

# Insights

## Employee Opioid Use, Addiction, and the ADA: EEOC Guidance Indicates Opioid Use and Addiction May Give Rise to ADA Rights

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Employers may need to revisit employee handbooks and policies after the Equal Employment Opportunity Commission (EEOC) issued guidance on August 5, 2020, addressing employee opioid use, addiction, and employee rights under the Americans with Disabilities Act (ADA).

### I. Testing for Drug Use—Employer Rights<sup>1</sup>

Employers are likely aware of their ability to drug test employees for suspected drug use, but the circumstances of such tests are nuanced and it is important for employers understand the ADA requirements for drug testing. Under the ADA, employers can conduct drug tests in the following circumstances: pre-employment drug testing, testing based on reasonable suspicion, periodic or random drug testing, and post-incident drug testing. It is important to note that drug testing under the ADA is not considered a medical examination, whereas tests for alcohol are and have many more restrictions. However, such test results should be maintained in a medical file as they may contain prescription information that would be considered medical information under the ADA.

#### A. Pre-employment Drug Testing

The ADA prohibits employers from making pre-employment inquiries about an applicant's disabilities. This means that employers cannot screen qualified applicants based on their disabilities, including the disability of being a recovering or recovered drug addict. An employer can, however, ask questions about the applicant's ability to perform specific job functions and may require an applicant to submit to a drug test or condition an offer of employment on successful passage of a drug test. Employers should be careful not to only require certain applicants to submit to a drug test, as singling an applicant out could lead to a claim of discrimination.

#### B. Testing Based on Reasonable Suspicion and Random Drug Testing

Employers can also test employees if they have reasonable suspicion that the employee is using illegal drugs or can even require random drug tests. The most likely case of reasonable suspicion is that the employee appears visibly intoxicated at work or illegal drug use is witnessed by the employer. Employers should be diligent in documenting what led to their determination that there was reasonable suspicion and should apply this policy uniformly. This will assist in avoiding claims of discrimination. Further, if an employer implements a random drug testing policy, it should be contained in a written policy that employees are aware of. The policy should be applied uniformly to either certain positions or to the entire workforce. Because random testing is costly for an employer, it is likely that employers choose not to use random testing unless their employees are in safety sensitive positions.

#### C. Post-Incident Drug Testing

Employers can also implement a post-incident drug testing policy. However, before doing so, they should be aware that the Occupational Safety and Health Administration (OSHA) requires that employers document workplace injuries and illnesses and that such policies be reasonable and not deter or discourage employees from reporting. The best practice to engage in is to require post-incident drug testing only when drug use is likely to have

contributed to the injury or illness and the test can accurately identify a present impairment. OSHA also believes that testing-related practices that are punitive or embarrassing are likely to deter reporting, such as escorting employees out of the work area and barring employees from accessing their personal belongings or vehicle. Thus, if an employer maintains a post-incident drug testing policy, employers should ensure it complies with both the ADA and OSHA requirements.

## II. EEOC Guidance

The **EEOC Guidance** makes clear that the ADA protects employees who are lawfully using opioid medication, are being treated for opioid addiction and are receiving Medication Assisted Treatment (MAT), and employees who have recovered from their addiction.

### *A. Job Disqualification*

As with other qualifying disabilities under the ADA, employers may not disqualify prospective employees from a job because of the employees' current, lawful opioid use or past opioid use. Rather, employers must consider whether such employees can perform the job safely and effectively before deciding to disqualify the individual from the job. Lawful opioid use includes opioids prescribed as directed by a MAT program.

In the event of a positive drug test, the EEOC encourages employers to give the prospective employee an opportunity to provide information about the positive test and whether it was caused by the employee's lawful use of opioids.

To avoid potential ADA mishaps, employers should consider asking prospective employees whether they are currently taking medication that may result in a positive drug test before the test is administered. If employers do not ask about medication prior to the test, employers should ensure that they ask all individuals who test positive additional questions, as singling out individuals that test positive puts employers at risk for violating the ADA.

Keep in mind, however, that employees currently engaging in the illegal use of opioids are NOT protected under the ADA.

### *B. Reasonable Accommodation*

Employees who are not using opioids illegally and who are not disqualified from a job by an applicable federal law (i.e., under Department of Transportation regulations) may be entitled to a job accommodation from an employer. If an employer thinks that an employee's lawful opioid use, history of opioid use, or treatment for opioid addiction will interfere with an employee's work, the employer should first consider providing a reasonable accommodation, if requested, before taking an adverse action against the employee or rejecting the prospective employee's application.

An employee taking opioid medication for pain may be entitled to a reasonable accommodation for two different reasons: (1) the opioid medication is treating an underlying condition that constitutes a qualifying disability under the ADA; and (2) the opioid medication itself interferes with the employee's everyday functioning. If an employee requests a reasonable accommodation in these instances, employers should engage the employee in the interactive process as it would in any other circumstance.

Opioid addiction and medical conditions related to opioid addiction may also give rise to an employee's right to reasonable accommodation under the ADA.

- Employees with an opioid use disorder ("OUD") may be protected under the ADA because OUD is a diagnosable medical condition that can be an ADA disability. A reasonable accommodation is only available, however, if the employee is not currently using illegal drugs. Illegal drug use does not warrant a reasonable accommodation even if the employee has an OUD.
- Employees with opioid addiction may also suffer from other medical conditions such as major depression and post-traumatic stress disorder. These medical conditions may constitute disabilities that trigger the right to a reasonable accommodation under the ADA.

Employees who have overcome and recovered from a previous opioid addiction may still be entitled to a reasonable accommodation to avoid relapse.

### III. Moving Forward and Takeaways

Employers should take the EEOC's recent guidance into account when making employment decisions, especially as it relates to reasonable accommodations and employee handbooks.

If a drug test reveals an employee has current or past drug use, an employer may consider granting reasonable accommodations to the employee. An employee is entitled to reasonable accommodations if they are a recovering or a recovered drug addict. Current illegal drug users are not entitled to reasonable accommodations under the ADA, but employers are also permitted to grant such reasonable accommodations. An employer should consider that reasonable accommodations, even when not required, could decrease absenteeism, increase productivity, and reduce healthcare claims, among many other benefits.

Some accommodations an employer might consider are:

- Reduced or altered work hours/flexible scheduling
- Frequent breaks
- Altering work location or assignments
- Referral to an Employee Assistance Program or other treatment program
- Leave (paid/unpaid) to either get treatment or to attend recovery meetings
- Transfer to another position
- Restricting narcotic handling if such handling is customary for the employee's job

Employers should also consider whether they should take advantage of the Indiana Employee Substance Abuse Treatment Law that assists with handling addiction treatment and can provide the employer with certain civil immunity for participating.<sup>2</sup>

As a result of the new EEOC guidance, employers should revisit current employee handbooks and policies and ensure they comply with both the EEOC guidance and the ADA. Additionally, employers and HR professionals should be prepared to address requests for reasonable accommodation based on an employee's legal opioid use, current addiction (without illegal use), or past addiction.

If you need assistance reviewing and updating your employee handbook or policies, or determining how the EEOC's guidance affects your business, please contact **Elizabeth M. Roberson** or any member of Krieg DeVault LLP's Labor and Employment Law practice group.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

*[1] This article addresses the laws and procedures related to drug testing done by private employer. Public employers have greater restrictions on their ability to conduct drug testing as a result of the application of the Fourth Amendment to the U.S. Constitution.*

*[2] Ind. Code § 12-23-23-0.5 et seq.*