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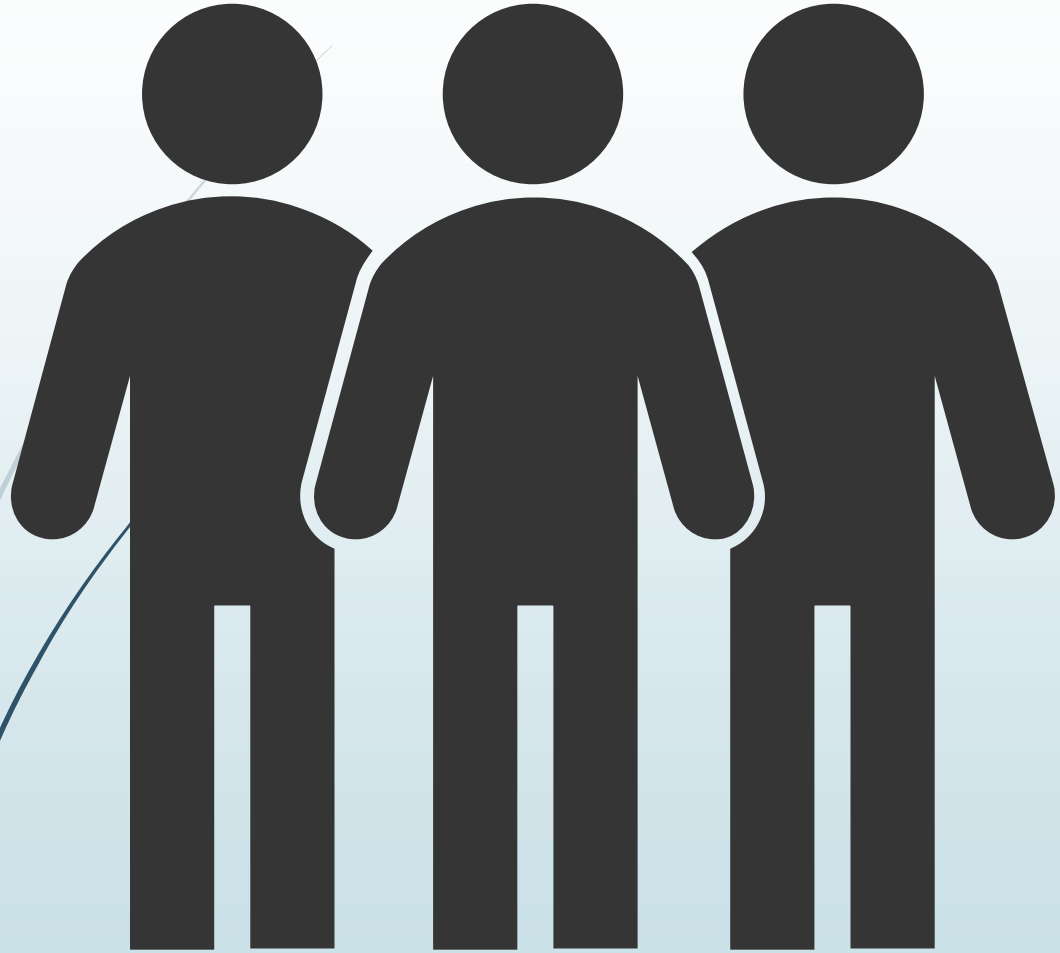
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Overview

- **Employee Rights**
  - Identification of the various federal, state and local laws which govern the relationship between a government employer and its employees.
- **Managing Employee Illnesses and Disabilities During a Pandemic**
  - An overview of the intersection of ADA and FMLA when managing employees with serious health conditions and/or disabilities.
  - A quick guide on how to use the fitness for duty process to assist employees with returning and successfully performing work.
- **Drug and Alcohol Testing in the Workplace**
  - Overview of workplace drug and alcohol testing and the impact of legalization of marijuana.



Employee Rights

EMPLOYEE RIGHTS

Introductory Quiz – True or False

A government employee…

- has an expectation of privacy in their e-mail communications.
- can work second jobs for vendors who provide services to the municipality.
- can publicly criticize his/her governmental entity.
- can decline to comply with an employer's drug testing program.
- cannot be fired once he/she passes probation.
- cannot be required to work overtime.
- who has worked for the entity the longest is entitled to any promotion in their division.



EMPLOYEE RIGHTS

Rights Are EXPECTATIONS

EXPECTATIONS can be created by:

- **LAW**
- POLICY
- **PROCEDURE**
- PRACTICE

EMPLOYEE RIGHTS - *Federal*

- **Constitution**
  - First Amendment (Free speech and association)
  - Fourteenth Amendment (Due process)
- **Laws**
  - Fair Labor Standards Act (wages and hours)
  - OSHA Approved State Plan (workplace safety and health)
  - Title VII of the Civil Rights Act (anti-discrimination/harassment)
  - Family and Medical Leave Act (unpaid job protected leave)
  - Americans with Disabilities Act (job accommodations)
  - Uniformed Services Employment and Reemployment Act (military personnel)
  - Health Insurance Portability and Accountability Act (privacy)



EMPLOYEE RIGHTS -State

Constitution

- Free Speech
- Due Process
- Privacy

Laws

- Civil Service laws
- OSHA Approved State Plan (workplace safety and health)
- Workers' Compensation
- Anti-discrimination/anti-retaliation laws
- Jury Duty, School Visitation Rights, etc.

EMPLOYEE RIGHTS - *Local*

Charter

- Civil Service

Ordinances

- Civil Service Classifications
- Pay Grades
- Civil Service Hiring
- Civil Service Promotions
- Grievance Steps and Procedures
- Appeals from Discipline
- Benefits, Leave
- Layoffs

Executive Orders / Administrative Procedures / Mayor's Policies

- Work Hours
- Work Conditions

Union Negotiated Contracts

- Minimum Salaries
- Other terms and conditions of employment

EMPLOYEE RIGHTS -*Protected Status*

Federal (7)

Race · Color · Religion · Sex · National Origin · disability · age

Cook County (17)

Race · Color · Sex · Age · Religion · National Origin · disability · ancestry · sexual orientation · marital status · parental status · military discharge status · source of income (including use of a housing choice voucher) · housing status · gender identity · credit history · criminal background

Illinois (16)

Race · Color · Religion · Sex · National Origin · citizenship status *(with regard to employment)* · Ancestry · age *(40 and over)* · order of protection status · marital status · familial status *(with regard to housing)* · physical or mental disability · arrest record · military status · sexual orientation · unfavorable discharge from military service

City of Chicago (16)

Race · color · sex · gender identity · age · religion · disability · national origin · ancestry · sexual orientation · marital status · parental status · military discharge status · source of income · credit history (employment only) · criminal history (employment only)

EMPLOYEE RIGHTS - *Practice*

Department · Division · Section · Supervisor · Individual

Authorized – Formal

Codified basis

Written

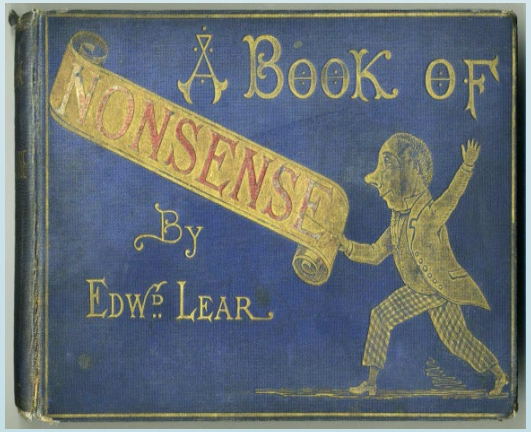
“By the book!”

Unauthorized – Informal

Not Codified

Unwritten

“How we do things!”





Managing Employee Illnesses and Disabilities

Big Picture

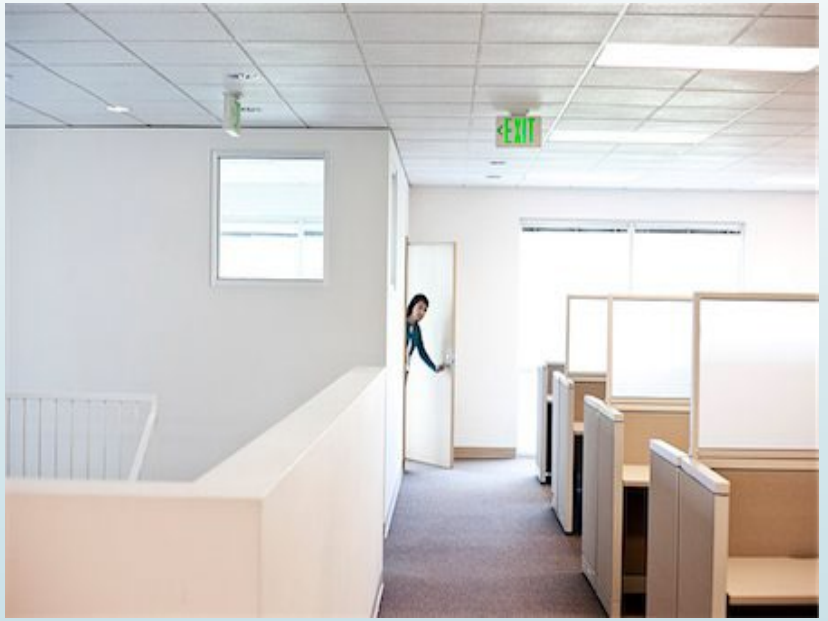
Costs associated with employee illnesses

Monetary

- Wages associated with accrued leave
- High costs of replacement workers
- Overtime pay for employees picking up the slack

Non-Monetary

- Reduced productivity
- Poor quality of services due to understaffing
- Low morale due to employees having to pick up the slack
- Higher turnover connected with unchecked absenteeism
- Manager's time dealing with attendance issues or finding replacements



Managing Employee Illnesses

Part I - Family and Medical Leave Act

FMLA Basics



The FMLA provides certain employees with up to 12 weeks of unpaid, job-protected leave per year to take medical leave when the employee is unable to work because of a serious health condition or because the employee is caring for a spouse, child, or parent who has a serious health condition.

FMLA Basics

(continued)

- 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 leave can be taken on an intermittent or continuous basis.
- Under an employer's policy, an employee may choose, or employers may require employees, to "substitute" (run concurrently) accrued paid leave, such as sick or vacation leave, to cover some or all of the FMLA leave period.

FMLA Basics (continued)

- 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.

FMLA Basics (continued)

- Employees must comply with their employer's policy for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request.
- An employer may require (1) certification in support of the leave from a health care provider; (2) second or third medical opinions (at the employer's expense); and (3) periodic recertification of a serious health condition
- Upon return from FMLA leave, an employee must be restored to his or her original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

Managing Employee Illnesses

Part II - Americans with Disabilities Act

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

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

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.*

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	



Mental impairments



ANXIETY DISORDER

People with anxiety order may experience:

- Feelings of panic
- Extreme physical, mental or emotional stress
- Intense fear

Highly individualized; symptoms can present in numerous ways and severity.

DEPRESSION

People with depression may experience:

- Feelings of sadness lasting for 2 weeks or longer; accompanied with
- Loss of interest in life
- Hopelessness
- Decreased energy

Clinical depression is very different from a temporary case of “the blues” triggered by an unhappy event or stressful situation.



Mental impairments



PHOBIAS

- People with phobias may experience irrational, involuntary, and inappropriate fears of (or responses to) ordinary situations or things.
- The fear is persistent and out of proportion to the actual danger the object or situation poses.
- People with phobias can experience panic attacks when confronted with their phobia.

OBSESSIVE COMPULSIVE DISORDER (OCD)

- Symptoms include persistent, upsetting thoughts (obsessions) and the use of rituals (compulsions) to control the anxiety those thoughts produce.
- Common problems in the include attendance and punctuality issues, the ability to meet deadlines and stay organized, and problems maintaining concentration and managing distractions

ADA BASICS

Major life activities impacted by mental health impairments

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

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.*

Managing Employee Illnesses

ADA Basics (continued)

ADA allows employer to require medical/psychological exam

- Must be job-related and consistent with business necessity
- Employer must have reasonable belief based on objective evidence that employee cannot perform functions or is danger to self or others

Managing Employee Illnesses

ADA Basics (continued)

Simple accommodations can sometimes assist

- Flexible work schedule
- Headphones
- Period of Leave
- Support animal

Engage in the Interactive Process

Request medical information if needed



Alternative accommodations

- Temporary job restructuring of marginal job duties (which are less critical or incidental job duties, contrasted with essential functions).
- Temporary transfers to a different position.
- Modifying work schedule or shift assignments.
- Moving the location where an individual performs work (for example, move the employee from a cubicle to an office)



Managing Employee Illnesses

1. Evaluate the situation under each law separately.
2. The law that provides the most benefit to the employee trumps. For example, an employee may not be eligible for FMLA, but may be protected and entitled to an accommodation under the ADA.
3. Reevaluate the situation under each law when new information regarding the employee's condition is received.
4. Train first line supervisors of employer's obligations under these laws.
5. Don't forget that the municipality's policy may provide additional protections (e.g. transitional duty assignments, set timelines to recover from a personal illness or work-related injury)



DRUG-TESTING IN THE WORKPLACE



Workplace Landscape

Think about it…

- There are certain professions that would understandably have higher risks of substance abuse and addiction.
- Employees that have mental disabilities that are not diagnosed and use controlled substances to self-medicate.
- You may have employees who are current users or recovering substance abusers.



Background

- Drug and alcohol testing in the workplace is a **search** within the meaning of the **Fourth Amendment**.
- "In light of our society's concern for the **security of one's person**, it is obvious that this **physical intrusion**, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing **chemical analysis** of the sample to obtain physiological data is a further **invasion of** the tested employee's **privacy interests**." Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989)
- Subjecting a person to a **breathalyzer test**, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber,* should also be deemed a search. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989)

Background (continued)

"We have recognized before that requiring the Government to procure a warrant for every work-related intrusion 'would conflict with the common-sense realization that government offices could not function if every employment decision became a constitutional matter.' " Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666, 109 S. Ct. 1384, 1391, 103 L. Ed. 2d 685 (1989)(citing O'Connor v. Ortega, *supra,* 480 U.S., at 722, 107 S.Ct., at 1500; quoting Connick v. Myers, 461 U.S. 138, 143, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983)).

Background (continued)

What do we know about 4th Amendment searches?

- Must be reasonable
- Must be based on individualized suspicion of wrongdoing



Drug/alcohol testing in the workplace

- There is no crime detection concern
- Balancing competing private and public interests



REASONABLE SUSPICION TESTING

Definition and Overview



- There is not one national standard of defining "reasonable suspicion".*
- Generally, reasonable suspicion "exists when an employer has specific, objective facts, and reasonable inferences drawn from those facts, that suggest an employee is using drugs while on the job.*

* 1Drug Testing Law Tech. & Prac. § 2:29

REASONABLE SUSPICION TESTING

Definition and Overview



- Some states establish the parameters for drug testing in the workplace, including defining "reasonable suspicion".
  - **Minnesota:** "Reasonable suspicion" means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.
  - **Utah**: An employer may require the collection and testing of samples for the following purposes…investigation of possible individual employee impairment.
  - **Alabama and Florida:** "Reasonable-suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. (see specific description on next slide)

REASONABLE SUSPICION

1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.
2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.
3. A report of drug use, provided by a reliable and credible source.
4. Evidence that an individual has tampered with a drug test during his or her employment with the current employer.
5. Information that an employee has caused, contributed to, or been involved in an accident while at work.
6. Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

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Test results…

- Did the employee violate your policy?
- Do you have an employee who is legally taking medication that could negatively impact the performance of safety sensitive duties?
- Do you have a zero-tolerance policy?
- Is the employee a qualified individual with a disability?



Medical Marijuana and Workplace Drug-Testing Programs



- Some states have laws that permit patients suffering from specific illnesses to access and use medical marijuana.
- This may trigger ADA evaluations on a case by case basis.
- FEDERAL LAW PROHIBITS MARIJUANA USE, DISTRIBUTION AND POSESSSION FOR ANY REASON.



Medical Marijuana and Workplace Drug-Testing Programs (continued)

Does the legalization of the use and possession of marijuana by a State, or other country that has drivers who operate in the United States, change the treatment of marijuana use under federal regulations applicable to drivers operating a commercial motor vehicle (CMV) (as defined in 49 CFR § 390.5)?

No. Marijuana, including a mixture or preparation containing marijuana, continues to be classified as a Schedule I controlled substance by the Drug Enforcement Administration (DEA) in 21 CFR § 1308.11. Under the Federal Motor Carrier Safety Regulations (FMCSRs), a person is not physically qualified to drive a CMV if he or she uses any Schedule I controlled substance such as marijuana. (See 49 CFR §§ 391.11(b)(4) and 391.41(b)(12)). In addition to the physical qualification requirements, the FMCSRs prohibit a driver from being in possession of or under the influence of any Schedule I controlled substance, including marijuana, while on duty, and prohibit motor carriers from permitting a driver to be on duty if he or she possesses, is under the influence of, or uses a Schedule I controlled substance. (See 49 CFR §§ 392.2 and 392.4). ***Legalization of marijuana use by States and other jurisdictions also has not modified the application of U.S. Department of Transportation (DOT) drug testing regulations in 49 CFR parts 40 and 382.***

(See https://www.transportation.gov/odapc/medical-marijuana-notice and https://www.transportation.gov/sites/dot.gov/files/docs/odapc-notice-recreational-mj.pdf.)

https://www.fmcsa.dot.gov/faq/does-legalization-use-and-possession-marijuana-state-or-other-country-has-d

Medical Marijuana and Workplace Drug-Testing Programs (continued)

The states that have legalized marijuana have a common protection for employers:

Employers retain the right to terminate and discipline employees for use of marijuana on premises and on-the-job intoxication.



Cannabidiol (CBD) Oil

- It is concentrated extracts from cannabis sativa plant. Because it is not regulated, it may have high levels of THC which could result in a positive drug test.
- It may be used to reduce pain or anxiety, help with sleep, treat tremors or symptoms of epilepsy, and alleviate multiple sclerosis symptoms.
- To be legal under federal law, it must have less that 0.3 percent THC.

https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/cannabis-oil-complicates-drug-testing.aspx





Cannabidiol (CBD) Oil

- There is currently no way an employer will be able to tell if a positive test for THC is a result of CBD oil use rather than abuse of marijuana.
- A positive test for THC may not necessarily mean that an individual is impaired because THC can remain in the body for weeks.



https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/cannabis-oil-complicates-drug-testing.aspx



QUESTIONS?