

# PUBLICATION

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## Play Under Review: USC Football Coach Wanted Mid-Season Timeout for Alcoholism

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At the beginning of last year's college football season, many folks had high expectations for the University of Southern California Trojans and the team's second-year head coach, Steve Sarkisian. Instead, USC ended the season with a new head coach, six losses and one lawsuit. Why? Because Sarkisian filed a lawsuit against USC seeking \$12.6 million under his contract, damages for mental anguish and punitive damages. The lesson for HR managers is this: each alcoholic's request for accommodation may require individual analysis under the ADA and FMLA.

First, some background: The media reported that Sarkisian appeared intoxicated and used inappropriate language during a speech at a "Salute to Troy" preseason event for football boosters, leading USC's infuriated athletic director, Pat Haden, to pull him off the stage. Sarkisian issued a public apology the following day. A few weeks later, the team was a 17-point favorite in a nationally televised game against Sarkisian's former team, the University of Washington. After USC lost the game, Sarkisian skipped the team's next practice. Haden announced that he asked Sarkisian to take an indefinite leave of absence on the same day. Haden said he spoke with Sarkisian, and it was "very clear... that he [was] not healthy." The media reported that players said their coach "showed up lit" to a pre-practice meeting and was told to leave. The Media also reported speculations that Sarkisian may have been under the influence while coaching a game earlier in the season. Haden made another announcement the next day saying that he terminated Sarkisian.

Sarkisian's complaint argued that his alcoholism was a disability under California law and that USC had a duty to make a reasonable accommodation for the disability unless doing so would have imposed an undue hardship. He argued that USC knew of his disability because Haden demanded he sign a letter following the Salute to Troy incident. The Complaint alleges that Haden's response to Sarkisian's request for time off failed to engage in an interactive process to determine if USC could make a reasonable accommodation. It further alleges that there would not have been an undue hardship on the school if it allowed Sarkisian to take a leave to seek treatment. Sarkisian also claims that the school discriminated against him because his alcoholism was a substantially motivating factor in firing him. USC has responded to Sarkisian's Complaint with a Motion to Dismiss pursuant to an arbitration provision in his contract. USC has also alleged Sarkisian's version of the events contains "half-truths and, in many cases, outright falsehoods."

It has yet to be determined how Sarkisian's claim will be resolved. One thing is certain: employers need to be careful if they find themselves in the position of making a decision about the employment of someone they suspect is an alcoholic. On the one hand, the business costs of employing someone with the disease can be great. Those costs include loss of productivity, employee absenteeism, exposure to liability and health care expenses. Of course, an employer's biggest concern is often the potential for a personal catastrophe involving the alcoholic employee, coworkers or the public. Nevertheless, modern medicine's understanding of alcoholism as a disease, not a character flaw, leads some employers to feel compassion for employees struggling with addiction. From a legal standpoint, federal and state laws may affect how employers can react.

The American with Disabilities Act (ADA) is one of the federal statutes that often comes into play when dealing with alcoholic employees' claims against employers. Title I of the ADA covers private sector employers with 15 or more employees. It prohibits employers from discriminating against qualified individuals with disabilities in

hiring or employment. A person is considered disabled under the ADA when he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. In order to be a "qualified individual" under the statute, a person must be able to "perform the essential functions" of the job "with or without reasonable accommodation." The statute prohibits employers from refusing to make reasonable accommodations for the known disabilities of otherwise qualified individuals unless the employer can demonstrate the accommodation would impose an undue hardship on the operation of the business.

Courts consider alcoholism to be a disability under the ADA; however, an individual whom medical professionals consider an alcoholic is not automatically considered disabled under the statute. Instead of focusing on the name or diagnosis medical professionals give to an individual's impairment, the ADA looks to the effect of an individual's impairment on his or her life. This requires an individualized inquiry of whether the person's alcohol use substantially limits a major life activity. Similarly, assessing whether an accommodation is reasonable also requires looking individually at the impairment, the accommodation and the employer.

While the ADA requires highly individualized inquiries in many respects, there are some rules about what employers may do and what is prohibited with respect to employees and alcohol. An employer may prohibit employees from being under the influence of alcohol at work. Similarly, an employer may hold alcoholic employees "to the same qualification standards for employment or job performance and behavior" as other employees "even if any unsatisfactory performance or behavior is related to the drug use or alcoholism." Conversely, an employer may not discipline an alcoholic employee where a non-alcoholic employee would not receive discipline without a Last Chance Agreement already in place. Finally, the burden is on the disabled employee to request an accommodation.

The Family and Medical Leave Act (FMLA) is another federal statute that may affect an alcoholic employee's claims against his or her employer. The FMLA requires 12 weeks of unpaid medical leave during a 12-month period when an employee is unable to perform the functions of his or her position due to a serious health condition. The statute also prohibits retaliation. The FMLA applies to entities that employ 50 or more employees for each working day during 20 or more calendar workweeks in the current or preceding year. The FMLA only applies to workers who have been employed by a covered entity for 12 months or more and for at least 1,250 hours during the previous 12 months. If an employee works at a worksite with less than 50 employees and the employer has less than 50 employees within 75 miles of that worksite, the FMLA excludes the employee from coverage.

The FMLA allows eligible employees to take 12 weeks of unpaid medical leave during a 12-month period. An employer may require an employee to use his or her paid vacation or sick time as part of the 12-week FMLA leave. An employer must provide an eligible employee on leave with the same medical coverage under a group health plan that would have been provided if the employee were not on leave. The employer can recover company paid premiums for the period if the employee fails to return to work following leave for reasons that were not out of his or her control and not because of a serious health condition that entitles the employee to another period of FMLA leave.

A serious health condition is defined under the FMLA as "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." The Department of Labor's regulations interpret the FMLA as providing leave for treatment of substance abuse. An employee's absence due to use of a substance does not qualify for FMLA leave. Like the ADA, the FMLA does not stop an employer from creating and enforcing policies prohibiting alcohol use on the job.

It is likely employers may find themselves having to make decisions related to an employee with alcoholism. It is important for employers to have a general understanding of federal laws that may affect that decision and seek legal advice on their own state's laws. Employers should also make sure they are complying with their own Employee Assistance Policies, which should not treat a protected class of employees different from other employees.