Using Recovery Agreements

Although some EA professionals oppose requiring an employee to use an EAP, agreements to this effect can provide a structured opportunity to improve a worker's performance.

by Tamara Cagney, RN, M.F.T., CEAP

Although employee assistance professionals have used recovery agreements for many years, there is little consensus within our industry regarding what they should say or even whether they should be used. The traditional recovery agreement is a written agreement between the employee/client and the EAP that outlines a program of abstinence maintenance. This type of agreement is also known as an abstinence support agreement or a statement of expectations.

Recovery agreements differ greatly from return-to-work agreements (RTWAs), which generally are between the employer and the employee and are initiated by employers to address issues involving alcohol, drugs, harassment, threats, unsafe acts, and so on. EAPs define recovery agreements, whereas RTWAs define the role the EAP is to play. Many RTWAs are considered a condition of employment, meaning noncompliance can result in termination. For this reason, RTWAs also are known as last-chance agreements (LCAs).

The wording of a recovery agreement or references to an EAP within an RTWA will vary widely from EAP to EAP. Many agreements use formal legal language referring to "the employee," while others are written in the first person and stress personal responsibility (e.g., "I am requesting that I be considered for a return to work following an alcohol and/or drug rule violation. My employer has given me an opportunity for rehabilitation and has agreed..."). Most recovery agreements contain requirements to comply with treatment recommendations, continue involvement with the EAP, participate in continuing care initiatives, and attend 12-step meetings if substance abuse is the issue.

There has long been disagreement within the EA field over whether EAPs should be involved in either recovery agreements or return-to-work agreements. The idea of requiring an employee to work with an EAP is antithetical to many EA professionals, but some see these agreements as appropriate alternatives to termination that provide poorly performing employees a structured opportunity to change their behavior.

Many EA professionals also have expressed concern about monitoring compliance with these agreements and how this might change the role and reputation of the EAP. For example, if an employee fails to adhere to the commitments of a recovery agreement, what are the consequences? If an employee violates an RTWA, who gets the report of non-compliance and what are the repercussions?

THE ISSUE OF NON-COMPLIANCE

If an EAP is to be involved in the implementation of a recovery agreement, RTWA, or LCA, the affected EA professionals will need to know how compliance will be ascertained. This is not as clear a question as those outside our field would like it to be, and how the EAP handles this question will reflect on the program's credibility. Are you, as an EA professional, willing to take a stand and help the employer determine if the employee is following recommendations? Some EA professionals feel it is our responsibility to help the employer with this difficult part of managing the troubled employee and that we should not back out when the process reaches this point.

If an EA professional determines that an employee is not adhering to a recovery agreement or RTWA, how and when does s/he report non-compliance?

First and foremost, however, we must determine what constitutes noncompliance with a recovery agreement or RTWA. Like many aspects of our profession, this is rarely a black-and-white issue. A positive drug test is an easy call, but what about a "slip" that is immediately addressed? What about not attending 12-step meetings because of the all-too-frequent struggle with the spiritual aspects of the program? These questions, difficult to answer in and of themselves, loom even larger when the consequence

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of non-compliance can be termination of employment.

Many recovery agreements and RTWAs contain abstinence requirements that include all mood-altering substances for the length of the agreement, even if the identified problem was solely alcohol or a specific drug. Most agreements also cover off-duty use, but there is lively debate within our profession about regulating off-duty behavior. If abstinence is part of the agreement, the consequences of a low-level positive test or an off-duty DUI conviction need to be explored and discussed. Policies regarding the use of prescription medications also need to be clarified.

If an EA professional determines that an employee is not adhering to a recovery agreement or RTWA, how and when does s/he report non-compliance? One EA professional, when asked whether an employee was complying with an agreement, reported to management, "I do believe this person may get well, it just isn't going to happen on our timeline. We've done what we can/should do at this point. He is unwilling or unable to [comply with the agreement]."

EA professionals who report non-compliance with a recovery agreement should be prepared for the employee to say, "You have no right to tell my supervisor I haven't been following through." A proper response would be, "I have both the right and the obligation. You 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."

LEGAL IMPLICATIONS

EA professionals should also be aware of the many legal ramifications of EAPs participating in recovery agreements and RTWAs. For example, in 2000 the Equal Employment Opportunity Commission looked into whether last-chance agreements that mandate an employee's participation in the EAP create the perception of a disability covered by the Americans With Disabilities Act. In an opinion letter, the commission ruled, "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."

Another question addressed by the EEOC was whether an employer may allow an employee who has experienced conduct or performance problems the option of following recommendations (including treatment) or participating with an EAP in lieu of discipline, such as probation or termination. The EEOC strongly endorsed last-chance agreements but cautioned that employers "may not force the individual with a dis-

One of the many places where the issue of EAP involvement in recovery and return-to-work agreements is being debated is the discussion board at EAPManager.com. Following are excerpts of comments that have been posted on the site:

"A formal supervisory referral is supportive of the improvement process. This type of referral is made by a supervisor when the work performance problem has reached a point of known job jeopardy of the employee—in that the employee's work performance has deteriorated to a point of severe concern by the organization. One of the more effective means of implementing a formal supervisory referral is through a work agreement specifying improvement expectations and the agreement to seek assistance through the EAP.

The setting for discussing the continuation and the concern of the organization over the employee's problematic pattern of work is the supervisor-employee conference. The focus of this meeting is on work performance expectations and concerns and on the status of how well the employee is demonstrating improvement. During the conference the supervisor should refer the employee formally to the EAP—suggesting that the organization is offering a formal opportunity to the employee to initiate EAP services which are supportive of helping the employee in the improvement process.

Three aspects of the referral need to be stated to the employee by the supervisor at the time of the referral:

(1) Specify the length of time for the employee to contact the EAP and take advantage of the opportunity;

(2) Stipulate that the employee will need to authorize the necessary releases of information as part of the referral, such that the EAP can report to the supervisor on following through on the EAP-recommended program (e.g., attendance and program progress); and

(3) Emphasize the importance of following all aspects of the recommendations of the EAP."

—Bob Bruner, CEAP

"One EA professional said, 'When our company places employees on conditional employment agreements, there has always been basis for termination or a serious issue of impairment impacting performance. In that event, EAP participation is part of the agreement, and the company must decide if non-attendance is a basis for termination. Our job is to report compliance.'

Rarely, in my experience, is EAP participation alone the only factor for companies to consider. Much of it appears to be rooted in the clarity and structure you lay out for the understanding of what the conditioned employment agreement requires and what action will be taken if noncompliance occurs.

Our EAP also asks participants to sign a very specific service agreement outlining participation with the EAP, missed appointments, what absences can be excused, and re-scheduling procedures. If this is not being followed after agreement with both parties, then we must assess meaning and intervene."

—Bonnie Brown

ability to choose between treatment/EAP participation and discipline in situations where other (non-disabled) employees would not be disciplined."

As for court decisions, EA professionals considering participating in RTWAs and LCAs should review *Marrari v. WCI Steel Inc.* (6th Circuit, 1997). In this case, an employee was rehired following two incidents involving alcohol abuse. He entered into a last-chance agreement that stipulated he would be terminated if he tested positive. After he tested positive and was terminated, he sued his employer, claiming he was fired for alcoholism, an ADA-protected disability. The court upheld his termination, ruling that he was fired not because of his disability but because of failure to abide by the agreement.

A recent case, *Fosmo v. Dept. of Personnel*, involved an employee of the Washington State Ferries who was terminated for poor performance. A year later he applied for reinstatement and indicated he would be willing to enter into a last-chance agreement. He was sent to the EAP to be evaluated and to draw up recommendations for the agreement. The EAP requested a urine analysis, but the man failed to produce a sample. Using the model established by the U.S. Department of Transportation, the WSF deemed this a refusal to test and did not reinstate him.

One year later, the employee sued for breach of confidentiality but lost the case. He appealed, arguing that WSF policy states that "action shall not be taken against any state employee for participation or nonparticipation in EAP." This triggered concerns about EAPs participating in and monitoring last-chance agreements. The appeals court ultimately overturned the earlier verdict, but for reasons unrelated to EAP participation.

Another case, *Graham v. Long Island Railroad*, involved an employee who was fired for a positive drug test but reinstated under an LCA. Two months later he again tested positive and was terminated. The employee filed suit under the Civil Rights Act, claiming that other employees governed by last-chance agreements were given second and third "last chances" because of their race.

The court found that the terms of all the LCAs were absolute and required termination. In the event of unsatisfactory attendance at or non-compliance with the EAP, the punishment imposed would have been the same. As far as the court was concerned, poor attendance was as serious a violation as a failed alcohol test.

DO THESE AGREEMENTS WORK?

The U.S. Department of Transportation's alcohol- and drug-testing regulations have focused renewed interest on return-to-work agreements by allowing continuing care recommendations to be part of such agreements. Although some human resources professionals doubt whether RTWAs are effective, most of us who have worked in the field have ample anecdotal evidence to the contrary. Still, some EA professions have strong objections to the coercive nature of recovery and return-to-work agreements, though others see them as strong interventions that build on deterrence and set clear expectations and consequences.

If your EAP uses recovery agreements, it is a good idea to re-examine them at least every three years and consider updates and changes.

If your EAP uses recovery agreements, it is a good idea to re-examine them at least every three years and consider updates and changes. If your EAP does not use these agreements but is asked to participate in one, you should examine them carefully. You need to fully understand the complexities of the issues and the challenges of balancing employer and employee needs with the integrity of the EAP when working in this area. ■