

Legal Bits

a publication
for the business-
minded

Electronic Edition

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Addiction and the ADA: Screening Employees for Drug Use

What is the ADA?

The U.S. Congress created the Americans With Disabilities Act (ADA) in order to eliminate discrimination faced day to day by people with disabilities. The ADA makes it illegal for employers, government entities, and places of public accommodation to discriminate against disabled individuals.

Under the ADA, employers may not discriminate against disabled individuals in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Does the ADA apply to my business?

Any employer having 15 or more employees is typically covered by the ADA. However, even if your small business has less than 15 employees, keep reading because Oregon's disability anti-discrimination laws (which are very similar to the ADA) apply to employers having as few as six employees.

What is a disability?

The ADA's protections extend to individuals with disabilities. A disability is a physical or

mental impairment that substantially limits an individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning, and working. A minor or temporary impairment, such as a paper cut, does not constitute a disability. On the other hand, permanent deafness is a disability because it substantially interferes with the major life activity of hearing.

Notably, a non-disabled individual is also covered by the ADA if that individual has a record of being impaired or if the employer regards the individual as being disabled.

What if a disabled applicant cannot perform the job being applied for?

Generally, it is illegal under the ADA to refuse to hire someone just because the applicant is disabled. However, in order for the ADA's protections to apply, the disabled applicant must be qualified to perform the job. Disabled applicants must have the requisite skills, education, experience, and other job related requirements of the position that the applicant desires, and must be able to perform the essential functions of such position, with or without reasonable accommodation.

Are individuals who are addicted to controlled substances "disabled" under the ADA?

Most likely, yes. Addiction to a controlled substance can be a disability if it substantially limits a major life activity. This means that an employer may not discriminate against a job applicant or employee just because that individual is an addict or has a history of being addicted to drugs.

Does this mean I have to hire employees who are under the influence of illegal drugs?

No! The ADA does not protect job applicants or employees who are currently engaging in the illegal use of drugs. An employer may refuse to hire any job applicant because the applicant is currently using illegal drugs.

Notice the difference between an addict and an illegal drug user. Individuals suffering from drug

addiction might be actively abusing drugs or they might be in recovery. The condition of being addicted can be a protected disability. By contrast, active illegal drug users (regardless of whether they are addicts) are not protected from adverse employment actions under the ADA.

The employer's motive is key. If the employer refuses to hire based upon assumptions and stereotypes about addicts, then the employer has likely violated the ADA. If the employer refuses to hire based upon a desire to keep illegal drug use out of the workplace, then the employer may do so without violating the ADA.

Which questions about drug use can an employer ask during an interview?

This is a tough issue. During an interview, questions regarding an applicant's disability are generally prohibited. For example, the question "Do you have a disability that would keep you from performing your job duties?" would blatantly violate the ADA. The question "Have you ever been addicted to drugs?" and similar questions about prior drug use might also be inappropriate because the questions elicit information about drug addiction, which can be a disability.

However, employers may ask about current illegal drug use because that drug use is not protected by the ADA. The best way to avoid trouble in this area is to keep your questions focused. Asking whether an applicant uses a particular drug would be appropriate. But, asking how often the applicant uses drugs might run afoul of the ADA because the quantity of illegal drug use relates to whether the applicant is an addict.

If your business uses a set of standard questions to interview job applicants, it would be wise to have an attorney review the questions to determine whether they could violate the ADA.

What about drug tests for potential employees?

Employers may conduct drug tests of prospective employees without violating the ADA. This is probably a safer way to screen out illegal drug use than by asking questions. The key

to doing this properly is to establish a policy that requires all applicants of a particular job category to submit to a drug test. If all potential employees in the same job category have to take a drug test, then the requirement is based upon the legitimate goal of maintaining a drug free workplace--not upon any particular applicant's disability.

The results of all drug tests should be kept in a separate, confidential file.

What about drug tests of current employees?

Drug tests may generally be used to detect an employee's current illegal drug use without violating the ADA. If you are certain that an employee is using illegal drugs at the workplace, you can require the employee to pass a drug test. It is important to note, however, that an employee who is erroneously regarded as engaging in the use of illegal drugs is considered to be disabled and therefore protected against discrimination under the ADA.

Because employers and employees are in a special employment relationship, other factors, such as the terms of an employment agreement, need to be considered before requiring an employee to submit to a drug test.

Can I fire an employee who is currently using illegal drugs?

The ADA allows an employer to protect against direct threats to property or the safety of others by prohibiting the illegal manufacture, distribution, possession, and use of drugs at the workplace. Further, employers may hold employees who are engaging in illegal drug use to the same standards for job performance and behavior as for other employees. So, the ADA would not prohibit an employer from firing an employee who is currently using illegal drugs.

Again, remember that an employer needs to consider other factors, such as employment contracts and collective bargaining agreements, before taking employment actions. These agreements sometimes give an employee the right, for example, to attempt rehabilitation prior to being terminated.

What about an employee who uses alcohol?

Alcohol is not an illegal drug, so a number of the ADA's provisions discussing illegal drug use do not apply to alcohol use. The answers to many of the preceding questions are analyzed in a different way with regard to alcohol. However, the outcome is basically the same.

As with drug addiction, alcoholism can be a disability. However, the ADA specifically allows employers to prohibit the use of alcohol at work, or arriving at work under the influence of alcohol. So, an employee may be terminated for those activities.

Testing for alcohol intoxication is not specifically addressed under the ADA. However, because an employer may act to prevent a direct threat of harm to the safety and welfare of others, testing for alcohol use would likely be legal under the ADA.

At the state level, Oregon law prohibits breathalyzer test requirements unless the employee consents or the employer has reasonable grounds to believe that the employee is under the influence of alcohol.

Implementing your policies.

All businesses should adopt a disability non-discrimination policy and distribute it with all employment application materials, employee handbooks, and business operations manuals. Such a documented policy will demonstrate sensitivity to disability discrimination and may provide critical evidence to defend against a disability discrimination lawsuit.

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