

Substance Abuse Self-Disclosure Policy



Many companies require workers to self-disclose their alcohol/drug problems on a non-disciplinary basis. The idea: Recognize that substance abuse is a problem, not a form of misconduct, and get workers who come forward voluntarily the help they need. Then if workers don't take the offered amnesty and later get caught using impairing substances, you can discipline them.

Although a recent Canadian Supreme Court called [*Stewart v. Elk Valley Coal Corp.*](#), 2017 SCC 30, [2017] 1 S.C.R. 591, recognizes the general legality of that approach, your policies must apply it very carefully. It comes down to a balance between your interest in workplace safety and the worker's privacy and right to accommodations.

- Rule 1: The policy must be not only necessary to ensure safety but carried out in the least privacy-intrusive way possible.
- Rule 2: The policy must accommodate workers' disabilities (remember that drug/alcohol dependency and addiction are 'disabilities' under human rights laws) to the point of undue hardship.

Is Your Policy Up to Snuff'

How can you tell if your own self-disclosure policy is legal'

To help you make that determination, we've looked at actual cases where courts and arbitrators applied the above rules to evaluate the legality of such policies. We then rolled the common problems that caused a policy to fail scrutiny into a fictional Model Substance Abuse Self-Disclosure Policy, a policy from hell demonstrating the pitfalls you need to avoid.

Your assignment: 1. Look at the policy and identify as many of the problems as you can. 2. Check out the [analysis](#) of these problems in OHS Insider. 3. Consider the Model Policy Corrected Version below.

BEFORE: The Substance Abuse Self-Disclosure Policy from Hell

1. Scope: This Policy applies to all ABC Company workers regardless of job, job title or employment-status.

2. Duty to Disclose: Workers must notify their supervisors if they currently use or have used drugs, alcohol and other impairing substances in the past 6 years.

3. Independent Medical Exam (IME): Upon disclosure, workers will be removed from duty, placed on leave and required to undergo an IME conducted by an addictions specialist selected by ABC Company. If the IME finds the use is related to an addiction or dependency, the worker will be offered reasonable accommodations, medical assistance and support designed to ensure his/her return to work as quickly as possible; if the IME finds the use to be recreational, the worker will be subject to discipline in accordance with the ABC Company Discipline Policy.

4. Return To Work: Workers may return to work upon completing the following rehabilitation, treatment and monitoring conditions:

(a) Abstention from drug and alcohol use during the return to work process;
(b) Completion of a prescribed treatment program consisting of: i. attending at least ____ Alcoholics/Narcotics Anonymous meetings per week over a _____ period; ii. maintaining regular and meaningful contact with an AA/NA sponsor; and iii. completing any 12-step program the sponsor recommends.

(c) Passing of random drug/alcohol tests every 2 weeks during the return to work process.

(d) Undergoing second IME that determines he/she no longer has an addiction or dependency and is ready to return to work.

5. Last Chance Agreement: After fulfilling the above return to work conditions, the worker will be reinstated after signing a Last Chance Agreement promising to adhere to his/her treatment program, submit to random testing and agree that any further alcohol/drug violations will result in termination.

[Click here](#) for a breakdown of all the problems in the Model Policy.

AFTER: Corrected Version of Substance Abuse Self-Disclosure Policy from Hell

1. Scope: While all individuals who are employed by or carry out business on behalf of ABC Company are required to arrive at work fit for duty and perform their assigned duties safely and responsibly without any limitations due to inappropriate use or after-effects of use of alcohol, drugs, medications or other intoxicating substances, both legal and illegal, the provisions of this Policy apply to workers that perform safety-sensitive jobs.

2. Duty to Disclose: Workers must notify their supervisors if they:

- * Currently use drugs, alcohol and other impairing substances;
- * Have a current addiction to or dependency on drugs, alcohol and other impairing substances; and/or
- * Have had a previous addiction to or dependency on drugs, alcohol and other impairing substances in the previous 6 years.

3. Independent Medical Exam (IME): Upon disclosure, workers will be temporarily removed from duty pending a medical examination to determine if they have an addiction or dependency. Where such a determination cannot be made quickly, workers will be placed on leave and required to provide medical information about their condition from their primary care doctor. Where such information is not sufficient to make a definitive determination, the worker will be asked to undergo an IME conducted by an addictions specialist that is mutually acceptable to both Company ABC and the worker. If the IME finds the use is related to an addiction or dependency, the worker will be offered reasonable accommodations, medical assistance and support designed to ensure his/her return to work as quickly as possible; if the IME finds the use to be recreational, the worker will be subject to discipline in accordance with the ABC Company Discipline Policy.

4. Return To Work: Workers may return to work upon completing the following rehabilitation, treatment and monitoring conditions:

- (a) Abstention from drug and alcohol use during the return to work process;
- (b) Completion of a treatment program to be created after an individualized assessment of the worker's condition, circumstances and needs, which may consist of: i. attending at least a set number of Alcoholics/Narcotics Anonymous meetings per week over a stated period; ii. maintaining regular and meaningful contact with an AA/NA sponsor; and iii. completing any 12-step program the sponsor recommends.
- (c) Passing of random drug/alcohol tests every 2 weeks during the return to work process.

5. Last Chance Agreement: After fulfilling the above return to work conditions, the worker will be reinstated. If the worker has a history of disciplinary, performance or other workplace problems, including problems related to his/her addiction or dependency, the worker will be required to sign a Last Chance Agreement promising to adhere to his/her treatment program, submit to random testing and agree that any further alcohol/drug violations will result in discipline up to and including termination.

Fitness for Duty Policy

1. POLICY STATEMENT

ABC Company recognizes that employees who use or are impaired by drugs or alcohol while performing work endanger not only themselves but their co-workers and others affected by the work. ABC Company's policy with regard to such conduct is one of zero tolerance and employees must be aware that any violations they commit may result in disciplinary action up to and including termination.

However, ABC Company also recognizes that addiction to drugs or alcohol is a serious health problem. The intent of this Policy is to accomplish the health and safety goal in a manner that is fair, humane and consistent with employees' accommodation rights under discrimination laws. The ultimate goal is not to punish but to help employees identify and get help for their substance abuse issues so that they can return to work healthy, safe, happy and productive.

2. PURPOSE

The purpose of this substance abuse policy is to ensure that all employees report to work fit for duty as part of its duty to ensure the health and safety of persons at or near the workplace under the [*insert name of your jurisdiction's occupational health and safety act*] (OHS Act).

3. SCOPE

This Policy applies to all individuals that work for ABC Company including but not limited to full-time, part-time, temporary and contract employees, independent contractors, volunteers and employees of third party contractors or subcontractors that ABC Company engages to perform work at its facilities.

3.1 Union Employees

This Policy applies to both union and non-union employees but is not intended to supersede or circumvent the provisions of any current collective agreement that ABC has negotiated with

an employee's union. In the event of a conflict between this Policy and a collective agreement, the latter shall control.

3.2 Contractor Employees

This Policy applies to individuals employed by contractors and subcontractors that perform work at ABC Company facilities but is not intended to supersede or circumvent the provisions of any current collective agreements that those contractors or subcontractors have negotiated with their own workers and their unions. In the event of a conflict between this Policy and a contractor employment agreement or collective agreement covering the worker, the latter shall control.

4. DEFINITIONS

For purposes of this Policy:

- **“Drugs”** includes:
 - Narcotics and illegal drugs;
 - Marijuana whether used or obtained legally or illegally; and
 - Legal prescription and over-the-counter medications and drugs that cause or have the potential to cause impairment and render an employee not fit for duty.
- **“Fit for duty”** means a state of physical and mental that allows an individual to perform his or her job duties safely and effectively without impairment due to the use of or after-effects of alcohol, illegal drugs, legal medications or other health conditions.
- **“On duty”** includes reporting for and performing work, including:
 - Scheduled work;
 - Unscheduled call-in work;
 - Work performed on ABC Company facilities;
 - Work performed for ABC Company away from Company facilities, including but not limited to driving

or traveling to and from work.

- **“Safety-sensitive job”** means positions that have a direct and substantial impact on the health and safety of the employee, other workers, customers, visitors, the public, property and/or the environment, including but not limited to those involving driving, operation of machinery or equipment, handling of toxic substances and others determined by ABC Company.
- **“Substance abuse”** means the use of alcohol, illegal drugs, legal marijuana and medications and other substances that can impair a person’s judgment, clarity and functioning and render him/her not fit for duty.

5. EMPLOYEE RESPONSIBILITIES

All employees and workers covered by this Policy are required to:

1. Come to work fit for duty;
2. Take reasonable care to protect the health and safety of themselves and others at the workplace at all times while on duty as required by the OHS Act;
3. Refrain from using or being impaired by alcohol or drugs while they are on duty;
4. Refrain from possessing, purchasing, selling, distributing or engaging in any other conduct involving alcohol or illegal substances or paraphernalia while they are on duty;
5. Refrain from misusing or being impaired by prescription or non-prescription drugs while they are on duty;
6. Notify their supervisor if they suspect that a co-worker is unfit for duty; and
7. Submit for drug and alcohol testing in accordance with the ABC Company Testing Policy.

6. LEGAL MARIJUANA

6.1 No Exemption for Legal Marijuana Use

All employees must understand that marijuana is an impairing drug and that using it at work or coming to work high renders them unfit for duty in violation of this Policy. This is true regardless of whether their use of marijuana is legal.

Being impaired at work is NEVER legal regardless of the legality of the impairing substance used!

6.2 Employee Duty to Notify

Employees must notify their supervisor if they are using legally prescribed medical marijuana or other legal prescription and non-prescription drugs that may cause impairment for the treatment of a medical condition. Off-duty and legal use of such drugs does not violate this Policy as long as employees are fit for duty at all times when they are on duty.

7. ABC COMPANY SUPPORT FOR EMPLOYEES WITH SUBSTANCE ABUSE ISSUES

Although ABC Company reserves the right to discipline, it also recognizes that addiction and substance abuse is a health problem. ABC Company is prepared to help employees get the counselling, treatment, rehabilitation and support they need to overcome those problems. *[Describe your organization's Employee Assistance Program or other resources or programs for helping employees with substance abuse issues.]*

8. SELF-REPORTING

ABC Company strongly encourages employees with substance abuse problems to step forward and request help voluntarily. *[Describe your organization's procedures for responding to self-report requests for help.]* Employees who do self-report will not be subject to discipline as long as they have complied with their obligation to be fit for duty under this Policy.

9. FITNESS FOR DUTY MEDICAL ASSESSMENT

Employees must undergo medical assessments to ensure they are fit for duty before being placed in a safety-sensitive job. Assessments will address substance abuse and be performed:

- Prior to employment when individuals are applying for safety-sensitive jobs;
- Before current employees are transferred from non-safety-sensitive to safety-sensitive jobs; and
- Periodically for as long as the employee remains in a safety-sensitive job.

Medical assessments will be performed by qualified healthcare professionals following appropriate medical practices and results will be kept confidential to the extent required by personal privacy laws.

10. DISCIPLINARY INVESTIGATIONS

ABC Company may open a disciplinary investigation to check whether an employee is engaged in substance abuse or otherwise in violation of his/her fitness for duty obligations under this Policy in response to:

- Complaints or concerns by co-workers, supervisors, etc.;
- Declining performance;
- Erratic behaviour;
- Involvement in safety incidents including near misses;
- Arrests for impaired driving, drug offences and similar violations; and
- Other indications that the employee has substance abuse issues or is otherwise not fit for duty.

Investigations will be carried out in accordance with ABC Company's Disciplinary Investigation Procedures.

11. DRUGS & ALCOHOL TESTING

Employees may be tested for alcohol and drugs in accordance

with ABC Company's testing policies. *[List the conditions for testing under your organization's own testing policies. Be sure to address: i. Alcohol and drug testing; ii. Safety-sensitive and non-safety-sensitive employees; and iii. Random and for-cause/post-incident testing.]* Supervisors will escort employees to the screening site for testing. Refusal to submit to testing will be grounds for immediate termination under this Policy.

12. EMPLOYEE PRIVACY RIGHTS

ABC Company recognizes that test results and related information is protected personal information under privacy laws and will keep it confidential and secure and refrain from using or disclosing it except as permitted or required by law.

13. CONSEQUENCES OF VIOLATIONS

Violation of this Policy is grounds for discipline up to and including termination in accordance with the ABC Company Progressive Discipline Policy. Employees with substance abuse issues on administrative leave may also be referred for counselling or assistance through the ABC Company Employee Assistance Program or outside agencies.

14. ASSISTANCE & REINSTATEMENT

ABC Company reserves the right to place employees with substance abuse issues on administrative leave and enter into Last Chance Agreements offering them the opportunity to return to work if they successfully complete the terms of their treatment and rehabilitation program, pass drug and alcohol tests and meet other conditions of reinstatement.

15. EMPLOYEE RIGHT TO ACCOMMODATIONS

ABC Company recognizes that drug and alcohol addiction is deemed a disability under the *[insert name of your jurisdiction's human rights act]*. Accordingly, in administering the disciplinary and other provisions of this

Policy, addictions and other substance abuse related to disabilities, such as use of medical marijuana or prescription drugs for chronic pain and debilitating conditions, will be treated as non-culpable violations and employees will be offered reasonable accommodations based on their individual circumstances and capabilities to the point of undue hardship.