ADA AND SUBSTANCE USE DISORDERS IN THE WORKPLACE

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Learning Objectives

1. Define disability as it applies to alcohol use disorder, substance abuse disorder (SUD), and opioid use disorder.

2. List the obligations for employers under ADA Title I (Employment).

3. List the obligations for employees with SUD under ADA Title I (Employment).
Southeast ADA Center

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• Phone: 1-800-949-4232 (voice/TTY/relay)
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LET’S LOOK AT THE NUMBERS
SUBSTANCE USE DISORDER (SUD) AND ANY MENTAL ILLNESS AMONG ADULTS AGED 18 OR OLDER: 2020

**Figure 35.**
Past Year Substance Use Disorder (SUD) and Any Mental Illness among Adults Aged 18 or Older: 2020

**Source:**
Substance Abuse and Mental Health Services Administration (SAMHSA)

**Web:**
tinyurl.com/2020-SAMHSA-NSUD-Report
MORE NUMBERS

• Over 22 million Americans are currently in recovery from alcohol and other drug use disorders.

• More than 70% of individuals who actively use alcohol or drugs continue to function on the job.

Harvard Health Blog: Working on addiction in the workplace

Source: Harvard Health Publishing, Harvard Medical School, Harvard University

Web: health.harvard.edu/blog/working-on-addiction-in-the-workplace-2017063011941
A Snapshot: The Spirit of the ADA

• Ensures that people with disabilities have the same rights and opportunities as everyone else.

• Includes people with addiction to alcohol, and people in recovery from opioid and substance use disorders.
The Five Titles of the ADA

• Title I Employment Protections.
• Title II Public Entities and Transportation.
• Title III Public Accommodation and Commercial Facilities.
• Title IV Telecommunications.
• Title V Technical Provisions.
The Definition of Disability

Under the ADA, disability is defined as a legal term, not a medical term.

- Has a **physical or mental impairment** that **substantially limits** one or more **major life activities**; or
- Has a **history** of a physical or mental impairment that substantially limits one or more major life activities; or
- Is **regarded** as having such an impairment.
Addiction is an impairment that can substantially limit:

- brain and neurological functioning
- working
- learning
- sleeping
- eating
- concentrating
- caring for oneself
- remembering
Alcohol Addiction, Illegal Use of Drugs. What is the Difference?

The ADA makes a *distinction* between:

- an *addiction to alcohol*;
- and the *illegal use of drugs*. 
Alcohol Addiction

• Is generally a “disability” regardless of whether it is in the present or in the past.
• A person still must meet the definition of disability.
The ADA protects a person who is:

• in **recovery**; and
• **no longer engaging in** the **current illegal use of drugs**.
What does “In Recovery” Mean?

A person is:

• **in recovery from substance use disorder** and is **no longer engaging** in the illegal use of drugs; or

• participating in a **supervised rehabilitation program** and is **no longer using drugs illegally**
What Does “Illegal Use of Drugs” Mean?

- **Use of illegal drugs** such as heroin or cocaine.
- **Use of controlled substances** such as opioids or morphine
  BUT a person:
  - has **no** prescription; or
  - has a **fraudulent** prescription; or
  - is **using more** than prescribed.
What do we mean by “Current” illegal drug use?

• “Illegal use occurred recently enough to justify a reasonable belief that a person’s drug use is a real and ongoing problem.”

• **Under the ADA, current drug use is decided on a case-by-case basis.**
ADA Title I Employment
Does the ADA Apply to all Employers?

• Applies to private employers with 15 or more employees and all state and local government employers.

• Applies to all aspects of employment: job application, interview, job training, etc.

• ... and other terms or conditions and privileges of employment.
The Three Stages of Employment

The ADA addresses addiction and recovery during in each stage of employment:

**Stage 1:** Pre-Employment, Pre-Offer

**Stage 2:** Pre-Employment, Post-Offer

**Stage 3:** On the job
Stage 1
Pre-Employment, Pre-Offer

- The ADA prohibits all disability-related questions, and medical exams, even if they are related to the job.
- These questions can reveal a disability.
Stage 1: What Employers Cannot Ask

- Are you taking prescription drugs?
- Do you have a disability, illness or condition that will prevent you from doing this job?
- Have you ever been treated for addiction to alcohol, opioids or other drugs?
Stage 1: Gaps in Employment

- If asked about the gaps, does the job applicant have to mention their addiction?
  - It depends...
Stage 1: How to Respond to Questions About Gaps in Employment?

- Applicant can say that she had an illness, is recovered, and excited to get back to work.
- If the employer asks a specific question about her disability (addiction), she should:
  - tell the truth, even though the question is illegal.
  - If she does not tell the truth and is caught lying, this is cause for not hiring.
  - The employer, however, can be found liable for asking an illegal question.
Stage 1: Questions an Employer Can Ask About Alcohol/Illegal Drugs

• Questions about use of alcohol/illega drugs that are allowed:
  • Have you ever used, or do you currently use ___?
  • A positive or negative answer does not reveal a disability.
Stage 1: Questions an Employer Cannot Ask About Alcohol/ Illegal Drugs

- Questions about *extent or frequency of use* are unlawful.
  - How much alcohol or drugs do, or did you, consume?
  - How often do you, or did you, drink alcohol or use illegal drugs?
- These questions may reveal an addiction.
Stage 2: Pre-Employment, Post-Offer

• An employer may make medical inquiries, require medical exams, and ask disability-related questions if this is done for all employees within a job category.

• All questions about use of alcohol/drugs, or extent of use, or diagnosis of alcohol/drug addiction are allowed.

• At this stage, the new hire must disclose a disability, if asked.
Stage 3: On the Job

- An employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.
An employer may ask:
• about an employee's well being.
  • Example: How are you?
• about non-disability-related impairments.
  • Example: How did you break your leg?
• about the employee’s ability to perform job functions.
Stage 3: On the Job. Allowable Questions (slide 2 of 2)

An employer may ask:

• if an employee has been **drinking**.

• an employee’s **current illegal use of drugs**.

• for the **name and telephone number of a person to contact in case of a medical emergency**.
Stage 3: On the Job. Questions not Allowed

An employer may not ask:

• about the nature or severity of an employee's disability;

• another person about an employee's disability;

• about an employee's genetic information [also not allowed under the Genetic Information Nondiscrimination Act (GINA)]

• about an employee's prior workers' compensation history;
Scenario 1: Marianna

- Marianna has been heroin-free for 6 years.
- She applies for a job that she is qualified to do.
- The employer refuses to hire her because she knows about her past addiction.

Is Marianna protected under the ADA?
Scenario 2
Michael

• Michael is often late for work.
• His supervisor warns him about his lateness.
• The third time Michael is late, his supervisor gives him a written warning, stating that one more late arrival will result in termination.
• Michael tells his supervisor that he is addicted to alcohol.
• His late arrivals are due to his drinking, and he needs immediate time off for detox and treatment.

• Does Michael have protections under the ADA?
Scenario 3: Julie

- Julie has been in recovery for 5 years from addiction to Oxycontin.
- She is under medical treatment for opioid use disorder.
- She works in the office at a day care center.
- Her boss learns about her former addiction.
- She tells her to “get off” methadone or you will be fired.
- Does Julie have protections under the ADA?
Scenario 3: Julie (a new twist)

- What if Julie’s employer found out that she recently used cocaine while in medical assisted treatment (MAT)?

- Would Julie have rights under the ADA?
Scenario 3
Julie
(another twist)

• What if Julie’s employer found out that she recently used marijuana while in MAT?

• Would Julie have protections under the ADA?
Medical Marijuana and State Law

• If medical marijuana is legal under state law, employers may need to consider reasonable accommodations for off-site use of medical marijuana under state law.
• **However, an employee who is high in the workplace has NO protections under federal or state law.**
Scenario 4
Juan

• Juan became addicted to Percocet while taking the medication in a prescribed manner and in prescribed amounts.

• Is Juan protected under the ADA?
Scenario 4a
Juan

• Juan wants to take a leave of absence from his job to taper off Percocet.

• Does Juan have protections under the ADA?
Scenario 4b: Juan

• What if Juan’s employer found out that he was using heroin on the job?

• Would Juan have rights under the ADA?
ADA National Network Publications (slide 1 of 2)

- **The ADA, Addiction, and Recovery Fact Sheet**
  Web: adata.org/factsheet/ada-addiction-and-recovery

- **The ADA, Addiction, Recovery, & State and Local Governments Fact Sheet**
  Web: adata.org/factsheet/ada-addiction-and-recovery-and-government
• The ADA, Addiction, Recovery, & Employment Fact Sheet
Web: adata.org/factsheet/ada-addiction-recovery-and-employment

• Reasonable Accommodations in the Workplace
Web: adata.org/factsheet/reasonable-accommodations-workplace

• Work-Leave, the ADA, and the FMLA
Web: adata.org/factsheet/work-leave
Southeast ADA Center Resources

- **ADA Live! Podcast: Opioid Addiction and the ADA**
  Web: adalive.org/episodes/episode-67

- **ADA Live! Podcast: Opioid Addiction and the ADA with the U.S. Department of Justice**
  Web: adalive.org/episodes/episode-68

- **Resource List: Opioid Addiction and the ADA**
  Web: adalive.org/resources/episode-67-resources

- **Reasonable Accommodation and Undue Hardship Under the ADA**
  [Web](eeoc.gov/policy/docs/accommodation.html)

- **Preemployment Disability-Related Questions and Medical Examinations**
  [Web](eeoc.gov/policy/docs/preemp.html)

- **Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act**
  [Web](eeoc.gov/policy/docs/guidance-inquiries.html)

• **The ADA: Applying Performance and Conduct Standards to Employees with Disabilities**
  
  **Web:** eeoc.gov/facts/performance-conduct.html

• **Employer-Provided Leave and the ADA**
  
  **Web:** eeoc.gov/eeoc/publications/ada-leave.cfm

• **Questions and Answers About the Association Provision of the Americans with Disabilities Act**
  
  **Web:** eeoc.gov/facts/association_ada.html

• Use of Codeine, Oxycodone, and Other Opioids: Information for Employees
  Web: eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees

• How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed
  Web: eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids
Job Accommodation Network (JAN) Resources

• **Job Accommodation Network Home Page**
  Web: askjan.org

• **Accommodation and Compliance: Alcoholism**
  Web: askjan.org/disabilities/Alcoholism.cfm

• **Accommodation and Compliance: Drug Addiction**
  Web: askjan.org/disabilities/Drug-Addiction.cfm
How to File an ADA Complaint with the EEOC

U.S. Equal Employment Opportunity Commission (EEOC)

How to File a Charge of Employment Discrimination

Web: eeoc.gov/employees/howtofile.cfm

Phone (voice): 1-800-669-4000

TTY: 1-800-669-6820

ASL Video Phone: 1-844-234-5122

Email: info@eeoc.gov
How to File an ADA Complaint with the DOJ

U.S. Department of Justice

How to File an Americans with Disabilities Act Complaint with the U.S. Department of Justice

Web: ada.gov/filing_complaint.htm
Phone (voice): 1-800-514-0301
TTY: 1-800-514-0383
Questions?
Phone: 800-949-4232 (toll free)

- All calls are confidential.
- Your call will be directed to the regional ADA Center that serves your state (based on area code of number dialed).

Email (online form): adata.org/email

Web: adata.org
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