background information for all employees, an employer may find it helpful to explain the requirements of the ADA, including the obligation to provide reasonable accommodation, in its employee handbook or in its employee orientation or training.
The ADA does not prevent an employer from requiring an employee to go to an appropriate health professional of the employer's choice if the employee initially provides insufficient information to substantiate that he/she has an ADA disability and needs a reasonable accommodation.

Of course, any examination must be job-related and consistent with business necessity. If an employer requires an employee to go to a health professional of the employer's choice, the employer must pay all costs associated with the visit(s).
An employer must provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability unless it can show that the accommodation would impose an undue hardship.

An employee's decision about requesting reasonable accommodation may be influenced by his/her concerns about the potential negative consequences of disclosing a psychiatric disability at work.
Employers are obligated to make reasonable accommodation only if they are aware of a person’s disability. Thus, employers do not have to accommodate disabilities that they are unaware of.

If an employee with a known disability is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In addition, if the employer has reason to know that the employee has a disability, they may have an obligation to discuss reasonable accommodation. In general, however, it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed.
There are two exceptions to the requirements of Title I of the ADA:

- First, an employer is not required to provide an accommodation if it will impose an "undue hardship" on the operation of its business such as accommodations that are excessively costly, extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of the business.

- Second, an employer may refuse to employ or provide accommodations to an individual who poses a "direct threat" to the health or safety of himself/herself or other employees in the workplace. The determination that an individual poses a direct threat to self or others cannot be made simply based on stereotypical generalizations about mental illness, but may be based only on objective evidence from a treatment provider or another credible source that the individual’s present condition makes him or her a direct threat to self or others.
Yes.

When the need for accommodation is not obvious, an employer may ask an employee for reasonable documentation about his/her disability and functional limitations.

The employer is entitled to know that the employee has a covered disability for which he/she needs a reasonable accommodation.

A variety of health professionals may provide such documentation with regard to psychiatric disabilities.
People with mental health impairments may develop some of the limitations discussed below, but seldom develop all of them. Also, the degree of limitation will vary among individuals. Be aware that not all people with mental health impairments will need accommodations to perform their jobs and many others may only need a few accommodations.
What Are The Essential Questions To Ask?

- What limitations is the employee with a mental health impairment experiencing?
- How do these limitations affect the employee and the employee’s job performance?
- What specific job tasks are problematic as a result of these limitations?
- What accommodations are available to reduce or eliminate these problems? Are all possible resources being used to determine possible accommodations?
What Are The Essential Questions To Ask?

- Has the employee with a mental health impairment been consulted regarding possible accommodations?
- Once accommodations are in place, would it be useful to meet with the employee with a mental health impairment to evaluate the effectiveness of the accommodations and to determine whether additional accommodations are needed?
- Do supervisory personnel and employees need training regarding mental health impairments?
Accommodations That Others Have Used

**Attendance:**

- Allow flexible work environment:
  - Flexible scheduling
  - Modified break schedule
  - Leave for counseling
  - Work from home/Flexi-place
Accommodations That Others Have Used

Concentration:

- Reduce distractions in the work area:
  - Provide space enclosures, sound absorption panels, or a private office
  - Allow for use of white noise or environmental sound machines
  - Allow the employee to play soothing music using an earbud and computer or music player
  - Plan for uninterrupted work time
  - Purchase organizers to reduce clutter

- Increase natural lighting or provide full spectrum lighting
Accommodations That Others Have Used

Concentration:

- Divide large assignments into smaller tasks and goals
- Use auditory or written cues as appropriate
- Restructure job to include only essential functions
- Provide memory aids such as schedulers, organizers, or email applications
Emotions:

- Encourage the use of stress management techniques to deal with frustration
- Allow the presence of a support animal
- Allow telephone calls during work hours to doctors and others for needed support
- Allow flexible breaks
- Refer to employee assistance program (EAP)
Accommodations That Others Have Used

Fatigue:

- Allow flexible work environment
- Provide a goal-oriented workload
- Reduce or eliminate physical exertion and workplace stress
- Implement ergonomic workstation design
Accommodations That Others Have Used

Memory:

- Allow use of job coach
- Provide mentor
- Provide minutes of meetings and trainings
- Use auditory or written cues as appropriate
- Allow additional training time
- Provide written checklists
- Use a color coding scheme to prioritize tasks
- Use notebooks, planners, or sticky notes to record information
- Provide labels or bulletin board cues to assist in location of items
Accommodations That Others Have Used

Organization:

- Use daily, weekly, and monthly task lists
- Use calendar with automated reminders to highlight meetings and deadlines
- Use electronic organizers or mobile devices
- Divide large assignments into smaller tasks and goals
- Use a color coding scheme to prioritize tasks
Panic Attacks:

- Allow the employee to take a break and go to a place where he/she feels comfortable to use relaxation techniques or contact a support person
- Identify and remove environmental triggers such as particular smells or noises
- Allow the presence of a support animal
Sleep Disturbances:

- Allow for a flexible start time
- Combine regularly scheduled short breaks into one longer break
- Provide a place for the employee to rest during break
- Allow the employee to work one consistent schedule
- Provide a device such as a Doze Alert or other alarms to keep the employee alert
- Provide work areas with sunlight or other natural lighting
Stress:

- Refer to counseling and EAP
- Allow telephone calls during work hours to doctors and others for needed support
- Allow the presence of a support animal
- Allow flexible work environment
Coworker Interaction:

- Encourage the employee to walk away from frustrating situations and confrontations
- Provide partitions or closed doors to allow for privacy
- Provide disability awareness training to coworkers and supervisors
Supervisors can also implement management techniques that support an inclusive workplace culture while simultaneously providing accommodations. Successful techniques include the following:

- Provide positive praise and reinforcement
- Provide day-to-day guidance and feedback
- Provide written job instructions via email
- Develop clear expectations of responsibilities and the consequences of not meeting performance standards
- Schedule consistent meetings with employee to set goals and review progress
- Allow for open communication
- Establish written long-term and short-term goals
Additional strategies include:

- Develop strategies to deal with conflict
- Develop a procedure to evaluate the effectiveness of the accommodation
- Educate all employees on their right to accommodations
- Provide sensitivity training to coworkers and supervisors
- Do not mandate that employees attend work related social functions
- Encourage all employees to move non-work related conversations out of work areas
Analyzing D&A Issues Under the ADA
It has long been clear that the Americans with Disabilities Act of 1990 (ADA) protects alcoholism and drug addiction if it qualifies as a “disability.”

However, courts have consistently held that employers can have legitimate work rules that prohibit alcohol and drug use in the workforce.

The distinction is important because protected alcoholics or addicts may be entitled to reasonable accommodations under the ADA and state laws.
Dependency And The ADA

Under the ADA, an employer must engage in the interactive process when an employee asks for an accommodation or when the employer becomes aware of its necessity. The issue of when the employer becomes aware of the necessity for an accommodation raises an interesting question—can (or should) an employer ask applicants about their drinking habits or use of drugs?

According to the Equal Employment Opportunity Commission (EEOC): “[t]hat depends on whether the particular question is likely to elicit information about alcoholism, which is a disability.” An employer may certainly ask an applicant whether he/she drinks alcohol because that does not reveal whether someone has alcoholism.

However, questions asking how much alcohol an applicant drinks are likely to elicit information about whether the applicant has alcoholism. Therefore, an employer should be wary of making such inquiries and should consult with counsel regarding the circumstances where such inquiries might potentially be appropriate.
A corollary to the duty to engage in the interactive process is the duty to reasonably accommodate employees with covered disabilities.

This does not mean, however, that the employer must ignore an individual’s use of alcohol or drugs in violation of a reasonable work rule. A reasonable accommodation for an employee suffering from alcoholism or drug dependency may be a modified work schedule so the employee can attend Alcoholics Anonymous/NA meetings or a leave of absence so the employee can seek treatment provided the desired accommodation would not cause unreasonable hardship to the employer.

The many side effects of alcoholism or drug dependency may also require reasonable accommodation. For example, depression, a common disability accompanying alcoholism, may necessitate transfer of the employee to a less stressful position if one is available and the employee is qualified.
However, an employer is generally not required to provide leave to an employee suffering from alcoholism or drug dependency to seek treatment if the treatment would likely be futile.

In one Ninth Circuit case, the court held that where the plaintiff’s previous attempts at recovery had not been successful, he could not stave off discharge indefinitely by attempting to enter into yet another course of treatment after several relapses. Similarly, one federal district court concluded that “an employer would not be required to provide repeated leaves of absence (or perhaps even a single leave of absence) for an alcoholic employee with a poor prognosis for recovery.”

Moreover, an employer does not have a duty to provide an accommodation to an employee who denies having a disability and has not requested an accommodation. In one case where the plaintiff denied having a disability, the court held that “imputing . . . knowledge [of the disability] is inappropriate where the employee has openly denied having any problems.”

Similarly, one plaintiff’s failure-to-accommodate claim based on the employer's not offering him a non-driving job or a last-chance agreement allowing him to return to work after drinking on the job—the offense for which he was fired—was foreclosed by his failure to request any.
Does The Family And Medical Leave Act Require An Employer To Grant A Medical Leave To An Employee With Alcoholism?

The federal Family and Medical Leave Act (FMLA) entitles employees who are unable to perform the functions of their job because of a serious health condition to an unpaid leave of absence of up to 12 weeks. The FMLA defines a “serious health condition” as an “illness, injury, impairment or physical or mental condition” that involves “inpatient care in a hospital, hospice, or residential medical care facility;” or “continuing treatment by a health care provider.” Thus, whether an employee’s alcoholism qualifies him or her for FMLA leave depends on whether impatient care or continuing treatment is necessitated.

The FMLA permits employers to require that employees taking such leave provide medical certification signed by the employees’ health care provider. Leave under the FMLA is not appropriately provided, however, due to the incapacity of an employee to work as a result of intoxication or its after affects.
Employers Can Implement and Enforce Rules Regarding Alcohol In The Workplace

While employers may be required to accommodate alcoholic employees, the law also makes clear that employers can enforce rules concerning alcohol at the workplace, including prohibiting the consumption of alcohol while at work. The Ninth Circuit noted in an ADA case that “alcoholics . . . are not exempt from reasonable rules of conduct, such as prohibitions against the possession or use of alcohol . . . in the workplace, and employers must be allowed to terminate their employees on account of misconduct, irrespective of whether the employee is handicapped.”

By the same token, employers can prohibit their employees from being under the influence of alcohol at the workplace. A federal district court judge in Massachusetts explained: “[r]easonable accommodation does not extend to accommodating an alcoholic employee’s showing up to work under the influence of alcohol or drinking alcohol on the job. Because [the plaintiff] violated a company policy . . . he cannot now, without more, belatedly avail himself of . . . [a] reasonable accommodation.”

Indeed, employers can hold an employee who is an alcoholic to the same standards for employment or job performance and behavior as it does other employees, even if any unsatisfactory performance or behavior is related to the employee’s alcoholism.
From the EEOC:

An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment.

The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee’s drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night.

However, absent undue hardship, the employer must grant the employee’s request to take leave for the next month to enter a rehabilitation program.
Also from the EEOC:

An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee’s tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again.

Thus, the employer reprimands the employee for being tardy. The supervisor’s actions violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly situated workers.
Final Thoughts

- Establish a policy against alcohol and drug use in the workplace addressing when alcohol consumption or drug use is permitted or prohibited and highlighting the availability of rehabilitation services and your employee assistance program. Consider adding provisions that allow for post-accident and reasonable suspicion drug and alcohol testing.

- If you suspect alcohol abuse, refer to your workplace drug and alcohol policy and employee assistance program. Educate supervisors and managers about the signs of use and abuse and steps for reporting any suspicious behavior. Such training is important for those who will determine whether an employee will be tested based on the reasonable suspicion of abuse.

- Consider assisting an employee suffering from alcoholism instead of terminating them from employment. As described above, alcoholism may be a disability protected by anti-discrimination laws, thus triggering the employer's duty to engage in the interactive process and to reasonably accommodate an employee suffering from alcoholism.
Thank you!

Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

Renee C. Mattei Myers
(717) 237-7163
rmyers@eckertseamans.com

Kevin M. Skjoldal
(717) 237-6039
kskjoldal@eckertseamans.com