

PBPA Podcast Transcript
Episode 30 – Why Your Nonprofit Should Have a Drug & Alcohol Policy
(23:32 minutes)



Sireesha ([00:00](#)):

How does your organization handle drugs and alcohol in the workplace? Do you follow a consistent policy or do you manage it as it arises? Alcohol and drug misuse poses a threat to the health and safety of a nonprofit's employees and program participants and to the security of the organization's equipment and facilities. In this episode of the PBPA Podcast, Jennifer Sandberg will share background and insight on legally addressing drugs and alcohol in the workplace.

Sireesha ([00:33](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Jennifer ([01:44](#)):

Jennifer Sandberg is the managing partner at the Atlanta office of Fisher Phillips. She has advised clients and spoken on numerous employment topics, including wage an hour employee leave and hiring and firing employees. Jennifer, thank you so much for being here today.

Jennifer ([02:00](#)):

Thank you for having me, Sireesha.

Sireesha ([02:02](#)):

So to begin with Jennifer, can you tell us what is legal framework around an employer and what should they consider when drug testing issues arise?

Jennifer ([02:12](#)):

Absolutely great place to start. So most drug testing issues are state law based, but every nonprofit should confirm whether or not they're covered by the federal Drug Free Workplace Act. And that would be most likely dependent upon a funding source potentially, but after federal law in Georgia, there's not a lot of state law about drug testing, subject to one exception that I'll explain. In Georgia it's really a reasonableness standard, you know, have you, have you been fair? Have you given enough notice and are you behaving like a reasonable employer? Um, compare that to a state like Maine, where an employer in Maine actually has to have a written policy that written policy has to be approved by the state. There are lots of very specific things that have to happen. In Georgia, that's just not the case.

Jennifer ([03:14](#)):

The one exception to that is if the employer is choosing, and it's voluntary, to participate in the Georgia workers comp program intended to reduce workers comp premiums through that program, there is a requirement for a written policy and there's some basic requirements for complying with those workers comp rules. Compared to a lot of states that have similar voluntary workers comp programs, Georgia's program is pretty easy to comply with. So, depending on the cost of your premiums, getting that premium reduction of about 7%, it might be worthwhile to go ahead and follow those rules and requirements. But one of those is a written policy.

Sireesha (04:09):

I see. And so Jennifer, what should an employer if they suspect an employee is under the influence at work.

Jennifer (04:18):

So when that information makes its way to, I'm going to say "the person in charge", and that could mean it, it could mean a supervisor. Um, it might mean a program director. It might mean the executive director. But when that information makes it to somebody on the management side of things, that manager probably should at a minimum ask their boss, just for a brainstorming session. If the agency is lucky enough to have an HR resource or consultant or companion, somebody to hold your hand, this is a really good time for a conversation. Because what one person perceives as signs of somebody being inebriated in some way another person might say, "Oh, you know, I don't know". Um, so it, it's always a good idea to do a gut check, to see if you really do think somebody is under the influence of alcohol or some type of drug. And then what happens next, um, is really what the rest of our program is going to be about because there are, there are multiple things to think about. But I think first trying to do your due diligence to be sure you are right, that somebody is more likely than not under the influence so that then you're ready to deal with it appropriately.

Sireesha (05:52):

Okay. So I see how this could be managed in person when you're speaking face to face or working side by side, but how is this managed in a remote workplace.

Jennifer (06:03):

So much more difficult naturally because it it's harder to gauge, um, somebody's behavior when you are interacting via the telephone or over a zoom, or maybe we're still, you're hearing third party reports from program participants. "Hey, I saw your employee and I think they were drunk. I think they were stoned. I think they had drugs or alcohol in their system." Um, people use different words to report behavior that they perceive as, you know, inappropriate in the workplace, but that is, that is much more difficult. And sometimes depending on the circumstances could result or require that somebody from the nonprofit, um, go on a field trip and meet in with that employee. And of course you never know how that's gonna turn out. It may be a good day for the employee and they're behaving in a very professional way or the nonprofit leader might sure enough get to that remote site and agree. Gosh, our employee does seem to be impaired in some way. And again, we're some of that, some of the next steps that we'll talk about will work the same once the nonprofit has made that decision. Yes, we do have an employee that we think is impaired at work.

Sireesha (07:30):

Now let's talk about drug testing in Georgia, looking at possibilities like: on-the-spot testing based on suspicion, random testing, scheduled, regular testing. What should employers consider as they explore these options?

Jennifer ([07:47](#)):

Okay. So let's set aside the fraction of nonprofits that will choose to follow the Georgia drug free workplace rules in order to get that worker's comp discount. And just talk about everybody else, which is probably the majority of the people listening to this podcast. So the type of testing you do, and when you do it ultimately should be contained in your policy. It should be something that you have a plan for so that, you know, what applies when.

Jennifer ([08:24](#)):

I think one of the biggest bits of confusion that I help employers work through is this notion of a random test versus a reasonable suspicion test. A random test is you come into the office one day and you draw 10 employee numbers out of a hat and you go find those 10 employees, or you notify those 10 employees. And you say in the next 12 hours, I need you to take a drug test. You have no idea which 10 you're gonna get. You have no reason to think that they have been doing anything in violation of company policy, 10 numbers literally drawn at random, some employers in some types of workforces do that still. I will say I see that less and less, over the last decade.

Jennifer ([09:14](#)):

Reasonable suspicion testing though, is something every employer needs to be prepared for. And it's kind of every employer's worst nightmare. So reasonable suspicion testing is, again, that program participant calling saying, I think you have an employee coming to work drunk. I think you have an employee coming to work stoned. Um, and now you have reasonable suspicion to think something's wrong and you gotta figure out what to do. Or you are interacting with an employee, whether it's, um, by phone, by video conference or in person and you, or somebody on your leadership team believes that an employee is impaired in some way. That's when you would do reasonable suspicion testing. And that's a good example of when it's nice to be able to talk to a colleague, um, and say, this is what I'm seeing or experiencing. What do you think, am I making the right choice here? Is there anything that we know? Um, and hopefully it's a little bit obvious that the people with whom you have that conversation should either be in an HR function specifically, or support HR issues when they arise within the nonprofit, or are at the most senior levels of leadership within the nonprofit. This is not a handful of frontline supervisors getting together saying "oh yeah, no, I always thought she was a little weird. I don't know what's wrong with her". Um, we <laugh>, we don't wanna be judgmental. We wanna make, we're just trying to be sure that we're making some good decisions at a high level.

Jennifer ([10:51](#)):

Another option is pre-employment testing. I have seen a drop off in pre-employment testing really ever since. Um, it started before the pandemic, but when it, when it's hard to find employees at all, employers do tend to focus slightly less on pre-employment drug testing. They figure it's a risk that might be worth taking. Um, you do need to think about the safety of program participants and the reputation of your nonprofit. But depending on the environment that your nonprofit operates in, that may be a reasonable risk. And certainly since the pandemic, when good employees have been particularly hard to find, I have seen less pre-employment testing or a limiting of the testing panel. And by that, I mean many employers rather than doing the, what those of us in the industry, or in the know

would say is the standard five panel test, which is five different families of drugs. Um, seeing more of a four panel test. And it's probably not a big surprise, but the drug that's getting dropped is the cannabinoids, the marijuana. So, you know, that seems to be a drug where some employers say to themselves, yeah, it's just marijuana. That's okay. Um, that's not a choice I can make for you every, every employer has to make that choice on their own, or within their own value system as an employer. But certainly something that I'm seeing more and more of.

Sireesha ([12:24](#)):

Now, my next question is an illegal question by know, listeners may be wondering any thoughts on where to go or where to send employees for drug testing.

Jennifer ([12:33](#)):

Absolutely. So a nonprofit, an employer that's going to do drug testing needs to have a plan. Um, something that I like to equate it to is, you have an emergency evacuation plan. Um, you're, you're not expecting a fire, but we know what to do if there is one, because we've thought about it ahead of time. Um, we know where the emergency exits are. We know how to get there. We know there's gonna be good lighting for us to get there. Drug testing is the same thing. So you need to find a provider in your community. Um, if you offer health insurance to your employees, you would wanna work with your insurance broker to be sure that the provider you select is one covered by your health insurance. And you're probably looking to the local emergency care facility. It, it could be a standard hospital, ER, it's more likely to be one of the offsite. I call 'em "Doc in a Box". But where, you know, it's a small local clinic that does, that does drug testing and all. All of them do drug testing. But it's good to have a relationship with the clinic manager. It's good to know their hours. Um, if you have a workforce that works odd hours, you need to find a clinic that also works odd hours, or you need a, you need more of a response plan to what do we do when there's not a 24 hour clinic, but we have a 24 hour workforce. So again, it's the preplanning that goes into, we really don't expect to have, um, an impaired employee report to work. But if, if we did, where would we start? And part of it is knowing what your policy says, knowing where your local clinic is, knowing whether or not that clinic is open, already having an account established at that clinic, knowing what you would say when you called that clinic to report that you were bringing the employee.

Jennifer ([14:39](#)):

And that's something else to think about. Just if you were in a bar with a friend and you thought that friend had had too much to drink, you wouldn't say, "have a safe drive home". You would say, "wow, let me take you home". Let me call you a cab, same thing with an employee. If you have any reason to think that an employee is impaired, you don't tell the employee, "drive yourself to the lab". You figure out how to get the employee to the lab, without them operating a vehicle or a scooter or any other piece of machinery. Your first instinct should be, how do I keep them safe if they actually are, um, impaired?

Sireesha ([15:24](#)):

And now this next question definitely is a legal question. What should be included in a drug and alcohol policy?

Jennifer ([15:35](#)):

So a drug and a good drug and alcohol policy is, should probably take up at least two, maybe three pages of your employee handbook. And first and foremost, your policy should say, we do not tolerate

drugs or alcohol at work. Um, don't bring it to work. Don't use it when you're here at work. Don't use it when you are performing work for us, possibly remotely, or if you're going to represent us at a convention or at a public gathering, no drugs or alcohol. Now, sometimes depending on the employer, you might need a small carve-out for appropriate behavior in social settings where alcohol is being offered. You don't want to write a policy so strict that without thinking about it, you end up with that being prohibited. Um, and there's a, a pretty simple way to do that. You just say, you know, while your behavior must remain professional and in compliance with all of our company policies and procedures, you may, you know, drink alcohol socially within reason. I mean, you just kind of gotta carve it out.

Jennifer ([16:58](#)):

So first you lay down your rules about where, and when you, for the most part, can't use drugs in alcohol. You should lay out that you have the right to search or to test. If you feel like drugs or alcohol have been brought onto your property or in property you control. And that you can send somebody for a test again, lay out when pre-employment, if you choose to institute a random program under reasonable suspicion conditions or any other time, we're lawful. Many policies lay out the types of things you'll test for. Again, in Georgia, that's not necessarily required. Um, you wanna think through whether or not you would give the employees an opportunity to contest the test results. But a good policy kind of lays out all the dos and don'ts from what you should be doing to what you can't do, and then what your testing program looks like.

Sireesha ([18:07](#)):

So Jennifer, does that mean that all nonprofits should have a drug and alcohol policy?

Jennifer ([18:13](#)):

Absolutely. Um, while Georgia is a great state for employers and employer rights and employer without a drug and alcohol policy is really just vulnerable. Your managers have less information available to them. Your employees have less information available about what the rules are. Um, you know, if we, if we counted on employees to understand everything that they should do to be a good employee, just intuitively, we wouldn't have employee handbooks. Cause most of what's in there is pretty straightforward, pretty simple, "come to work, be good to people. <laugh> get your job done. Don't do drugs and alcohol while you're here". But unfortunately, being an employer is not that easy. So a written policy is actually very important to protect the nonprofit.

Sireesha ([19:07](#)):

And to wrap up our conversation today. Um, let's talk about drugs and alcohol in the workplace and how that could tie into the Americans with Disabilities Act.

Jennifer ([19:20](#)):

Absolutely. So the Americans with Disabilities Act or the ADA treats alcohol differently from drugs. So let's do alcohol first. Um, the ADA looks at alcohol and alcoholism as a disease that's not particularly controllable. And so someone who is an alcoholic is immediately protected by the ADA. That does not mean that I employee who drinks at work doesn't get in trouble. So what it does mean is as long as I come to work and do my job and do my job well and I'm on time and I don't smell like I've been drinking and I don't look like <laugh>, like I just woke up out of a ditch somewhere - as long as I show up and do my job. Um, if I'm an alcoholic and I drink too much at night or on the weekends or episodically, my behavior is protected. And where most employers get in trouble with alcohol in the ADA is they perceive

that an employee drinks too much or perceives that the employee is an alcoholic. And that's very dangerous because although the employee may not know it, that actually gives the employee an ADA claim just because you think there's something wrong with them. Um, and I see that come up more often with alcohol than with any other type of condition under the ADA. So employers need to tread carefully there.

Jennifer ([21:01](#)):

The ADA treats drugs differently. A current abuser of illegal drugs is not protected by the ADA. A recovered user of illegal drugs is protected by the ADA. And because employment law is not hard enough. The definition of "current" is gray. It's a little squishy. It depends on all the facts, but typically somebody who has used drugs within the last month or so, and has allowed those drugs to impact their work is going to be considered a current drug user who is not protected by the ADA.

Jennifer ([21:51](#)):

But anytime we're talking about a drug or alcohol issue that is presenting itself in the workplace or causing an employer to say, "gosh, what's going on here", is always a good time to think about ADA. Also potentially think about family and medical leave act issues. Um, if you're a nonprofit has more than 50 employees, uh, within a 75 mile radius, you would be covered by the family and medical leave act. That might be a law that doesn't apply to a lot of you. If you have, you know, just a handful of employees, but if you're a bigger nonprofit, you also need to be thinking about that law as well.

Sireesha ([22:32](#)):

Okay. Well, Jennifer, those are all the questions I have today. So much great information that you've shared with us. Um, thank you for sharing your insight and expertise with us.

Jennifer ([22:44](#)):

Thank you so much for having me. I appreciate it.

Sireesha ([22:48](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.