

The opioid crisis: Is drug addiction a disability?

The opioid crisis claims an estimated 130 lives per day, an annual death toll of over 47,000 people. Drug addiction touches every employer, whether it's finding applicants to fill open jobs or accommodating treatment and recovery. The Centers for Disease Control (CDC) estimates the cost of the opioid crisis at \$78.5 billion annually. Employers absorb part of that cost in the form of lost productivity and higher healthcare costs.

The opioid crisis is so pervasive that most employers have dealt with an addicted or recovering employee. Some employers have fired or refused to hire individuals based on their drug use. Depending on how the employer handled each case, it could have violated state and federal laws. The Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) provide leave and job protection for recovering addicts.

Drug addiction and disability

Under the ADA, drug addiction is a disability. Employers cannot discriminate against applicants with disabilities. You face the prospect of hiring addicts who are not currently using illegal drugs or who are on prescribed opioids. Opioid Use Disorder (OUD) is listed as a specific disability in the ADA. It is certainly a serious health condition under the FMLA. The ADA defines a disability as a physical or mental impairment that substantially limits one or more major life activity. People who have a record of drug addiction and disability, even if they do not currently take opioids, are protected too.

Major life activities include, but are not limited to:

- caring for oneself,
- performing manual tasks,
- seeing,
- hearing,
- eating,
- sleeping,
- walking,
- standing,
- lifting,
- bending,
- speaking,
- breathing,
- learning,
- reading,
- concentrating,
- thinking,
- communicating, and

Some court decisions have also included social interaction and parenting as major life activities.

The ADA does limit protection for some individuals with opioid or other drug addiction and disability. Employers do not have to accommodate current illegal drug use, including heroin, cocaine, other opioids and fentanyl. They may have to accommodate current use of prescribed opioids. This applies to both current employees and applicants. Hiring opioid or other drug addicts, unless they are not currently using illegal drugs, is not required by the ADA.

What constitutes current illegal drug use?

Unfortunately for employers, no clear bright line defining current illegal drug use exists. The ADA says it is drug use “that occurred recently enough to justify a reasonable belief that...drug use is current.” It is also illegal drug use that “is a real and ongoing problem.”

Courts have interpreted the phrase “current illegal drug use” in a wide variety of ways. Some courts have held that an employee/applicant who has been drug-free for 30 days is not currently using drugs. Under that definition, someone who completes a standard 28-day inpatient treatment program is not a current user. That’s despite the commonly held belief that opioid addicts, in particular, relapse at least once. Other federal courts have refused to set a drug-free period. Instead, they assess each individual’s situation.

Courts *have* ruled that a current accurate drug test showing an illegal drug’s presence means there’s current illegal drug use.

Addiction treatment methods & leave

Addiction treatment options fall into three groups:

- Counseling
- Medication Assisted Treatment (MAT), or
- Inpatient treatment in a hospital or rehabilitation facility.

Employees who are being counseled may request time off to attend counseling or therapy sessions. The time off may be a reasonable accommodation under the ADA. FMLA-eligible employees can use leave to attend counseling sessions. If the sessions are part of ongoing treatment, the addiction would meet the FMLA’s definition of serious health condition.

Generally, leave as an accommodation under the ADA is unpaid. The employer’s leave policy would ultimately determine whether or not the leave is paid. Employers must treat all similar leave requests the same to avoid charges of discrimination or retaliation.

FMLA leave operates similarly. Employees have up to twelve weeks of unpaid, job-protected leave to use for their own serious health condition. The employer’s FMLA policy will determine if the employee can substitute paid leave for the unpaid.

MAT involves using medically prescribed drugs such as methadone, buprenorphine, and naltrexone in conjunction with counseling. Because these drugs are given under medical supervision, they do not constitute “current illegal drug use.”

For ADA and FMLA purposes, leave is treated the same for employees receiving counseling and those receiving MAT. Employees receiving MAT may have to take time off to receive drug treatment as well as counseling. Employers may not treat leave requests for medically prescribed drug treatment differently than requests for counseling.

The calculus gets a little trickier for employees receiving inpatient addiction treatment. Employees who are

currently or recently using illegal drugs may check themselves in to detoxify. In that scenario, they would most likely not be eligible for an ADA accommodation.

However, the FMLA would cover the employee's stay in rehab. To be eligible the employee must:

- Work for a covered employer defined as an employer with 50 or more employees within a 75-mile radius;
- Have been employee with the employer for at least a year; and
- Have not used all of the employee's twelve-week leave entitlement during that year.

The remainder of the twelve-week entitlement could be used if the employee had already used some leave. Again, the employer's FMLA policy determines whether the leave is paid or unpaid.

Drug testing

The ADA bars employers from insisting on most medical examinations. Again, illegal drugs are the exception. Employers may test employees for illegal drugs as long as it is not done in a discriminatory way. For example, random drug testing of all employees or all employees in safety-sensitive positions does not violate the ADA.

Employers can test for illegal drug use following a workplace accident or any incident where the employee's behavior justified it. Employers must document the reason for any drug test based on the employee's behavior. The more specific the observation, the better.

Employees receiving MAT may test positive for the drugs used to treat addiction. If so, the employer should give the employee an opportunity to explain the test result. If the employee reveals he or she is receiving MAT, that information must be kept confidential. The employer can't discriminate against the employee based on participation in MAT - assuming that the test reveals prescribed treatment drugs. If the test reveals illegal street drugs or narcotics not prescribed for treatment, the employee is no longer ADA disabled. That's because the test result revealed active illegal drug use.

Employers should have a procedure in place to address positive drug tests for illegal substances. While these employees have no ADA protections, firing them may not be the best move. Generally, policies that encourage employees to come forward with addiction problems and get the help they need are better.

Employers who retain positive testing employees still have to take action. Positive-testing employees in safety-sensitive positions should be placed on leave immediately in accordance with company policy. Many companies either require employees to get help as a condition of employment. Others may refer them to the company Employee Assistance Program (EAP) for guidance.

Many employers use last chance agreements for those testing positive for current illegal drug use. Some employers call them firm choice agreements, but the two terms mean the same thing. Last chance agreements can be particularly effective when the employee performed satisfactorily prior to becoming addicted.

Typical last chance agreement terms include refraining from illegal drugs, attending all counseling sessions and maintaining good performance. Any failure to meet these terms means automatic termination. The agreement should be for a specific period of time. Consult with counsel to draft up an appropriate last chance agreement, especially for opioid addiction.

Other accommodations

Because many opioid addictions began as attempts to relieve pain, employees with addiction histories may have underlying medical conditions. In fact, many addicted to opioids began by taking prescribed opioids under a doctor's supervision. These employees may need additional accommodations to lessen their pain while

working. Most accommodations are relatively inexpensive.

Employees recovering from opioid addiction may need any of the following accommodations:

- More frequent breaks;
- To be allowed to sit instead of stand for certain jobs;
- Ergonomically designed furniture that can relieve stress on injured body parts;
- Assign nonessential job functions to other employees;
- Redesign the job so that the employee can easily perform the essential functions.

Turnover costs in a tight job market

While the human cost of opioid crisis is painfully obvious, employers should also focus on economic factors. Unemployment is at record lows. An open position may remain open for a long period of time. The traditional turnover cost of 1.5 times the position's salary can easily balloon in this economy. Rehabilitating an addicted worker, especially one with in-demand skills, may be the most cost-effective approach.

Given the likelihood an employer will have to address employee addiction, it is best to develop a response. Employers should consult with counsel to develop procedures to get addicted employees back to being productive.