

Lawyer Insights

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EEOC Targets Employers' Prescription Drug Use Policies

by Robert T. Dumbacher and Karen Jennings Evans

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The opioid epidemic is causing employers to consider the best ways to ensure a safe workplace, but companies should be careful when addressing employees' prescription drug use. Recent court filings and settlements by the U.S. Equal Employment Opportunity Commission illustrate the potential pitfalls employers face when attempting to implement a drug-free workplace.

For example, the EEOC recently filed a lawsuit against a Texas painting company that it alleges violated the Americans with Disabilities Act when it terminated an employee who was taking methadone as part of a prescribed treatment program.¹ The EEOC noted that the employee had been dependent on prescribed opioid pain medication but had been in a treatment program for over a year. On his first day on the job, the employee took a pre-employment drug and alcohol test. When he learned that the prescription medication he took caused the drug test to be "positive," he provided a letter from his doctor that detailed his treatment and invited the employer to contact the clinic if it needed more information. The company terminated his employment, however, and did not seek additional information about his treatment.

The EEOC alleges that this conduct violates the Americans with Disabilities Act, which prohibits discrimination against qualified individuals with disabilities. With respect to this case, the EEOC stated that "[e]nforcement of the ADA is a top priority of this agency. When an employer regards a worker's impairment as preventing him from doing the job but refuses to consult with the worker's treating doctor and assess the worker's ability to work, the company should expect that the EEOC will enforce the ADA and defend the employee's rights."

In addition, the EEOC recently settled two cases involving employers' actions related to prescription drug use. In one case, a school in South Carolina terminated a teacher on his first day of work after learning that he was on a prescription drug to treat opioid dependency.² The EEOC claimed that the school failed to conduct an individualized assessment to determine what, if any, impact the drug had on the teacher's ability to perform his job, and therefore, violated the ADA. As part of the settlement, the company agreed to create an ADA-compliant procedure for conducting an individualized assessment of an employee who is enrolled in any form of alcohol, drug or illegal substance rehabilitation program to determine whether the individual can safely perform the essential functions of the position with or without reasonable accommodation.

In the second settlement, the EEOC sued a South Dakota company for violating the ADA when it

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withdrew an applicant's job offer for a cashier position at a casino following a drug test that was positive for the lawful presence of a prescription medication.³ The employer asserted it relied on a third-party testing vendor to review test results to determine whether the non-negative result was caused by the prospective employee's lawful use of a prescription drug, and if so, it was to report the test result to the employer as negative, which allegedly did not occur in this instance. The employer attempted to bring the testing company into the lawsuit, claiming indemnification or contribution, if it was found liable, but that third-party action was dismissed by the district court as impermissible under Title I of the ADA.

The EEOC also alleged the employer maintained an unlawful policy requiring all employees to report if they were taking any prescription or nonprescription medication. As part of the settlement, the employer agreed to change its policy to only require employees to report prescription medications if the employer had a "reasonable suspicion" that the medication may be affecting performance. In the press release announcing the settlement, the EEOC stated, "Employers must follow the law and take steps to ensure that their third-party vendors and independent contractors do the same."

So, what should an employer do to comply with the ADA?

The EEOC enforcement guidance addressing disability-related inquiries encompasses prescription drug medications.⁴ While not binding law, it provides that an employer should not generally:

- Ask an employee whether he/she is currently taking any prescription drugs or medications;
- Ask an employee whether he/she has taken any prescription drugs or medications in the past; or
- Monitor an employee's taking of prescription drugs or medications.

According to the EEOC, employers may ask employees about their current illegal use of drugs. This is because an individual who currently uses drugs illegally is not protected under the ADA and, therefore, questions about current illegal drug use are not disability-related inquiries.⁵ Questions about past addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs but are not currently using drugs illegally are protected under the ADA.⁶

In addition, the EEOC notes that asking, "all employees about their use of prescription medications is not job-related and consistent with business necessity." An exception, however, exists in limited circumstances affecting public safety. If an employer is able "to demonstrate that an employee's inability or impaired ability to perform essential functions will result in a direct threat," then employers may be able to demonstrate that an inquiry "is job-related and consistent with business necessity to require employees in positions affecting public safety to report when they are taking medication that may affect their ability to perform essential functions."

Finally, if an employee discloses that he or she is taking a medication that can affect the safe performance of the job, the employer should not automatically bar the employee from performing the job based simply on the employee's use of the medication. The employer should perform an individualized assessment of the employee to determine whether the individual can safely perform the essential functions of her/his position with or without reasonable accommodation. While it may be necessary to

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obtain further information about the impact of the medication on the employee's ability to perform the essential functions of the job with or without reasonable accommodations, the employer must be careful to tailor the request for information to these issues. It could be a violation of the ADA to seek information about the underlying condition for which the employee is taking the medication, if that information is not relevant to whether the employee can perform the essential functions of the job, with or without reasonable accommodation.

Notes

¹ <https://www.eeoc.gov/eeoc/newsroom/release/6-29-18a.cfm>

² <https://www.eeoc.gov/eeoc/newsroom/release/5-15-18.cfm>

³ <https://www.eeoc.gov/eeoc/newsroom/release/5-18-18.cfm>

⁴ <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>

⁵ 42 U.S.C. §12114(a)(1994); 29 C.F.R. §1630.3(a)(1998).

⁶ 29 C.F.R. §1630.3(b)(1),(2)(1998).

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