

Water Cooler Talk: Office Drug Abuse Insights From ‘Industry’

WRITTEN BY

Evan Gibbs | Tracey E. Diamond

Published in [Law360](#) on June 23, 2023. © Copyright 2023, Portfolio Media, Inc., publisher of Law360. Reprinted here with permission.

The Max TV series “Industry” exaggerates—and occasionally glamorizes—illicit drug use in the workplace. However, in real life, employee substance use and addiction can raise significant issues. According to the Society for Human Resource Management, nearly 9% of adults in the workplace, or about 13.6 million workers, struggle with alcohol or illicit drug use. An equal number have reported that they are in recovery or have recovered from a substance use problem.

The show sheds some light on employment and HR issues and offers several takeaways, including:

- Every employer should have a policy on workplace conduct that covers excessive drug and alcohol use.
- It is crucial to think through the criteria for reasonable suspicion and when testing is justified.
- States and cities may have different laws on drug testing, particularly with regard to marijuana use, so employers operating across jurisdictions need to be up to speed on local law.

Q&A

We spoke with Larissa Boz, senior counsel at Squarespace, about the Max TV show “Industry,” managing employee performance, and workplace drug use.

Evan Gibbs: The Max series “Industry” follows protagonist Harper and a group of young graduates competing for a spot at an investment bank. They subscribe to the “work hard, play hard” mentality.

Tracey Diamond: Harper shows up at work hungover, and her manager basically says, “Go take a shower.” What do you think of how her manager handled the situation?

Larissa Boz: Every employer should have a policy around conduct in the workplace that covers drug and alcohol use. Employers should not make assumptions about addiction, but rather should focus on employee behavior.

Here, she comes into work disheveled and smells of alcohol. That is something that is objective and observable, and it's related to her job; she sees clients and has to appear at the office. In the real world, a manager should first focus on performance, keep a close eye on it and also document that behavior to remind the employee of what the expectations are when they come to work.

Tracey: Evan, I want to ask you about reasonable suspicion. It's an easy policy to write, but a somewhat difficult policy to put into place.

Evan: It is a really difficult issue. It's easy if there's something that's observable, like red eyes, slurred speech, the smell of alcohol, anything that can't be mistaken for something else. With white-collar jobs and working from home, however, it can be hard to detect.

Larissa: This is an area where often there are missteps. Employers should focus on physical characteristics and observable behaviors—if an employee has red eyes, they're jittery or talking too fast, slurring their words—as opposed to saying, “They were aggressive, they were upset, they were hostile.” A lot of managers will characterize the behavior, as opposed to observing and describing the actual conduct they're seeing.

Tracey: The idea of saying “he raised his voice” rather than “he was aggressive.”

Larissa: Exactly. That is a common pitfall. Because then, for an employee, it becomes personal because it's no longer about what you're seeing and your concern; it's about your impression of them, and people tend to get defensive.

It's also really hard to determine whether there is a reasonable suspicion in isolation—do we have enough objective evidence or indicia that this person is not acting in a way that is reasonable or expected? Is the behavior really out of character; is it a fair assessment?

Managers should not order a drug test in isolation without talking to their HR team, their legal team or external counsel to pressure-test those observations to make sure they aren't making assumptions about the conduct itself.

Evan: Is there any penalty for the employer if they get reasonable suspicion wrong? In other words, if the test comes back negative, are there any penalties for over-testing?

Larissa: The monetary cost, the time, the effort of doing the testing; in some form that's a penalty. The penalty can also be viewed as the impact on morale. If other employees are seeing and hearing about this, there's going to be chatter about testing an employee when it was a misread. The employer should review their policy with the manager and make sure there is alignment on the approach.

It's also crucial to sit down with the employee who does not test positive and align on expectations and the conduct that led the employer to send the employee for testing in the first place, so there's no confusion about the concerns that led to the reasonable suspicion.

Tracey: What are the company's options if the person tests positive?

Larissa: It's always context specific. What did they test positive for? What is the philosophy of the company? Is there a zero-tolerance policy? Does the employee have access to sensitive information or a unique fiduciary obligation to the company?

The company must think about the employee's role and, absent a zero-tolerance policy, determine reasonable next steps based on the situation, the industry they are in, and the programs and benefits the company may offer to address it.

Evan: Marijuana use is even more nuanced. You need to be very careful and make sure you know exactly what you can and can't do in your city or state if somebody tests positive in the workplace.

Tracey: In "Industry," Hari is a young employee who takes a combination of energy drinks and amphetamines to pull a series of all-nighters, and ends up dying.

In this example, employees are taking drugs so they can focus better to get more work done. Should companies be acknowledging and managing this sort of problem? Is it a problem?

Evan: This is a serious problem. I don't hear people talk about it because amphetamines can be prescribed to treat ADHD, in which case it's not illegal, so it's not viewed as a big deal. But these drugs can be addictive when misused.

Tracey: How do companies recognize when employees may be misusing substances to fuel productivity?

Larissa: Employers need to train their managers to show some empathy, share accountability, and make sure they are setting reasonable goals for their team and monitoring productivity and burnout, as well as the use of their systems.

We're in a digitized environment. When did the employee log off? Did they log off? Have they been active on their computer for an extended or unreasonable period of time? Have your IT department do some forensics for you.

This goes to the heart of making sure that companies achieve the right sort of work-life balance where employees feel motivated and confident in their ability to get their work done without needing to resort to performance-enhancing drugs as a crutch to meet minimum expectations which, as we've seen, isn't sustainable in the long run.

Conclusion

While TV shows drastically dramatize drug use in the workplace, real life situations occur when employees are impaired while on the clock.

Understanding how to broach this sensitive topic—and the repercussions of getting it wrong—will help companies when it comes time to answer the question: To test or not to test?

Our Cannabis Practice provides advice on issues related to applicable federal and state law. Marijuana remains

an illegal controlled substance under federal law.

RELATED INDUSTRIES + PRACTICES

- [Labor + Employment](#)