



## Legal Considerations

### ADA, HIPAA AND OTHER LEGAL AND REGULATORY CONSIDERATIONS

Protecting confidentiality and preventing discrimination are critically important when developing drug free workplace programs (DWFPs), to protect both the employer and the employee.

Key points:

- Sensitive information (testing results, medical communications, and other communications relating to an employee's potential substance use or substance use disorder) should be stored in a secure location so that they are only accessible to those who need to know; they should be made available only with the written consent of the employee in question, or if required in court or other legal proceedings
- Supervisors should be trained on when they can and cannot disclose information about employees' use or alleged use of a substance prohibited in the DFWP
- Employees should be made aware of all elements of the program – while typically done during onboarding at beginning of employment, consider requiring a yearly review for each employee to ensure thorough understanding of the DFWP (policies, procedures and consequences) as well as their rights

When developing your workplace policies and procedures, it is essential to work with an attorney or legal counsel who is experienced in these specific areas. Different policies may have requirements that must align with federal, state, local, union and/or industry regulations.

### Key acts and policies

#### Americans with Disabilities Act (ADA)

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ADA<sup>1</sup> is civil rights legislation that prohibits discrimination and guarantees that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life, including employment opportunities. To be protected by ADA, one must have a disability, defined as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.

ADA does not specifically name all of the impairments that are covered, though substance misuse disorders (addiction) are generally considered disabilities under ADA. The ADA as it pertains to opioid use or opioid use disorder, is complicated. Some people who misuse opioids may be using illegal opioids, and illegal drug use (even in the event of a relapse) is *not* protected under ADA. Always obtain legal counsel when a situation arises.

### Health Insurance Portability and Accountability Act (HIPAA)

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Among many provisions, HIPAA<sup>2</sup> sets standards for the protection of individually identifiable health information by health plans, health care providers and other entities that have access to health information.

The HIPAA Privacy Act<sup>3</sup> sets boundaries on the use and release of health information and records and gives patients more control over their health information. For employers, this means that you can ask for a doctor's note or other health information if needed for sick leave, workers' compensation, wellness programs or health insurance. However, you cannot ask a health care provider directly for information about an employee<sup>4</sup>. The provider cannot give out employee information without prior authorization unless other laws require them to do so.

### Other laws, acts and regulatory considerations

There are other federal, state and municipal laws and authorities<sup>5</sup> to be aware of when constructing a DFWP.

- US Department of Transportation has its own set of regulations
- National Labor Relations Act (NLRA)
- Occupational Safety and Health Act
- Family Medical Leave Act
- Controlled Substances Act
- Mental Health Parity Act
- State and municipal level employment law
- Union regulations
- Workers' compensation regulations

Learn more at:

[American with Disabilities Act](#)

[10 Steps for Avoiding Legal Problems](#) from Substance Abuse and Mental Health Services Administration

[Information Related to Mental and Behavioral Health, including Opioid Overdose](#) from hhs.gov

[How HIPAA Allows Doctors to Respond to the Opioid Crisis](#)

[You can also reach out to the Department of Labor at](#) (866) 4-USA-DOL, the Equal Employment Opportunity Commission at (800) 669-4000, or your local EEOC office for further guidance.

### Legal Implications

Every component of the DWFP must:

- Be developed in partnership with the organization's legal advisers
- Safeguard employee confidentiality
- Comply with federal, state and local regulations, including but not limited to OSHA, the Americans with Disabilities Act, Mental Health Parity Act and HIPAA
- Comply with company, union and industry regulations

The Opioids at Work Employer Toolkit has been developed to raise awareness with businesses about how to respond to the risks associated with the misuse of opioids and other drugs. The content is meant for educational purposes only and not for the purpose of providing legal advice or replacing the work needed to develop a responsible drug-free workplace program. As such, it should not be used as a substitute for consultation with a legal professional, or other competent advisor.

*Medical advice and information in this document were approved by NSC physicians who advise the Council on our substance use harm initiatives. These doctors also are members of the [NSC Physician Speakers Bureau](#).*

<sup>1</sup> Introduction to the ADA. (n.d.). Retrieved August 1, 2019, from [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm)

<sup>2</sup> HHS Office of the Secretary, Office for Civil Rights, & Ocr. (2017, June 16). HIPAA for Professionals. Retrieved August 1, 2019, from <https://www.hhs.gov/hipaa/for-professionals/index.html>

<sup>3</sup> HHS Office of the Secretary, Office for Civil Rights, & Ocr. (2017, June 16). HIPAA for Professionals. Retrieved August 1, 2019, from <https://www.hhs.gov/hipaa/for-professionals/index.html>

<sup>4</sup> HHS Office of the Secretary, Office for Civil Rights, & Ocr. (2017, June 16). HIPAA for Professionals. Retrieved August 1, 2019, from <https://www.hhs.gov/hipaa/for-professionals/index.html>

<sup>5</sup> Dose Of Reality For Employers - Module 2: Laws and Authorities Impacting Your Drug Free Workplace Program. (2019). Retrieved August 1, 2019, from [https://s3.us-east-2.amazonaws.com/ohiochamber/Module 4/story\\_content/external\\_files/Module 2 - Laws and Authorities Impacting Your DWFP Program.pdf](https://s3.us-east-2.amazonaws.com/ohiochamber/Module 4/story_content/external_files/Module 2 - Laws and Authorities Impacting Your DWFP Program.pdf)