

Is addiction a disability under the ADA?

Your employee, Joe, has always been a great worker. He shows up on time, does his job well, and is generally liked by coworkers and customers. However, lately Joe's performance has been declining. Joe's been coming in late in an unkempt state and you've heard rumors from other employees that he's been out late drinking. Your star employee is becoming unreliable, less thorough, and a customer complained that they could smell alcohol on his breath.

This is clearly unacceptable behavior, but addiction is an illness. The question then becomes, is Joe's alcohol abuse considered a disability under the Americans with Disabilities Act? If so, what are your obligations as an employer? Firing an employee for having a disability can result in major consequences including fines, lawsuits, and a major hit to your company's reputation.

How does the ADA define disability?

The Americans with Disabilities Act (ADA) is a federal law that is considered one of the defining pieces of legislature in disability civil rights. Title I of the ADA governs employment.

The ADA defines disability as a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment.

The ADA provides the following non-exhaustive list of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. It also includes as major life activities the operations of a major bodily function. In addition, it includes chronic conditions such as diabetes and conditions that are episodic or in remission. A condition creating substantial limitations on any of these life activities can be defined as a disability. As anyone that has been around an addict knows, addiction and substance use often greatly impacts the addict's ability to care for oneself, concentrate, and perform other major life activities.

An amendment to the ADA also settled the ongoing question of whether an employee who can compensate for a disability through drugs or other aids qualifies as disabled. The law determined that for the purpose of determining whether someone is disabled, ameliorating devices beyond ordinary eyeglasses should be ignored. In other words, just because someone can correct deafness with hearing aids or take insulin to control blood sugar does not mean the person is not disabled and protected under ADA.

The Equal Employment Opportunity Commission's final regulations, issued in 2011, further expand the ADAAA's goal of broadening the definition of "disability" under the ADA. As a result, a greater number of employees will be covered under federal disability law and be eligible to file ADA-related claims. The stated goal of the final regulations—like that of the ADAAA—is to limit extensive analysis over whether an employee's ailment does or does not qualify as an ADA-covered disability. Instead, it encourages courts to focus on whether employers have "complied with their obligations and whether discrimination has occurred.

What are reasonable accommodations under the ADA?

The ADA requires employers to provide reasonable accommodations to employees with disabling conditions.

The ADA requires reasonable accommodations in the following aspects of employment:

1. Providing equal opportunity to job applicants with disabilities.
2. Enabling a qualified individual with a disability to perform the essential functions of a job.
3. Making it possible for an employee with a disability to enjoy equal benefits and privileges of employment by modifying the role or providing additional support such as ensuring that bathrooms are accessible, providing a screen reader or technical assistance, or allowing a service animal to come to work with the employee.

Employers are typically obligated to provide ADA accommodations unless providing a requested accommodation would cause an undue hardship on the business. Accommodation requests should be handled on a case-by-case basis and employers should work with prospective and current employees to find reasonable accommodations.

Drug and alcohol addiction under the ADA

The ADA was drafted broadly to provide disabled Americans the opportunity for gainful employment. Congress recognized that some disabilities, by their nature, are special and pose safety risks. Drug and alcohol addiction are two such disabilities. The ADA requires employers to walk a fine line between enforcing reasonable workplace safety and behavioral rules and making accommodations for those who are addicted.

As a general rule, employers are allowed to enforce reasonable workplace rules against coming to work under the influence and against disruptive behavior, even if that behavior may be associated with an addiction to drugs or alcohol. That is, employers can punish inappropriate behavior and require that employees show up clean and sober. It is best to have clear written policies on the use of alcohol or drugs in the workplace and how ongoing problems will be handled.

The waters get murkier, however, when workers addicted to drugs or alcohol want to clean up their act. In some circumstances, you may be required to accommodate their attempts. In addition, they may be eligible for leave under the Family and Medical Leave Act. Under the ADA, what the employee is addicted to makes a difference in how much leeway you must provide as an employer.

Is there ADA protection for the "current" use of Illegal Drugs?

The ADA does not protect current users of illegal (i.e., "street") drugs. The Equal Employment Opportunity Commission (EEOC) has taken the position that "current" means "the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct."

Thus if you have a drug-free workplace policy in place, you are in the clear when it comes to firing employees addicted and actively using illegal drugs. You can fire people who are current drug users even if their work isn't suffering. Just be sure that the use in question is really "current." The ADA specifies that a worker who is "currently engaged in the illegal use of drugs" isn't covered by the law.

However, it is worth noting that drug addiction does not always constitute the use of illegal or street drugs. Substance use disorders can also result from improper use of prescription drugs. It is becoming increasingly more common for addiction to stem from drugs that were prescribed completely legally. Opiates, benzodiazepines, and other controlled substances are highly addictive but frequently prescribed. In this case, you will likely need to follow the guidelines for alcohol addiction rather than illicit drug addiction, as prescription medications are not classed with street drugs unless they are obtained illegally.

The ADA does, however, protect those who've shaken their addiction sufficiently to no longer be classified as active illegal drug users. You should offer these workers reasonable accommodations to keep them on track: for example, time off for therapy, counseling, and attending Narcotics Anonymous meetings or even inpatient care for related psychiatric problems like depression.

MAT Therapy

One popular treatment for opioid addiction is Medication Assisted Treatment (MAT). MAT uses drugs to assist addicts in recovering and controlling withdrawal symptoms. A common form of MAT is methadone therapy. Applicants or employees may test positive for these drugs and employers who do not permit employees to explain and document that the drug found in the test is legally prescribed violate the ADA.

Consider the case of Appalachian Wood Products. It violated the ADA by demanding to know what drugs applicants were taking before making a conditional job offer. When the employer refused to offer jobs to two applicants who revealed they were receiving MAT for their former addiction, they filed EEOC complaints. The employer ended up paying \$42,000 to settle the case. (EEOC v. Appalachian Wood Products, No. 3:18-CV-198, WD PA 2019).

Alcohol addiction

The ADA covers workers who are alcoholics even if they currently drink. To be covered by the ADA, the alcoholic's addiction must be severe enough to substantially impair a major life function such as taking care of themselves. Many heavy drinkers may meet that test. That does not mean, however, that you have to tolerate alcoholics coming to work drunk.

Courts have consistently held that employers have the right to establish reasonable workplace rules, including coming to work clean and sober. For example, in *Salley v. Circuit City, Inc.*, 160 F.3d 977 (3rd Cir.), a federal appeals court ruled that the retailer was well within its rights when it fired a manager who admitted to using illegal drugs with a coworker, was absent due to recreational drug use, and reported to work high. His behavior violated company policy.

Are employees fired for substance abuse eligible for rehire?

How you treat a former drug user is more problematic. Some appeals courts have taken the position that you can't have a blanket policy by which you refuse to hire anyone who has a history of drug abuse.

The U.S. Supreme Court considered whether a former addict was entitled to a second chance: an opportunity to be rehired in 2004. Joel Hernandez worked for Hughes Missile Systems in Arizona for about 30 years, first as a janitor and then as a technician. In 1991 he flunked a drug test because he had done cocaine the night before. When confronted, he agreed to resign for violating company rules rather than being fired. He then received treatment. Three years later, he was clean and applied for a job with the company again. The company refused to rehire him because they had a policy against rehiring anyone who'd been fired or resigned for violating company rules.

Hernandez sued, alleging that under the ADA he was entitled to preferential treatment. The 9th Circuit Court of

Appeals agreed and concluded that workers who've recovered from addiction can't be excluded from rehiring if the workplace rule they violated had been directly linked to their disability. The Supreme Court heard the case and sent it back to the appeals court to determine whether a reasonable jury might believe that the employer refused to rehire Hernandez because of his past drug use, and not due to the company's blanket no-rehire policy. Hernandez couldn't raise the question of whether the blanket no-hire policy has a disparate impact on disabled applicants because he hadn't raised it in his original pleadings. The appeals court ruled that the case should go to trial. Employers dodged the bullet with this case, but they may not be so lucky next time. The Supreme Court didn't rule on whether employees could bring disparate-impact lawsuits if employers implement policies that harm disabled workers more than non-disabled workers.

This is a developing area of law. To avoid being a test case, examine all of your blanket policies to determine if they disparately harm the disabled or any other protected group.

Recreational drug use and drinking

Not everyone who uses drugs (legal or illegal) or drinks alcohol is disabled. Remember, to be a disability, a condition must substantially limit a major life activity. A worker who sometimes smokes marijuana or a social drinker who sometimes is hungover on Monday is probably not disabled. Neither is covered by the ADA or needs to be accommodated.

Some states have "lifestyle discrimination" laws that limit what employers can do to workers who commit legal acts on their own time. The laws originally focused on employers who sought to keep employees from smoking tobacco. In states where marijuana is legal and these laws are established, employers would not be allowed to discipline employees under state law.

However, if these behaviors result in job performance issues, such as a hungover employee failing to meet productivity expectations or delivering poor customer service, it is fine to discipline them. Just be sure to enforce disciplinary and performance management practices fairly across the board.

How to remain ADA compliant and avoid lawsuits or EEOC complaints

To protect yourself from lawsuits by employees suffering from addiction, follow these guidelines:

- Set job-related rules against coming to work under the influence of drugs or alcohol.
- Establish behavioral rules such as demanding punctuality and regular attendance, allowing for appropriate FMLA absences.
- Apply the rules consistently. That is, if you fire someone who comes to work high, you should terminate those who show up drunk. In both cases, you're punishing behavior (intoxication), not a disability (alcoholism or addiction).
- Keep records of whom you discipline and why. Review how you discipline workers who violate your rules with an eye toward identifying patterns. For example, see if you've disciplined those who come to work late because of an addiction more harshly than those who show up late for other reasons such as "traffic" or "car trouble." Remember, a neutral rule created for a valid business purpose, applied evenhandedly, will stand up in court.

Work with employees that request accommodations such as time off to access healthcare for addiction and mental health or a leave of absence to seek treatment in a rehabilitation program. Also, consider including an Employee Assistance Program (EAP) in your benefits package to provide a resource for employees that need help recovering from addiction. Try to approach the issue from a compassionate yet fair perspective.