

Can we fire admitted drug user, or should we offer time off for treatment?

Q. We have an employee who has been performing poorly and who has shown up for work appearing to be intoxicated. In a discussion with a manager, the employee admitted that he was currently using cocaine and it was affecting his personal and work life. We haven't done a drug test on the employee, given his admission of drug use. We want to fire the employee, but we aren't sure if the FMLA or any other law requires us to give him time off to undergo treatment?

A. If your company has distributed a written policy to employees that clearly states that an employee can be disciplined and terminated for illegal drug use, you don't need to give the employee time off under the FMLA.

Substance abuse can be a "serious health condition" entitling someone to FMLA leave for treatment. That being said, an FMLA regulation expressly provides that the FMLA does not prohibit an employer from disciplining or terminating an employee to illegal drug use under an established policy that has been clearly communicated to all employees and applied in a nondiscriminatory way. As such, you should be able to terminate the employee if your company is acting based on a clear written policy that it has communicated to its employees.

Before terminating the employee, however, you should be sure that the conduct at issue clearly violates the language of the company's policy. For example, if your policy only mentions a prohibition on illegal drug use at work and doesn't mention usage outside of work hours, you'll want to be sure you can establish the employee was under the influence of drugs at work.

In addition to the FMLA, you should also consider the impact of any other applicable laws. Current illegal drug use is not a protected disability under the federal ADA, although alcoholism and past drug addiction from which someone has recovered are protected disabilities. Given that the employee at issue has admitted current illegal drug use, he should not be protected by the ADA.

You should, however, check on whether any applicable state or local laws provide the employee with any disability discrimination protections or leave of absence rights for current illegal drug use.

Sometimes state law may depend on whether you've drug tested the employee or not, which in this case you have not. For example, Minnesota has a drug-testing law that provides that, if an employee has been drug tested and has a first-time positive test, the employee must be offered treatment before the employee can be fired.