

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

- Funded by the National Institute on Disability, Independent Living and Rehabilitation Research (NIDILRR) through the Administration for Community Living (ACL) and U.S. Health and Human Services.
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- Web: www.adasoutheast.org

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](https://www.samhsa.gov/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: www.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.

Substance Use Disorders

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/illegal 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.

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.

Stage 3: On the Job. Allowable Questions (slide 1 of 2)

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: www.adata.org/factsheet/adaaddiction-and-recovery
- The ADA, Addiction, Recovery, & State and Local Governments Fact Sheet Web: www.adata.org/factsheet/adaaddiction-and-recovery-andgovernment

ADA National Network Publications (slide 2 of 2)

- The ADA, Addiction, Recovery, & Employment Fact Sheet Web: www.adata.org/factsheet/adaaddiction-recovery-and-employment
- Reasonable Accommodations in the Workplace Web: www.adata.org/factsheet/reasonableaccommodations-workplace
- Work-Leave, the ADA, and the FMLA Web: www.adata.org/factsheet/work-leave

Southeast ADA Center Resources

- ADA Live! Podcast: Opioid Addiction and the ADA Web: www.adalive.org/episodes/episode-67
- ADA Live! Podcast: Opioid Addiction and the ADA with the U.S. Department of Justice Web: www.adalive.org/episodes/episode-68
- Resource List: Opioid Addiction and the ADA Web: www.adalive.org/resources/episode-67-resources

U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance (slide 1 of 3)

- Reasonable Accommodation and Undue Hardship Under the ADA Web: www.eeoc.gov/policy/docs/accommodation.html
- Preemployment Disability-Related Questions and Medical Examinations Web: www.eeoc.gov/policy/docs/preemp.html
- Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act Web: www.eeoc.gov/policy/docs/guidance-inquiries.html

U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance (slide 2 of 3)

- The ADA: Applying Performance and Conduct Standards to Employees with Disabilities Web: www.eeoc.gov/facts/performance-conduct.html
- Employer-Provided Leave and the ADA Web: www.eeoc.gov/eeoc/publications/ada-leave.cfm
- Questions and Answers About the Association Provision of the Americans with Disabilities Act Web: www.eeoc.gov/facts/association_ada.html

U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance (slide 3 of 3)

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

- How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed Web: www.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: www.askjan.org
- Accommodation and Compliance: Alcoholism Web: www.askjan.org/disabilities/Alcoholism.cfm
- Accommodation and Compliance: Drug Addiction Web: www.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:

www.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: <https://beta.ada.gov/file-a-complaint/>

Phone (voice): 1-800-514-0301

TTY: 1-800-514-0383

Questions?

ADA National Network

Information, Guidance and Training on the Americans with Disabilities Act

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)

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