

# WASHINGTON STATE HUMAN RIGHTS COMMISSION

## GUIDE TO DISABILITY and WASHINGTON STATE NONDISCRIMINATION LAWS

Disability Law and Addictions



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## Disability Law and Addictions: Questions and Answers for Employers Dealing with Addiction Issues in the Workplace

Q: Is drug or alcohol use considered a disability?

A: Drug and alcohol addiction is considered to be a disability. Casual drug users or “social drinkers” are not considered to be disabled.

Q: Who is protected under the law?

A: Individuals who are in a drug or alcohol recovery program, or who have been through a drug or alcohol recovery program and are not currently using illegal drugs, are protected under the Washington Law Against Discrimination (RCW 49.60).

Q: Are current users of drugs or alcohol protected under the law?

A: Current users of illegal drugs are not protected under the law. However, alcoholics who currently drink alcohol are generally considered to be protected under the law. Alcoholics or drug users who commit crimes due to intoxication (drunk driving, disorderly conduct, providing alcohol to minors, etc.), who create unsafe working conditions, or who violate workplace rules are not protected from discipline – it is the behavior that creates the consequences.

Q: What is considered to be use of an illegal drug?

A: This is the use of any illegal drugs, as well as illegal use of prescription drugs (i.e. taking medication that is prescribed to someone else, taking medication that your doctor has not prescribed to you, or using over the amount of medication that has been prescribed.)

Q: How do I determine if someone is a “current user” of an illegal drug?

A: The Equal Employment Opportunity Commission defines this to mean that the use of an illegal drug occurred recently enough to justify the employer’s reasonable belief that drug use is an ongoing problem. Generally, periodic use during the weeks and months prior to the determination is enough. However, there is no set time limit to define current use.

Q: What questions can I ask during a job interview or on an application about drug and alcohol use?

A: You may ask if an applicant drinks alcohol, and if he or she is currently using drugs.

Q: What questions should I avoid asking during a job interview or on an application?

A: Do not ask if the applicant is a drug addict or an alcoholic, because this elicits information about the applicant's potential disability. Do not ask if the applicant has ever been in a drug or alcohol rehabilitation program.

Q: Do I need to provide reasonable accommodations for drug addicts and alcoholics?

A: As with any other disability, an employer must engage in an interactive process with drug addicts or alcoholics when the employee requests a reasonable accommodation. It is not necessary to make illegal drug use or drinking alcohol in the workplace acceptable. An employer does not need to tolerate criminal or unsafe behavior, or allow the violation of workplace rules. (For example, if a forklift operator crashes the forklift due to intoxication, the employer can discipline or terminate the employee. If a person loses use of a regular driver's license due to a drunk driving conviction, and driving is a job duty, the employer does not need to "reasonably accommodate" a criminal conviction by finding the employee a non-driving job.)

Q: What reasonable accommodations do I need to provide?

A: Usually, a leave of absence to get treatment, and time off to attend counseling or meetings. Chronic absenteeism or tardiness does not need to be tolerated, unless in connection to treatment. Again, an employer is not required to "accommodate" unsafe or criminal behavior by not taking action against an employee who engages in such behavior.

Q: What if an employee engages in workplace misconduct, but the misconduct is a result of the drug or alcohol addiction?

A: Violations of workplace rules due to substance abuse do not have to be tolerated by an employer. An employer should be prepared to show that the policy or rule that the employee violated was job-related and consistent with business necessity. If the rule or policy is job-related and consistent with business necessity, then an employer is under no obligation to allow an employee to engage in misconduct in violation of policy, even if the misconduct is caused by an addiction. Be sure to apply conduct rules and policies consistently to every employee. In addition, remember that current users of illegal drugs are not protected under the law.

Q: Can an employee avoid discipline by enrolling in a rehabilitation program?

A: If the employee violated a rule or policy that was job-related and consistent with business necessity, and if the rule or policy was applied consistently to everyone, then an

employee cannot avoid discipline by enrolling in a treatment program after the fact. If an employer disciplines or terminates an employee for behavior or conduct, and then the employee claims to be an addict and requests treatment, the employee is not protected. If the employee is a drug user, requests reasonable accommodation in the form of time off for treatment, returns to work, and then is still using illegal drugs, that employee is not protected. If an alcoholic requests reasonable accommodation in the form of time off for treatment, returns to work, and then violates a workplace rule by showing up to work under the influence, the employer should consider putting the employee on a last chance agreement, and giving the employee the opportunity to go back to treatment.

However, if an employee violates a workplace rule or policy, and prior to discipline or other action by the employer, discloses an addiction and asks for a reasonable accommodation of time off to go to a treatment program, then the employer must reasonably accommodate the employee, and cannot discipline the employee after the employee discloses the disability and asks for reasonable accommodation.

Q: What policies regarding drug and alcohol use can I put into place?

A: You can have policies that prohibit the use of illegal drugs and alcohol at the workplace, prohibit employees from being under the influence of illegal drugs or alcohol during work hours or while on-call, and prohibit employees from being under the influence of legal drugs that would impair performance or risk safety. You do not have to employ current users of illegal substances.

Employees who take legal prescription drugs that could impact their work may need to be provided with a reasonable accommodation. For certain types of jobs, there may be state or federal regulations that require drug testing. Following accidents, for certain types of jobs, such as those in the transportation field, post-incident drug testing is required.

Even though recreational marijuana use may be legal in Washington, it is still illegal under federal law, and employers can decide to prohibit employees from using marijuana or to not hire persons who test positive for marijuana use.

Q: If I suspect an employee of drug use or alcohol abuse, can I ask if they use drugs or abuse alcohol?

A: This can be risky to do, because you may then be placing yourself in the situation of “regarding” the employee as disabled, which could place the employee in a protected category. If you decide to confront the employee, do so only if you have documented, objective, and verifiable proof of the drug use. No civil rights law requires you to tolerate or ignore or avoid reporting illegal drug use or driving under the influence of alcohol to law enforcement authorities.

Q: What do I do if an employee comes to me with a drug or alcohol issue?

A: Do not immediately assume that the employee is an addict, and do not refer to the employee as disabled. Gather more facts, thank the employee for being open and honest,

and ask what the employee is requesting from you. If the employee requests reasonable accommodation, begin the interactive process with the employee.

Q: What questions can I ask the employee about treatment and what medical documentation can I request?

A: You may ask for medical information from the employee's medical provider verifying that the employee has a disability that requires time off to attend treatment, counseling, or meetings. You can verify the dates and length of the treatment. You may also ask for verification from the medical provider that the employee is ready to return to work.

Q: What do I do if an employee uses medication for his or her disability?

A: Some medications have side-effects that may cause drowsiness or impair job performance. Employers should try to accommodate these conditions. However, the employer can prohibit the employee from performing certain job functions for safety purposes. These may include use of machinery and driving. An employee must be able to perform the essential functions of the job with or without reasonable accommodation. An employee in this situation may need a re-assignment to another job or medical leave.

Q: What do I do if an employee needs to self-administer legal prescription drugs in the workplace?

A: The employer should accommodate these needs. An example of such an accommodation would be to allow the employee to have his or her break time at the same time that he or she needs to self-administer the medication, and providing the employee with a private place to do so.

Q: What if I have an employee or applicant who fails a random drug test, and then shows me that they have a medical marijuana card?

A: In *Roe v. Teletch*, 171 Wash.2d 736 (2011), the Washington State Supreme Court held that the Washington State Medical Use of Marijuana Act does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use. An employer can still enforce its drug use policy against the user of medical marijuana. Marijuana is still an illegal substance under federal law.

If you need additional information, have additional questions, or wish to have training for your organization, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on this and other civil rights issues can be found on our website at [www.hum.wa.gov](http://www.hum.wa.gov). This document does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.

