



May an employer ask all employees if they are taking prescription medications?

The EEOC has issued its new EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Exams and their answer is “generally, no.” Asking all employees about their use of prescription medications may not be job related and consistent with business necessity.

If an employer insists that employees disclose whether he/she is taking medication that might impair their ability to perform the duties of their job, an employer must be able to demonstrate that an employee’s inability or impaired ability to perform essential functions will result in a direct threat. For example, a police department could require armed officers to report when they are taking medications that may affect their ability to use a firearm or to perform other essential functions of their job. Similarly, an airline could require its pilots or mechanics to report when they are taking any medications that may impair their ability to fly or perform maintenance on the plane. A fire department, however, could not require fire department employees who perform only administrative duties to report their use of medications because it is unlikely that the employer could show that these employees would pose a direct threat as a result of their inability or impaired ability to perform their essential job functions. An exception to this example might be for an employee who routinely handles incoming emergency calls or an administrative employee in a “dispatcher” position. These employees would need to be mentally sharp and can be asked to report any medications that might impair their ability to do their jobs.

It is traditional for employers to include language on prescription drug usage in a Drug/Alcohol Policy and to ask for employees to report such usage in all cases where performance may be impaired. Under the EEOC’s new guidance, the federal agency would find such questions illegal under the ADA unless the employee is in a position where prescription drug usage would affect public safety, their own safety or the safety of a co-worker.

Ask OHR Client Question:

Dear OHR, our hourly employees are showing up on-site however the person with the keys is consistently late. Some employees leave the job site, other employees wait. How shall we pay the employees in each category, and can we have a policy in our manual regarding their obligation to call in for instructions if they do leave the site?

Dear Client, it sounds like this situation can really impact productivity for the entire department! There seems to be a couple of issues here:

1. The “Key Master” fails to show up
2. Employees are waiting to start to work
3. Employees haven’t been trained on what to do if there is no leader

Firstly, the employee in the responsible position, the one I’ve called “Key Master” has set the tone. It appears inconsistent, irresponsible behavior is acceptable. My first recommendation is to address the performance of the “Key Master”.

You’ve asked, “How shall we pay the employees in each category?” This would fall under “show up” pay also called “report” pay. Report pay occurs when an employee reports for work, but is unable to work for any of a variety of reasons. In California, the employer must pay the greater of

- at least half their regular day’s work (up to a maximum of four hours), or
- two hours work.

In certain cases, the employer does not have to pay the premium if the lack of work was caused by something beyond the employer’s control. The following situations are considered to be beyond employers’ control:

- the failure of the sewer system, or the failure of a public utility to supply electricity, water, gas, or any service necessary to keep the business open and operating;
- the inability of the business to begin or continue due to threats to employees or property, or due to the recommendation of civil authorities; and
- an act of God or other cause not within employers’ control.

This situation doesn't appear to fall under the "act of God" category, so the employees must be paid per the report pay policy.

The last issue concerns what employees should do when the "Key Master" fails to arrive. Clearly they don't know, and since the behavior modeled to them indicates that the work is not important they may also have a lack of commitment. Some employees drift off, other employees wait to be led. All the employees should be trained to consult with management before leaving the facility or work-site. It's important, not only for corporate productivity and employee time keeping requirements, but to provide a safe work environment for all the employees.

Your company should establish an operating procedure by doing the following; correct the performance of the "key master", document the desired to response to such an occurrence, create necessary policies and include them in the employee handbook, provide in-person training to the employees, during which their questions can be addressed and finally, the employer should continue to monitor the situation.

In the News:

Healthcare reform continues in the news. Employers will want to watch the news coverage. Most requirements will become effective in 2014. The impact of this legislation will vary based on the size of the organization. In general the plan includes (at least at this time) premium subsidy, grandfathered plans, essential health benefits, and minimum essential coverage. Effective 2011 employers must report the value of each employees' health coverage on the W-2. Effective 2012 employers must comply with standardized summary of benefits disclosures.and so much more.

EEOC Guidance on ADEA Defense outlines the key defenses available to employers who have been accused of Age Discrimination under the Age Discrimination in Employment Act (ADEA). Among other things, the proposed regulation would necessitate employers undertaking "reduction in force" measures to survey "common business practices" in developing their statistical analysis.

The OSHA Log 300 can be taken down effective 4-30.

COBRA Subsidy has been extended, yet again. Eligible individuals may use the premium subsidy

through May 31. Employer who previous sent basic COBRA notices to qualified individuals for occurrences after March 31st, should send updated notices to those beneficiaries.

Subsidized Employment in the San Mateo County. San Mateo County has instituted a program that will subsidize 100% of wages for placing qualified candidates in the workplace. Employers must provide in-kind training and/or supervision costs equal to or greater than 25% of the subsidized amount. Contact SMC Works for more information.

The IRS announces, as a result of changes made by the recently enacted Affordable Care Act, health coverage provided for an employee's children under 27 years of age is now generally tax-free to the employee, effective March 30, 2010. These changes immediately allow employers with cafeteria plans — that is plans which allow employees to choose from a menu of tax-free benefit options and cash or taxable benefits — to permit employees to begin making pre-tax contributions to pay for this expanded benefit.

The IRS announces, many small businesses and tax-exempt organizations that provide health insurance coverage to their employees now qualify for a special tax credit, according to the Internal Revenue Service. Included in the health care reform legislation, the Patient Protection and Affordable Care Act, approved by Congress and signed by President Obama on March 23, the credit is designed to encourage small employers to offer health insurance coverage for the first time or maintain coverage they already have. In general, the credit is available to small employers that pay at least half the cost of single coverage for their employees.

There is a new poster requirement: The Department's Employment and Training Administration and Wage and Hour Division published a final rule implementing changes to the H-2A program effective March 15, 2010. One of the requirements in the rule is for employers who employ H-2A workers (agricultural workers) to display a new H-2A poster where employees can readily see it. The poster is also available in Spanish. It will be made available in other languages in the coming months.

There is a New CHIPRA Notice to provide to employees by 5-1-2010. Under the federal Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), employers who offer group health coverage to employees

must provide notice to those employees of state health insurance premium assistance for dependents that employees may be eligible for. This notice must be provided by the later of (1) the first day of the first plan year after February 4, 2010; or (2) May 1, 2010. Civil penalties of up to \$100 per day may be assessed on employers for each day that the notice is not provided.

These articles should not be construed as legal advice or as pertaining to specific situations. Consult with your legal counsel for further information.

Stay “in the know” in 2010 –

Educational Seminars

We have a variety of educational seminars planned for 2010. Most will be held at the office of our partner in Campbell:

Leavitt Pacific Insurance Brokers
695 Campbell Technology Parkway, Ste 250
Campbell, CA 95008

May Educational Session

In May we will be featuring Richard Polak of IBIS to address International Benefits for our client groups. The session is scheduled for Thursday, May 27th at 9:00 AM to 11:00 AM at our Campbell location. Watch for your invitation, or register here [May Int'l Benefits](#)

June Educational Session

We will welcome Helena Younossi for our June educational session. Helena heads up Younossi Law Group. Helena will update us on current immigration issues including e-verify and standing H-1 caps. The session is scheduled for Thursday, June 24th at 9:00 AM to 11:00 AM at our Campbell location. Watch for your invitation.

OHR's Quarterly Harassment Prevention Training for Managers

As a service to your business we have a quarterly Harassment Prevention Training. Those sessions occur each quarter on the last Thursday of the month at 1:00 PM. Mark your calendars for March, June, September and December. We also do individual sessions for your offices, including

Managers and Supervisors and non supervisory employees.

The next OHR Harassment Prevention Training for Managers session is scheduled for June 24th at 1:00 pm in Campbell, CA. To register please RSVP to [Harassment Prevention Training](#)

If you are not receiving our education session invitations, please drop us a line. We will add you to the list.

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