

EEOC Issues Guidance on Opioid Addiction in Employment

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The U.S. Equal Employment Opportunity Commission (EEOC) issued two technical assistance documents on August 5, 2020, addressing accommodation issues under the Americans with Disabilities Act (ADA) for employees who use opioid medications or may be addicted to opioids. They provide employers insight into how the EEOC envisions information exchange and accommodation efforts.

[Use and Misuse of Codeine, Oxycodone, and Other Opioids; Information for Employees](#) is for employees. [How Health Care Providers Can Help Current and Former Patients Who Have Used or Misused Opioids Stay Employed](#) is for healthcare providers. The documents are in a question-and-answer format.

The stated purpose of both is to “provide clarity to the public regarding existing requirements under the law.” The guidance documents do not “have the force and effect of law” or “bind the public in any way.” They do not contain any new information about reasonable accommodations under the ADA, but may provide helpful technical assistance now as the opioid epidemic reportedly has worsened during the COVID-19 pandemic.

“Opioids” include prescription drugs, such as codeine, morphine, oxycodone (OxyContin, Percodan, Percocet), hydrocodone (Vicodin, Lortab, Lorcet), and meperidine (Demerol), as well as illegal drugs like heroin. They also include buprenorphine (Suboxone or Subutex) and methadone, which can be prescribed to treat opioid addiction in a Medication Assisted Treatment (MAT) program.

Guidance for Employees

The guidance educates employees that employers may fire them and take other adverse employment actions based on illegal drug use, including illegal opioid use (such as heroin use). In addition, employers may disqualify employees if another federal law requires or permits them to do so.

However, employees may seek accommodations under the ADA if they are taking lawfully prescribed opioid medications (including opioids prescribed as part of a MAT program), or if they are recovering or recovered opioid users. The EEOC notes that opioid addiction (sometimes called “opioid use disorder” or “OUD”) is itself a diagnosable medical condition that can be an ADA disability.

The EEOC explains that a reasonable accommodation “is some type of change in the way things are normally done at work, such as a different break or work schedule (*e.g.*, scheduling work around treatment), a change in a change in shift assignment, or a temporary transfer to another position.” Employees may ask for, and employers may suggest, other modifications or changes. However, an employer never has to lower production or performance standards, eliminate essential functions (fundamental duties)

of a job, pay for work that is not performed, or excuse illegal drug use on the job as a reasonable accommodation. An example of an accommodation is an altered schedule to allow an employee to attend group meetings or therapy sessions to avoid relapse.

Employees who need a reasonable accommodation must ask for one. The employer may ask the employee for a written request or to fill out a form, and to generally describe how the employee's work is affected by the disability. The employer also may ask for a letter from the employee's healthcare provider that shows the ADA disability and explains why the employee needs a reasonable accommodation because of it. If a reasonable accommodation would allow the employee to perform the job safely and effectively, and does not involve significant difficulty or expense, the employer must provide the accommodation. If more than one accommodation would work, the employer can choose one of them.

Drug Testing and Safety Issues

Employees subject to drug testing should be given an opportunity to explain lawful opioid use that may cause a positive test result. If an employee is using opioid medications lawfully, but the employer is concerned about whether the employee can perform the job safely, the employee may ask for a reasonable accommodation.

If the employee is not disqualified from performing their job by federal law and is not using opioids illegally, an employer still may have concerns that the employee cannot perform the job safely, even with a reasonable accommodation. The employer must show the employee poses a significant risk of substantial harm and may ask the employee to undergo a medical evaluation.

Additionally, a leave of absence may be a reasonable accommodation in appropriate cases.

Guidance for Healthcare Providers

The guidance explains the type and form of medical information that will be useful to healthcare employers who request documentation for an employee's reasonable accommodation or to establish the individual can perform a certain job safely and effectively.

Blueprint for Completing Documentation to Support the Request

As suggested by the title, the healthcare provider guidance offers a blueprint for drafting medical documentation to support an employee's request for reasonable accommodations related to the use or a history of misuse of opioids. The guidance includes examples of potential reasonable accommodations, a summary of the types of information the provider should include, and suggestions for crafting the response.

The guidance gives providers examples of potential reasonable accommodations, including an altered schedule "(e.g., scheduling work around treatment)," temporary transfers, unpaid leave, and shift changes. It also flags what employers are not required to do. Examples include lowering production or performance standards, "eliminat[ing] essential functions," "pay[ing] for work that is not performed," or "excus[ing] illegal drug use on the job."

The guidance also states that medical documentation is "most likely to support your

patient's request" if it explains:

- The provider's professional qualifications and the nature and length of the relationship with the patient;
- The nature of the patient's medical condition;
- The patient's functional limitations in the absence of treatment (*i.e.*, how the condition would limit a major life activity such as walking, sleeping, lifting, concentrating, or caring for oneself);
- The need for a reasonable accommodation (an explanation of how the patient's medical condition makes changes at work necessary, and how the patient's symptoms — as they are, with treatment — make performing the job function more difficult); and
- Suggested accommodations (without overstating the need for a particular accommodation in the event an alternative is necessary).

Safety Concerns

The guidance outlines the significance of the healthcare provider's safety assessment. It states, "If an employer asks whether your patient poses a safety risk, it is likely asking for medical information that will help it to decide whether the patient's disability creates a safety risk significant enough to justify suspension or other adverse action under the law." It further explains that such actions are warranted only if the safety risk poses a "direct threat," which means a significant risk of substantial harm to self or others that cannot be eliminated or reduced to an acceptable level with a reasonable accommodation.

A restriction such as "no operating heavy machinery" is insufficient. The guidance lists the factors employers must evaluate when making a direct threat assessment: "the level of risk posed by a disability, taking into account the probability that harm will occur, the imminence of the potential harm, the duration of the risk, and the severity of the potential harm."

Additionally, the EEOC suggests that the healthcare provider consider and assess any risks the patient's condition may present in light of the type of work the patient performs on a day-to-day basis; the type of equipment they use; their access to harmful objects or substances; any safeguards in place at the worksite; the type of injury or other harm that may result if one of the identified medical events or behaviors occurs; and the likelihood that injury or other harm would in fact occur as a result of the event or behavior. If a healthcare provider does not have all of this information, but needs it to make an accurate assessment, the provider should ask the employer for it, the guidance states.

Although the technical assistance documents were created for employees and healthcare providers, they are worth a close reading by employers. They provide insight into how the EEOC envisions the information exchange and necessary accommodation efforts related to opioid-related disabilities. Employers must ensure that they do not make employment decisions that are influenced by the social stigma around substance abuse and recovery. The agency has a long history of pursuing cases where employers made adverse employment decisions based on unsupported conclusions about an applicant's or employee's ability to perform a job due to a positive drug test result for

opioids or for lawful use of opioids. When an employer believes the use of opioid medication may create a safety risk, the EEOC reminds employers that the direct threat defense requires an assessment based on objective evidence, and often a medical opinion.

Jackson Lewis attorneys are available to assist you with drug testing issues and questions about reasonable accommodations.

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