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Managing Opioid Addiction and Related Treatment in the Workplace

By Jeffrey S. Klein, Nicholas J. Pappas and Lauren E. Richards

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The opioid epidemic has plagued the United States for years, and the crisis does not appear to be abating. More than 47,000 people died from opioid overdose in 2017.¹ Recent studies estimate that the crisis has cost the economy billions of dollars.² The impact of the opioid epidemic has also reached the workplace. Specifically, employers face challenges in addressing employees' addiction to opioids and rehabilitation from such addictions.

Employers' responsibilities and perspectives concerning opioid addiction may be very different from how employers address addictions to illegal drugs. While employers can lawfully prohibit use of illegal drugs in the workplace, employers cannot impose a blanket restriction on the use of opioids, because physicians can—and frequently do—prescribe opioids for lawful therapeutic purposes. Indeed, one common way in which physicians treat opioid addiction is to prescribe small doses of the drug to break the addiction and simultaneously reduce withdrawal symptoms. This “medication-assisted treatment” can continue for years.

The Equal Employment Opportunity Commission (the “EEOC”) has become active in this area and has brought enforcement actions to prevent employers from taking adverse employment actions based on the lawful use of opioids, particularly where such use occurs in connection with medication-assisted treatment. To avoid such actions by the EEOC or employees under the Americans with Disabilities Act (“ADA”), employers need to understand the rules of the road in dealing with employees suffering from opioid addiction. This includes understanding that the use of opioids may *not* be inherently illegal, and that addiction treatment can include the continued use of the drug.

However, when an employee misuses opioids, such as by obtaining the medications without a prescription, such use of the drug can become illegal. 29 C.F.R. § 1630.3(a)(2) (defining illegal drug use as “the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act”). In such circumstances, employers may take adverse employment action when the illegal opioid use affects performance. 29 C.F.R. § 1630.3(a) (“The terms disability and qualified individual with a disability do not include individuals currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”)

In this article, we will analyze the case law addressing the lawful and unlawful use of legal drugs, and suggest how employers can effectively address employees' use of opioids.

Background

The ADA protects individuals with disabilities from, among other things, discrimination in employment. 42 U.S.C. § 12101 et seq. Employers cannot “discriminate against a qualified individual on the basis of disability.” 42 U.S.C. § 12112(a). Discrimination includes taking adverse employment actions, using qualification standards that “screen out or tend to screen out” individuals with disabilities (unless that standard is “job-related . . . and is consistent with business necessity”), and failing to provide “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.” 42 U.S.C. § 12112(b).

The ADA contains certain exceptions key to the opioid epidemic. Individuals are *not* protected if they are “currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” 42 U.S.C. § 12114(a). This exception is not intended to exclude from protection individuals who are participating in a rehabilitation program, have successfully completed a drug rehabilitation program, or have otherwise been rehabilitated successfully and are no longer using drugs illegally. 42 U.S.C. § 12114(b). Federal regulations interpreting 42 U.S.C. § 12114 also specify that illegal drug use “does not include the use of a drug taken under the supervision of a licensed health care professional.” 29 C.F.R. § 1630.3.

Responding to Addiction

Courts across the country have taken varying approaches in determining what behavior constitutes *current* illegal drug use under the ADA. For example, the Tenth Circuit affirmed a district court’s ruling that an individual who had recently completed a month-long rehabilitation program, during which time he had refrained from using drugs, still may be considered to be currently using drugs illegally and not entitled to protection under the ADA. *Mauerhan v. Wagner Corp.*, 649 F.3d 1180 (10th Cir. 2011). There, the employer refused to reinstate the employee at the same level of compensation after the employee completed a rehabilitation program for his addiction to cocaine and marijuana. The court found that an

individual may no longer be considered “currently using” if their “drug use and recovery justify a reasonable belief that drug use is no longer a problem.” *Id.* at 1188. This establishes a fact-specific test in assessing when “illegal use” has ended following treatment, as an employer can find that the employee’s addiction and surrounding circumstances do not allow the employer to form a “reasonable belief” that drug use is no longer a problem. In *Mauerhan*, the Tenth Circuit found that it was reasonable for the employer and district court to have concluded, based on the employee’s history and response to treatment, that thirty days was not sufficient where the employer presented evidence from an addiction specialist that the employee’s addiction would have required approximately three months of treatment. *Id.* at 1189. Therefore, employers must engage in an analysis of the facts specific to each employee to determine whether they have a reasonable belief that drug use is no longer a problem.³

A recent lawsuit by the EEOC illustrates the difficulty employers may have determining whether an employee is “currently using drugs illegally” in the context of opioid addiction. In *EEOC v. SoftPro, LLC*, No. 5:18-CV-00463 (E.D.N.C. 2019), an employee entered inpatient treatment to eliminate his need for physician-supervised medication-assisted treatment, which he had been undergoing since 2009. The EEOC argued that his dismissal immediately following his return from inpatient treatment violated the ADA because the dismissal was on the basis of the employee’s disability, *i.e.*, addiction to opioids. Under the settlement, the employer agreed to pay \$80,000 in damages. The employer also agreed to a three-year consent decree requiring the company to revise, implement, and distribute personnel policies stating that the company does not exclude employees on the basis of participation in medication-assisted treatment. The employer also agreed to take other remedial actions, including reporting to the EEOC negative actions the employer takes against employees having a record of substance abuse disorder or participating in a drug rehabilitation program.

In *U.S. EEOC v. Appalachian Wood Products, Inc.*, No. 3:18-cv-00198 (W.D. Penn. 2019), an employer refused to hire an employee undergoing medication-assisted treatment for opioid addiction. The company also required all applicants to disclose their use of medications prior to making conditional job offers. The EEOC argued that both practices violated the ADA. The parties settled the case, and the company agreed to refrain from unlawfully discriminating against any person in hiring or in making job assignments because the individual is receiving legal medical treatment for drug addiction, including refraining from making medical inquiries before making a conditional job offer. The company also paid \$42,500 in monetary relief to two workers involved in the lawsuit.

Recommendations

Employers should assess their hiring practices and policies on drug use and addiction treatment to ensure that they are in compliance with the ADA. Specifically, employers should ensure that they are able to distinguish between the illegal use of opioids and the use of those same drugs legally, including for addiction treatment. This assessment will greatly assist the employer's determination as to when an employee may not be protected under the ADA as a result of current illegal drug use.

Employers should keep in mind that they may inquire only at certain times about disabilities, which may include opioid addiction and related treatment. Pre-offer inquiries into disabilities are not allowed. 42 U.S.C. § 12112(d)(2). However, an employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions. After making an offer, but before employment begins, an employer may ask about disabilities or require a medical examination if (1) this is required of all applicants and (2) any information received is maintained on separate forms and treated as a confidential medical record. 42 U.S.C. § 12112(d)(3). That inquiry or examination must be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). Once employment begins, an employer can ask about a disability only if the inquiry is "job-related and consistent with business

necessity." *Id.* Therefore, the employer has to believe that the employee's ability to perform the job is impaired or the employee poses a threat to others. See 42 U.S.C. § 12113(a), (b).

The ADA permits drug tests; however, employers should consider whether the test may identify drugs used legally in connection with medication-assisted addiction treatment for opioid addiction. See 42 U.S.C. § 12114(d) (noting that drug tests to determine the *illegal* use of drugs shall not be considered an improper medical examination). If an employer does not investigate whether the employee's use of the opioids is *legal*, and instead takes a zero tolerance approach on the basis of the drug test, the employer may run afoul of the EEOC's recent position.

This is not to suggest that employers can never take action on the basis of opioid use. Under the ADA, individuals "currently engaging in the illegal use of drugs" are *not* protected. Employers also can take actions against employees with disability as long as those actions are not "*on the basis of disability.*" 42 U.S.C. § 12112(a) (emphasis added). Finally, employers should be able to defend any adverse employment actions taken if they can demonstrate that the employee did not meet specific job qualifications or posed a direct threat to safety in the workplace. Therefore, employers should assess their policies and protocols to determine whether they adequately respond to opioid addiction and medication-assisted treatment. Employers also should develop appropriate and consistent guidance for making the fact-specific determination as to when an employee is sufficiently removed from their illegal drug use such that the employer no longer considers them to be "currently engaging in the illegal use of drugs."

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¹ Centers for Disease Control and Prevention, *Opioid Overdose: Drug Overdose Deaths* (June 27, 2019) <https://www.cdc.gov/drugoverdose/data/statedeaths.html>.

² Sheelah Kolhatkar, *The Cost of the Opioid Crisis*, *The New Yorker* (September 11, 2017) (citing a 2013 study estimating the cost to the economy of \$78.5 billion).

³ Similarly, in the Ninth Circuit, the test is whether the employee has “refrained from using drugs for a *significant*

period of time.” *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1186 (9th Cir. 2001) (emphasis added). The Second Circuit test asks whether the employer held a reasonable belief that the employee had a current substance abuse problem, “severe and recent enough” so that the employer is justified in believing the employee is unable to perform the essential duties of the job. *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 520 (2nd Cir. 1991).

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If you have questions concerning the contents of this issue, or would like more information about Weil’s Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

Practice Group Members:

Jeffrey S. Klein
Practice Group Leader
New York
+1 212 310 8790
jeffrey.klein@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

London
Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Sarah Downie
+1 212 310 8030
sarah.downie@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Amy M. Rubin
+1 212 310 8691
amy.rubin@weil.com

Paul J. Wessel
+1 212 310 8720
paul.wessel@weil.com

Silicon Valley
David Singh
+1 650 802 3010
david.singh@weil.com

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