The Opioid Epidemic & Our Workplaces: Employment Law Considerations

June 14, 2017

Presented by:
Arielle Kristan and Catherine E. Reuben
Hirsch Roberts Weinstein

Table of Contents

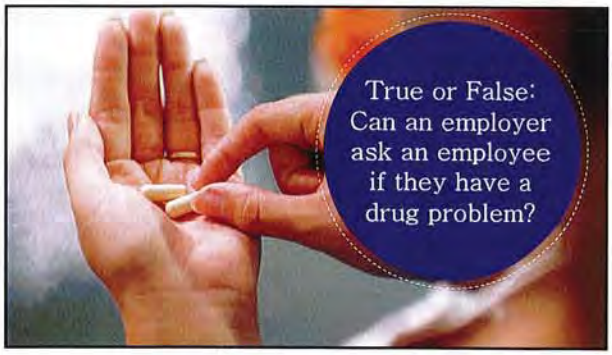
HIRSCH ROBERTS WEINSTEIN LLP
www.hrwlawyers.com

The Opioid Epidemic & Our Workplaces: Employment Law Considerations

Presented by
Ari Kristan and Catherine Reuben
Hirsch Roberts Weinstein LLP

How the Opioid Epidemic Impacts Employers

- Safety
- Productivity
- Potential Liability



Americans with Disabilities Act:

15 or more employees

Mass. Fair Employment Practices Act:

6 or more employees

Americans With Disabilities Act and M.G.L. c. 151B

Two Obligations

- Employers shall not discriminate against qualified disabled individuals
- \+ Employers must provide a reasonable accommodation to qualified disabled individuals

Qualified Individuals

The following are qualified individuals:

- Individuals who have been successfully rehabilitated and are no longer engaged in the illegal use of drugs.
- Individuals who are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs;
- Individuals who are erroneously regarded as illegally using drugs.

What is Reasonable Accommodation?

- Enables employee to perform the essential functions of their position
- Does not cause the employer undue hardship
  - Significant difficulty or expense – based on net cost (outside funding, employee contribution, etc.)
  - Unduly extensive, substantial or disruptive (does not include morale); or
  - Would fundamentally alter the mature or operation of the business

What is NOT Reasonable Accommodation

- Holding disabled persons to lower standards
- Putting up with poor performance or misconduct
- Eliminating essential job functions.

Family and Medical Leave Act (FMLA)

- Employers with 50 or more employees
- Employee must have worked for 1 year and 1250 hours in the last year
- Provides 12 weeks of job protected leave for
  - Care of spouse, child or parent with serious health condition
  - Employee's own serious health condition
  - Birth/adoption/placement of child
  - Certain military obligations

Massachusetts Sick Leave Law

- Up to 40 hours of leave for illness and doctor's appointments for self or certain family members and other authorized purposes
- Paid if employer has 11 or more workers; otherwise unpaid
- Accrues at rate of 1 hour per 30 hours worked
- Accrual starts immediately, but employee not entitled to use until after 90 days
- Job protected / no discrimination or retaliation for use

Drug Testing in Massachusetts

- May violate privacy laws under certain circumstances
- Permissible if "legitimate business interest"
- Types of testing generally permissible:
  - Pre-offer
  - Post-accident (if accident could have been related to drug use)
  - Reasonable suspicion
  - Random, if required by law (e.g. CDL drivers) or safety-sensitive position

An Ounce of Prevention...

- Foster company culture to encourage employees to come forward if they or a family member has a substance abuse problem
- Offer resources and benefits to support employees (e.g., EAP, health insurance, etc.)
- Implement clear, lawful policies on time off, leaves of absence, reasonable accommodation, and substance use
- Seek guidance when dealing with substance abuse issues

HIRSCH ROBERTS WEINSTEIN LLP
ATTORNEYS AT LAW

Sample Massachusetts Earned Sick Time Policy[1]

Ari Kristan and Catherine E. Reuben
Hirsch Roberts Weinstein LLP
akristan@hrwlawyers.com // creuben@hrwlawyers.com
(617) 348-4316

Accrual of Sick Time

All employees of the Company whose primary place of employment is Massachusetts shall be eligible to accrue and use paid [or unpaid, for employers with fewer than eleven (11) employees] sick time. Sick time accrues at the rate of one (1) hour for every thirty (30) hours worked per calendar [fiscal] [anniversary] year, up to a maximum of forty (40) hours. For accrual purposes, exempt employees will be assumed to work forty (40) hours per week, unless they are normally scheduled to work fewer than forty (40) hours, in which case earned sick time accrues based on their regular schedule. Up to forty (40) hours of unused sick time may be carried over into the following year.

[Alternate accrual method: Employees will be granted forty (40) hours of earned sick time at the outset of employment and at the start of every calendar [fiscal] [anniversary] year thereafter.]

Use of Sick Time

Employees may not use more than forty (40) hours of accrued sick time per calendar *[fiscal] [anniversary] year*. Accrual of sick time begins on the employee's date of hire, but employees may not use such earned sick time until ninety (90) days after their start date.

Sick time is provided to allow employees to:

1. care for employee's own physical or mental illness, injury, or other medical condition that requires home, preventative or professional care;

2. care for a child, parent, spouse, or parent of a spouse who is suffering from a physical or mental illness, injury, or other medical condition that requires home, preventative or professional care;

3. attend routine medical and dental appointments for themselves or for their child, parent, spouse, or parent of a spouse;

[1] This sample policy is provided for educational purposes only and should not be relied on as legal advice. Consult with counsel about your legal obligations under the earned sick time law and how to appropriately tailor this policy for your business.

4. address the psychological, physical, or legal effects of domestic violence; and

5. travel to and from an appointment, a pharmacy, or other location related to the purpose for which the time was taken.

Use of sick time for other purposes is not allowed and may result in an employee being disciplined.

Employees may not use sick time if the employee is not scheduled to be at work during the period of use. An employee may not accept a specific shift assignment with the intention of calling out sick for all or part of that shift.

Earned sick time may be used for full or partial day absences. The smallest amount of sick time that an employee can take is one (1) hour. Sick time cannot be used as an excuse to be late for work without notice of an authorized purpose. If an employee's absence from work requires the Company to call in a replacement worker to cover the absent employee's job functions, the Company may require the absent employee to use an equal number of hours of sick time as were worked by the replacement.

[In certain circumstances, the employee and supervisor may mutually agree that an employee will work and be paid for an equivalent number of additional hours or shifts during the same or the next pay period as the hours or shifts taken as sick time. In those cases, the employee will not be required to use accrued sick time, and the Company will not pay for the time that the employee was absent.]

[The Company may, at its discretion, permit employees to use earned sick time before the employee accrues it, and count the use against future accrual. In such cases, the Company's agreement to permit such use will be confirmed in writing.]

Absence Notification Procedures

If an employee determines that the employee needs to be absent, to be late or to leave work early, the employee must give advance notice to his or her supervisor. Notice should be provided in person, by telephone or e-mail [or text].

If the absence is foreseeable (i.e., if the employee will be absent to attend a previously scheduled appointment), the employee must provide seven (7) days advance notice, or more if possible.

If the absence is not foreseeable, the employee must provide notice to his or her supervisor at least ____ (x) hours before the start of the employee's shift. If _____ (x) hours' notice is not feasible due to accidents or sudden illness, notice must be provided as soon as practicable.

If an employee is going to be absent on multiple days, the employee or the employee's surrogate (i.e., spouse, adult family member or other responsible party) must provide notice of the expected duration of the leave or, if unknown, provide notice on a daily basis, unless the circumstances make such notice unreasonable.

Verification of Use of Sick Time

The Company will generally require an employee to submit a doctor's note or other documentation to support the use of sick time if the absence:

a. exceeds twenty-four (24) consecutively scheduled work hours or three (3) consecutive days on which the employee is scheduled to work;

b. occurs within two (2) weeks prior to an employee's final scheduled day of work (except in the case of temporary employees); or

c. occurs after four unforeseeable and undocumented absences within a three (3)-month period.

[In other circumstances, the Company may, at its discretion, require the employee to personally verify in writing that they have used sick time for an allowable purpose.]

Required documentation must be submitted within seven days of the absence. Additional time may be granted for good cause shown.

If an employee fails to timely comply with the Company's documentation requirements, the Company may recoup the sick time paid from future wages. *[Alternative for small employers: If an employee fails to timely comply with the Company's documentation requirements for use of unpaid sick time, the Company may deny future use of an equivalent number of hours of accrued sick time until the documentation is provided.]*

[In cases where the Company has a reasonable belief that the employee's return to work could present a significant risk of harm to the employee or others, the employee may be required to provide a fitness for duty certificate prior to returning to work.]

Company Expectations Regarding Attendance

Employees should remember that regular, reliable attendance and timeliness is expected. If an employee is repeatedly absent, late or leaves work early for reasons not covered by earned sick time, is absent or tardy for more than forty (40) hours in a year, commits fraud or abuse by engaging in an activity that is not consistent with allowable purposes for sick time or exhibits a clear pattern of taking sick time on days just before or after a weekend, vacation or holiday, the employee may be subject to disciplinary action.

[Employees who use sick time will not be eligible for the Company's perfect attendance bonus.]

[If an employee is absent from work the day before or after a scheduled holiday, the employee will not receive holiday pay.]

Payout of Sick Time

Sick time is not [is] payable on termination of employment.
[The Company permits [requires] employees to cash out up to forty (40) hours of unused sick time at the end of the calendar year. In such cases, the Company will provide the employee with an equivalent amount of unpaid sick time, up to sixteen (16) hours, to use the following year until the employee accrues new paid time.]

[Interaction with Other Types of Leave

If any time off covered under this policy is also covered under the Company's FMLA, Parental Leave, Domestic Violence Leave, SNLA leave or other leave of absence policies, sick time shall run concurrently with such leave. Employees may choose to use, and the Company may also require employees, to use earned sick time to receive pay for absences under other leave policies if those absences would otherwise be unpaid.]

EARNED SICK TIME

Notice of Employee Rights

Beginning July 1, 2015, Massachusetts employees have the right to earn and take sick leave from work.

WHO QUALIFIES?

All employees in Massachusetts can earn sick time.

This includes full-time, part-time, temporary, and seasonal employees.

HOW IS IT EARNED?

- Employees earn 1 hour of sick time for every 30 hours they work.
- Employees can earn and use up to **40 hours per year** if they work enough hours.
- Employees with unused earned sick time at the end of the year can **rollover up to 40 hours.**
- Employees **begin earning** sick time on their first day of work and **may begin using** earned sick time 90 days after starting work.

WILL IT BE PAID?

- If an employer has 11 or more employees, sick time must be paid.
- For employers with 10 or fewer employees, sick time may be unpaid.
- Paid sick time must be paid on the same schedule and at the same rate as regular wages.

WHEN CAN IT BE USED?

- An employee can use sick time when the employee or the employee's child, spouse, parent, or parent of a spouse is sick, has a medical appointment, or has to address the effects of domestic violence.
- The smallest amount of sick time an employee can take is one hour.
- Sick time cannot be used as an excuse to be late for work without advance notice of a proper use.
- Use of sick time for other purposes is not allowed and may result in an employee being disciplined.

CAN AN EMPLOYER HAVE A DIFFERENT POLICY?

Yes. Employers may have their own sick leave or paid time off policy, so long as employees can use at least the same amount of time, for the same reasons, and with the same job-protections as under the Earned Sick Time Law.

RETALIATION

- Employees using earned sick time cannnot be fired or otherwise retaliated against for exercising or attempting to exercise rights under the law.
- Examples of retaliation include: denying use or delaying payment of earned sick time, firing an employee, taking away work hours, or giving the employee undesirable assignments.

NOTICE & VERIFICATION

- Employees must **notify** their employer before they use sick time, except in a emergency.
- Employers may require employees to **use a reasonable notification system** the employer creates.
- If an employee is out of work for 3 consecutive days **OR** uses sick time within 2 weeks of leaving his or her job, an employer may require documentation from a medical provider.

DO YOU HAVE QUESTIONS?

Call the Fair Labor Division at 617-727-3465 ○ **Visit** www.mass.gov/ago/earnedsicktime

Commonwealth of Massachusetts
Office of the Attorney General
English - July 2016

The Attorney General enforces the Earned Sick Time Law and regulations.
It is unlawful to violate any provision of the Earned Sick Time Law.
Violations of any provision of the Earned Sick time law, M.G.L. c. 149, §148C, or these regulations, 940 CMR 33.00 shall be subject to paragraphs (1), (2), (4), (6) and (7) of subsection (b) of M.G.L. c. 149, §27C(b) and to §150.
This notice is intended to inform.
Full text of the law and regulations are available at www.mass.gov/ago/earnedsicktime.

HIRSCH ROBERTS WEINSTEIN LLP

Sample Massachusetts Substance Abuse Policy[1]

Ari Kristan and Catherine E. Reuben
Hirsch Roberts Weinstein LLP
akristan@hrwlawyers.com // creuben@hrwlawyers.com
(617)348-4316

Purpose

The purpose of this policy is to foster a substance-free, healthful, and safe work environment for all at the Company.

Prohibitions

All employees are prohibited from the following:

- The manufacture, possession, use, sale, distribution, dispensation, receipt, or transportation of illegal substances while on Company property or while otherwise engaged in Company business.
- The use of alcohol, marijuana, or illegal substances while on duty.
- The use of alcohol, marijuana or illegal substances preceding duty when such use affects the employee's fitness for duty.
- Being under the influence of substances while on Company property or while otherwise engaged in Company business or during employment.

Violation of this policy will not be tolerated and may subject the violator to discipline, up to and including termination of employment.

Any employee who refuses to submit to testing as provided for in this policy may also be subject to disciplinary action, up to and including termination of employment.

Definitions

Possession: To have on one's person, in one's personal effects, in one's vehicle or otherwise under one's care, custody, or control.

---

[1] This sample policy is provided for educational purposes only and should not be relied on as legal advice. Consult with counsel regarding your legal obligations with respect to drug testing, and how to properly and lawfully tailor and implement this policy for your business.

Substance: Any alcohol, drugs, marijuana, prescription drugs or other substances that have known mind altering or function-altering effects upon the human body or that impair one's ability to safely perform his or her work.

Premises: For the purpose of this policy all property, facilities, buildings, structures, installations, work locations, work areas, or vehicles owned, operated, leased, or under the control of the Company. Private vehicles parked on premises or properties are also included under this definition. Although the vehicle used by an employee is not under the control of the Company, this Policy shall be construed as prohibiting the use of substances by the employee while traveling to and from the premises, or to any other location at which the employee has been designated to work, in such vehicle.

Under the Influence: The condition wherein any of the body's sensory, cognitive, or motor functions or capabilities is altered, impaired, diminished, or affected due to substances. This also means the detectable presence of substances within the body, regardless of when or where they may have been consumed, having an alcohol test result of 0.02 or greater alcohol concentration of blood or breath, and/or having a positive test for other substances.

Post-Offer Testing

Prior to beginning work for the Company, and depending on the position, employees to whom an offer of employment is made may be subject to substance abuse testing. A positive finding for which the individual cannot offer an acceptable explanation will generally result in withdrawal of the offer of employment.

Post-Accident / Injury Testing

If a workplace accident occurs causing injury to an employee or damage to property under circumstances that raise a question about possible substance use, the employee may likewise be subject to substance abuse testing.

Reasonable Suspicion

The Company may require an employee to submit to a substance abuse test if the employee's supervisor or another individual in a management position reasonably suspects that the employee is using, is under the influence of, is in the possession of, or is unlawfully distributing substances, or has otherwise violated this policy's prohibitions with respect to substances. The following is a non-inclusive list of factors that may lead to reasonable suspicion under this policy:

- Odors (e.g., smell of alcohol or marijuana)
- Movements (unsteady, fidgety, dizzy)

- Eyes (dilated, glassy, bloodshot, watery, pupils abnormally dilated or constricted, involuntary eye movements)
- Face (flushed, sweating, confused or blank look, constant sniffing, redness under nose)
- Speech (slurred, slow, distracted mid-thought, inability to verbalize thoughts)
- Indicia of drug use (needle marks, possession of drug paraphernalia)
- Personality (change in personality, argumentative, agitated, irritable, forgetful)
- Other observations (extreme drowsiness, sleeping, unconsciousness, slowed reaction rate, erratic behavior)

If there is reason to suspect that the employee is working while under the influence of a substance in violation of this policy, the employee may be suspended until the results of the substance abuse test are made available to the Company.

Random Selection Testing

Employees in safety-sensitive positions may be subject to unannounced substance abuse testing at any time on a random basis as a condition of their continued employment.

Reporting to Law Enforcement

Where available evidence warrants, the Company may bring violations of this policy to the attention of appropriate law enforcement authorities.

Medications

Employees taking legally prescribed or over-the-counter medications (including medical marijuana) that have the potential to negatively impact the employee's ability to perform his/her job functions in a safe and effective manner (e.g., medications which caution against use while operating machinery) must report such use to their immediate supervisor, and may be required to present medical documentation describing the effects such medication may have on the employee's ability to perform his/her tasks. The Company may take such action as it deems appropriate, including but not limited to temporarily transferring the employee to a different position, permitting the employee to take a leave of absence or other steps, depending on the circumstances.

Workplace Searches

Management may conduct searches of Company property, including lockers, and an employee's personal property, in cases where there is reason to suspect a violation of this policy. An employee who refuses to consent to and/or cooperate in the conducting of such searches may be subject to disciplinary action up to and including termination of employment.

Testing Procedures / Confidentiality of Test Results

Any drug testing required or requested by the Company will be conducted by a laboratory licensed by the state. All expenses related to the test will be incurred by the Company. Employees asked to undergo substance abuse testing will be asked to sign a consent form. Refusal to sign the form may result in discipline, up to and including termination. Specimens that are found to be adulterated or substituted will be considered a refusal to test, and therefore may result in termination of employment or ineligibility for hire. The Company will strive to keep the employee's test results confidential, treating them the same as other medical records and disseminating the results only on a need-to-know basis.

Positive Results

If an employee tests positive on a drug test, the employee will be placed on unpaid administrative leave. The employee will be given the opportunity to explain the positive result and will be informed that employee may have the same sample retested at a laboratory of their choice at their cost.

Employees with confirmed positive results may be subject to disciplinary action, up to and including termination.

Prior Reporting of a Substance Abuse Problem

The Company strives to treat employees consistently with regard to discipline for violations of this policy. So, if an employee violates this policy in a manner that could result in termination (for example, testing positive for drug use after having been involved in a workplace accident), the employee's after-the-fact revelation that they suffer from addiction will generally not result in them being treated in a more lenient manner. This Company is committed to providing reasonable accommodations to employees that suffer from addiction and other disabilities. While *addiction* to drugs or alcohol is a protected disability, the actual *use* of such substances is not, particularly if such use creates a safety hazard on the job. For this reason, employees are encouraged to seek help if they have a drug or alcohol problem *before* such problem results in a failed test or other violation of this policy. If an employee or a member of the employee's family is struggling with addiction, please tell us, and let us help. For example, the Company may be able to provide the employee with time off, access to support services, a different schedule, or other accommodations to help the employee address the situation.

ACKNOWLEDGEMENT OF RECEIPT OF SUBSTANCE ABUSE TESTING POLICY

I, _____, acknowledge that I have received a copy of the Substance Abuse Testing Policy (the "Policy"). I have read and understand the Policy. I understand that, if I violate the Policy, I may be subject to disciplinary action, including termination. I further understand that, under the Policy, I may be subject to substance abuse testing. I also understand that if I am asked to submit to a substance abuse test, and refuse to do so, I may be subject to disciplinary action, including termination. I will contact my supervisor if I have any questions about any aspect of the Policy. I further understand that that I am an employee-at-will and that the Policy does not alter that status.

_____ _____

Date Employee Signature

_____ _____

Date Witness

HIRSCH
ROBERTS
WEINSTEIN LLP

Sample Last Chance Agreement[1]

Ari Kristan and Catherine E. Reuben
Hirsch Roberts Weinstein LLP
akristan@hrwlawyers.com // creuben@hrwlawyers.com
(617)348-4316

This Last Chance Agreement ("Agreement") is entered by and between John Smith ("Employee"), and ABC Corp. ("Company"), for the purpose of giving the Employee a final opportunity to deal with a substance use disorder involving his use of _____. The parties acknowledge and agree that absent this Agreement, the Company has ample grounds upon which to terminate the Employee's employment based upon its neutral and uniformly applied policies regarding behavior and work performance.

WHEREAS the Employee acknowledges he has a substance use disorder involving his use of _____, and acknowledges that he wishes to have an opportunity to seek medical treatment and counseling to overcome his _____ use disorder.

WHEREAS the Company wishes to give the Employee one opportunity to seek medical attention and to receive the necessary medical treatment and counseling for his substance use disorder involving his use of _____.

The parties hereby agree as follows:

1. The Employee shall seek treatment at the Employee's expense. The Employee shall follow a prescribed course of treatment arrived at by and between the Employee and a substance abuse professional.

2. The Employee agrees to utilize his best efforts and to participate in good faith in any treatment program prescribed by the substance abuse professional or any medical professional with whom he consults concerning his substance abuse problem.

3. The Employee with provide a fitness for duty certificate from his health care provider before being allowed to return to work.

[1] This sample Last Chance Agreement is provided for educational purposes only, and should not be relied on as legal advice. Consult with counsel before using this document.

4. Employee will give his health care providers written permission to speak with Company's human resources representatives so that Company can confirm that Employee is participating in good faith and following the directions of the health care professional.

5. The Employee understands and agrees that if at any time after he returns to duty, he uses _____ during the course of his employment, at work or at any work related social event or in his role as a representative of the Company or he is found to be under the influence of _____ and refuses to promptly submit to testing by the Company upon request or fails to comply with his obligations to abide by the terms of this Agreement or violates any Company policy concerning _____, he shall be terminated immediately.

6. The Employee understands and agrees that when he returns to duty, he must meet the performance requirements for his position with the Company or his employment will end.

7. Employee understands and agrees that after he returns to work, the Employee shall remain bound by the terms of this Agreement, and shall be subject to immediate discharge if he violates any Company policy concerning substance use.

8. Notwithstanding the terms of this Agreement, the Employee shall remain at all times an "at-will" employee and will continue to be subject to discipline, termination, performance reviews, and all other aspects of management decisions affecting employment. Specifically, nothing in this Agreement alters the at-will status of Employee's employment, meaning the Employee may sever his employment with the Company at any time, and the Company may sever its employment relationship with the Employee at any time, with or without cause, and with or without notice. Nothing in this Agreement shall be read to grant the Employee any additional protection from termination or discipline.

9. By entering into this Agreement with the Employee, the Company does not establish a practice or precedent for dealing with employees found to be using or under the influence of _____. The parties stipulate and agree that this circumstance is unique, and that this Agreement, or the fact this Agreement has been entered between the Company and the Employee, shall not be advanced as a practice or precedent in any future cases whether similar or dissimilar.

10. The Employee understands and agrees that he shall not be paid for time spent obtaining treatment and counseling for his substance abuse problem.

11. The Company agrees to limit disclosure of this Agreement to only those members of its workforce who require access to this Agreement to carry out its terms, including clerical employees, attorneys and agents, law enforcement officers, any government investigative officer with statutory or judicially granted power to compel Company to release this information, or to the testing or treatment laboratories and professionals described in this Agreement.

12. The Company shall also have the right and opportunity to admit this Agreement into evidence in a proceeding defending the termination of the Employee or in any other cause of action or claim brought by Employee. The Employee hereby consents to the use of this Agreement by the Company for these purposes, and agrees to hold the Company harmless and not responsible for any dissemination of this Agreement or any other information relating to this Agreement, as set forth above, or in any court or administrative agency proceeding.

13. The Employee agrees to keep this Agreement confidential, and not to share its terms with anyone except members of his immediate family, his attorney(s), and any health care providers from whom he seeks treatment pursuant to this Agreement.

WHEREFORE the parties to this Agreement hereto set their hands and acknowledge that they agree to the terms of this Agreement, and stipulate that the Agreement has been entered into fairly and in good faith between them.

_____ Dated: _____
John Smith

ABC CORPORATION

_____ Dated: _____
By: [Insert Name and Title]

HIRSCH ROBERTS WEINSTEIN LLP
ATTORNEYS AT LAW

HRW CLIENT ALERT: MARIJUANA AND THE WORKPLACE[1]

Hirsch Roberts Weinstein LLP
(617) 348-4300 // www.hrwlawyers.com

On November 8, 2016, Massachusetts voters answered "yes" to Question 4, approving the Regulation and Taxation of Marijuana Act (the "Marijuana Act"). The Marijuana Act goes into effect on December 15, 2016. It allows, among other things, adults 21 years of age and older to possess up to one ounce of marijuana in public and up to 10 ounces at home for recreational purposes and to grow up to 6 marijuana plants per person with a limit of 12 plants per home. It also provides for the establishment of a Cannabis Control Commission to regulate and license the commercial sale of marijuana (starting in January 2018).

Four year ago, Massachusetts voters passed the Massachusetts Act for the Humanitarian Medical Use of Marijuana (the "Medical Marijuana Act"), which went into effect on January 1, 2013. That law already allows qualifying patients with certain medical conditions to obtain and use marijuana for medical purposes. Since the passage of the Medical Marijuana Act, the Massachusetts Department of Public Health ("DPH") has issued procedures for the registration of qualifying patients. These procedures allow qualifying patients to obtain a registration card used to verify that they have been certified by a physician.

Both the Marijuana Act and Medical Marijuana Act impact marijuana's legality under Massachusetts law. The possession and sale of marijuana remains illegal under federal law.

Many employers have inquired about the impact of the Marijuana Act in the workplace. The publicity surrounding marijuana legalization has also rekindled questions regarding the impact of the Medical Marijuana Act in the workplace. This Client Alert discusses the impact of both Acts, the accommodation of employee marijuana use, and drug testing of employees.

Can Employers Continue to Enforce Drug-Free Workplace and Drug Testing Policies?

The short answer: Probably, but with care given the many unanswered questions. Neither the Marijuana Act nor the Medical Marijuana Act require Massachusetts employers to tolerate use, possession, or being under the influence of marijuana in the workplace.

The Marijuana Act

The Marijuana Act explicitly provides as follows:

> Employment. This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.

[1] This sample communication is provided for educational purposes and does not constitute legal advice.

Thus, despite the Marijuana Act, employers may continue to enforce drug-free workplace and lawful testing policies. This includes disciplining employees who test positive for marijuana.

The Medical Marijuana Act

The Medical Marijuana Act and the DPH regulations provide that "nothing in this law requires any accommodation of on-site medical use of marijuana in any place of employment." Yet, while the Medical Marijuana Act itself may not require such accommodation, that does not foreclose the possibility that such accommodation would be required under other laws, such as the disability discrimination provisions of the Massachusetts Fair Employment Practices Act, G.L. c. 151B. Further, the Medical Marijuana Act's use of the phrase "on-site medical use" seems to contemplate that an employer might indeed have an obligation to accommodate "off-site" medical marijuana use under G.L. c. 151B.

For example, if a qualifying patient uses marijuana after work or on the weekend, but then tests positive under an otherwise lawful drug testing policy days or weeks later, can the employer terminate the employee? One Massachusetts Superior Court answered this question yes. In *Barbuto v. Advantage Sales and Marketing, LLC* (Suffolk Superior Court C.A. 15-02667), the employer terminated Cristina Barbuto after she tested positive for marijuana, even though she had a valid medical marijuana prescription to treat her Crohn's disease. She sued, alleging, among other claims, that her termination constituted disability discrimination under G.L. c. 151B. Ms. Barbuto argued that her off-site marijuana use was a reasonable accommodation that her employer was required to provide under G.L. c. 151B.

The court disagreed and dismissed the disability discrimination claim. The court relied on the fact that the Medical Marijuana Act does not contain an anti-discrimination provision. Some other states that have legalized medical marijuana have included an employment protection provision in their laws. Massachusetts did not. The Court noted that, to the contrary, the Act and its implementing regulations explicitly state that an employer need not accommodate medical marijuana use. The court acknowledged that the Medical Marijuana Act's no-accommodation provision does not reference "off-site" use. However, it also noted that the Medical Marijuana Act provides that "[n]othing in this law requires the violation of federal law or purports to give immunity under federal law" and that marijuana use for medical purposes remains illegal under federal law. The court further stated that its decision is consistent with court decisions in other states that have legalized medical marijuana, which "have held that state disability discrimination statutes do not extend to marijuana use for medical purposes because such use remains illegal under federal law."

It should be noted, however, that *Barbuto* is only one case, and a different court or the Massachusetts Commission Against Discrimination (MCAD) might reach a different conclusion. Ms. Barbuto is currently seeking to appeal the decision to the Supreme Judicial Court. If the SJC accepts the appeal, its decision would be the final word on this issue and would provide clearer guidance to employers.

Drug Testing of Applicants and Employees in Massachusetts

No Massachusetts statute explicitly limits an employer's ability to conduct drug testing as a condition of employment. Depending on the circumstances, however, drug testing may violate Massachusetts privacy laws. The Supreme Judicial Court has established principles for drug testing of applicants and employees.

Massachusetts case law currently recognizes the four following levels of employee drug testing:

1. Pre-Employment

Applicants for employment are considered to have a lesser expectation of privacy than existing employees. Thus, pre-employment drug testing generally may be imposed on all applicants. Employers should test only after a bona fide offer of employment has been made. If a position requires pre-employment drug testing, the advertisement for the position or the job application should say so.

2. Reasonable Suspicion

Drug testing of an existing employee is generally permitted where the employer has a reasonable suspicion that an employee is under the influence while at work. Signs of impairment could include bloodshot eyes, poor coordination, drowsiness, or odor. Employers should document the basis for testing a particular employee by filling-out a reasonable suspicion checklist. It is a best practice to have at least two witnesses observe the employee and sign-off on the checklist.

3. Post-Accident

Drug testing of an existing employee is generally permitted under state law after the employee has been involved in a work-related accident. (Note, however, that such testing may be problematic under OSHA's anti-retaliation regulations if there is no reasonable possibility that drug use was a contributing factor to the accident.

4. Random

To determine if random drug testing is permitted, Massachusetts courts balance whether the employer has a legitimate business interest that outweighs the employees' privacy interests. An employer's "general interest" in protecting the safety of employees and providing a drug free environment is not enough. Generally, random drug testing violates employees' privacy rights unless the position is safety sensitive, e.g., it requires operating a vehicle or heavy machinery.

Regardless of what level of testing an employer implements, testing should generally be conducted under a specific policy and procedures that have been made known to applicants and employees. Ideally, employees subject to reasonable suspicion, post-accident, or random testing

should be provided with a copy of the employer's drug testing policies and procedures upon commencing employment or upon the implementation of a new or updated policy. Employers also should consider implementing within their policies procedural safeguards to mitigate the impact on employees and their privacy. These might include the following:

- Advance notification (for example, 30 days before implementing random testing);
- Doing all testing at a medical facility with privacy safeguards;
- Providing employers only with "pass or fail" test results;
- Retesting to confirm positives;
- Not terminating employees for first-time positives;
- Offering employees assistance through Employee Assistance Programs; and
- Last Chance Agreements.

The Limitations of Marijuana Testing, Forgoing Pre-Employment Marijuana Testing, and Voluntary Accommodation of Medical Marijuana Use

The limitations of marijuana testing complicate the interplay of marijuana use and the workplace. A person can test positive for marijuana for weeks after using it. Additionally, there are non-psychoactive forms of medical marijuana (i.e. topical creams for pain relief) the use of which may still result in a positive drug test. This means that, when an employee tests positive, the test does not indicate whether the employee used marijuana or a derivative thereof hours before, days before, or even weeks before they were tested. Thus, the test does not reveal whether the employee was actually impaired while at work.

With this in mind, and expecting that legalization will lead to a rise in adult marijuana use, some employers are rethinking testing their employees for marijuana in order to avoid losing good applicants and employees. Instead, they are choosing to treat marijuana like alcohol – prohibiting employees from being under the influence while at work but not out-off-work use that does not affect the workplace. To enforce these policies, they are focusing on workplace behavior and observation (i.e., bloodshot eyes, odor, etc.) rather than drug tests that give no indication of when marijuana was used.

Employers have been increasingly willing to accommodate medical marijuana use for employees who are qualified patients, are not under the influence at work, and are not in safety sensitive positions. Ideally, any such policy should be made available to employees in writing. Below is some sample language for such an accommodation policy:

> The Company may in its discretion seek to accommodate legally recognized Massachusetts medical marijuana users when possible depending on the Employee's position. Employees who obtain a registration card from the Massachusetts Department of Public Health must submit a letter to the Director of Human Resources attaching a copy of their card and requesting a reasonable accommodation. The Company will then enter into a discussion with the Employee and where applicable the Employee's Health Care provider to determine if such accommodation is appropriate under the circumstances.

An employer will want to consider a number of factors in assessing whether to offer their employee an accommodation such as:

1. Frequency of use;
2. Work schedule;
3. Federal and state regulatory requirements;
4. Safety sensitive position;
5. Vulnerable population;
6. Transfer to another position; and
7. Length of service, among others.

Whether to forego marijuana testing or to accommodate off-site medical marijuana use are cultural and business decisions for employers to make.

As states across the country legalize marijuana, these issues will become more prevalent. It is more important than ever for employers to carefully consider – and communicate to their employees – how such issues will be handled. These changes in the law present a good opportunity for employers to establish or update drug-related workplace policies to comply with the law and meet their business or organizational objectives.

Employers with questions or concerns regarding marijuana and the workplace can contact:

- Michael Birch // mbirch@hrwlawyers.com // (617) 348-4359
- Toby Crawford // tcrawford@hrwlawyers.com // (617) 348-4367
- Dave Wilson // dwilson@hrwlawyers.com // (617) 348-4314

HIRSCH
ROBERTS
WEINSTEIN LLP

Substance Abuse and the ADA:
Guidance from the Equal Employment Opportunity Commission[1]

Ari Kristan and Catherine E. Reuben
Hirsch Roberts Weinstein LLP
akristan@hrwlawyers.com // creuben@hrwlawyers.com
(617)348-4316

Excerpts from EEOC publication "The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities" (Jan. 20, 2011). Available at https://www.eeoc.gov/facts/performance-conduct.html.

Does the ADA protect employees with substance abuse problems?

The ADA may protect a "qualified" alcoholic who can meet the definition of "disability." The ADA does not protect an individual who currently engages in the illegal use of drugs, but may protect a recovered drug addict who is no longer engaging in the illegal use of drugs, who can meet the other requirements of the definition of "disability," and who is "qualified." As explained in the following questions, the ADA has specific provisions stating that individuals who are alcoholics or who are currently engaging in the illegal use of drugs may be held to the same performance and conduct standards as all other employees.

May an employer require an employee who is an alcoholic or who illegally uses drugs to meet the same standards of performance and conduct applied to other employees?

Yes. The ADA specifically provides that employers may require an employee who is an alcoholic or who engages in the illegal use of drugs to meet the same standards of performance and behavior as other employees. This means that poor job performance or unsatisfactory behavior – such as absenteeism, tardiness, insubordination, or on-the-job accidents – related to an employee's alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

May an employer discipline an employee who violates a workplace policy that prohibits the use of alcohol or the illegal use of drugs in the workplace?

---

[1] This document was created in June, 2017 based on information then available on the EEOC's website. The EEOC updates their website frequently, so persons using this document should verify that the information remains current. This document was prepared by Ari Kristan and Catherine E. Reuben of the law firm of Hirsch Roberts Weinstein LLP. (617) 348-4300 www.hrwlawyers.com

Yes. The ADA specifically permits employers to prohibit the use of alcohol or the illegal use of drugs in the workplace. Consequently, an employee who violates such policies, even if the conduct stems from alcoholism or drug addiction, may face the same discipline as any other employee. The ADA also permits employers to require that employees not be under the influence of alcohol or the illegal use of drugs in the workplace.

Employers may comply with other federal laws and regulations concerning the use of drugs and alcohol, including: (1) the Drug-Free Workplace Act of 1988; (2) regulations applicable to particular types of employment, such as law enforcement positions; (3) regulations of the Department of Transportation for airline employees, interstate motor carrier drivers and railroad engineers; and (4) the regulations for safety sensitive positions established by the Department of Defense and the Nuclear Regulatory Commission.

May an employer suggest that an employee who has engaged in misconduct due to alcoholism or the illegal use of drugs go to its Employee Assistance Program (EAP) in lieu of discipline?

Yes. The employer may discipline the employee, suggest that the employee seek help from the EAP, or do both. An employer will always be entitled to discipline an employee for poor performance or misconduct that result from alcoholism or drug addiction. But, an employer may choose instead to refer an employee to an EAP or to make such a referral in addition to imposing discipline. However, the ADA does not require employers to establish employee assistance programs or to provide employees with an opportunity for rehabilitation in lieu of discipline.

What should an employer do if an employee mentions drug addiction or alcoholism, or requests accommodation, for the first time in response to discipline for unacceptable performance or conduct?

The employer may impose the same discipline that it would for any other employee who fails to meet its performance standard or who violates a uniformly-applied conduct rule. If the appropriate disciplinary action is termination, the ADA would not require further discussion about the employee's disability or request for accommodation.

An employee whose poor performance or conduct is attributable to the current illegal use of drugs is not covered under the ADA. Therefore, the employer has no legal obligation to provide a reasonable accommodation and may take whatever disciplinary actions it deems appropriate, although nothing in the ADA would limit an employer's ability to offer leave or other assistance that may enable the employee to receive treatment.

By contrast, an employee whose poor performance or conduct is attributable to alcoholism may be entitled to a reasonable accommodation, separate from any disciplinary action the employer chooses to impose and assuming the discipline for the infraction is not termination. If the employee only mentions the alcoholism but makes no request for accommodation, the employer may ask if the employee believes an accommodation would prevent further problems with

performance or conduct. If the employee requests an accommodation, the employer should begin an "interactive process" to determine if an accommodation is needed to correct the problem. This discussion may include questions about the connection between the alcoholism and the performance or conduct problem. The employer should seek input from the employee on what accommodations may be needed and also may offer its own suggestions. Possible reasonable accommodations may include a modified work schedule to permit the employee to attend an on-going self-help program.

Must an employer provide a "firm choice" or "last chance agreement" to an employee who otherwise could be terminated for poor performance or misconduct resulting from alcoholism or drug addiction?

An employer may choose, but is not required by the ADA, to offer a "firm choice" or "last chance agreement" to an employee who otherwise could be terminated for poor performance or misconduct that results from alcoholism or drug addiction. Generally, under a "firm choice" or "last chance agreement" an employer agrees not to terminate the employee in exchange for an employee's agreement to receive substance abuse treatment, refrain from further use of alcohol or drugs, and avoid further workplace problems. A violation of such an agreement usually warrants termination because the employee failed to meet the conditions for continued employment.

Excerpt from EEOC publication "Fact Sheet on Recent EEOC Litigation-Related Developments Under the Americans with Disabilities Act (Including the ADAAA)" (June 18, 2015). Available at https://www.eeoc.gov/eeoc/litigation/selected/ada_litigation_facts.cfm.

***EEOC v. Old Dominion Freight Line, Inc.*, (W.D. Ark. No. 2:11-cv-02153-PKH).** The EEOC's Memphis District Office sued defendant Old Dominion Freight Line alleging it had discriminated against charging party, a truck driver, because of self-reported alcohol abuse in violation of the ADA and ADAAA. The charging party had worked for the company for five years without incident. In late June 2009, the employee reported to the company that he believed he had an alcohol problem. Under U.S. Department of Transportation regulations, Old Dominion suspended charging party from his driving position and referred him for substance abuse counseling. However, the EEOC maintained that DOT Regulations did not require charging party's suspension because he did not meet the definition of alcohol misuse under DOT Regulations. The EEOC admitted that once the charging party received a clinical diagnosis of alcoholism, then he could not drive until he received the treatment. Also, the charging party did not receive the treatment due to lack of funds. The EEOC argued that conditioning reassignment to non-driving positions on the enrollment in an alcohol treatment program violated the ADA and ADAAA. In addition, the EEOC argued that Old Dominion's policy banning any driver who self-reports alcohol abuse from ever driving again also violates the ADA. In May 2014, the district judge, sua sponte, reversed his prior ruling that defendant's "no-return policy" violated the ADA as a matter of law, and instead denied summary judgment to both parties. On January 16, 2015, the jury returned a verdict for the EEOC and awarded the charging party $119,612 in backpay.

EMPLOYEE RIGHTS
UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

LEAVE ENTITLEMENTS

Eligible employees who work for a covered employer can take up to 12 weeks of unpaid, job-protected leave in a 12-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care;
- To bond with a child (leave must be taken within 1 year of the child's birth or placement);
- To care for the employee's spouse, child, or parent who has a qualifying serious health condition;
- For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job;
- For qualifying exigencies related to the foreign deployment of a military member who is the employee's spouse, child, or parent.

An eligible employee who is a covered servicemember's spouse, child, parent, or next of kin may also take up to 26 weeks of FMLA leave in a single 12-month period to care for the servicemember with a serious injury or illness.

An employee does not need to use leave in one block. When it is medically necessary or otherwise permitted, employees may take leave intermittently or on a reduced schedule.

Employees may choose, or an employer may require, use of accrued paid leave while taking FMLA leave. If an employee substitutes accrued paid leave for FMLA leave, the employee must comply with the employer's normal paid leave policies.

BENEFITS & PROTECTIONS

While employees are on FMLA leave, employers must continue health insurance coverage as if the employees were not on leave.

Upon return from FMLA leave, most employees must be restored to the same job or one nearly identical to it with equivalent pay, benefits, and other employment terms and conditions.

An employer may not interfere with an individual's FMLA rights or retaliate against someone for using or trying to use FMLA leave, opposing any practice made unlawful by the FMLA, or being involved in any proceeding under or related to the FMLA.

ELIGIBILITY REQUIREMENTS

An employee who works for a covered employer must meet three criteria in order to be eligible for FMLA leave. The employee must:

- Have worked for the employer for at least 12 months;
- Have at least 1,250 hours of service in the 12 months before taking leave;* and
- Work at a location where the employer has at least 50 employees within 75 miles of the employee's worksite.

*Special "hours of service" requirements apply to airline flight crew employees.

REQUESTING LEAVE

Generally, employees must give 30-days' advance notice of the need for FMLA leave. If it is not possible to give 30-days' notice, an employee must notify the employer as soon as possible and, generally, follow the employer's usual procedures.

Employees do not have to share a medical diagnosis, but must provide enough information to the employer so it can determine if the leave qualifies for FMLA protection. Sufficient information could include informing an employer that the employee is or will be unable to perform his or her job functions, that a family member cannot perform daily activities, or that hospitalization or continuing medical treatment is necessary. Employees must inform the employer if the need for leave is for a reason for which FMLA leave was previously taken or certified.

Employers can require a certification or periodic recertification supporting the need for leave. If the employer determines that the certification is incomplete, it must provide a written notice indicating what additional information is required.

EMPLOYER RESPONSIBILITIES

Once an employer becomes aware that an employee's need for leave is for a reason that may qualify under the FMLA, the employer must notify the employee if he or she is eligible for FMLA leave and, if eligible, must also provide a notice of rights and responsibilities under the FMLA. If the employee is not eligible, the employer must provide a reason for ineligibility.

Employers must notify its employees if leave will be designated as FMLA leave, and if so, how much leave will be designated as FMLA leave.

ENFORCEMENT

Employees may file a complaint with the U.S. Department of Labor, Wage and Hour Division, or may bring a private lawsuit against an employer.

The FMLA does not affect any federal or state law prohibiting discrimination or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights.

For additional information or to file a complaint:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

www.dol.gov/whd

U.S. Department of Labor | Wage and Hour Division

WH1420 REV 04/16

HIRSCH ROBERTS WEINSTEIN LLP
ATTORNEYS AT LAW

Client Alert on New OSHA Regulations:

New OSHA anti-retaliation regulations impacting post-accident drug testing policies and workplace safety incentive programs

Charlotte Petilla
Hirsch Roberts Weinstein LLP
(617) 348-4300 // cpetilla@hrwlawyers.com

Employers should carefully review their policies and procedures concerning the reporting and investigation of work-related injuries and illnesses in light of the Occupational Safety and Health Administration ("OSHA")'s recent amendments to the regulations implementing the Occupational Safety and Health Act ("Act"). The revised regulations call into question the lawfulness of two common employer policies: post-accident drug testing policies and programs that reward employees who are not involved in workplace accidents.

The amendments focus on three areas: (1) employer reporting obligations; (2) the reasonableness of reporting procedures; and (3) employer policies that discourage the reporting of work-related injuries and illnesses.

1. Certain Employers Are Now Required to Electronically Report Accident and Illness Information Annually

Most employers with more than 10 employees must keep records of all work-related illnesses and injuries, compile a log of those incidents, and post an annual summary of those cases in the workplace. Under the amended regulations, employers with more than 250 employees must electronically submit, on OSHA forms, incident reports, a log of such reports and a yearly summary of such reports to OSHA annually. Employers with 20 or more employees but fewer than 250 employees in certain higher-risk industries (such as construction, manufacturing, residential care facilities, and dry-cleaning and laundry services) must complete and electronically submit to OSHA Form 300A, which requires employers to summarize work-related injuries and illnesses for the reporting year. Using these submissions, OSHA will post establishment-specific data (purged of individual identifying information) on its website.

These reporting requirements become effective as of January 1, 2017, and will be gradually phased in. For the 2016 reporting year, employers affected by these amendments are only required to complete and electronically transmit Form 300A by July 1, 2017. After that (and absent a legal challenge), the reporting obligations outlined above will become fully effective and submissions for 2017 will be due on July 1, 2018. Submissions for 2018 will be due on March 2, 2019.

2. *Employers Must Have A "Reasonable" Procedure for Reporting Work-Related Injuries or Illness*

OSHA regulations require employers to establish a procedure by which employees can report work-related injuries and illnesses promptly. Under the amended OSHA regulations, any such procedure must be "reasonable." This means that the procedure must not deter a reasonable employee from accurately reporting a workplace injury or illness. Under this standard, a reporting procedure that is overly complicated or that requires prompt reporting, even where employees could not have reasonably known that their injuries were attributable to work-related activity, is not permissible.

Although "reasonableness" is a flexible and, at times, murky standard, employers can and should proactively assess whether their reporting procedures are or could be considered unreasonable. In particular, employers should focus on whether their procedures are simple, clear and accessible to employees. Employers should also create procedures that build in flexibility for employers to distinguish between excusable and inexcusable non-compliance with reporting procedures. For example, instead of imposing rigid reporting deadlines, employers should require the "reporting of work-related injuries and illnesses within a reasonable timeframe after the employee has realized that he or she has suffered a work-related injury or illness." Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29670 (May 12, 2016).

3. *Are Post-Accident Drug Testing Policies and Employee Incentive Programs Retaliatory?*

The Act prohibits employers from retaliating against employees who report work-related injuries or illnesses. OSHA has promulgated a new regulation that makes this prohibition explicit and provides OSHA with the ability to enforce the Act's anti-retaliation provision even if an employee does not file a complaint with OSHA.

According to the OSHA, whether conduct violates the new regulation turns on if the conduct "would deter or discourage a reasonable employee from reporting a work-related injury or illness." 81 Fed. Reg. 29672. Impermissible conduct may include termination, a reduction in pay, and reassignment to a less desirable position. In the commentary explaining this regulation, OSHA emphasized two categories of employer conduct that, in the OSHA's opinion, could in some cases be retaliatory: (1) post-accident drug testing policies; and (2) employee incentive programs.

a. Post-Accident Drug Testing

Although the new ant-retaliation regulation does not mention drug testing, the OSHA's commentary explaining the regulation states that the regulation "prohibit[s] employers from

using drug testing (or the threat of drug testing) as a form of adverse action against employees who report injuries or illnesses." 81 Fed. Reg. 29673. The commentary warns that liability for retaliation *may* arise if an employer mandates post-accident drug testing whenever a work-related accident or illness is reported even if the accident or illness could not have arisen from drug use, unless such testing is required under state or federal law. In the OSHA's view, such blanket drug-testing policies deter employees from reporting work-related accidents or illnesses. As a result, "drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use. For example, it would likely not be reasonable to drug-test an employee who reports a bee sting, a repetitive strain injury, or an injury caused by a lack of machine guarding or a machine or tool malfunction." *Id.* The commentary clarifies, however, that "[e]mployers need not specifically suspect drug use before testing, but there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing." *Id.*

To reduce the risk that their policy could be deemed retaliatory, employers should consider modifying their post-accident or illness drug testing policies to require drug testing only where there is a "reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness." *Id.*

b. Employee Incentive Programs

Even though the new regulation does not mention employee incentive programs (such as those that reward employees with prizes or bonuses for not having been injured), in the commentary explaining the regulation, the OSHA takes the position that such programs may violate the anti-retaliation regulation. Employers may therefore wish to instead focus on initiatives that proactively promote workplace safety, such as offering a reward for following legitimate safety rules. Alternatively, if an employer has administered a successful incentive program over a significant period of time, the employer could consult with labor counsel to determine if there are steps the employer may take to maintain the existing program without creating a dynamic where an employee who reports an injury or illness in good faith (as employers should want them to do) is automatically excluded from the benefits of such a program.

For more information, feel free to contact Charlotte Petilla or any other Hirsch Roberts Weinstein LLP attorney.

HIRSCH
ROBERTS
WEINSTEIN LLP

Sample Reasonable Accommodation Policy[1]

Ari Kristan and Catherine E. Reuben
Hirsch Roberts Weinstein LLP
akristan@hrwlawyers.com // creuben@hrwlawyers.com
(617)348-4316

The Company is committed to complying with the Americans with Disabilities Act and applicable state and local laws prohibiting discrimination in employment against qualified individuals with disabilities. The Company will endeavor to provide reasonable accommodations requested by all employees with disabilities who are otherwise able to perform the essential functions of their job. An employee seeking an accommodation should contact Human Resources.

A reasonable accommodation may include any action which enables a qualified individual with a disability to perform the essential functions of his or her position but which does not result in an undue hardship to the Company or pose a threat to the health and safety of the employee or coworkers. The Company will engage in an interactive process with the employee and determine the feasibility of the requested accommodation, considering various factors, including but not limited to, the nature and cost of the accommodation, the availability of outside resources, the overall financial resources of the organization and the accommodation's impact on the operation of the business.

The Company may require that the individual requesting the accommodation provide adequate medical certification and a job related functional assessment. It may, under certain circumstances, request and finance an independent medical examination. Also, in some instances, the Company may not approve the accommodation requested by the employee but may provide an alternate accommodation.

The employee will be informed of the decision on the accommodation request by Human Resources.

[1] This document is just a sample for educational purposes, and should not be relied on as legal advice. Consult with employment counsel before implementing this policy.

HIRSCH ROBERTS WEINSTEIN LLP

Arielle B. Kristan

Hirsch Roberts Weinstein LLP
24 Federal Street, 12th Floor
Boston, Massachusetts 02110
(617) 348-4365
akristan@hrwlawyers.com

Ari advises and counsels businesses and non-profits to assist clients in avoiding employee conflict and minimizing the risk of costly litigation. She also advises clients on compliance with federal and state employment laws, including the Fair Labor Standards Act, the Family and Medical Leave Act, the Americans with Disabilities Act, Title VII, Massachusetts leave laws, and Massachusetts General Law Chapter 151B. Ari's experience includes advising entities on subjects such as employment contracts, restrictive covenants and noncompetition agreements, and other employment-related issues. In addition, she works closely with clients to draft and review employer policies and handbooks.

As an experienced business litigator, Ari represents clients in state and federal court and before administrative agencies, including the EEOC and the MCAD. Ari understands the importance of her clients' ability to focus on their businesses. She works to efficiently obtain successful results for clients as early in the litigation process as possible through the use of motions for preliminary relief, motions to dismiss, and summary judgment.

Ari's litigation experience ranges from employment discrimination and wage and hour disputes to civil rights claims and breaches of fiduciary duty. She has particular experience in cases involving noncompetition and nonsolicitation agreements and misappropriation of trade secrets.

Education

Boston University School of Law, J.D., magna cum laude, 2009; Edward F. Hennessey Distinguished Scholar

Tufts University, B.A., magna cum laude, 2003

HIRSCH ROBERTS WEINSTEIN LLP

Catherine E. Reuben

Hirsch Roberts Weinstein LLP
24 Federal Street, 12th Floor
Boston, Massachusetts 02110
(617) 348-4316
creuben@hrwlawyers.com

Cathy Reuben provides counseling, training, and litigation defense for employers in labor and employment matters. Cathy's clients include both private and nonprofit businesses and professional organizations involved in a wide range of industries, including healthcare, education, technology, human service, building trades, manufacturing, legal and other professional services, insurance, finance/banking, hospitality and retail.

Cathy is a member of the College of Labor and Employment Lawyers. She is ranked by Super Lawyers as one of the top 50 women lawyers and top 100 lawyers in Massachusetts, and one of the top 100 lawyers in New England. She is also ranked in Chambers USA and Best Lawyers for employment law. Cathy is a frequent speaker on labor and employment law issues. She has chaired seminars and served on panels for a variety of trade, bar, and continuing legal education associations, organizations, and schools, and is an MCAD-certified trainer in harassment and reasonable accommodation.

Cathy is actively involved in a wide variety of professional and community service activities and projects. She serves on the Massachusetts Bar Association's Ethics and Education Committees, and formerly served as Co-Chair of its Labor and Employment Law Section. She received the 2014 "Commitment to Service" award from the Massachusetts Transgender Political Coalition, the 2013 MBA Community Service award, and one of the 2012 "Excellence in Diversity Awards" from Massachusetts Lawyers Weekly. She serves on the Mattapan Community Health Center Healthcare Revival Steering Committee.

Cathy received her B.A., Magna Cum Laude, in Political Science from Amherst College in 1985 and her J.D. from Harvard Law School in 1988. She has been admitted to the Massachusetts bar since 1988 and is also a member of the bar of the U.S. District Court, District of Massachusetts, U.S. Courts of Appeals for First Circuit, and U.S. Courts of Appeals for Second Circuit.

HIRSCH ROBERTS WEINSTEIN LLP

Labor and Employment Service Program

Hirsch Roberts Weinstein's Labor and Employment Service Program (LESP) is designed to help employers address labor and employment issues on a proactive basis, before they result in costly litigation, agency proceedings or other disruptions. Employers on the LESP program pay a flat monthly fee and are free to consult the firm's leading attorneys on day-to-day labor and employment issues without the worry of being "on the clock." The monthly fee also includes quarterly training and document review/updating, two important strategies to reduce legal exposure.

Telephone Consultations

Telephone consultations for advice on labor and employment law issues. Our team of attorneys can be available 24 hours a day to respond to your telephone inquiries.

Annual Review

Annual review and update of your application forms and employee handbook or personnel manual and safety policies. If your company does not have a handbook, we will provide you with a model to help you develop your own.

Training Seminars

Quarterly in-house training seminars to selected managers and supervisors, facilitated by our attorneys, and tailored to your specific needs.

Roundtable Sessions

Bi-monthly roundtable sessions allow clients from different industries to share information and learn about cutting edge topics.

OSHA Walk-arounds

Many employers present unique health and safety issues. Our attorneys are also available to lead regular OSHA "walk-arounds" to review your safety procedures and policies.

Monthly LESP Fee

The fee for the LESP starts at $2,000 per month for employers with up to 100 employees. Fees for companies with more than 100 employees will be agreed upon on an individual basis.

Fee Discount on Other Matters

Litigation, union negotiations, hearings, discrimination complaints, and other agency proceedings or special projects are not covered by the LESP but can be handled by our attorneys on a separate basis. LESP members are eligible for a 5% courtesy discount on other matters. For more information about the LESP contact any HRW attorney.