

**Leave Law Tip of the Month: Addiction and Leave  
What does the law say you should do about an employee with an addiction  
problem?**

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Some of you may have attended the recent Legal Day Conference sponsored by SHRM, where I spoke about dealing with opioid addiction in the workplace. One of the more vexing aspects of dealing with employees with substance abuse problems is when, and to what extent, they are entitled to leave, either as a reasonable accommodation under the Americans with Disabilities Act (ADA) or under the Family and Medical Leave Act (FMLA).

The answer, as always with leave laws, is complicated. The first thing you need to determine is what it means for an employee to have a "problem" with illegal drugs or alcohol. Has the employee voluntarily come to HR to ask for help, has the employee tested positive for illegal drugs or alcohol, or does the employee have a past problem with drugs or alcohol but successfully completed rehab?

If an employee has tested positive for illegal drugs or alcohol, she is not entitled to leave from her employer under either the ADA or the FMLA. The employer can, in its discretion, refer such an employee to a rehabilitation program in lieu of termination, but is not obligated to do so.

On the other hand, if the employee comes to HR to ask for help before he tests positive (and before he is scheduled to take a drug or alcohol test), that person's problem is considered a "serious health condition" under the FMLA and so does qualify for leave as long as other requirements of the statute are met. If the employee does not qualify for FMLA because he has not worked for the employer long enough, has used up his FMLA leave allotment, etc., he still may be entitled to leave as a reasonable accommodation on the grounds that having an addiction to illegal drugs or alcohol is considered a disability under the ADA.

An employee who has successfully completed a rehabilitation program for drug or alcohol abuse is not entitled to leave, but is entitled to the protection of the ADA as a qualified person with a disability who cannot be discriminated against in employment because of fears that she may relapse. That protection will disappear, however, if the employee does relapse by testing positive for illegal drugs or alcohol.

Lisa Krupicka's practice is focused primarily on advising and representing employers on a variety of employment-related matters, including employee handbooks, training, wage and hour issues, labor relations, and employee discipline and termination. She also advises businesses on compliance with the accessibility requirements of Title III of the Americans with Disabilities Act. Her litigation experience includes claims for race, sex, age, disability, religious and age discrimination; constitutional claims under 42 U.S.C. § 1983, Title III ADA litigation, ERISA discrimination and benefits claims, as well as wage and hour class actions. Ms. Krupicka is also a frequent speaker on employment-related topics for various professional and industry groups.

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