

ADA Employment Protections for Individuals Who Use or Are Addicted to Opioids

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Legal Protections

Disparate Treatment

In general, employers are not permitted to terminate, demote, involuntarily suspend, etc. someone because of a medical condition

- Exception: conditions that are transitory and minor

Reasonable Accommodation

People with certain medical conditions can get reasonable accommodations—changes in the way things are typically done that enables the individual to apply for a job, do a job, or enjoy the benefits and privileges of employment

Examples—

- Assistive technology
- Changes in policy
- Special schedules or breaks
- Leave (if the individual is expected to return)
- But not reduced productivity standards

Who Can Get One?

To be entitled to a reasonable accommodation, you must have a condition that “substantially limits” a “major life activity”

- To be “substantially limiting,” a condition does **not** need to be severe, permanent, or long-term—many conditions will qualify
- Functional limitations on, e.g., concentrating, caring for oneself, sleeping, brain function...
- What matters is how the condition **would** affect you in the absence of treatment, during an active episode

Who Can Get One, cont'd

Must need the reasonable accommodation because of the substantially limiting medical condition

Can also get reasonable accommodation because of a past condition that substantially limited a major life activity

Conditions that May Substantially Limit a Major Life Activity

Underlying medical condition

- E.g., patient prescribed morphine for pain caused by a medical condition, the condition may be a disability if they substantially limit a major life activity

Underlying condition and side effects

- E.g., patient prescribed morphine for surgery; side effects of morphine (dizziness, drowsiness, ...) are substantially limiting

Opioid Use Disorder

- Very likely to be substantially limiting; diagnosis defined by substantial limitations

Related/comorbid condition

- Conditions that commonly co-occur with opioid use disorder include major depression, PTSD

Scheduling changes to attend therapy or other treatment

Accommodations to address side effects of MAT medication, if necessary (e.g., nausea, vomiting, headaches, sleepiness)

Leave to begin treatment

Example Accommodations: OUD

Exceptions

May hold individuals who have medical conditions to the same standards of performance and conduct as others, even if the unsatisfactory performance or conduct is related to the medical condition

- Lateness
- Missed deadlines
- Insubordination
- Inappropriate interactions with customers

May impose discipline, including termination when appropriate, consistent with general practice

1. Misconduct or Poor Performance

2. Other Federal Laws

If another federal law or regulation requires an employer to exclude someone from a particular position for reasons related to a disability, then the employer must comply with the other federal law or regulation

Some agencies that enforce regulations related to workplace drug use include:

- DOT
- DOD
- NRC

3. Safety

May exclude individual from the workplace for reasons related to a disability if the individual poses a **direct threat** to safety of self or others

But, adverse action can't legally be taken based on risks that are merely speculative or remote—

- Determination based on an **individualized assessment**, using **reasonable medical judgment** and **up-to-date medical knowledge**

Level of risk set by statute

- Must be **significant risk of substantial harm** that **cannot be eliminated/reduced by a reasonable accommodation**

3. Safety, cont'd

Factors to consider:

- Duration of the risk
- Nature and severity of the potential harm
- Likelihood of harm
- Imminence of harm

Final determination will depend on the individual, the medication involved, job functions, work environment

SAMHSA: “[W]hen provided at the proper dose, medications used in MAT have no adverse effects on a person’s intelligence, mental capability, physical functioning, or employability.”

ADA doesn't protect individuals who are currently engaging in the illegal use of drugs when the employer acts on the basis of such use

“Illegal use” defined by the Controlled Substances Act

- Possession of heroin
- Possession of prescription opioids that are not obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his or her professional practice, 21 U.S.C. § 844(a)
- Possession of prescription opioids by misrepresentation, fraud, forgery, deception, or subterfuge, 21 U.S.C. § 843(a)(3)

Prescribed MAT medication is not illegal

4. Illegal Use

Illegal Use does NOT Mean

Misuse

- Use for purposes other than intended purpose

Abuse

- Intentional misuse for the purposes of experiencing euphoria or other altered states of consciousness

Dependence

- If drug is stopped, person experiences withdrawal

Addiction

- Compulsive use; use is an overriding priority

The “safe harbor”: Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who—

1. has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
2. is participating in a supervised rehabilitation program and is no longer engaging in such use; or
3. is erroneously regarded as engaging in such use, but is not engaging in such use

4. Illegal Use, cont'd

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1. has successfully completed a supervised drug rehabilitation program **and is no longer engaging in the illegal use of drugs**, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
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4. Illegal Use, cont'd

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“No formula can determine if an individual qualifies for the safe harbor for former drug users or is ‘currently’ using drugs, although certainly the longer an individual refrains from drug use, the more likely he or she will qualify for ADA protection.”

A person is “currently engaging” if:

- Problem is “severe and recent enough” that the employer is justified in believing that the employee is unable to perform the job’s essential duties
 - 2d Cir.
- There is periodic or ongoing activity “that has not yet permanently ended” in which the person engages in illegal use
 - 4th Cir.
- The use is “sufficiently recent to justify the employer’s belief that the drug abuse remains an ongoing problem”
 - 5th Cir.

Illegal Use, cont’d

A person is “currently engaging” if:

- The individual has not refrained from illegal use “for a significant period of time”
 - 9th Cir.
- The individual has engaged in illegal use “recently enough to indicate that the individual is actively engaged in such conduct”
 - EEOC
- The individual has engaged in illegal use “recently enough to justify a reasonable belief that a person’s drug use is current.”
 - Leg. history

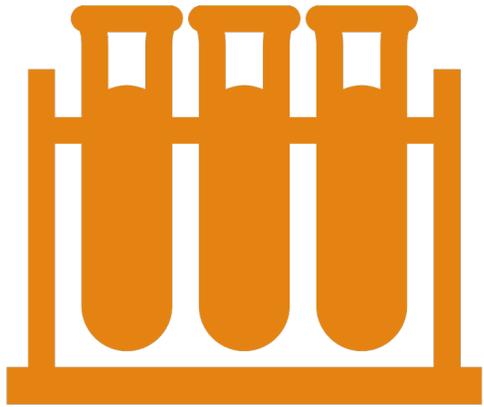
Illegal Use, cont’d

Illegal Use, cont'd

“Mere participation in a rehabilitation program is not enough”

The term currently engaging in illegal use is “not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question”

In *Mauerhan v. Wagner Corp.*, 649 F.3d 1180 (10th Cir. 2011), Plaintiff was found to be “currently engaging” when an expert testified that “three months of treatment would be necessary for an addict like Mr. Mauerhan to reach a ‘threshold of significant improvement’ in his or her addiction.”



Testing

Two Systems

Drug screens required by the federal government

- Highly regulated (49 CFR pt. 40)
- Involve a Medical Review Officer that checks whether an individual who tests positive has a prescription
- Generally, if the individual has a prescription, reported as a negative result

All others

- Drug tests are commercially available, and are administered as agreed upon by employer and screener

Commercial Drug Screens

5-panel test typically screens for heroin/morphine/codeine (“opiates”)

- Heroin metabolizes into codeine, codeine metabolizes into morphine
- Relatively high false positive rate
- Usually followed up with confirmatory test, which has a lower false positive rate

Methadone, oxycodone, buprenorphine, etc. are usually added in broader panels

ADA Protections

Disability-related inquiries and medical examinations, including drug tests, are generally subject to restrictions

- None prior to a conditional offer of employment
- During employment: only if the employer has a legitimate reason to believe, based on objective evidence, that the employee may be experiencing a workplace problem due to drug use

Exception

ADA does not restrict “tests to determine the illegal use of drugs” 42 U.S.C. 12114(d)

Even though legal use of codeine or morphine can produce a positive result on the standard “opiates” test, these and related tests have generally been considered to be “tests to determine the illegal use of drugs”

Wrap-Up

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Questions?

Comments?