

Why “Mandatory” EAP Referrals Aren’t “Mandatory”

The problem with “mandatory” EAP referrals is the use of the word “mandatory.”

The argument can be made that we’re talking semantics but that’s not exactly the case. The two types of referrals to an EAP are “self” and “formal” referrals. A “self” referral to the EAP occurs when the employee decides to contact the EAP on his/her own or when informally suggested by his/her employer. In such circumstances, the EAP should have no contact with the employer nor should the employee be expected to have to consent to any contact. When an employee’s behavior or performance has reached the point where a referral to the EAP is warranted be careful about using the word “mandatory.”



Employers and employees in industries where Federal regulations come into play, such as those required by the D.O.T. (Dept. of Transportation), N.R.C. (Nuclear Regulatory Commission) or D.O.D. (Dept. of Defense) employees are subject to “mandatory” drug and alcohol testing. A “formal” referral to the EAP is made whenever a positive drug/alcohol test occurs. The EAP would then proceed with getting the proper consent forms signed, assess the employee’s problem, make the appropriate referral, monitor the case and report compliance. Here’s the catch: The drug testing is “mandatory.” Requiring a clean alcohol/drug test result is mandatory...compliance with the EAP is not. For example, an employee may decide to decline the EAP’s referral and seek treatment on his/her own. That is their right and terminating someone for exercising that right leaves an employer open to liability. However, that same employee, can be rightfully terminated should he/she have a positive result in any additional drug/alcohol tests. A smart employer notes the employee’s the referral to the EAP and refusal of the referral in the employee’s personnel file. Employers who do not fall under Federal regulations can protect themselves by having a well-written Drug & Alcohol policy.

When an employee’s performance, attendance or behavior begins to show initial signs of a problem, it is appropriate for an employer to remind an employee that EAP help is available and “suggest” that they call. Again, this should be noted in personnel notes. When problems in those areas become significant or possibly dangerous, a “formal” referral to the EAP is warranted. The referral should be memorialized in writing and, as with drug testing, an employee may decline the referral, which should also be noted in their file. Regardless of the nature of an employee’s problem and whether or not an employee uses the EAP, the employer can terminate an employee if their performance or behavior does not improve. However, it is the notation that the employer attempted to help via the “formal” process that helps protect the employer from liability.