

The Balancing Act

Navigating Employee Substance Abuse Issues in the Workplace

IMLA 2022 EMPLOYMENT LAW PROGRAM

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Deidra Norris Sullivan
Senior Assistant City Attorney
Labor, Employment and Civil Service Section
City Attorney's Office
City of Houston, Texas



Agenda

- Background
- FMLA
- ADA
- Policy Considerations
- Questions

Positive drug test results are on the rise

- Quest Diagnostics found that US workers tested positive for drug use in 2019 at the highest rate since 2003
- Positive drug test results have been steadily rising since 2013.
- Experts believe the 2020 data will show even higher rates, due to the coronavirus pandemic.
- National Institute of Environmental Health Sciences identified multiple COVID-19-related factors that are driving the trends related to drug use, including social isolation, loss of in person recovery meetings, anxiety, loss of contacts, work-related stress like loss of income, fear of being infected with COVID-19 and work-related ergonomics related to remote work.



https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/positive-workplace-drug-tests-hit-16-year-high.aspx



Background

SELF - IDENTIFICATION

- Employee discloses to supervisor or other manager
- Employee seeks help with an employer sponsored Employee Assistance Program (EAP)
- Requesting protected leave or an accommodation



Background

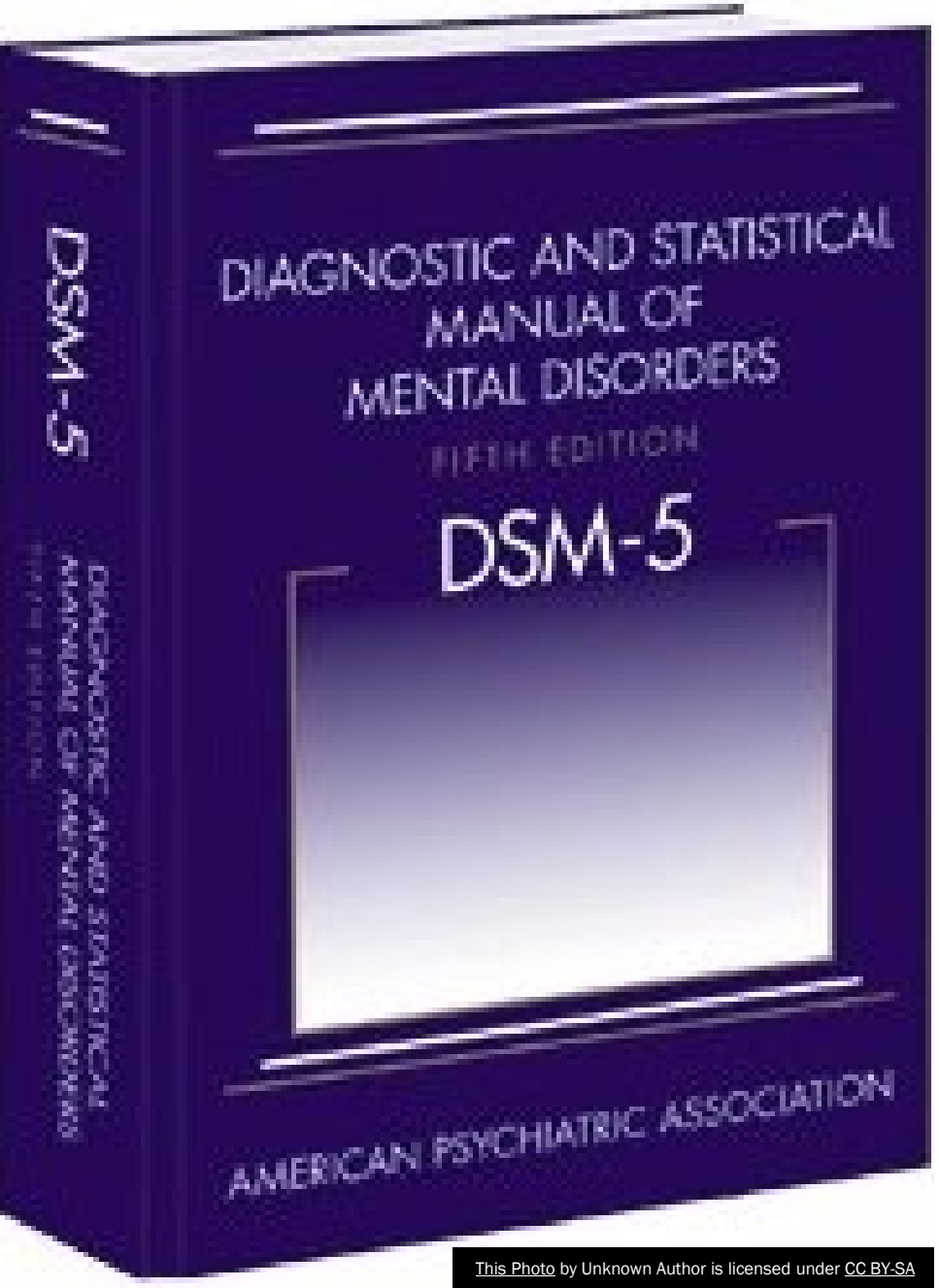
EMPLOYER IDENTIFICATION

- The need for reasonable suspicion or post accident drug testing.
- Report from a reliable 3rd party (e.g. co-worker, family member, law enforcement)

What are the signs…

- Absences without notification and an excessive use of sick days
- Frequent disappearances from the work site, long unexplained absences, improbable excuses
- Unreliability in keeping appointments and meeting deadlines
- Work performance that alternates between periods of high and low productivity.
- Mistakes made due to inattention, poor judgment, and bad decisions
- Confusion, memory loss, and difficulty concentrating or recalling details and instructions
- Ordinary tasks require greater effort and consume more time
- Interpersonal relations with coworkers suffer
- Rarely admits errors or accepts blame for errors or oversights
- Progressive deterioration in personal appearance and hygiene
- Wearing long sleeves when inappropriate
- A personality change that includes mood swings, anxiety, depression, lack of impulse control, suicidal thoughts or gestures
- Increasing personal and professional isolation

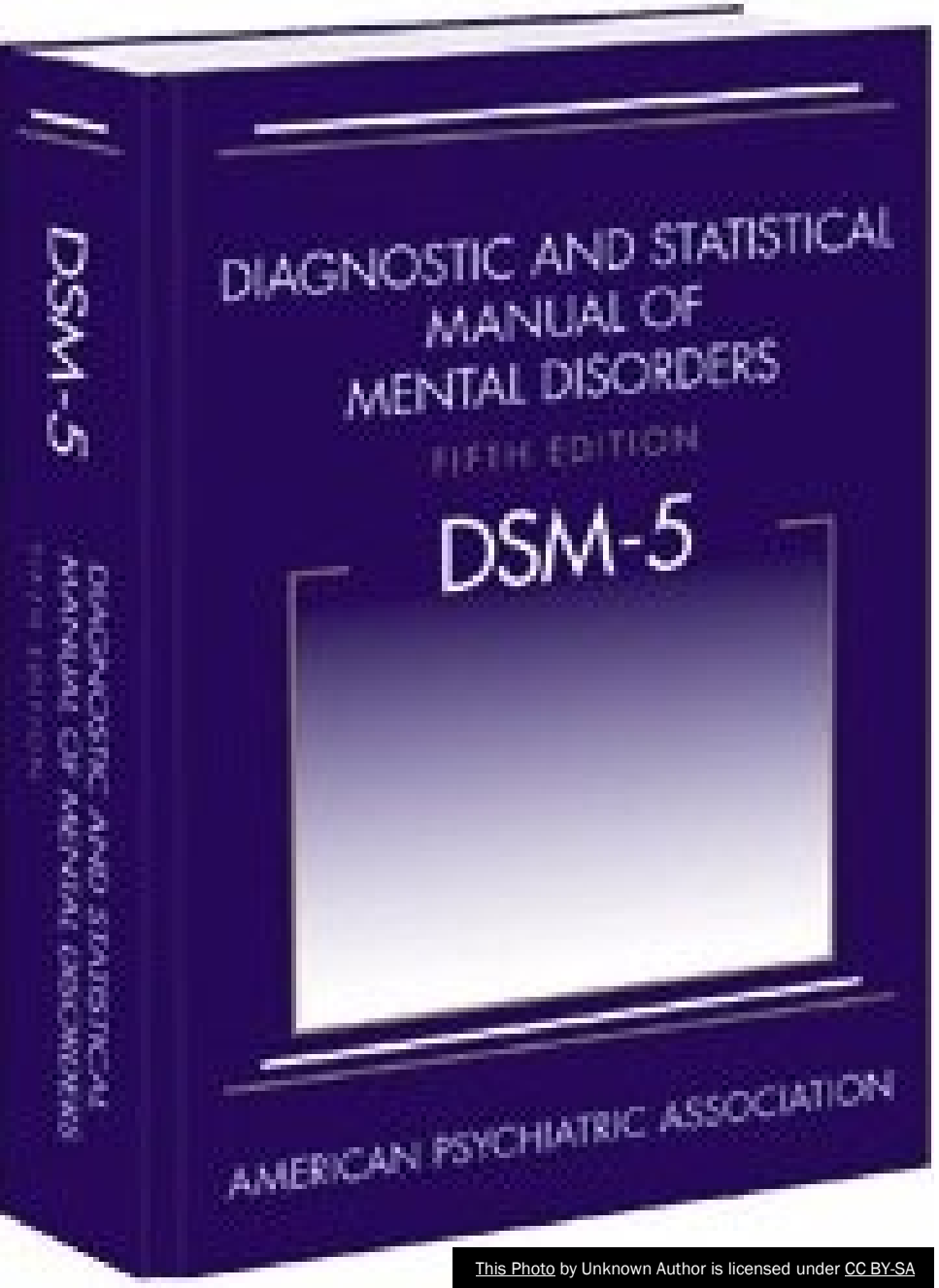
Drug Addiction (askjan. https://askjan.org/disabilities/Drug-Addiction.cfmorg)



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DSM-V Criteria for Substance Abuse Disorders

1. Taking the substance in larger amounts or for longer than you're meant to.
2. Wanting to cut down or stop using the substance but not managing to.
3. Spending a lot of time getting, using, or recovering from use of the substance.
4. Cravings and urges to use the substance.
5. Not managing to do what you should at work, home, or school because of substance use.
6. Continuing to use, even when it causes problems in relationships.



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DSM-V Criteria for Substance Abuse Disorders

7. Giving up important social, occupational, or recreational activities because of substance use.
8. Using substances again and again, even when it puts you in danger.
9. Continuing to use, even when you know you have a physical or psychological problem that could have been caused or made worse by the substance.
10. Needing more of the substance to get the effect you want (tolerance).
11. Development of withdrawal symptoms, which can be relieved by taking more of the substance.



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Family Medical Leave Act

- FMLA provides certain employees with up to 12 weeks of unpaid, job-protected leave per year when the employee is unable to work because of a serious health condition.
- Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months.
- Previous time working for the same employer (including seasonal work) could, in most cases, be used to meet the 12-month requirement
- The 12 weeks of unpaid job-protected leave can be intermittent or continuous.

Family Medical Leave Act

- A **serious health condition** is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
- For all conditions **"incapacity"** means inability to work, including being unable to perform any one of the essential functions of the employee's position, or perform other regular daily activities due to the serious health condition, treatment of the serious health condition, or recovery from the serious health condition.
- **"Treatment"** may include conditions that involve an inpatient hospital stay or ones that include one or more visits to a health care provider and ongoing treatment.



29 CFR Sec. 825.113

Family Medical Leave Act

✓**Does the serious health condition require inpatient care? (*See* 29 CFR § 825.114)**

- Overnight stay in a hospital, hospice, or residential medical care facility
- Any period of incapacity (inability to work)
- Any subsequent treatment and recovery
- Does the serious health condition require continuing treatment by a healthcare provider

Family Medical Leave Act

- ✓ ***Does the serious health condition require continuing treatment?*** *(See 29 CFR § 825.115)*
  - **Period of incapacity** of more than three consecutive, full calendar days
  - **Subsequent treatment** or period of incapacity relating to the same condition that also involves the following:
    - Treatment two or more times, within 30 days of the first day of incapacity
    - Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.
    - Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.



Types of Substance Abuse Treatment Programs

Inpatient Addiction Treatment – Person is in a facility where people stay overnight for the duration of the treatment. Options include 28/30/60/90 days stay.

Outpatient Addiction Treatment – Person is required to visit a facility to receive care while still living at home. These programs require a certain number of hours per week at the outpatient facility.

Intensive Outpatient Program – Person requires more structure and support than a typical outpatient program. These programs may require a person to attend treatment for 9-19 hours per week.

https://recovery.org/drug-treatment/types-of-programs/

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Types of Substance Abuse Treatment Programs

Partial Hospitalization – offers a more intense level of outpatient care than an IOP. This is more appropriate for people who have medical and/or psychiatric needs. Person may attend treatment for 20 or more hours per week. Medical, psychiatric, psychological, toxicological and emergency service are required at the facility.

Mutual Support Groups and 12-Step – these programs help a person to remain abstinent and continue the recovery process through a network of people with shared experiences.

Behavioral therapy – Multiple sessions that address why they began misusing drugs or alcohol. It can provide them with the skills to identify, avoid or react to high-risk relapse situations and allow them to practice coping mechanisms in the face of cravings.



https://recovery.org/drug-treatment/types-of-programs/

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Family Medical Leave Act

29 CFR § 825.119 - Leave for treatment of substance abuse

- Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met.
- FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider
- An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse.

Family Medical Leave Act

- Absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.
- Treatment for substance abuse does not prevent an employer from taking employment action against an employee.
- The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment.

Family Medical Leave Act

- Treatment for substance abuse does not prevent an employer from taking employment action against an employee.
- The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment.
- If the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave.

FMLA Wrap Up

A few things to consider



Americans with Disabilities Act (ADA)



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ADA BASICS

The ADA provides for reasonable accommodations for an employee with a disability.

A disability is a physical or mental impairment that substantially limits one or more major life activities.

The employee must be able to perform the essential functions of their job with or without a reasonable accommodation.

The employer may deny a requested accommodation that presents an undue hardship to the employer.

ADA Basics

The ADA Amendments expressly made this statutory list of examples of major life activities non-exhaustive. *See Appendix to Part 1630 – Interpretive Guidance on Title I of the Americans with Disability Act.*

Major life activities listed in 42 U.S.C. § 12102(2) and 29 C.F.R. §1630.2(i):

Performing manual tasks	Caring for oneself	Speaking
Communicating	Seeing	Breathing
Eating	Sleeping	Walking
Standing	Lifting	Bending
Hearing	Learning	Reading
Concentrating	Thinking	Sitting
Reaching	Interacting w/ others	Working

ADA Basics

A **Major Life Activity** also encompasses the operation of Major Bodily Functions—except for transitory impairments—which include:

Immune System	Normal cell growth	Digestion
Bowel & Bladder	Neuro & Brain	Respiratory functions
Circulatory system	Endocrine functions	Reproductive functions
Genitourinary system	Cardiovascular system	Hemic system
Lymphatic system	Musculoskeletal system	

ADA and Substance Abuse Disorder

LIMITATION

Attentiveness/Concentration

Decreased Stamina/Fatigue

Executive Functioning Deficits

Non-compliant Behavior

Stress Intolerance

MAJOR LIFE ACTIVITY

Performing manual tasks	Caring for oneself	Speaking
Communicating	Seeing	Breathing
Eating	Sleeping	Walking
Standing	Lifting	Bending
Hearing	Learning	Reading
Concentrating	**Thinking**	Sitting
Reaching	**Interacting w/ others**	**Working**

https://askjan.org/disabilities/Drug-Addiction.cfm

Recommended Accommodations

ATTENTIVENESS/CONCENTRATION

Cubicle Doors, Shields, and Shades

Environmental Sound Machines

Noise Cancelling Headsets

Flexible schedule

Job restructuring

Written instructions

DECREASE STAMINA/FATIGUE

Ergonomic equipment

Job restructuring

Period rest breaks

Telework

Modified work schedules

https://askjan.org/disabilities/Drug-Addiction.cfm

Recommended Accommodations

NON-COMPLIANT BEHAVIOR

Flexible schedule

Habit monitoring

Noise Canceling Headsets

Environmental Sound Machines

STRESS INTOLERANCE

Flexible schedule

Job restructuring

Marginal functions

Supervisory methods

Support Animal

Modified Break Schedule

https://askjan.org/disabilities/Drug-Addiction.cfm

ADA Wrap Up

A few things to consider




Any
Questions