

# Employee Assistance Programs: What Your Clients Should Know

By Jennifer Randlett\* and Rafael Icaza\*\*

**W**hat options are available to help employers manage troubled employees? In today's market, retention is king. Every employer knows to the dime the cost of recruiting, hiring and training a new employee. As a result, employers would rather work to develop creative solutions to problems rather than terminate a once productive employee.

This article discusses Employee Assistance Programs, one effective tool for dealing with troubled employees. While some employers are familiar with the benefits of EAPs, many remain unaware of their



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existence and purpose. The following hypothetical illustrates one set of circumstances in which an EAP might be helpful:

Sylvia sells software for Macrohard, a small but growing Kennebunkport, Maine company. Once very profitable, Sylvia no longer makes her sales quotas and is irritable-her coworkers, and even some clients, complain about her. She looks unprofessional, often wearing odd combinations of wrinkled, dirty clothes.

Ted, Sylvia's supervisor, has tried several times to discuss these problems. But he can't seem to get through to her. Lately, Sylvia's problems have come to the attention of Leona, Ted's boss.

As a result, Leona calls a meeting with Ted. She also invites Ed, Macrohard's new-and first-HR manager. Leona and Ted wonder what they can do to bring the old Sylvia back. Given the company's hiring and retention problems in the red-hot software industry and in the Kennebunkport area-they also hate the idea of finding a replacement for her.

Unknown to Ted, Ed and Leona, and to Sylvia herself, she suffers from severe depression. Sylvia's depression made it impossible for her to recognize these symptoms herself. She has not sought professional help for her persistent feelings of deep sadness and existential emptiness; she has instead been drinking heavily over the past several months.

She now also suffers from alcoholism.

Ed came to Macrohard from a large west coast bank. There, troubled employees were encouraged to call an employee representative at the company's confidential Employee Assistance Program. The EAP offered counseling and referrals to professionals in a wide range of areas, including alcohol and drug addiction and depression. He suggests to Leona and Ted that, given Macrohard's growth and Sylvia's problems, they should both encourage her to consult with an EAP provider at Macrohard's expense and consider establishing one for the company.

## What is an EAP Program, and Why Might M Company Need One?

Employee Assistant Programs provide services to employees and union members whose personal problems affect their work and well-being. 1 EAP counselors may be trained to provide human resources, chemical-dependency, substance abuse, mental health, managed behavioral health care and benefit plan administration services.2

The problems Sylvia and Macrohard faced in the hypothetical are far from rare. In 1999, the U.S. Department of Health and Human Services estimated that there are 3.6 million Americans who were dependent on illicit drugs, and an estimated 8.2 million who were dependent on alcohol. 3 Of these, 1.5 million people were dependent on both. 6.6% of Americans employed in full-time jobs report heavy drinking (five or more drinks per occasion on five or more days in the past 30 days). 4 60% of alcohol-related work performance problems can be attributed to employees who are not alcohol dependent, but who occasionally drink too much on a work night or drink during a weekday lunch.5 Shortfalls in productivity and employment among individuals with alcohol or other drug-related problems cost the American economy \$80.9 billion in 1992. 6 Additionally, absenteeism among alcoholics or problem drinkers is 3.8 to 8.3 times greater than normal and up to 16 times greater among all employees with alcohol and other drug-related problems. 7

However, for every dollar invested in EAPs, employers generally save anywhere from \$5 to \$16.8 The average annual cost for an EAP ranges from \$12 to \$20 per employee. 9 For example, General Motors Corporation's EAP saves the company \$37 million per year-\$3,700 for each of the 10,000 employees enrolled in the program. 10 While roughly 90% of the Fortune 500 companies have established EAP's, this percentage is much lower among smaller companies. Only 9% of businesses with fewer than 50 employees have EAP programs.11 90% of U.S. businesses fall into this category. 12 Finally, studies suggest that employees who are pressured into treatment by their employers are *more* likely to recover from their alcoholism and improve their performance than those who are not so pressured. 13

Employers in Macrohard's position who are unaware of the benefits of EAPs might simply terminate employees like Sylvia. Assuming she hasn't made the employer aware of some protected disability and requested reasonable accommodation,14 the termination would be defensible.15 But in a robust economy or industry, training and replacing workers is hard and expensive. And, given the magnitude of alcohol, drug and other

problems, terminating large numbers of employees might not even be a realistic solution. Company morale, for one thing, is likely to be higher if employees can confidentially seek help for problems impacting their work performance rather than face the threat of termination.

Cost efficiency will certainly be another consideration for employers considering establishing EAP programs. The Employee Assistance Professionals Association suggests certain areas employers may discuss with potential providers. These include (1) organizational design (profit, nonprofit), (2) staffing, experience, special skills of the EAP, (3) whether employee assistance is a primary part or an auxiliary service of the EAP provider, (4) detailed description of the services provided, (5) client list and references, (6) malpractice and general liability insurance, (7) providers' statistical summaries, (8) providers' written clinical standards including assessment, referral and follow-up procedures, (9) employees covered to professional staff ratio.<sup>16</sup>

#### The Americans with Disabilities Act and the California Fair Employment and Housing Act

Employers shouldn't take on the role of a parent or counselor. Inquiring into employees' personal lives, including their medical condition, or their legal, drug or alcohol problems, can expose employers to liability for violating employee privacy or anti-disability discrimination statutes such as the American with Disabilities Act or the Fair Employment and Housing Act.<sup>17</sup>

The ADA and FEHA prohibit employers from making pre-employment inquiries into potential employees' medical conditions.<sup>18</sup> Employers are limited to pre-employment questions that relate directly to the position in question. With certain limitations, employers may also condition an offer of employment upon a medical examination strictly limited to determining the employee's fitness for the job.<sup>19</sup> This health and safety exception applies to post employment health-related inquiries as well. Individuals who have successfully overcome or are attempting to overcome a drug or alcohol problem may qualify as disabled under the ADA and FEHA. However, individuals who currently abuse illegal drugs or alcohol may be held to the same performance standards as other employees.

These laws also require employers to reasonably accommodate qualified individuals with disabilities. Generally, a qualified individual with a disability is one who with or without reasonable accommodation can accomplish the essential functions of his or her job. While actual on-the-job drug and alcohol use are not protected, under certain circumstances individuals recovering from or who have drug and alcohol dependency problems off the job may be considered disabled and entitled to accommodation.<sup>20</sup> Under the ADA and California law, in some instances employers must grant leave to employees to voluntarily participate in rehabilitation programs.<sup>21</sup>

ADA and FEHA provisions can potentially run contrary to workplace commonsense. For example, a supervisor may want to know what is bothering their employees, not to discriminate against them or from mere curiosity, but out of a humanistic concern or desire to help. Regardless of the benignity of their motives, because of these and other laws, employers must be

careful to limit focus to their employees' performance, without inquiring into the cause or causes behind performance problems.

#### The Code of Professional Conduct for Certified Employee Assistance Professionals

Employees with problems negatively affecting their work might very well be reluctant to disclose their problems to their employer. They might fear being branded unprofessional, difficult or crazy and losing their jobs. Because EAPs handle client communications in the strictest confidence, these fears can be neutralized.

Certified Employee Assistant professionals, the persons staffing EAPs, are prohibited by their Professional Code of conduct from disclosing any information received from an employee in the course of and for the purpose of assessment, referral or treatment, except with written consent,<sup>22</sup> or in instances where the client poses an imminent threat of injury to himself, to others, or to children.<sup>23</sup> These prohibitions extend to revealing client identities.<sup>24</sup>

#### Possible Problems with EAP Programs

Contracting an EAP is not a panacea to all issues relating to troubled employees. EAPs, for example, do not relieve employers from their duty to accommodate qualified individuals with disabilities. Nor does it affect an employer's duty to comply with other laws affecting employees with personal, health or family problems, such as the family and medical leave laws.

Under certain circumstances, reliance on an EAP might even afford an employee cover to bring a lawsuit. An employee using their employer's EAP service might be told to request some form of reasonable accommodation. Having failed to do so, and being terminated, such an employee might then sue under the FEHA or ADA, claiming that the employer knew or should have known about their disability and need for accommodation through the EAR.

On balance, however, the benefits of an EAP, as outlined above, are likely to outweigh the risks. Furthermore, in the litigation setting just described, a litigious employee would presumably be putting their problems at issue, thereby waiving the confidentiality of his or her EAP records. In addition to presenting evidence of an employer's ignorance of the employee's disability or need for accommodation, these could then be used in support of such contentions.

#### Conclusion

In today's business environment, characterized by a tightening labor market and by its emphasis on ever-increasing productivity, employers cannot escape dealing with employees' whose personal problems affect their productivity. Instituting EAP programs may be an effective way to address these problems without getting caught in a thicket of privacy and employment laws, including the ADA and FEHA.

*End notes for this article on page 27*

