

# PUBLICATION

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## Is Opioid Addiction Protected Under The ADA? EEOC Issues Clarifying Guidance

**Authors: Reba Letsa**  
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**The U.S. is currently in the midst of an unprecedented opioid epidemic, and opioid misuse can significantly impact workplace safety and employee health and wellness. Accordingly, on August 5, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) released technical guidance in the form of questions and answers that addresses concerns about the employment provisions of the Americans with Disabilities Act (ADA) and the opioid epidemic.**

The EEOC's guidance first defines the term "Opioids" to include prescription drugs such as codeine, morphine, oxycodone, hydrocodone and meperidine, as well as illegal drugs like heroin. The definition also includes buprenorphine and methadone which can be prescribed to treat opioid addiction in a Medication Assisted Treatment (MAT) program.

The EEOC's guidance makes clear that the document does not have the binding force and effect of law, and the information in the document is not new policy. The guidance document applies principles that are already established under the ADA's statutory and regulatory provisions. The guidance also indicates that its purpose is to provide further clarity on the existing requirements under the ADA.

Below is a summary of the key points from the guidance:

### **Disqualification for Opioid Use**

The EEOC's guidance affirms that current illegal drug use is not a covered disability that would entitle an employee to protection under the ADA. Therefore, it is entirely permissible for an employer to terminate an employee, or take other employment actions, if the employer discovers that an employee is illegally using opioids. This rule applies even if the employee has not exhibited any performance or safety issues related to their illegal opioid use. However, unless the employee is otherwise disqualified from their employment by federal law, an employee's lawful opioid use may qualify as a disability under the ADA requiring an employer to provide a reasonable accommodation for the employee to perform their job safely and effectively.

Also, according to the guidance, if an employee is using opioid medication, such as methadone, as directed in a MAT program, then the employee may not be denied a job opportunity or terminated based on their participation in the MAT program, unless the employee cannot do the job safely and effectively, or the employee is disqualified under another federal law. Prior to requiring employees to undergo drug testing, the guidance encourages employers to give employees the opportunity to explain whether the employee is taking any medication that could cause a positive result.

### **Performance and Safety Issues Related to Opioid Use**

As the guidance suggests, employers may be required under the ADA to provide employees with a reasonable accommodation based on legal opioid use, history of opioid use, or treatment for opioid addiction, so long as the employee is able to perform their job safely. An example of a reasonable accommodation would be a modified schedule granting the employee time off to attend therapy sessions or support group meetings to avoid relapse. However, the guidance reiterates the EEOC's position that an employer is not required to lower

production or performance standards, eliminate essential functions of a job, compensate employees for work not performed, or excuse illegal drug use at the worksite as a reasonable accommodation.

### **Prescription Opioids to Treat Pain**

An employer may be required to provide a reasonable accommodation for an employee who takes prescription opioids to treat pain, if the medical condition that is causing pain qualifies as a disability under the ADA. The guidance also notes that a medical condition need not be permanent or prevent an employee from working to qualify as a disability, as most conditions that cause pain significant enough for a doctor to prescribe opioids will likely qualify. An employee may also qualify for a reasonable accommodation if their prescribed opioid medication interferes with their daily functioning. Additionally, medical conditions that are often associated with opioid addiction, such as major depression and post-traumatic stress disorder, may also constitute disabilities protected under the ADA.

### **Employer Discretion in Granting a Reasonable Accommodation for Opioid Use**

As the guidance explains, employers are required to grant employee requests for a reasonable accommodation under the ADA if the request would permit the employee to perform the job safely and effectively and does not involve significant difficulty or expense.

The EEOC also addressed the issue of how an employer should respond if the employee believes that they can perform their job duties safely with a reasonable accommodation and the employer disagrees. If an employee is not otherwise disqualified for a position under federal law because of legal opioid use, the employer must have objective evidence that the employee cannot perform the job, or doing so poses a significant risk of substantial harm even with a reasonable accommodation. To that end, it is permissible for an employer to ask an employee to undergo a medical evaluation to ascertain objective evidence about what tasks an employee may safely perform.

The guidance also indicates that an employer may be required to hold a position for an employee while an employee is on leave for treatment or recovery for opioid addiction, and the employee should be permitted to use their accrued sick leave for that purpose. If the employee does not have sick leave available, they may also be entitled to unpaid leave under the federal Family and Medical Leave Act, if applicable. If an employee is permanently unable to perform their job as a result of their prescription opioid use or addiction, a transfer to another position that the employee is able to perform may also suffice as a reasonable accommodation.

### **Bottom Line**

This guidance document provides employers with insight into the types of interactive discussions the EEOC contemplates taking place between employers and employees with regard to providing accommodations for opioid-related conditions. The guidance also provides specific examples of the types of issues that may arise in the context of opioid addiction under the ADA. Failure to accommodate claims under the ADA can carry steep penalties for employers, so this guidance is a helpful reminder that employers must have objective evidence that an employee poses a safety risk prior to termination or refusal to grant an accommodation.

If you have any questions about this recent guidance and employer obligations under the ADA regarding opioid use, please contact [Reba Letsa](#), or a member of Baker Donelson's [Labor & Employment Group](#).