

Opioid Use and the EEOC

Expectations for Employers Regarding Reasonable Accommodations

In early August, the Equal Employment Opportunity Commission (EEOC) released a new technical assistance document that addresses concerns about the employment provisions of the Americans with Disabilities Act (“ADA”) and the opioid epidemic.

The guidance, titled **“Use of Codeine, Oxycodone, and Other Opioids: Information for Employees”** makes clear that current illegal drug use is not a covered disability, but explains that the following individuals are protected from disability discrimination under the ADA:

- ▲ individuals who are lawfully using opioid medication,
- ▲ individuals who are in treatment for opioid addiction and are receiving Medication Assisted Treatment (MAT), and
- ▲ individuals who have recovered from their addiction.

The EEOC’s guidance answers questions about reasonable accommodations that may be available to employees who are currently using opioids legally, as well as what to do if an employer has concerns about the employee’s ability to perform his or her job safely. The guidance defines a reasonable accommodation as “some type of change in the way things are normally done at work, such as a different break or work schedule (e.g., scheduling work around treatment), a change in shift assignment, or a temporary transfer to another position.”

It is important to note that the guidance explains that employees with opioid addiction (sometimes called “opioid use disorder” or “OUD”) may be eligible for a reasonable accommodation for their disorder because the opioid addiction itself is “a diagnosable medical condition that can be an ADA disability.” However, employers may deny an employee’s request for an accommodation if he or she is using opioids illegally, even if that employee has been diagnosed with OUD. Further, an employee who had a past addiction to opioids may be eligible for a reasonable accommodation in relation to that past addiction.

Below is the EEOC’s document issued to employees. It is important for companies and managers to review and



familiarize themselves with this information in order to take the necessary legal precautions surrounding reasonable accommodation if an opioid situation arises.

Official Technical Assistance Document: “Use of Codeine, Oxycodone, and Other Opioids: Information for Employees”

If you are using opioids, are addicted to opioids, or were addicted to opioids in the past, but are not currently using drugs illegally, you should know that under the Americans with Disabilities Act (ADA) you may have the right to get reasonable accommodations and other protections that can help you keep your job.

“Opioids” include prescription drugs such as codeine, morphine, oxycodone (OxyContin®, Percodan®, Percocet®), hydrocodone (Vicodin®, Lortab®, Lorcet®), and meperidine (Demerol®), as well as illegal drugs like heroin. They also include buprenorphine (Suboxone® or Subutex®) and methadone, which can be prescribed to treat opioid addiction in a Medication Assisted Treatment (“MAT”) program.

The following questions and answers from the EEOC briefly explain these rights. This information is not new policy; rather, this document applies principles already established in the ADA’s statutory and regulatory provisions as well as previously-issued guidance. The contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This guidance is intended only to provide clarity to

Continued on Next Page

the public regarding existing requirements under the law. You may also have additional rights under other laws not discussed here, such as the Family and Medical Leave Act (FMLA) and state or local laws.

DISQUALIFICATION FROM A JOB

1. Could I be automatically disqualified for a job because I use opioids, or because I used opioids in the past?

The ADA allows employers to fire you and take other employment actions against you based on illegal use of opioids, even if you do not have performance or safety problems. Also, employers are allowed to disqualify you if another federal law requires them to do it.

But if you aren't disqualified by federal law and your opioid use is legal, an employer cannot automatically disqualify you because of opioid use without considering if there is a way for you to do the job safely and effectively.

2. What if I am in a MAT program for opioid addiction that requires me to take opioid medication?

If you are taking an opioid medication as directed in a MAT program, then you have a valid prescription and your use of the medication is legal. Under the ADA, you cannot be denied a job or fired from a job because you are in a MAT program unless you cannot do the job safely and effectively, or you are disqualified under another federal law.

3. What if a drug test comes back positive because I am lawfully using opioid medication?

An employer should give anyone subject to drug testing an opportunity to provide information about lawful drug use that may cause a drug test result that shows opioid use. An employer may do this by asking before the test is administered whether you take medication that could cause a positive result, or it may ask all people who test positive for an explanation.

PERFORMANCE AND SAFETY

4. What if my employer thinks that my opioid use, history of opioid use, or treatment for opioid addiction could interfere with safe and effective job performance?

If you aren't using opioids illegally and aren't disqualified for the job by federal law the employer may have to give you a reasonable accommodation before firing you or rejecting your job application based on opioid use. If the employer has let you know about its concern, then you

need to ask for a reasonable accommodation if you want one. (See Question 9, below.)

A reasonable accommodation is some type of change in the way things are normally done at work, such as a different break or work schedule (e.g., scheduling work around treatment), a change in shift assignment, or a temporary transfer to another position. These are just examples; employees may ask for, and employers may suggest, other modifications or changes.

However, an employer never has to lower production or performance standards, eliminate essential functions (fundamental duties) of a job, pay for work that is not performed, or excuse illegal drug use on the job as a reasonable accommodation.

5. Could I get a reasonable accommodation because I take prescription opioids to treat pain?

You may be able to get a reasonable accommodation if the medical condition that is causing pain qualifies as a "disability" under the ADA. A medical condition does not need to be permanent or stop you from working to be an ADA "disability." Many conditions that cause pain significant enough for a doctor to prescribe opioids will qualify.

You may also qualify for a reasonable accommodation if the opioid medication you are taking interferes with your everyday functioning.

It is your responsibility to ask for a reasonable accommodation if you want one.

6. Could I get a reasonable accommodation because of an addiction to opioids?

Yes, opioid addiction (sometimes called "opioid use disorder" or "OUD") is itself a diagnosable medical condition that can be an ADA disability. You may be able to get a reasonable accommodation for OUD. But an employer may deny you an accommodation if you are using opioids illegally, even if you have an OUD.

7. What if I have recovered from an opioid addiction, but still need a reasonable accommodation to help me avoid relapse?

You can get reasonable accommodations that you need because of a disability that you had in the past. You might be able to get an altered schedule, for example, if you need it to attend a support group meeting or therapy session that will help you avoid relapse.

Continued From page 13

8. Could I get reasonable accommodations for a medical condition related to opioid addiction?

Yes, if the condition is a disability. Medical conditions that are often associated with opioid addiction, such as major depression and post-traumatic stress disorder (PTSD), may be disabilities.

9. What should I do if I need a reasonable accommodation?

Ask for one. Tell a supervisor, HR manager, or other appropriate person that you need a change at work because of a medical condition. Check to see whether your employer has procedures for requesting reasonable accommodations. Following these procedures may make the process go faster, although employers can't deny you a reasonable accommodation just because you did not follow specific procedures.

You are allowed to make a request at any time. You don't need to have a particular accommodation in mind, but you can ask for something specific if you know what it is. You can also have someone else ask for you, such as a doctor or counselor, although your employer will still probably want to discuss the accommodation directly with you as soon as possible.

Because an employer does not have to excuse poor job performance, even if it was caused by a medical condition or treatment for a medical condition, it is generally better to ask for a reasonable accommodation before problems occur or become worse. (Many people choose to wait to after they receive a job offer, however, because it may be hard to prove illegal discrimination that takes place before a job offer.)

10. What will happen after I ask for a reasonable accommodation?

Your employer might ask you to put your request in writing or to fill out a form, and to generally describe how your work is affected by your disability. Your employer may also ask you to submit a letter from a health care provider that shows your ADA disability (see Questions 6–9 above), and that explains why you need a reasonable accommodation because of it.

Your employer cannot legally fire you, or refuse to hire or promote you, simply because you asked for a reasonable accommodation or because you need one.

11. If I need a reasonable accommodation because of an ADA disability, does the employer have to give it to me?

If a reasonable accommodation would allow you to perform the job safely and effectively, and does not involve significant difficulty or expense, the employer must give you one. If more than one accommodation would work, the employer can choose which one to give you. The employer is not allowed to charge you for the accommodation.

12. What if I think I can do the job safely (with a reasonable accommodation, if one is necessary), but the employer disagrees?

Assuming you aren't disqualified by federal law or using opioids illegally, the employer must have objective evidence that you can't do the job or pose a significant safety risk, even with a reasonable accommodation. To remove you from the job for safety reasons, the evidence must show that you pose a significant risk of substantial harm—you can't be removed because of remote or speculative risks. To make sure that it has enough objective evidence about what you can safely and effectively do, the employer might ask you to undergo a medical evaluation.

13. What if I really can't do the job safely or reliably right now, but I may be able to do it safely again in the future?

Your employer might still be required to hold your job while you take leave for treatment or recovery. If you need leave because of an ADA disability (see Questions 6–9), you should be allowed to use sick and accrued leave like anyone else, unless you are using opioids illegally. You should also check your employer's leave policy to see whether it provides leave for substance abuse treatment.

Even if you have no employer-provided leave available, you still may be able to get unpaid leave. If you have worked at least 1,250 hours during the past 12 months and your employer has 50 or more employees, you may be entitled to unpaid leave under the FMLA. The FMLA is enforced by the United States Department of Labor. More information about this law can be found at <https://www.dol.gov/agencies/whd/fmla>. You might also be entitled to unpaid leave as a reasonable accommodation if you need the time off because of a disability, are not using drugs illegally, and are expected to recover the ability to do your job.

If you are permanently unable to do your regular job, you may ask your employer to reassign you to a job that you can do as a reasonable accommodation, if one is available. For more information on reasonable accommodations in employment, including reassignment, see Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, <https://www.eeoc.gov/disability-discrimination>.