

Turn to Last-Chance Agreements for Legal Leverage

Many employers use "last-chance agreements" to give employees one final opportunity to turn around attendance, productivity and attitude problems. Here's good news if you use last-chance agreements on employees with drug and alcohol problems: The ADA and many state laws give you the leverage to keep employees clean ... and fire them if they're not.

EAP programs are typically the initial point of contact for employees who use illegal drugs. Often, it happens like this: An employee approaches someone in HR about taking FMLA or sick leave for unspecified "problems." An EAP counselor learns about the drinking or drug problem and arranges treatment and leave. When the employee is ready to return, you require that the person sign a last-chance agreement that calls for continued participation in rehab and random drug testing. It makes clear that failure to follow the agreement means termination.

As the following case shows, last-chance agreements are legal and don't violate the ADA because they allow drug users to obtain treatment in lieu of losing a job. If the employee then doesn't follow up and is caught using drugs again, you're free to fire the person.

Recent case: Thomas Parlowe told his boss that he had an alcohol problem and was referred to the company's EAP, where he admitted to a counselor he used cocaine. Parlowe took leave and wasn't allowed to return until he signed a last-chance agreement in which he promised to stay clean and sober. Within two weeks, police found him with cocaine. The company fired him.

Parlowe filed an ADA lawsuit, arguing that last-chance agreements discriminate against people who are disabled by drug addiction, singling them out for special employment terms.

The court tossed out his case, saying that last-chance agreements are perfectly legal under the ADA and employers can fire people who break those agreements. Plus, employees who are current users of illegal drugs aren't covered by ADA's protections. (*Parlowe v. Blue Coral-Slick 50*, No. 85437 Ohio Court of Appeals, 2005)

Online resources: Read the EEOC rules on illegal drug use and last-chance agreements at www.eeoc.gov/policy/docs/guidance-inquiries.html#9 (see question 19).