



Recovery Agreements and Last Chance Agreements – A Double Edged Tool

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What's in a name?

○ Recovery Agreements

- Between the employee/client and the EAP
- Non-compliance indicates problem with motivation and need to redirect
- Abstinence Support Agreements
- Statement of Expectations

Last Chance Agreements

- Between the employer and the employee
 - EAP/SAP recovery agreements part of LCA, includes condition of employment (COE)
 - non-compliance results in termination
 - Return to Work Agreements
- Alcohol, drugs, harassment, threats, unsafe acts, etc

Appropriate Role?

- EAP
 - Recovery agreement defined by EAP
 - Last chance agreement defines role of EAP
- SAP
 - Beyond the regulatory definitions, defined by agreement with employer



Appropriate Role?

- Treatment recommendations
 - Continuing care recommendations
 - Compliance monitoring
-
- Does your EAP policy have “no penalty” language



Legal Implications

What can an employer require? Can an employer discipline for off duty behavior? Should they? Can an employer regulate off duty behavior? Should they? If an employer requires treatment/counseling is the employer acknowledging a mental health condition that triggers a disability protection?



Legal Implications

- ADA - Does an employer's required referral to an EAP create the perception of a disability covered by the ADA?



Legal Implications

- July 19, 2000 (19 NDLR Para. 31) “ It is unlikely that a mere referral to an EAP, by itself, would be sufficient to establish that an employer treated an individual as having a substantially limiting impairment. Simply referring someone to the EAP probably would not constitute regarding the person as having a substantially limiting impairment if the employer routinely referred people to the EAP for reasons unrelated to impairments.



Legal Implications

- Question to the EEOC “whether an employer may give an employee who has experienced conduct or performance problems the option of following recommendations, including treatment, of a required referral to an EAP in lieu of discipline such as probation or termination?”



Legal Implications

- The EEOC strongly endorsed last-chance agreements and employers may, but do not have to, offer last chance agreements to employees who perform poorly or engage in misconduct because of alcoholism, an ADA- covered disability



Legal Implications

- “Employers may not force the individual with a disability to choose between treatment/EAP participation and discipline in situations where other (non-disabled) employees would not be disciplined

Legal Implications

- *Marrari v. WCI Steel Inc.*, CA 6 MP/96-4195, 1997 An employee was rehired following two incidents involving alcohol. He entered into a last chance agreement that included testing. If he tested positive he would be terminated. He tested positive and was terminated. He sued under the ADA claiming that he was fired for alcoholism an ADA protected disability. The court upheld the agreement, ruling that he was not fired because of his disability but because of failure to abide by the agreement

Legal Implications

- Washington State Ferries. An employee was terminated for poor performance. A year later he applied for reinstatement indicating his willingness to enter into a last chance agreement. He was sent to the EAP to be evaluated and to draw up recommendations. A UA was requested. He failed to produce a sample and the WSF modeled their response after the DOT dealing with this as a refusal to test. He was not reinstated.

Legal Implications

- A year later he sued for breach of confidentiality. Releases were in place and he lost the case. He appealed several more times up to the Court of Appeals level where the attorney pointed out that the WSF policy stated that “action shall not be taken against any state employee for participation or nonparticipation in EAP”. This triggered concern about EAP participation in last chance agreements and monitoring last chance agreements

Legal Implications

- Graham v Long Island Railroad – Employee terminated for positive test reinstated on last-chance agreement. Two months later he tested positive and was terminated. Filed a lawsuit under the Civil Rights Act claiming that others on last chance agreements were given second and third “last-chances” due to race. Court found that terms of all of the last chance agreements were absolute and required termination – in the event of unsatisfactory attendance or non-compliance with the EAP. Because the conditions imposed were the same, as far as the court was concerned, poor attendance was as serious a violation of a last chance agreement as a failed alcohol test.



Components of LCA

- COE
- Required participation in EAP/Compliance with Recovery Agreement
- Releases
- Testing
- Costs
- Comply with work rules – including drug and alcohol use
- Appeal rights
- Term
- Consequences



Components of Recovery Agreement

- First Person/Responsibility
- Does not interfere with right to discipline
- Does not guarantee employment
- Comply with treatment recommendations
- Continued involvement with EAP
- Continuing care recommendations
 - 12 step participation
- Continuing care group



Components of Recovery Agreement

- Abstinence agreement
- Regulating legal off-duty behavior
- Alcohol and drug testing
- Correct job performance problems
- Applicable periods – leaves, vacations
- Length – one year, two years, five years, length of employment - COE



Monitoring Compliance

- Access to PHI (HIPAA)
- EAP Credibility – Are you willing to take a stand – Is the client following recommendations?



Reporting Non-Compliance

- What constitutes non-compliance?
 - Slips?
 - Relapse?
 - Missing Meetings?
 - Positive Tests?
 - Struggling but engaged in the process?



Reporting Non-Compliance

- “ I do believe this person may get well. It just isn't going to happen on our time line. We've done what we can/should do at this point. He is unwilling or unable to...”

Reporting Non-Compliance

- “You have no right to tell my supervisor I haven’t been following through.” “ I have both the right and the obligation. You (the employee) committed to certain steps you would take as a condition of continued employment. You have decided not to take those steps. I am simply putting into words what you have told me through your actions. You have breached your COE, that’s a decision you have made. You have placed yourself at the point of job jeopardy.”



Do RA/LCAs Work?

- Doubts in HR
- Clinical Doubts
- Strengths of Deterrence
- Clear Expectations and Consequences



Discussions in Your EAP

- EAP Philosophy
- EAP Role
- Responsibility To Employer
- Responsibility to Employee
 - Protection
 - Recovery
- Standard Application
- Legal Review