

Know the facts.

ADA Basics, Disability-Related Inquiries

Under the American With Disabilities Act (ADA), an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer and employment.

1. Prior to an offer of employment – The ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
2. After an applicant is given a conditional job offer, but before he or she starts work – An employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
3. After employment begins – An employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

CONFIDENTIALITY EXPECTATIONS

The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.

WHAT'S A DISABILITY-RELATED INQUIRY

In its guidance on Preemployment Questions and Medical Examinations, the U.S. Equal Employment Opportunity Commission explains in detail what is and is not a disability-related inquiry. A "disability-related inquiry" is a question (or series of questions) that is likely to elicit information about a disability. The same standards for determining whether a question is disability-related in the pre- and post-offer stages apply to the employment stage.

Among the permitted disability-related inquiries:

- Whether the employee has (or ever had) a disability, how he/she became disabled or the nature or severity of an employee's disability
- Requesting medical documentation regarding the employee's disability
- Asking an employee's co-worker, family member, doctor or another person about the employee's disability
- Genetic information
- Prior workers' compensation history
- What current prescription drugs or medications he or she may be taking or has taken the past, plus monitoring an employee's taking of the medication
- Broadly asking about his or her impairment(s), which will likely elicit information about a disability (what impairments do you have?)

Examples of additional general health or well-being inquiries that are permitted:

- Asking about an employee's overall well-being (how are you?)
- Asking an employee who looks tired or ill if he/she is feeling okay
- Asking an employee who is sneezing or coughing whether he/she has a cold or allergies
- Asking how an employee is doing following the death of a loved one or the end of a marriage/relationship
- Asking an employee about non-disability-related impairments (how did you break your leg?)
- Asking an employee whether he/she can perform job functions
- Asking an employee whether he/she has been drinking
- Asking an employee about his/her current illegal use of drugs
- Asking a pregnant employee how she is feeling or when her baby is due
- Asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency



www.eeoc.gov/policy/docs/guidance-inquiries.html

Source: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA

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Medical Review Officer, Designated Employer Representative and Verifying Your Results

NEXT STEPS FOR A POSITIVE, ADULTERATED OR SUBSTITUTED SPECIMEN

You will have the opportunity to speak directly with a medical review officer (MRO). During your interview, you can provide information and/or medical documentation to explain/support why your specimen was positive, adulterated or substituted. Based on the information you provide, the MRO will “verify” your result by determining whether or not there is a legitimate medical reason for your test result. The MRO will report your result to your employer only after making this determination.

During the interview, the MRO will ask if you would like to verify the laboratory’s result by having your split or “B” specimen (your primary specimen is the “A” sample) sent to another laboratory for analysis. You will have 72 hours from the time the MRO verifies your result to request an analysis of your “B” specimen. Who pays for the analysis is between you and your employer, but the MRO cannot reject or hold up your request because of payment issues.

NOTIFYING AN EMPLOYEE OF CONFIRMED NON-NEGATIVE DRUG TEST RESULTS

When an MRO receives a confirmed positive, adulterated, substituted or invalid test result from the laboratory, they must contact the employee directly (i.e., actually talk to the employee), on a confidential basis, to determine whether the employee wants to discuss the test result.

In making this contact, they must explain to the employee that, if he or she declines to discuss the result, the MRO will verify the test as positive or as a refusal to test because of adulteration or substitution, as applicable.

MRO staff – under the MRO’s personal supervision – may conduct this initial contact under the following parameters:

- The staff contact must be limited to scheduling the discussion between MRO and the employee and explaining the consequences of the employee’s declining to speak with MRO (i.e., that the MRO will verify the test without input from the employee). If the employee declines to speak with MRO, the staff person must document the employee’s decision, including the date and time.
- A staff person must not gather any medical information or information concerning possible explanations for the test result.
- A staff person may advise an employee to have medical information – prescriptions, information forming the basis of a legitimate medical explanation for a confirmed positive test result – ready to present at the interview with the MRO.
- Since the MRO is required to speak personally with the employee, face-to-face or on the phone, the staff contact must not inquire if the employee wishes to speak with MRO.

The MRO and associated staff must make reasonable efforts to reach the employee at the day and evening telephone numbers listed on the custody and control form (CCF). If the MRO or staff contact cannot reach the employee directly after making these efforts, the following steps must be taken:

1. Document the efforts made to contact the employee, including dates and times.
2. Contact the designated employer representative (DER), instructing the DER to contact the employee.
 - The MRO must simply direct the DER to inform the employee to contact you.
 - The MRO must not inform the DER that the employee has a confirmed positive, adulterated, substituted or invalid test result.
 - The MRO must document the dates and times of your attempts to contact the DER, and you must document the name of the DER you contacted and the date and time of the contact.

If the DER successfully contacts the employee (i.e., actually talk to the employee), they must document the date and time of the contact and inform the MRO.

1. The DER must inform the employee that he or she should contact the MRO immediately. They must also inform the employee of the consequences of failing to contact the MRO within the next 72 hours.
2. The DER must not inform anyone else working for the employer that they are seeking to contact the employee on behalf of the MRO.
3. If the DER has made all reasonable efforts to contact the employee but failed to do so, they may place the employee on temporary medically unqualified status or medical leave. Reasonable efforts include, as a minimum, three attempts, spaced reasonably over a 24-hour period, to reach the employee at the day and evening telephone numbers listed on the CCF.
 - The DER must document the dates and times of these efforts.
 - If the DER is unable to contact the employee within this 24-hour period, they must leave a message for the employee by any practicable means (voice mail, email, letter) to contact the MRO and inform the MRO of the date and time of this attempted contact.

www.transportation.gov/odapc/part40/40-131

Source: U.S. Department of Transportation Drug and Alcohol Testing Guidance

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Americans With Disabilities Act Basics, Addiction and Recovery

DEFINITION OF DISABILITY

A person has a disability under the Americans With Disabilities Act (ADA) if the person has:

- a physical or mental impairment that substantially limits one or more major life activities* (bipolar disorder, diabetes or addiction to alcohol); or
- a history of an impairment that substantially limited one or more major life activities, (cancer diagnosis or someone in recovery from illegal use of drugs); or
- been regarded as having such an impairment (has a family member who has HIV, so is assumed to have HIV as well and faces discrimination as a result, or is perceived to have a disability and is treated negatively based on the assumption of disability); or
- Major life activities include, but are not limited to walking, seeing, caring for oneself, learning, working, thinking, communicating and also the operation of bodily functions, such as neurological and brain functions.

ADDICTION TO ALCOHOL

Regardless of whether the addiction to alcohol is current or in the past, it is generally considered a disability because it is an impairment that affects brain and neurological functions.

SCENARIO 1: Michael is often late for work. His supervisor warns him about his tardiness. 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. Michael says his late arrivals are due to his drinking and that he needs immediate time off for treatment.

Is Michael protected under Title I of the ADA? Yes, he is a person with a disability (addiction to alcohol), but it is complicated. The employer does not have to withdraw the written warning nor grant an accommodation that supports Michael's drinking, like allowing him to arrive late in the morning. The employer can require an employee with addiction to alcohol to meet the same standards of performance and behavior as other employees. 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).

SCENARIO 2: Isabella's manager hears a rumor that she is addicted to alcohol and reassigns her to a less stressful job with lower pay because of concerns that work stress contributes to her drinking, despite the fact that she has not had any work-related problems.

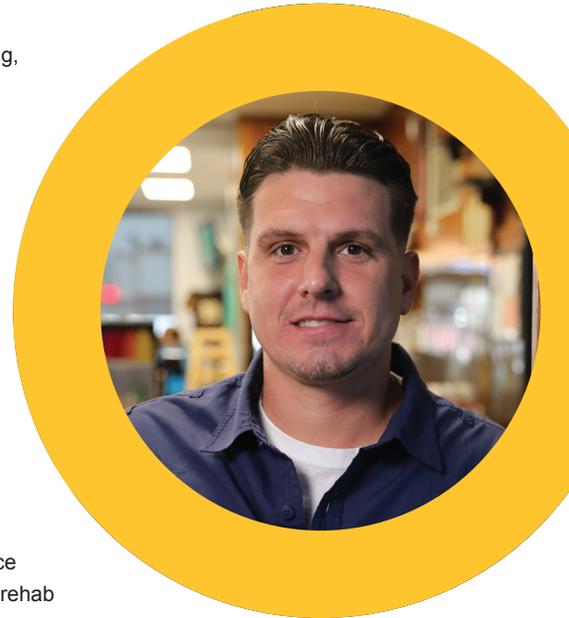
Is Isabella protected under the ADA? Yes, she is being regarded as having a disability and has been negatively affected. Isabella's manager violated the ADA when he reassigned Isabella to a lower paying job.

ILLEGAL USE OF DRUGS

The ADA protects a person who is in recovery and not currently engaging in the illegal use of drugs, and who can show that they meet one of the three definitions of disability listed above.

Illegal use of drugs falls into two categories: 1) using illegal drugs such as heroin or cocaine; or 2) misusing prescription medications such as OxyContin or Morphine – either taking more than prescribed or not having a legal prescription for the medication.

A person in recovery can be recovering from a substance use disorder, no longer engaging in the illegal use of drugs or participating in a supervised rehabilitation program/successfully rehabilitated.



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Current illegal drug use means that it's occurred recently enough to justify a reasonable belief that a person's drug use is a real and ongoing problem. Under the ADA, whether someone is currently using drugs illegally is decided on a case-by-case basis.

SCENARIO 1: Marianna has been cocaine-free for eight 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 Marianna protected under Title I of the ADA? Yes, she is protected under the ADA because she has a history of an impairment (addiction to cocaine) and has refrained from the use of illegal drugs for eight years, which is a good indication that there is not an ongoing problem. The potential employer violated the ADA when he refused to hire Marianna because of her recovery status.

In medication-assisted treatment (MAT), a person is prescribed medication such as Suboxone, Methadone or Vivitrol to treat their addiction.

SCENARIO 2: Tom is in MAT. He appeared in family court and requested that he begin to see his children on the weekend. The judge responded to his request saying, "You'll see your children when you get off Suboxone".

Is Tom protected under Title II of the ADA? Yes, he has a history of addiction. MAT participants usually have a history of addiction to controlled substances. Family court is regarding the use of Suboxone as though it is an illegal drug. Suboxone is a legally prescribed medication to help Tom function just like insulin is prescribed for the health and function of a person with diabetes. Tom's use of Suboxone cannot, by itself, justify a refusal to let Tom see his children on the weekend.

What if the court found out that Tom recently used cocaine while in MAT? Would he have protections under the ADA? No, Title II does not protect individuals who are "currently engaging in the illegal use of drugs."

SCENARIO 3: Alex had a double hip replacement and needs to go into a private rehabilitation facility for physical therapy for a month. When the rehabilitation facility finds out he is being prescribed Methadone, they refuse to accept him as a patient.

Is Alex protected under Title III of the ADA? Yes, Methadone is a legally prescribed drug used to treat addiction. The rehab facility violated Title III of the ADA when it denied Alex admission based upon his MAT.

ADDICTION AND LEGAL USE OF DRUGS

SCENARIO: Jennifer became addicted to Percocet while taking the medication in a prescribed manner and in prescribed amounts.

Is Jennifer protected under the ADA? Yes, she is protected under the ADA because she is legally using a drug as prescribed for an underlying condition. However, if she takes more than prescribed, she may not be covered under the ADA.

NEED MORE INFORMATION?

If you have questions about your rights or obligations under the ADA, contact your local ADA center. Each center has ADA specialists who provide information and guidance to anyone requesting ADA information. You can call toll-free at 1-800-949-4232. You can also email your local center by through adata.org/email. All calls and emails are treated anonymously and confidentially.



<https://adata.org/factsheet/ada-addiction-and-recovery>

Source: ADA National Network