

## **The Opioid Epidemic and Our Workplaces: Summary of Common Employment Law Considerations<sup>1</sup>**

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### **Disability Discrimination: The Americans with Disabilities Act and the Massachusetts Fair Employment Act**

The Americans with Disabilities Act (the “ADA”) and the Massachusetts Fair Employment Practice Act (the “FEPA”) protect qualified disabled individuals from discrimination and require employers to provide reasonable accommodations to qualified disabled individuals. Substance use disorder is considered a protected disability under both state and federal law.

#### **Which employers have to comply with the Americans with Disabilities Act?**

All employers with fifteen or more employees must comply with the Americans with Disabilities Act.

#### **Which employers have to comply with the Massachusetts Fair Employment Practices Act?**

All employers with six or more employees in Massachusetts must comply with the Fair Employment Practice Act.

#### **Can an employer take action against an employee based on the employee’s current illegal use of drugs?**

Yes. An employee who is currently engaging in the illegal use of drugs is not protected by the ADA or the FEPA when an employer takes action on the basis of that drug use. For example, an employer may discipline an employee for using alcohol or drugs at a worksite or coming to work under the influence of alcohol or an illegal drug.

#### **Can an employer take action against an employee based on the employee’s past illegal use of drugs?**

It depends. An employee who casually used drugs in the past, but did not develop a substance use disorder, is not protected by the ADA or the FEPA. The ADA and FEPA do protect employees who have a substance use disorder and have participated in a rehabilitation

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<sup>1</sup> This document contains a short summary of only a few of the many legal issues faced by employers dealing with the impact of the opioid epidemic in their workplaces. This summary is provided for educational purposes only and should not be relied on as legal advice. Employers should consult with counsel when faced with attendance problems, misconduct, safety violations, requests for time off and other issues arising out of drug or alcohol use by an employee or a member of the employee’s family.



program or are currently participating in a rehabilitation program and are not currently using illegal drugs. The ADA and FEPA also protect employees who are wrongly regarded as illegally using drugs.

For example, an employer may not terminate an employee because the employer finds out that the employee was participating in Narcotics Anonymous meetings. As another example, an employer may not reject a job applicant solely because the applicant was hospitalized for substance abuse related issues several years ago.

### **The Family and Medical Leave Act**

The Family and Medical Leave Act (FMLA) is a federal law that requires employers with 50 or more employees to provide eligible employees with up to twelve weeks of job-protected leave due to a serious health condition and other purposes.

#### **Which employees are eligible for FMLA leave?**

To be eligible for FMLA leave, an employee must have been employed by the employer for one year and have worked 1250 or more hours in the past year. The employee must also be employed at a worksite that has 50 or more employees within a 75-mile radius.

#### **Can FMLA leave be used for absences related to substance use disorder?**

In many cases yes. FMLA leave can be used for an employee's own serious health condition, which could include substance use disorder. FMLA leave can also be used to care for a spouse, child or parent with a serious health condition. FMLA leave can be used intermittently, for example, to attend weekly appointments at a medication assisted treatment clinic. An employee seeking FMLA leave can be required to submit medical documentation in support, and to comply with certain other notice and reporting requirements. Employers are similarly subject to certain procedural and notice requirements. Not all absences that are caused by substance abuse are necessarily protected. The Federal Department of Labor takes the position that absence because of an employee's use of a substance, rather than for treatment, does not qualify as FMLA leave. So, for example, if an employee becomes intoxicated and sleeps through her shift, that absence would not qualify as FMLA leave.

### **The Massachusetts Sick Leave Law**

Under the Massachusetts Earned Sick Time law, most workers – including temporary, part-time, and seasonal employees – are eligible to accrue and use up to 40 hours of leave per year. Workers must earn at least one hour of earned sick leave for every 30 hours worked. Employers with 11 or more employees must provide paid sick time. Employers with fewer than 11 employees must provide earned sick time, but it does not need to be paid.

**Can Sick Leave be used for absences that are related to substance use disorder?**

In some cases, yes. The law states that workers may use earned sick time if they are ill or injured or have a routine medical appointment. They can also use earned sick time for their child, spouse, parent, or spouse's parent for the same purposes.

**Can an employee be terminated for taking too many sick days?**

Massachusetts earned sick time is considered job-protected leave. An employee cannot be fired or disciplined for using it. Note also that employers can ask for a doctor's note or other documentation only in limited circumstances, such as when employee misses more than three consecutive workdays.

If an employee has used more than 40 hours of leave for purposes covered by the Massachusetts Earned Sick time law, disciplining that employee would not violate the Earned Sick Time law; however, the employee may have rights under other laws, such as the FMLA, ADA and FEPA, as discussed above.

**Drug Testing Laws**

Many Massachusetts employers require applicants and existing employees to undergo drug tests. While drug testing is generally permissible in Massachusetts, there are laws that impact how and when such tests may be administered, and how the results can be used. For example, random testing of an existing employee who is in a position that is not safety-sensitive could give rise to a claim for violation of the Massachusetts Privacy Act. As another example, if an employer does not administer drug tests in a consistent way, the employer could face claims for discrimination.

**Can an employer have a policy requiring that any employee who is in an accident be subject to a drug test?**

An employer can require post-accident drug testing, but only if there is reason to believe that the accident was caused by drug or alcohol use. Otherwise, employees would have a large disincentive to report workplace accidents.

**Can an employer have a policy that requires employees to be tested if there is reasonable suspicion that the employee is using drugs on the job?**

Yes, provided that the reasonable suspicion is based on objective factors, like slurred speech, glassy eyes, erratic behavior and the like. Unsubstantiated rumors that an employee has an alcohol or drug problem, absent any other evidence, would not be considered a reasonable basis to test an employee.



### **Practical Tips for Employers**

- Foster a company culture that encourages and supports employees to come forward if they or a family member has a substance abuse problem.
- Offer resources and benefits to support employees, including health insurance and an employee assistance plan (“EAP”)
- Implement clear and lawful policies about time off, leaves of absence, reasonable accommodations, and substance use.
- Seek guidance from professional resources when confronting issues related to substance abuse.