The ADA, Addiction, Recovery and Employment

Mid-Atlantic ADA Update 2019

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Purpose

1. Definition of disability and how it applies to:
   • Addiction to Alcohol
   • Substance Use and Opioid Use Disorders

2. Scenarios under the ADA:
   • Employment: Title I of the ADA
   • State and Local Governments: Title II of the ADA
   • Public Accommodations: Title III of the ADA

Americans with Disabilities Act

Ensures that people with disabilities have the same rights and opportunities as everyone else. This includes people with addiction to alcohol, and people in recovery from opioid and substance use disorders.

President G.H. Bush Signing the ADA
July 26, 1990
ADA Definition of Disability

A person has a disability under the ADA if the person:

1. Has a physical or mental impairment that substantially limits one or more major life activities, e.g. a person with bi-polar disorder, diabetes or addiction to alcohol; or

2. Has a history of a physical or mental impairment that substantially limited one or more major life activities, e.g. a person who has a history of cancer or someone in recovery from addiction to heroin; or

3. Is regarded as having such an impairment, e.g. an employer assumes an employee has an addiction to drugs (whether or not person actually has an addiction), and takes a negative employment action based on that belief, such as refusal to promote, giving a poor performance rating or termination.

What are Major Life Activities?

Major life activities include, but are not limited to:

Caring for oneself, thinking, learning, working, breathing, sleeping, seeing, hearing, and major bodily functions such as neurological and brain functions.
Addiction is an impairment that affects brain and neurological functions

The ADA makes a distinction between addiction to alcohol and the illegal use of drugs
Addiction to Alcohol

Generally is a “disability” regardless of whether it is in the present or in the past. However a person still has to meet the definition of disability.

Scenario

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?
Yes, Michael is a person with a disability (addiction to alcohol), but it’s complicated. The employer does not have to withdraw the warning.

The employer must grant Michael’s request to take leave to enter a rehab program, unless the employer can prove that Michael’s absence would cause a great difficulty or expense (undue hardship).

Substance Use Disorder

The ADA protects a person in recovery who is no longer engaging in the current illegal use of drugs.
In Recovery Means:

1) Is in recovery from substance use disorder;

2) Has ceased engaging in the illegal use of drugs;

3) Is either participating in a supervised rehabilitation program; or

4) Has been successfully rehabilitated.

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** person has no prescription
  **OR** has a fraudulent prescription
  **OR** is using more than prescribed
What Does “Current” Mean?

Current illegal use of drugs means:

- “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.

Scenario 2

Marianna has been heroine-free for 3 years. She applies for a job that she is qualified to do. The employer refuses to hire her because he knows about her past addiction.

Is she protected under the ADA?
Yes, Marianna is protected under the ADA because she:

- Has a history of an impairment (addiction to heroin)
- Has refrained from the use of illegal drugs for three years which is a good indication that there is not an on-going problem.

The potential employer violated the ADA when he refused to hire Marianna because of her recovery status.

Scenario 3

Julie has been in recovery for 5 yrs. from addiction to Oxycontin. She is in medical assisted treatment (MAT).

She works in the office at a day care center. Her boss learns about her former addiction and tells her to “get off” methadone or she’ll be fired.

Does Julie have protections under the ADA?

Yes, Julie has a history of addiction and is being regarded as a current user of drugs because of her medical treatment.
What if Julie’s employer found out that she recently used cocaine while in medical assisted treatment (MAT)?

Would she have rights under the ADA?

No, the ADA does not protect individuals who are “currently engaging in the illegal use of drugs.”
Or, what if Julie’s employer found out that she recently used marijuana while in MAT?

Would she have protections under the ADA?

No, Marijuana in all its forms is illegal under federal law.
Marijuana is illegal under federal law, even if it is used with a medical prescription.

* However, check your state law.

Medical Marijuana and State Law

- If medical marijuana is legal under state law as in Massachusetts, then employers may need to consider reasonable accommodations for offsite use of medical marijuana under state law.

  *However, an employee who shows up high to work has NO protections under either federal or state law.
Legal Use of a Prescribed Medication

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

Is James protected under the ADA?

Yes, he is protected under the ADA because he is legally using drugs.

*But, if he takes more than prescribed, he may not be covered.
James wants to take a leave of absence from his job to taper off Percocet.

Does James have protections under the ADA?

Yes, he is a person with a disability and may have rights to an accommodation. He needs to discuss the possibility of an accommodation with his boss.

Employment: Title I of the ADA

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

Applies to all aspects of employment: job application, job training

... and other terms or conditions and privileges of employment.
What if James’ employer found out that he was using heroin on the job?

**Would he have rights under the ADA?**

**No.** However, nothing in the ADA would limit the employer’s ability to offer leave or other assistance that may allow James to receive treatment.
Does and Don’ts
Three Stages of Employment

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

1. Application and interview process
2. After a job offer, but before starting work
3. On the job

First Stage:
Application and Interview

- The ADA prohibits all disability-related questions, and medical exams, even if they are related to the job.
- These questions can reveal a disability.
What are Disability Related Questions?

1. Are you taking prescription drugs?
2. Do you have a disability, illness or condition that will prevent you from doing this job?
3. Have you ever been treated for addiction to alcohol, opioids or other drugs?

Gaps in Employment

Can an interviewer ask about gaps in employment? **Yes!**

If asked about the gaps, does the job applicant have to mention their addiction? **It depends....**
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 doesn’t and is caught lying, this is cause for not hiring. The employer can be found liable for asking an illegal question.

### Do’s and Don’ts Related to Alcohol/Illegal Drugs

**Do’s**

Questions about use are permissible

Have you ever used or do you currently use ______?

A positive or negative answer does not reveal a disability.
Don’ts

Questions about **extent or frequency of use** are unlawful.

- How much alcohol or drugs do or did you consume?
- How often do or did you drink alcohol or use illegal drugs?

These questions may reveal an addiction.

Stage Two:
After a Job Offer, but Before Starting

- An employer may require medical exams and ask disability-related questions provided it does so for all individuals within a job category.
- All questions about use of alcohol/drugs, or extent of use, or diagnosis of alcohol/drug addiction are lawful.
Stage Three: On the Job

- Questions about use are permissible (answers can’t reveal a disability).
- Questions about extent or frequency are disability-related and reason for asking must be job-related and consistent with business necessity.

State and Local Governments: Title II of the ADA

People with disabilities must be able to participate in or benefit from all state and local government, programs, services & activities.

- Courts
- Law enforcement
- Public education
- Public Transportation
- Recreation
- Health care
- Social Services
- Voting
State and Local Government: Title II of the ADA

Tom is in medical assisted treatment. He appeared in family court and requested that he begin to see his kids on the weekends. The judge responded to his request saying, “You’ll see your kids when you get off Suboxone.”

Is Tom protected under the ADA?

1. Yes, Tom has a history of addiction.
2. Family court is regarding the use of Suboxone as though it is an illegal drug.
3. Tom’s use of Suboxone cannot, by itself, justify a refusal to let Tom see his kids on weekends.

Tom Hits the ADA Jackpot
Scenario 4

People who enter the correctional system in MAT are discontinued on their medication.

Are prisoners protected under the ADA?

• Yes, generally correctional systems have an obligation to provide legally prescribed medications to people entering with a prescription when the correctional facility has a medication dispensary program.

• Then, MAT should be treated like medication for diabetes or cancer.
Public Accommodations: Title III of the ADA

ADA requires places of public accommodations to provide goods and services to people with disabilities.

- Pharmacies
- Insurance offices
- Health care providers
- Restaurants
- Movie theaters
- Private schools
- Hospitals
- Health care
- Social Services center
- Establishments
- Day care centers
- Hotels

Recovery Homes and Sober Houses

Many recovery homes won't let residents use medicine to quit opioids.

Do residents have protections under the ADA?
• Yes, it’s a violation of either the ADA or the Fair Housing Act (FHA) to turn people away from sober and halfway houses for MAT although this is a frequent practice.

• Both the ADA and FHA require public entities to grant “reasonable accommodations” so that individuals with disabilities can access equal housing opportunities.

Three Legal Cases

Selma Medical in Virginia refused to accept a new patient into their family practice after learning that he had a prescription for Suboxone.

Did Selma Medical violate the ADA?
• **Yes,** Selma violated the ADA by denying a person with a disability equal access to goods and services.

• They have an obligation to modify existing policy that excludes people with OUD, considered a disability.

Athena Rehabilitation and Skilled Nursing

Athena Health Care refused to accept patients with OUD. These individuals were seeking admissions to their facilities for health issues unrelated to their addiction.
Recent Court Case
Nursing Home

Nursing homes are refusing admission to patients being treated for opioid addiction.

Recently, the MA Department of Justice (DOJ) successfully sued a nursing home that was in violation of the ADA for not accepting a patient in MAT.

In Summary

1. People with addiction are people with disabilities under the ADA.
2. The ADA provides civil rights protections for people with addiction.
3. The ADA makes a distinction between addiction to alcohol and the illegal use of drugs.
Resources

• ADA National Network
  Find your ADA Center at www.ADATA.org or call 1-800-949-4232
  – ADA, Addiction, and Recovery Fact Sheet
    https://adata.org/factsheet/ada-addiction-and-recovery

• New England ADA Center
  Addiction and Recovery resources
  https://www.newenglandada.org/addiction-and-recovery

How to File an ADA Complaint

• Employment
  US Equal Employment Opportunity Commission (EEOC)
  https://www.eeoc.gov/employees/howtofile.cfm
  800-669-4000 or info@eeoc.gov
  United State Attorney’s Office of Civil Rights Unit
  “Opioid Initiative” in each state Department of Justice (DOJ) office

• State and Local Governments and Public Accommodations
  Department of Justice (DOJ)
  https://www.ada.gov/filing_complaint.htm
  1-800-514-0301
Thank You!

Questions About the ADA?
1-800-949-4232

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