

**Abuse and Addiction: It's in Your Workforce, Too**  
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Illegal use of drugs may lead to employee performance problems as well as greater risk for workplace accidents that affect employees, customers, and the general public. To what extent are job applicants and employees who use or have used drugs protected under the ADA and the FMLA? What may employers do (and not do) to mitigate the risks of drug abuse and impaired employees in the workplace?

**ADA Basics**

Under the Americans with Disabilities Act (ADA), as amended, an employee has a disability if he or she: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment regardless of whether the person currently is substantially limited in a major life activity; or (3) is regarded as having such an impairment. 42 U.S.C. §§ 12102(1), (3)(a). To be protected, an employee must be a “qualified individual with a disability,” 42 U.S.C. § 12112(a), *i.e.*, “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8).

**FMLA Basics**

The Family and Medical Leave Act (FMLA) entitles eligible employees to 12 weeks of unpaid leave during a 12-month period. 29 C.F.R. § 825.100 *et seq.* Employees may qualify for FMLA leave for a variety of reasons, including an employee’s own serious health condition and

to care for a family member with a serious health condition. 29 C.F.R. § 825.112 *et seq.* The FMLA prohibits employers from “interfer[ing] with, restrain[ing] or deny[ing] the exercise of or the attempt to exercise, any right provided [by FMLA]” and from “discharg[ing] or in any other manner discriminat[ing] against any individual for opposing any practice made unlawful [by FMLA].” 29 U.S.C. § 2615.

### **Drug Abusers and Lawful Users**

The ADA generally requires employers to reasonably accommodate disabled employees whose medical conditions require prescription drug use. The ADA distinguishes, however, between lawful and unlawful drug use, including prescription drug abuse.

#### ***Current Illegal Use of Drugs***

Importantly, any individual who is “currently engaging in the illegal use of drugs” is not covered by the ADA when the employer takes action on the basis of that drug use. 42 U.S.C. §§ 12114(a), 12210(a); 29 C.F.R. §§ 1630.3(a) & App. at § 1630.3. The term “drug” means a controlled substance, including opioids, as defined in schedules I through V of section 202 of the Controlled Substances Act, 21 U.S.C. § 812. 29 C.F.R. § 1630.3(a)(1).

“‘Current’ drug use means that the illegal use of drugs occurred recently enough to justify an employer’s reasonable belief that involvement with drugs is an ongoing problem.” EEOC Technical Assistance Manual: Title I of the ADA, at § 8.3 (Jan. 1992 EEOC M-1A) (EEOC Manual), *available at* <http://askjan.org/links/ADAtam1.html#VIII>; *see also* 29 C.F.R. § 1630.3 App. (defining current use as “occurr[ing] recently enough to indicate that the individual is actively engaged in such conduct”). Current drug use is not limited to use as recent as the previous day or week; current may include use that occurred months in the past. EEOC Manual at § 8.3. On the other hand, “*past* addiction to illegal drugs or controlled substances *is* a covered

disability under the ADA[.]” Enforcement Guidance No. 915.002, *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995), at 7 (emphasis added). But the past use must rise to the level of addiction; past casual use of illegal drugs or controlled substances is *not* a covered disability under the ADA. *Id.*

Whether an individual is a “current” or “rehabilitated” drug user depends on many factors, including the length of time the person has been drug-free, the probability of a relapse, the severity of the employee’s addiction, the level of responsibility entrusted to the employee, the employer’s job and performance requirements, the level of competence required to perform the task in question, and the employee’s past performance record.

Although there is no hard and fast rule, courts have generally held that employees who have used illegal drugs in a period of weeks or a few months prior to being fired from their jobs were current drug users for ADA purposes, while periods of sobriety longer than that do not typically rise to “current use.” *Compare Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1184-89 (10th Cir. 2011); *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274, 276-82 (4th Cir. 1997), *abrogated on other grounds by Baird ex rel Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995); and *Baustian v. Louisiana*, 910 F. Supp. 274, 276-77 (E.D. La. 1996) (last use of drugs seven weeks prior to employment action considered current use), *with United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992) (one-year abstinence not “current use”); and *Herman v. City of Allentown*, 985 F. Supp. 569 (E.D. Pa. 1997) (nine months not “current use”).

To be clear, the “illegal use of drugs” excluded from ADA protection covers more than use of illegal drugs. “Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs.” 29 C.F.R. § 1630.3 App. Opioids, for

example, are not illegal drugs because they may be legally prescribed. An employee who takes Oxycontin without a prescription, however, has illegally used drugs for ADA purposes. *See* EEOC Manual at § 8.3. Similarly, a casual drug user who has not become addicted to the drug is not considered “substantially limited,” and thus is not covered as disabled under the ADA. *See* EEOC Manual at § 8.5. Illegal use of drugs also includes taking a prescription drug in excess of the amount prescribed and may also include performing activities that are prohibited while on the medication (*e.g.*, driving or operating heavy machinery).

On the other hand, an individual who is no longer illegally using drugs but who: (1) has completed a drug rehabilitation program; (2) is participating in a drug rehab program; or (3) is incorrectly regarded as illegally using drugs by his or her employer is covered by the ADA. 42 U.S.C. §§ 12114(b), 12210(b); 29 C.F.R. § 1630.3(b); *see also Bailey v. Real Time Staffing Servs.*, 927 F. Supp. 2d 490, 498-500 (W.D. Tenn. 2012) (citation omitted).

“A ‘rehabilitation program’ may include in-patient, out-patient, or employee assistance programs, or recognized self-help programs such as Narcotics Anonymous.” EEOC Manual at § 8.5; *see* 29 C.F.R. § 1630.3 App. These exceptions, however, do not allow a job applicant or employee who has failed a drug test to enter rehab after the positive test result and claim that he or she is protected. *See* EEOC Manual at § 8.3; *see also Zenor*, 176 F.3d at 857-58 (“[T]he mere fact that an employee has entered a rehabilitation program does not automatically bring that employee within the safe harbor’s protection.”). Employers may also seek “reasonable assurances” from employees that the illegal use of drugs has stopped. For example, if an individual tells the employer that they are in a rehabilitation program, employers may request evidence of the individual’s participation in that program. *See* 29 C.F.R. § 1630.3 App.; *Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 678-83 (5th Cir. 2013) (an employee needs to show

not only that he was enrolled in a rehabilitation program, but also that “the circumstances of [his] drug use and recovery justify a reasonable belief that drug use is no longer a problem”).

The ADA may also protect an employee’s use of prescription drugs to treat a disability. *See Fowler v. Westminster College*, 2012 U.S. Dist. LEXIS 133269 (D. Utah Sept. 17, 2012). In *Fowler*, the employee had been back at work for approximately one year after being on leave for treatment for an opiate addiction. The employee was on prescription medications and was taking his drugs according to the prescription. The court found that the employee was regarded as disabled. While the employee was using some medications in excess of his prescription, his usage was within the manufacturer’s recommended amount.

Employers should not prohibit use of prescription drugs that are used as prescribed. If an employee notifies an employer that her medication may impair her ability to perform her job, an employer must engage in the interactive process and, if possible, provide a reasonable accommodation. In other words, Employees who can show that their prescriptions are necessary as a mitigating measure for their disabling condition may be able to show that they need to be allowed to use medication as prescribed while at work. In such situations, employers should evaluate whether altering their policies and practices regarding drug testing is a reasonable accommodation on a case-by-case basis. If prescription drug use becomes prescription drug abuse, however, then the use is considered illegal drug use and employers may test employees based on a reasonable suspicion.

### ***Medical Marijuana***

One of the “hot button” areas of the law is how medical marijuana fits within the ADA and analogous state laws. Currently, 31 *states* (plus the District of Columbia, Guam and Puerto Rico) have laws allowing for the medical use of marijuana. *See Nat’l Conf. of State Legislatures*

(NCSL), *State Medical Marijuana Laws*, available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. Similarly, 15 states permit “low THC, high cannabidiol (CBD)” products – *i.e.*, products that utilize the medicinal properties of the marijuana plant without containing enough tetrahydrocannabinol to induce a “high” from the user – either as a legal defense to liability, or for medical reasons. *Id.*

At the same time, marijuana remains illegal under *federal* law. *See* 21 U.S.C. § 812(b)(1); *see Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (“[B]y characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses[.]”). Thus, as one federal court categorically observed, “medical marijuana use is not protected by the ADA.” *James v. City of Costa Mesa*, 684 F.3d 825, 828 (9th Cir. 2012).

On the other hand, “illegal use of drugs” under the ADA does *not* include “the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.” 42 U.S.C. § 12111(6)(a). Thus, the ADA generally requires employers to allow employees to take prescription medications as recommended by a licensed medical professional as a form of reasonable accommodation. *See* 42 U.S.C. § 12111(6); 29 C.F.R. § 1630.3(a)(2).

The vast majority of states to be faced with the issue have sided with employers who discipline their employees for marijuana usage, regardless of state medical marijuana laws. *Breech v. Town of Ocean View*, 2016 Del. Super. LEXIS 402 (Del. Super. Ct. Aug. 15, 2016); *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016) (New Mexico law); *Coats v. Dish Network, LLC*, 303 P.3d 147 (Colo. App. 2013), *aff’d*, 350 P.3d 849 (Colo. 2015); *Savage v. Maine Pretrial Servs.*, 58 A.3d 1138 (Me. 2013); *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914 (W.D. Mich. 2011), *aff’d*, 695 F.3d 428 (6th Cir. 2012); *Emerald Steel*

*Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Ore. 159, 169 n.7 (2010); *Johnson v. Columbia Falls Aluminum Co., LLC*, 350 Mont. 562, 2009 Mont. LEXIS 120, at \*5 (Mont. Mar. 31, 2009); *Ross v. Ragingwire Telecomms., Inc.*, 174 P.3d 200 (Cal. 2008).

Most recently, however, the highest court in Massachusetts concluded that an employer arguably violated *state* law by terminating an employee who was prescribed marijuana to treat her Chron's Disease for failing a drug test. *Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37, (Mass. 2017). The court ruled that the employer could have made the reasonable accommodation of waiving its drug use policy so that she could continue to use medical marijuana off-site as her physician recommended.

It would not be surprising for many states to follow the *Barbuto* Court's reasoning, as public opinion on the issue evolves. In the meantime, it is generally a best practice for employers to focus their concerns on employees' ability to perform their job-related tasks. In other words, it creates a substantial risk of exposure for most employers to discipline employees who are using marijuana off-site for medically recognized reasons. That said, local governments who receive Federal funding or grants – and who, therefore, are subject to the Drug-Free Workplace Act – have firmer footing on which to rest their discipline decisions.

### ***Medical Inquiries***

The ADA limits an employer's ability to conduct medical examinations or make medical inquiries that relate to an employee's or applicant's disability status. *See* 42 U.S.C. § 12112(d). The restrictions vary depending on the stage in the employment process -- pre-offer, after a conditional job offer has been made, and during employment.

At the pre-offer stage, an employer is barred from conducting a medical examination or making an inquiry as to whether an applicant has a disability. 42 U.S.C. § 12112(d)(2)(A). An

employer may ask only about the applicant’s “ability . . . to perform job-related functions.” *Id.* at § 12112(d)(2)(B); *see also* 29 C.F.R. § 1630.14(a). Employers may not ask applicants about legal use of prescription drugs, since such inquiries are likely to elicit information about a disability. *See EEOC Guidance on Disability-Related Inquiries and Medical Examinations Under the ADA*, available at <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>; *see also Harrison v. Benchmark Electronics Huntsville, Inc.*, 593 F.3d 1206 (11th Cir. 2010); *Roe v. Cheyenne Mountain Conf. Resort Inc.*, 124 F.3d 1221 (10th Cir. 1997); EEOC, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (“Preemployment Guidance”), available at <https://www.eeoc.gov/policy/docs/preemp.html>.

That said, testing for the illegal use of drugs is not considered a medical examination. *See* 42 U.S.C. § 12114(d); 29 C.F.R. § 1630.16(c)(1). In other words, employers may perform drug screenings before hiring job applicants, provided that those screenings do not otherwise violate the law.

The EEOC issued a guidance memorandum that helpfully counsels employers on the contours of “dos and don’ts” when it comes to drug screenings. *See* U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002: Preemployment Disability-Related Questions and Medical Examinations (Oct. 10, 1995), *available at* [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html). Consistent with this guidance:

**Do** ask the following questions:

- “Have you ever used illegal drugs?”
- “When is the last time you used illegal drugs?”
- “Have you used illegal drugs in the last six months?”
- “Here are our attendance requirements. Can you meet them?”



**Don't** ask the following questions:

- “What medications are you currently taking?”
- “Have you ever taken AZT/oxycontin/etc.?”
- “How often did you use illegal drugs in the past?”
- “Have you ever been addicted to drugs?”
- “Have you ever been treated for drug addiction?”
- “Have you ever been treated for drug abuse?”

Questions about an applicant's arrest or conviction record for the use, possession, or sale of drugs are not prohibited medical questions under the ADA (though other laws may impact whether arrest- and conviction-related questions are permissible). *Id.* On the other hand, questions about addiction, treatment, and/or the extent of the drug use, are impermissible. Preemployment Guidance at 11.

The issue of pre-offer inquiries was thoroughly addressed in *Bates v. Dura Auto Sys., Inc.*, 767 F.3d 566 (6th Cir. 2014). In *Bates*, an auto-parts manufacturing plant implemented a drug-test program that tested for, among other things, certain prescription drugs known to cause impairment. The drug testing program was implemented pursuant to an employee handbook substance-abuse policy prohibiting employees from “being impaired by or under the influence of” alcohol, illegal drugs, or legal drugs to the extent the use posed a safety risk to others or affected the tested employees' job performance. Seven employees tested positive for legal substances banned by the program. The employees who tested positive for banned drugs were permitted to switch medication. When the employees again tested positive for the banned substances, each was fired. The employees claimed that the drug test violated the ADA.

The court ruled that the ADA's drug-testing exemption should not be read as limited to illegal drugs and should apply to the illegal use of drugs of any type. The court also ruled, however, that the employer's policy exceeded the limits for the ADA's drug-testing exemption because the test could *possibly* be used to reveal confidential health information, which is

prohibited by the ADA. Thus, there was a jury question as to whether the policy was designed to “reveal impairments or health conditions” because the test only revealed compounds and the company could not likely associate the compounds or prescription medications involved with specific impairments or health conditions.

After making a conditional job offer, an employer may require a medical examination if: (1) all entering employees are subjected to such an examination regardless of disability; and (2) information obtained regarding the medical condition or history of the individual is collected and maintained according to statutorily prescribed confidentiality requirements. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).

Once an individual is employed, employers may require medical examinations or make medical inquiries so long as they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A); *see also* 29 C.F.R. §§ 1630.13, .14(c). Employers also may “conduct voluntary medical examinations” as part of a health and/or wellness program. 42 U.S.C. § 12112(d)(4)(B).

In addition, employers may request information about prescription medications when those medications may affect an employee’s ability to perform essential job functions. To justify such a request, however, the employer must be able to demonstrate that an employee’s inability or impaired ability to perform essential functions would result in a direct threat. *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees*, available at <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>. A “direct threat” is “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3). The determination that an individual with a disability

poses a direct threat is based on an individualized assessment of the individual's ability to safely perform the essential functions of his job. 29 C.F.R. § 1630.2(r).

### **Workplace Drug Policies**

Under the ADA, employers “may prohibit the illegal use of drugs . . . at the workplace by all employees” and “may require that employees shall not be . . . engaging in the illegal use of drugs at the workplace.” 42 U.S.C. §§ 12114(c)(1)-(2); 29 C.F.R. §§ 1630.16(b)(1)-(2).

Employers are expressly permitted to “adopt or administer reasonable policies or procedures, including but not limited to drug testing,” to ensure that job applicants and current employees are not illegally using drugs. 42 U.S.C. § 12210(b).

Specifically, the ADA also permits employers to:

- prohibit the illegal use of drugs and the use of alcohol in the workplace;
- prohibit employees from being under the influence of illegal drugs or alcohol at work;
- require that employees conform to the requirements of the Drug-Free Workplace Act of 1988;
- hold an employee who engages in the illegal use of drugs to the same qualification standards for employment or job performance and behavior to which the entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use;
- require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding the illegal use of drugs; and
- require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations.

See 42 U.S.C. § 12114(c); 29 C.F.R. §§ 1630.16(b)-(c); see also EEOC, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, available at <https://www.eeoc.gov/facts/performance-conduct.html>.

Employers may also discipline employees for performance or behavior issues stemming from the illegal use of drugs as long as its performance standards are neutrally applied between drug users and non-users. See 42 U.S.C. § 12114(c)(4); 29 C.F.R. § 1630.16(b)(4); see also *Salley v. Circuit City Stores, Inc.*, 160 F.3d 977, 981 (3d Cir. 1998) (“[D]rug-related misconduct is a legitimate, non-discriminatory reason for termination.”). To mitigate legal concerns, however, policies must be uniformly applied and discipline uniformly administered, without regard to applicant and employee disabilities. See *Fogle v. Ispat Inland, Inc.*, 32 F. App’x 155, 157-58 (7th Cir. 2002).

The Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 8101 *et seq.*, requires companies that serve as Federal government contractors or grant recipients to take certain specific steps to police the use of drugs in the workplace. These requirements include:

- Notifying employees that “the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the [ ] workplace and specifying the actions that will be taken against employees for violations of the prohibition,” and providing a written copy of this notification to employees;
- Establishing and maintaining a “drug-free awareness program” that informs employees of the dangers of drug abuse in the workplace; policies regarding maintaining a drug-free workplace; available employee assistance programs and other rehabilitation resources; and penalties imposed on employees for violations of policy;
- Requiring employees, as a condition of employment, to notify their employer within 5 days after being convicted of any “criminal drug statute conviction for a violation occurring in the workplace;” and
- Requiring employees who are convicted either to be sanctioned (disciplined) or to complete a drug abuse assistance or rehabilitation program.

41 U.S.C. §§ 8102(a)(1)(A)-(G), 8103(a)(1)(A)-(G). Employers who are not government contractors or grant recipients, and therefore are not required to comply with the Drug-Free Workplace Act, may voluntarily “require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988.” 29 C.F.R. § 1630.16(b)(3).

Employers may also wish to reference drug addiction in the context of their reasonable accommodation policy. In order to encourage self-reporting by employees who believe they may be addicts, employers may wish to offer accommodations such as leave (whether paid or unpaid) to seek treatment or referrals to assistance programs. In positions where employees have access to prescription drugs and similar substances (for example, employees working in pharmacies or hospitals), reassignment to a comparable position without direct access to such substances can often be advisable. Referring employees to online resources such as the Addiction Resource Guide ([www.addictionresourceguide.com](http://www.addictionresourceguide.com)) can also assist employees in finding help without significant cost or effort by employers.

### **Impairment: Creating Workplace Definitions and Mitigating Legal Concerns**

An ADA-covered “disability” is “(1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 42 U.S.C. § 12102(1); *see* 29 C.F.R. Part 1630 App. Thus, the EEOC has stated, “an impairment is a disability only if it substantially limits a major life activity.” Enforcement Guidance No. 915.002: *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995) at 6.

A “physical or mental impairment” is defined as

- (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as

neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

- (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). Moreover, “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” 42 U.S.C. § 12102(4)(D). Thus both the addiction itself and conditions that are symptomatic of past addiction (such as skin conditions and musculoskeletal issues) may be considered disabilities.

When amending the ADA in 2008, Congress stated that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.” ADAAA § 2(b)(5). Nevertheless, there are many “physical, psychological, environmental, cultural, and economic characteristics that are not impairments.” 29 C.F.R. § 1630.2(h) App. For example, “physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder” are not covered. *Id.* “The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder.” *Id.* The fact that an individual is in poverty or has a prison record because of drug use is also not considered an impairment. *See id.*

### ***Drug Testing***

Again, tests for illegal drugs are not considered medical examinations for ADA purposes. 42 U.S.C. § 12114(d)(2); 29 C.F.R. § 1630.16(c)(1); *see also* 29 C.F.R. §§ 1630.13, 1630.14.

Drug testing policies should clearly, in language that is easily understood, inform applicants and employees about the employer's testing program, requirements, and methods. Any such policy should identify situations in which testing will (or may) occur and the employees who will (or may) be subject to the testing. If employers intend to test employees based on a reasonable suspicion of employee drug abuse, the policy should explain what constitutes reasonable suspicion (such as appearance, speech, and behavior) and inform employees that they should communicate with human resources should an accommodation be needed. Employers may also consider periodic and/or random testing for security or safety-related positions and post-accident testing for employees involved in a workplace accident, injury, or work rule violation.

Employers may make employment decisions based on the results of drug tests. If the test is positive for a lawfully prescribed drug or reveals other medical information, that information must be treated as a confidential medical record. *See* 42 U.S.C. § 12114(d); *see also* The ADA, Questions and Answers, <https://www.eeoc.gov/eeoc/publications/adaqa1.cfm>. Medical information should be maintained separately from employee personnel files, and policies should insulate such information from disclosure beyond an employer's human resources or benefits functions. 42 U.S.C. § 12112(d); *see* Enforcement Guidance No. 915.002: *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995), at 13. There are, however, limited circumstances where confidential information may be shared, including:

- Disclosure to supervisors or managers only to the extent necessary to inform them of restrictions on duties or other necessary accommodations;
- Disclosure to first aid or safety personnel if the disability might require emergency treatment; and
- Disclosure to government officials investigating ADA compliance, when requested.

*Id.*; *see* 29 C.F.R. §§ 1630.14(b)(1)(i)-(iii) and 29 C.F.R. pt. 1630 app. § 1630.14(b).

## **Suspected Drug Abuse: What Can and Cannot be Asked**

After receiving a positive test result during a drug test, employers may validate the results by asking the applicant for possible explanations for the positive result, including lawful drugs. *See* 29 C.F.R. § 1630.3(a); *see also* Preemployment Guidance. Thus, employers may ask questions such as: “What medications have you taken that might have resulted in this positive test result?” and “Are you taking this medication under a lawful prescription?” Employers may not, however, ask employees about past addictions to drugs or other substances, nor about criminal history related to substance abuse.

If management receives a report from a third party about suspected drug abuse, they should immediately conduct an investigation to understand how the complaining party came to learn of that information. Any investigation should also include speaking with the alleged drug abuser to get his or her side of the story, and interview responses should ideally be documented at the time they are occurring. As discussed above, if the employee admits to abusing drugs and admits they have a problem, employers may wish to consider leaves of absence and rehabilitation programs as an option for the abuser.

In any case, it is often a best course for employers, before taking action, to review their drug policies to determine whether there has been a violation and, if so, what the policy provides as appropriate discipline. Employers should also consider how similar violations in the recent past have been handled to mitigate the potential for future lawsuits. If employers fear there may be a direct threat to the safety of others in the meantime, suspending the suspected employee with pay in the interim until further facts can be gathered may be advisable.



## **Substance Abuse Treatment and the FMLA**

Under the FMLA, substance abuse may be a serious health condition if the requirements of sections 825.113 (serious health condition), 825.114 (inpatient care) or 825.115 (continuing treatment) are met. 29 C.F.R. § 825.119. Section 825.119 provides that an employee may take FMLA leave for substance abuse treatment provided by a health care provider or by a provider of health care services on referral by a health care provider. An employee's absence *because of the employee's use of the substance*, rather than for treatment, does not qualify for FMLA leave. *Id.*

While substance abuse treatment is covered by the FMLA, that treatment does not prevent an employer from taking adverse action against an employee so long as the employer has a legitimate reason for that action. The regulations provide that “[t]reatment for substance abuse does not prevent an employer from taking employment action against an employee[.]” and that

if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave.

29 C.F.R. § 825.119(b). Employer policies should state that employees may be disciplined for substance abuse regardless of an employee's use of FMLA leave.

If an employee takes FMLA leave for substance abuse treatment, an employer may not take action against the employee because the employee has exercised his right to take FMLA leave. *See* 29 C.F.R. §825.119(b); *see also Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 683 (5th Cir. 2013) (affirming summary judgment in favor of employer on FMLA claim where evidence reflected that the employee was discharged for a violation of the employer's drug-free workplace policy after he started his FMLA leave because he checked himself out of a substance abuse treatment program before completing the program).

One way in which an employer can address workplace drug use is to use last chance agreements for employees who violate workplace drug policies. Under this approach, if an employee violates a workplace drug policy, instead of immediately terminating the employee, the employer can require the employee to sign a last chance agreement whereby subsequent violations of the employer's policies will result in immediate termination based on the employee's violation of the last chance agreement. *See Allen v. City of Sturgis*, 559 F. Supp. 2d 837, 847 (W.D. Mich. 2008) (finding plaintiff, who was terminated after he completed treatment for substance abuse, did not adequately rebut employer's proffered reason for terminating him -- that he had violated the terms of its substance abuse policy and of his last chance agreement).

The Seventh Circuit Court of Appeals addressed the FMLA's application to substance abuse in *Ames v. Home Depot U.S.A., Inc.*, 629 F.3d 665 (7th Cir. 2011). There, the plaintiff did not check herself into a hospital until a week after she was fired for violating Home Depot's substance abuse policy. She did not receive inpatient care and could not show that she received continuing treatment. Instead, her primary care doctor referred her to a clinical social worker for counseling and to a specialist for psychiatric medication management. As a result, the employee was not entitled to FMLA leave because she did not show that she had a serious health condition.

In another case, *Seegert v. Monson Trucking, Inc.*, 717 F. Supp. 2d 863 (D. Minn. 2010), an employee with a history of drug and alcohol abuse voluntarily entered a treatment program. The employer told him that his absence was covered under the FMLA, however, the day after he asked about FMLA coverage, the employer fired him because he was not available for work. The plaintiff claimed that the employer interfered with his FMLA rights by terminating him. The court denied the employer's summary judgment motion on the interference claim because

the plaintiff “was not afforded the opportunity to complete a treatment program, at least in part because he was terminated, and return to work.” *Id.* at 869-72.

An employer may not fail to reinstate an employee following his return from FMLA leave, but only if the statutory requirements have been satisfied, including that an employee must actually be entitled to the position to which he seeks reinstatement and would not have lost his position even had he not taken FMLA leave. 29 U.S.C. § 2614(a)(3); 29 C.F.R. § 825.216(a).

### **Prescription Drugs, Potential Safety Hazards, and Mitigating Liability**

The ADA and FMLA allow employers to hold employees accountable for meeting employment standards. Employers, therefore, have the right to discipline employees who abuse prescription drugs and/or unlawfully use prescription drugs and do not meet performance standards. Employers must **maintain and consistently enforce workplace policies regarding substance abuse and performance expectations.**

While employers may discipline employees for violating workplace policies, including unlawful use of prescription drugs, employers should be mindful that the FMLA covers substance abuse treatment. Thus, if an employee tells you that she will take time off for substance abuse treatment, then the employee is entitled to FMLA leave (assuming FMLA coverage applies) for that treatment.

Employers should do the following to mitigate liability as it pertains to employees and substance abuse issues:

- Have a policy addressing workplace use of drugs, both legal and illegal. Be sure to consider industry specific regulations.
- Consistently enforce the policy in a non-discriminatory manner.
- Review and update policies.

- When a drug abuse situation arises, learn the circumstances of the employee's drug use.
- Determine whether the drug is prescribed, being taken as prescribed, and/or otherwise being used lawfully
- Determine whether an employee can perform essential job functions while taking the medication?
- Where there is a disability or potential disability, engage in the interactive process to identify potential reasonable accommodations.
- Determine when the employee last used the illegal drug or illegally used a prescription.
- Determine whether the employee is in a treatment program or has been in a treatment program?
- Review and update job descriptions, to include essential functions.
- Analyze positions to determine those with functions and safety implications that may warrant heightened sensitivity to drug use.
- Consult with employment counsel before making an inquiry or taking action against an employee.
- Segregate employee medical files from personnel files to maintain confidentiality.
- Train supervisors and HR staff on medical examinations/inquiries, drug testing, the interactive process, reasonable accommodations, FMLA notice requirements, and confidentiality requirements.

Employers can take action to reduce the harmful impact of unlawful drug use and abuse of lawfully prescribed drugs. Policies that are consistently enforced by trained personnel are a great way to mitigate liability in litigation and on the job from workplace accidents.