

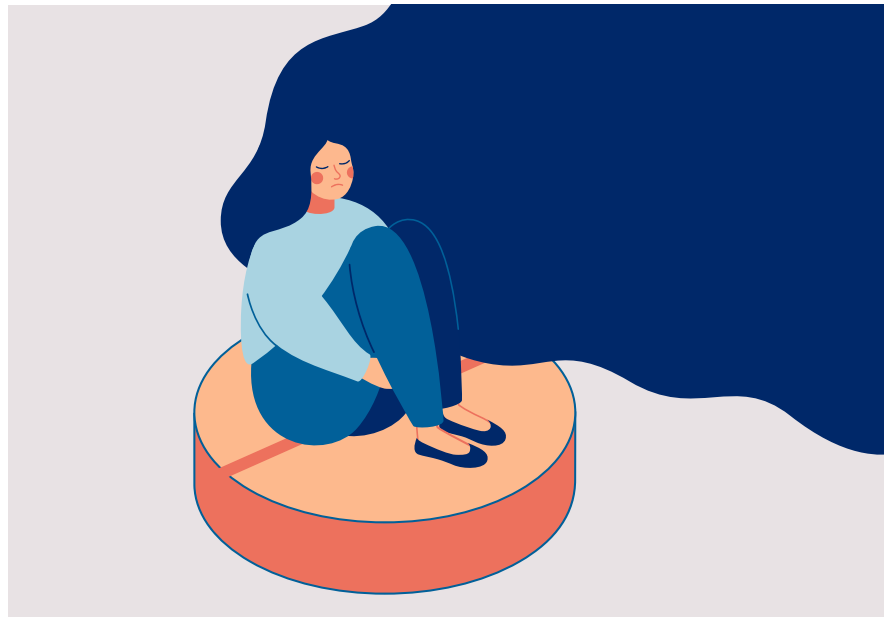
Substance Abuse In The Era Of Covid-19

| How to evaluate and implement workplace safety programs

 By **Wilson Jarrell**, Barran Liebman LLP

As we mark the two-year anniversary of the Covid-19 pandemic, many parts of the economy are optimistically beginning to reopen as the virus falls to a more manageable level. Employers are looking at fully reopening, and considering when and how to recall workers, or how a more permanent remote workforce will operate.

As employers work to figure out yet another “new normal,” it is important to acknowledge that things have changed in many ways in the last two years, and employers need to prepare for the possibility that previous policies may no longer be sufficient or appropriate for a changing workforce. In addition to figuring out how to operate their businesses and serve their customers in the safest way possible in this shifting landscape, it is important to evaluate how to implement their existing safety



programs, including drug and alcohol policies.

Unfortunately, the Covid-19 pandemic has brought to light very real problems with substance abuse, and employers should recognize that their employees may have developed unhealthy or problematic habits during

the pandemic. According to the Centers for Disease Control and Prevention, as of June 2020, 13% of Americans reported starting or increasing substance use as a way of coping with stress or emotions related to Covid-19, and many studies have shown that drug and alcohol use increased significantly in the last two years.



Although not all drug and alcohol use is problematic for every employer, in order to have the ability to properly address potential drug and alcohol use and substance abuse issues that may affect your workforce, it is important to ensure that your policies reflect how you wish to deal with these issues and provide you with the tools necessary to do so.

I. Re-evaluating Drug and Alcohol Policies

As an initial matter, now may be an excellent opportunity to re-evaluate the content of drug testing policies contained in your drug and alcohol policy, and perhaps its existence at all. With changing attitudes and legal

framework around marijuana use, many employers are moving away from pre-employment testing and focusing instead on monitoring for on-the-job intoxication, as they would for alcohol.

As our economy begins to more fully reopen, employers who are calling back employees or re-hiring for now-open positions may face some trouble finding qualified applicants, who can pass a pre-employment screen for marijuana use. Public opinion is constantly becoming more accepting of recreational marijuana use, and here in Oregon, as well as other states, marijuana dispensaries remained open during coronavirus closures

because they were considered essential businesses.

It is possible that employees and many potential employees may have turned to or continued to use marijuana as they dealt with the pandemic and its associated stress and anxiety.

Furthermore, the use of cannabidiol or CBD products, which contain a non-psychoactive compound found in marijuana and tout anti-anxiety/anti-depressant qualities, was skyrocketing prior to the pandemic, and can only be assumed to have continued to do so; in the last two years, an estimated 64 million Americans had tried such a product at least once, and one in seven of those used one every day.

Although drug tests do not commonly test for CBD (marijuana use is determined by testing for the psychoactive compound called Tetrahydrocannabinol or THC), the relatively unregulated nature of CBD products creates several possibilities for inducing a positive test for marijuana that would violate most employer's drug use policies. As a side note, many employers, who maintain drug-free workplace policies, are choosing to specifically call out in policies or notices that employees use CBD products at their own risk.

Employers that opt to modify their policies should be sure to do so indiscriminately for non-safety-sensitive positions and should consult employer counsel.

II. The Logistics of Addressing Substance Abuse in the Workforce

Eliminating drug testing programs isn't always an option. Some employers may wish to continue with their drug testing programs or may have employees in safety-sensitive positions or positions that require drug testing, like those subject to U. S. Department of Transportation regulations.

In these cases (as well as for employers carrying out post-accident or reasonable suspicion drug tests), employers should be aware that many of the facilities that they would previously send applicants and employees to for drug testing are now being used to test people for Covid-19.

Employers should be careful to not unnecessarily put their employees at risk by sending them to a location used for Covid-19 testing and be aware that state law may direct what kind of on-the-site drug testing can be administered.

Employers must ensure their policies reflect how they wish to address instances, where they believe an employee is struggling with substance abuse or violating its policies, as well as how they may be restricted in how they respond. It is worth noting that employers should exercise caution when confronting an employee about suspected drug or alcohol use or misuse absent a drug test.

There may be legitimate reasons for any perceived symptoms, and it is often best to focus any conversation on performance or conduct concerns, which may open the door for more direct and open conversations.

When an employer learns that an employee has violated its drug and alcohol policy or otherwise is struggling with substance abuse, either due to a failed drug test or an admission by an employee, there are several obvious courses of action. Some employers maintain zero-tolerance policies, and uniformly terminate any employee who fails a drug test. Others routinely offer last-chance agreements, coupled with time-off for the employee to seek treatment or drug use counseling,

which may be covered by protected leave laws.

Finally, it is worth noting that there may be legal restrictions on how an employer can react to substance abuse concerns, particularly in situations, where an employee discloses a substance abuse disorder without failing a drug test or admitting to current illegal drug use. For example, although current illegal drug use is not protected, the Americans with Disabilities Act can cover individuals with alcoholism, as well as individuals addicted to illegal drugs or prescription drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully. Situations such as this should be approached carefully, and with the advice of counsel.



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