

Employing and Accommodating Individuals With Histories Of Alcohol Or Drug Abuse

This brochure is one of a series on human resources practices and workplace accommodations for persons with disabilities edited by Susanne M. Bruyère, Ph.D., CRC, SPHR, Director, Program on Employment and Disability, School of Industrial and Labor Relations – Extension Division, Cornell University. This brochure was updated in May, 2001, by Dennis Moore, Director, Substance Abuse Resources and Disability Issues, RRTC on Drugs and Disability, from the initial version, developed by Ellen M. Weber, Co-Director of National Policy of the LegalAction Center in March, 1994.

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The full text of this brochure, and others in this series, can be found at: www.ilr.cornell.edu/ped/ada. Research reports relating to employment practices and policies on disability civil rights legislation, are available at: www.ilr.cornell.edu/ped/

For further information, contact the Program on Employment and Disability, Cornell University, 102 ILR Extension, Ithaca, New York 14853-3901; 607/255-2906 (Voice), 607/255-2891 (TTY), or 607/255-2763 (Fax).

More information is also available from the ADA Technical Assistance Program and Regional Disability and Business Technical Assistance Centers, (800) 949-4232 (voice/TTY), www.adata.org

Why Is Drug And Alcohol Abuse Considered A Disability?

Clinicians and researchers commonly divide drug and alcohol consumption into three levels or stages of use: use, abuse, and dependence. While the use of drugs and alcohol does not generally rise to the level of an impairment that constitutes a disability, abuse and dependence do. Drug and alcohol abuse is characterized by intensified, regular, sporadically heavy, or “binge” use, and dependence is characterized by compulsive or addictive use.

Drug and alcohol abuse and dependence are classified as treatable illnesses by both standard diagnostic medical manuals, the Diagnostic and Statistical Manual IV (DSM-IV) and the International Statistical Classification of Diseases, Injuries, and Causes of Death (ICD-10). These manuals also provide criteria for diagnosing drug and alcohol abuse and dependence that focus on psychological, behavioral, and cognitive symptoms. The impact of drug and alcohol use on social and occupational functioning is an important factor in evaluating the severity of an individual's condition. Many individuals with drug and alcohol problems can continue to function in their jobs long after drug and alcohol use has begun to take its toll on family and social functioning. However, the impact on the American workforce can be appreciable. It is estimated that lost productivity and wages plus injury-related expenses cost the American workforce over 100 billion dollars per year.

What Protections Against Discrimination are Provided to Individuals With Drug and Alcohol Impairments?

Many employers do not realize that the Americans with Disabilities Act (ADA) protects individuals with drug and alcohol problems against discrimination in employment. This confusion exists because the ADA includes both employment protections and sanctions regarding individuals with current drug problems.

People with past drug or alcohol are protected from job discrimination by the ADA, as are persons with current alcohol problems who are able to perform their job. Individuals do not have the same rights as others with disabilities if they are currently using illegal drugs, or abusing alcohol.

The ADA specifically excludes from the definitions of “individual with a disability” any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. This includes individuals who use illicit drugs as well as those who use prescription medications unlawfully. Individuals who use drugs under the supervision of a licensed health care professional -- such as methadone -- are not using drugs illegally, and therefore are protected against discrimination. In recent years there have been gains in creating drugs to assist individuals with recovery, and consequently it is more likely that former drug users will enter the workforce with

specialized medication to assist with their maintenance of sobriety.

Although individuals who are current illicit drug users are not protected, the ADA specifically protects individuals who are participating in a supervised drug rehabilitation program, have completed a treatment program, or have been rehabilitated through self-help groups, employee assistance programs or any other type of rehabilitation, and are no longer using drugs.

In addition, the ADA protects individuals who are erroneously perceived as abusing drugs illegally, but are not doing so. Because of societal attitudes about drug abuse, many individuals who have had drug problems in the past are perceived as still being drug dependent. Similarly, individuals who participate in methadone maintenance programs are also often perceived as drug dependent, even though methadone is a lawfully prescribed medication and individuals who participate in a methadone maintenance program are able to do every task -- even safety-related tasks -- that a person who is not receiving such treatment can do. These individuals are protected against discrimination under the ADA.

Workplace drug testing programs also create a pool of individuals who may be erroneously perceived as being drug dependent when, in fact, they are not. Invariably, drug tests will inaccurately identify some individuals as drug users. This occurs because the drug test may be performed incorrectly, substances in an individual's system may be incorrectly identified as a drug, or a prescription medication may be incorrectly identified as an illicit drug. The ADA prohibits discrimination against individuals who are erroneously regarded as being addicted to controlled substances because of a false positive drug test, but are not engaging in such use. However, the ADA does not protect an individual who is erroneously perceived as recreationally using illegal drugs on an occasional basis, because the employer is not regarding the individual as having a substantially limiting impairment. This is a sensitive and complex area and many employers utilize drug testing policies that set forth specific steps for handling positive drug findings.

Individuals with current alcohol impairments that substantially limit one or more major life activities are protected against discrimination like any other individual with a disability. Alcohol is not considered a "drug" under the ADA, and, therefore, the current abuse of alcohol does not exclude an individual from the ADA's protection. However, individuals with current alcohol related disabilities, like any other individual with a current disability, must be able to perform the essential functions of the job to be protected against discrimination. In addition, the ADA specifically permits an employer to hold employees who abuse alcohol to the same performance and conduct standards applicable to all employees, even if that employee's problems are related to the alcohol abuse.

What is "Current" Illegal Use of a Drug?

The definition of a person "currently engaging in the illegal use of drugs" is not limited to a person who illegally used drugs on the day of or within a matter of weeks before the employment action in question. Rather, the employer must make an individualized determination that focuses on whether the individual has used drugs close enough to the time of the employment action to indicate that there is a real and on-going problem. If an individual tests positive on a test for illegal drugs, the person will be considered a current drug user under the ADA where the test correctly indicates the illegal use of a controlled substance.

According to the U.S. Equal Employment Opportunity Commission, casual drug use is not a disability under the ADA. Only individuals who are addicted to drugs, have a history of addiction, or who are regarded as being addicted have an impairment under the law. In order for an individual's drug use to be considered a disability under the ADA, it would have to pose a substantial limitation on one or more major life activities. In addition, the individual could not currently be using illegal drugs. Denying employment to job applicants solely because of a history of casual drug use would not raise ADA concerns. On the other hand, policies that screen out applicants because of a history of addiction or treatment for addiction must be carefully scrutinized to ensure that the policies are job-related and consistent with business necessity. If safety is asserted as a justification for such a policy, then the employer must be able to show that individuals excluded because of a history of drug addiction or treatment would pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of others or, perhaps, to themselves as well, that cannot be eliminated or reduced by reasonable accommodation. Again, individuals who currently use illegal drugs, even users who are addicted, may be denied employment because of their current use.

Because the ADA protects individuals who are participating in a rehabilitation program and those who have been rehabilitated (as long as they are not still using drugs illegally), employers should be careful about reaching back in time and taking adverse actions against individuals for drug use that occurred before they entered treatment.

What Medical Tests or Inquiries are Permitted to Determine Whether an Individual has a Drug or Alcohol Problem?

The permissible scope and timing of inquiries and tests relating to drug and alcohol use will depend on the specific information being sought. An employer may ask applicants and employees about the current illegal use of drugs before or after extending a job offer and during employment without violating the ADA, because an individual who currently uses illegal drugs is not protected under the ADA. The ADA specifically states that tests

for the current illegal use of controlled substances are not considered medical examinations.

An employer also may ask about past illegal drug use at the pre-offer stage so long as the question is not likely to elicit information about a disability. A question such as “Have you ever used illegal drugs?” or “When did you last use illegal drugs?” would be acceptable. Questions about addiction would not be permissible at the pre-offer stage, but could be asked either after a job offer was extended, or during employment if the inquiry was job-related and consistent with business necessity.

Generally, questions about lawful drug use are not allowed pre-offer because they are likely to elicit information about disability.

However, if a person tests positive for illegal drug use, an employer could ask about lawful drug use as a possible explanation for the positive drug test.

When an employer obtains medical information at the pre-offer stage, it must be careful not to use the information in a way that would violate the ADA. To avoid the possibility of this type of allegation, many employers choose to conduct drug testing after a conditional offer of employment has been made. In all cases where an employer obtains medical information from an inquiry or exam, the medical information must be collected and maintained on separate forms and in separate files and treated as a confidential medical record.

An employer could ask about drinking habits at the pre-offer stage, such as whether a person drinks or has ever been arrested for driving while intoxicated, so long as the question is not likely to elicit information about alcoholism. IN contrast, questions about how much someone drinks or whether they have ever been in an alcohol rehabilitation program are not acceptable because they are likely to garner information about alcoholism. Alcohol tests may not be given pre-offer because they are considered to be medical tests. Inquiries relating to alcoholism or alcohol tests could be conducted post-offer, or at the employment stage if the inquiry or test is job-related and consistent with business necessity.

What Can an Employer Do To Ensure that an Individual is No Longer Using Drugs?

The ADA permits employers to take reasonable steps to ensure that an individual is no longer illegally using drugs. Employers are permitted to conduct drug tests and to obtain information from treatment programs in order to monitor drug use. If an employer has an employee assistance program (EAP), the EAP may be the best entity to conduct the follow-up.

While the ADA does not impose many restrictions on drug testing, employers are required to use accurate test procedures and to comply with any federal, state, or local law that regulates drug testing.

In addition, when seeking information from a drug or alcohol treatment program about an individual’s rehabilitation, employers should be aware that federal regulations govern the release of drug and alcohol patient information by virtually all treatment programs ¹. These regulations, in order to protect the confidentiality of individuals with drug and alcohol problems, require the execution of a detailed consent form before employers can receive treatment information and place strict limitations on the employer’s use, maintenance and re-disclosure of that information. Because these regulations impose more stringent confidentiality standards than those in the ADA, they supersede the ADA's requirements for protection of drug and alcohol treatment information.

What Accommodations Do Individuals with Drug and Alcohol Problems Need?

Accommodations for individuals in recovery from a drug or alcohol problem will vary depending upon the requirements of their jobs and their length of time in recovery. For example, individuals who have recently completed a rehabilitation program may need to participate in a structured, outpatient continuing care program on a regular basis. Others who have been sober for a long time may participate in self-help groups, such as Alcoholics Anonymous, in order to prevent relapse. Involvement in such continuing care may require some accommodation.

Examples of possible accommodations include:

- Structuring the work day so that less demanding tasks are required when fatigue occurs
- Adjusting supervisory methods, e.g., communicating assignments or instructions in writing or by e-mail rather than orally, or providing more detailed guidance or structure.
- Modified work schedule to permit an employee to pick up her daily methadone dosage or to attend an out-patient relapse prevention counseling session.
- Job restructuring to relieve an employee of “risky” environments or tasks that may compromise recovery e.g., expectations for socializing with clients or other employees who are known to be heavy alcohol users.
- Temporary reassignment of an employee in a safety-related position to a vacant non-safety sensitive position while he or she completes treatment.
- Reassignment to an equivalent vacant position when the current supervisor is too busy supervising other employees or serving the public to provide the necessary guidance or structure.

In addition, because individuals with current alcohol impairments are protected against discrimination to the extent they can perform their job effectively and safely, employers are required to consider providing unpaid leave to permit an individual with a

¹ Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. Part 2

current alcohol impairment to attend an in-patient treatment program. In addition, if an employer provides paid leave to individuals who are obtaining medical treatment for a disability, the employer must provide the same benefit to an individual who is obtaining treatment for an alcohol problem.

It is important to remember that some employees will need no accommodation, but simply a change in attitude regarding what an individual with a past drug or alcohol impairment can do. Persons in recovery are able to perform all jobs safely, including safety-related jobs, and they pose no risk to others solely because of a past drug or alcohol addiction. An employer's most important obligation under the ADA is to evaluate each individual's ability to do essential job tasks and make employment decisions based on the individual's qualifications and work performance.

How Do Other Federal Laws Relating to Drug and Alcohol Use Affect the ADA's Standards?

The ADA permits employers to comply with other federal laws and regulations that relate to drug and alcohol use. These federal standards include the Drug Free Workplace Act and standards established by the Department of Transportation, Department of Defense, and the Nuclear Regulatory Commission relating to testing safety-sensitive employees for drug use, and in some cases, alcohol use. The standards established by these other federal laws and rules are consistent with the ADA and, for the most part do not impose additional restrictions on the rights of individuals in safety-related jobs.

The drug testing regulations, in particular, cover a fairly narrow set of employees whose jobs directly affect safety. They require employees to comply with restrictions on off-duty drug and alcohol use and prohibit individuals who violate drug or alcohol rules from holding safety-sensitive jobs. The regulations give employers the right to determine when individuals who have tested positive for drug or alcohol may return to work in the safety-related position.

Apart from these standards, the ADA does not permit employers to treat individuals with past drug or alcohol impairments who hold safety-related jobs any differently from other employees.

Resources

For information on the Americans with Disabilities Act and reasonable accommodations the following organizations can be contacted:

ADA Regional Disability and Business Technical Assistance Center Hotline, 800/949-4232 (voice/TTY).

U.S. Equal Employment Opportunity Commission, 1801 L Street NW, Washington, DC 20507, 800/669-4000 (voice), 800/800-3302 (TTY), or 800/669-EEOC (publications-voice).

There are a number of organizations that can provide information about drug and alcohol problems and assist individuals with such problems. Some of these are:

Employee Assistance Professional Association, 2101 Wilson Boulevard, Suite 500, Arlington, Virginia 22201. Phone: 703-387-1000 Fax: 703-522-4585
<http://www.eapassn.org/>

Job Accommodation Network, 918 Chestnut Ridge Road, Suite 1, Morgantown, WV 26506-6080, (800) ADA-WORK (voice/TTY).

Legal Action Center, 153 Waverly Place, New York, NY 10014, 212/243-1313, and 236 Massachusetts Avenue, N.E., Suite 510, Washington, DC 20002, 202/544-5478.

The Workplace Center, Columbia University, School of Social Work, 622 West 113th Street, New York, NY 10025, 212/854-5458.

Disclaimer

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Cornell University is authorized by the National Institute on Disability and Rehabilitation Research (NIDRR) to provide information, materials, and technical assistance to individuals and entities that are covered by the Americans with Disabilities Act (ADA). However, you should be aware that NIDRR is not responsible for enforcement of the ADA. The information, materials, and/or technical assistance are intended solely as informal guidance, and are neither a determination of your legal rights or responsibilities under the Act, nor binding on any agency with enforcement responsibility under the ADA.

The Equal Employment Opportunity Commission has issued enforcement guidance which provides additional clarification of various elements of the Title I provisions under the ADA. Copies of the guidance documents are available for viewing and downloading from the EEOC web site at: <http://www.eeoc.gov>