

The American With Disabilities Act: A Summary of Alcohol and Drug and AIDS Provisions

The Americans With Disabilities Act (ADA) of 1990 has been described as one of the most far reaching pieces of civil rights legislation. Following the ADA's enactment, various federal agencies issued regulations to guide the implementation of the Act.

Two of the most controversial issues during the debate on the ADA related to coverage of individuals with alcohol and drug problems and HIV disease. The following summary outlines the scope of coverage for these groups, providing references to the statute and relevant legislative history. While the summary refers to the ADA, the scope of coverage is the same for the federal Rehabilitation Act of 1973. The summary focuses primarily on the employment provisions of the ADA – Title I, but the Act also prohibits discrimination against qualified disabled individuals by public accommodations, state and local governments and entities that provide communication and transportation services.

I. Coverage for Persons with Drug and Alcohol Dependence in the Employment Context

A. Who is protected against discriminated?

The following individuals (both applicants and employees) are protected against discrimination:

- 1) an individual who has successfully completed a drug rehabilitation or is otherwise rehabilitated and is no longer using drugs illegally;
- 2) an individual who is participating in a supervised rehabilitation program and is no longer using drugs illegally;
- 3) an individual who is erroneously regarded as using drugs illegally, but is not doing so; and
- 4) an individual with a current alcohol dependence problem who can perform the essential function of the job sought or held and does not present a direct threat to the health or safety of other individuals in the workplace. (42.U.S.C. §§ 12114(b), 1211(8) and 12113(a) and (b).)

The conference report makes clear that individuals fit into the “otherwise rehabilitated” category if they have participated in an inpatient or outpatient program or an employee assistance program. (H. Rpt. 101-596 at 64.) In addition, a floor statement by Senator Kennedy (D-Mass.), one of the key Senate sponsors, makes clear that persons who have recovered without the benefit of formal treatment, including those who participate in self-help groups, are protected against discrimination. (Cong. Rec. (S.10774-10775), September 7, 1999.) Employers and other covered entities are permitted to “adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual ...is no longer engaging in the illegal use of drugs.” (42 U.S.C. § 12114(b) and (H. Rpt. 101-596 at 64).)

The conference report also makes clear that an individual who is regarded as a current drug user as a result of an inaccurate drug test can challenge any resulting adverse job action under the “erroneously regarded” provision. (H. Rpt. 101-596 at 65.) The House Education and Labor Committee report also states that an individual who uses prescription medication but is deemed to use drugs illegally because of a positive drug test result can challenge the decision under this provision. (H. Rpt. 101-485 Part 2 at 80.)

B. Who is not protected against discrimination?

1) An individual (applicant or employee) who is currently engaged in the illegal use of drugs is not protected against discrimination. (42 U.S.C. §§ 12114(a), 12210(a) and 510(a).)

2) There are two limitations to this rule:

a) a current drug user who has a covered disability, (e.g. a person with HIV disease or a quadriplegic) and is discriminated against because of the other covered disability is protected.

b) a current drug user cannot be denied health services or other services provided in connection with drug rehabilitation if the individual is otherwise entitled to those services. (42 U.S.C. § 12110(c).) The scope of “other services” is not defined and thus should include the full range of services traditionally provided in connection with drug treatment.

3) The term “illegal use of drugs” is defined as the use of drugs which is unlawful under the Controlled Substances Act. It does not include the use of a drug taken under the supervision by a licensed health care professional or other uses authorized by federal law. (42 U.S.C. § 12111 (6).) Thus, as Senator Kennedy noted, the use of methadone in a methadone maintenance treatment program is not considered “illegal use.” (Cong. Rec. (S.10774-10775) September 7, 1989).

The Education and Labor Committee also noted that “many people with disabilities, such as people with epilepsy, AIDS, and mental illness, take a variety of drugs, including experimental drugs, under supervision by a health care professional. Discrimination on the basis of use of such drugs would not be allowed.” (H. Rpt. 101-485, Part 2 at 79.)

C. What are employers prohibited from doing?

1) Covered employers are prohibited from discriminating against a qualified individual with a disability on the basis of the disability with regard to job application procedures, hiring, advancement, or discharge, employee compensation, job training, and other terms, conditions, and privileges of employment. (42 U.S.C. § 12112(a).)

2) Covered employers are also prohibited from failing to make reasonable

accommodations to the known physical or mental limitations of a qualified disabled person, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. (42 U.S.C. § 12112(b)(5).) Thus, employers must accommodate a recovering individual who needs a flexible work schedule to attend a treatment program, unless such an adjustment would impose an undue hardship.

3) Covered employers are also prohibited from giving medical examinations or making inquiries about the nature or severity of a disability before making a conditional offer or employment. (42 U.S.C. § 12112(c)(2).) Thus, an employer would be prohibited from asking a applicant whether he or she has had a drug or alcohol problem in the past or has a current alcohol problem before making an offer of employment.

D. What are employers permitted to do?

1) Covered employers are permitted to establish qualification standards and criteria that are job-related and consistent with business necessity. An employer may require that an individual not pose a direct threat to the health or safety of other individuals in the workplace.

2) Employers are permitted to make preemployment inquiries into the ability of an applicant to perform job-related functions.

3) Employers are permitted to require a medical examination after an offer of employment has been made and before commencement of the job and may condition an employment offer on the results of a medical examination if three conditions are met:

a) all entering employees are subjected to the examination (this may be limited to all employees in a particular job category (42 U.S.C. § 12112(c)(3)(A), (H. Rpt. 101-485, Part 2 at 73));

b) the information obtained as a result of the medical examination must be kept strictly confidential, and maintained on separate forms and in separate medical files. The only individuals who may have access to the information are: 1) supervisors and managers who need to be informed about necessary work restrictions and necessary accommodations; 2) first aid and safety personnel who may be informed when appropriate to provide emergency treatment.; and 3) government officials investigating compliance with the ADA (42 U.S.C. § 12112(c)(3)(B), and

c) the information is used only in accordance with the ADA; i.e. the medical information cannot be used to retract a job offer unless the results indicate that an individual is not qualified to perform the job. (42 U.S.C. § 12112(c)(3)(C).)

4) Employers may establish workplace rules relating to the use of drugs and alcohol that:

- a) prohibit the illegal use of drugs and the use of alcohol at the workplace;
- b) prohibit employees from engaging in the illegal use of drugs and from being under the influence of alcohol at the workplace;
- c) require employees to comply with the Drug-Free Workplace Act of 1988;
- d) require employees with drug and alcohol dependence problems to conform to the same qualification standards, behavior and job performance as other employees; and
- e) require employees to comply with existing Department of Defense, Department of Transportation, and Nuclear Regulatory Commission regulations that relate to alcohol and drug use. (42 U.S.C. § 12114(c)(1-5).)

E Is drug testing permitted under the ADA?

- 1) The ADA permits employers to conduct drug tests for the illegal use of drugs and to make employment decisions based on a positive drug test result as long as the test result is accurate and the employers “complies with applicable Federal, State, or local laws or regulations regarding permitted testing, quality control, confidentiality, and rehabilitation...” (42 U.S.C. § 12114 (d) and H. Rpt. 101-485, Part 2 at 79.) Thus, an employer must comply with state and local laws when conducting drug tests and adhere to any limitations imposed on testing. (42 U.S.C. § 12201(b).)
- 2) The ADA does not establish any standards for testing other than to require accurate testing. However, the House Education and Labor Committee encouraged employers to follow the HHS Mandatory Guidelines on Federal Workplace Testing to achieve accurate test results, (H. Rpt. 101-485, Part 2 at 79.) Persons who are erroneously regarded as using drugs illegally as a result of an inaccurate drug test may challenge that finding under Section 12114(b)(3) of the ADA. (See above citations.)
- 3) Drug tests for illegal drugs are not considered a “medical examination” under the ADA. (42 U.S.C. § 12114(d)(1).) Accordingly, employers can subject applicants to drug tests before making an offer of employment as long as the test identifies only the illegal use of drugs and not the use of drugs taken by individuals with other covered disabilities, e.g. mental illnesses, AIDS, epilepsy. If an employer’s drug test identifies such other drugs, the test cannot be conducted until after a conditional offer or employment has been made. This is necessary to protect individuals against disclosure of covered disabilities in the pre-offer stage. (H. Rpt. 101-485, Part 2 at 79-80.)

II. Coverage for Persons with HIV Disease

A. Individuals with HIV disease are protected against discrimination. The term HIV disease encompasses the range of HIV-related illness, from asymptomatic HIV infection to AIDS.

B. Individuals who associate with persons with HIV disease, such as caretakers, spouses and housemates, are also explicitly protected against employment discrimination. (42 U.S.C. § 12112(b)(4).)

III Miscellaneous Issues

A. What are the remedies for a violation of the ADA?

The employment provision of the ADA (Title I) adopts the remedies provided by Title VII of the Civil Rights Act of 1964. (Section 107(a).) An individual who seeks to challenge a discriminatory practice must first go through the administrative process established by the Equal Employment Opportunity Commission (EEOC). Individuals have a private right of action in court and have the right to get injunctive relief, which includes reinstatement, backpay and frontpay.

B. When do, the employment provisions of the ADA go into effect?

The employment provisions go into effect in two stages depending upon the size of the employer. Employers with twenty-five (25) or more employees will be required to comply with the Act on the effective date of July 26, 1992 – twenty-four (24) months after the date of enactment. Employers with fifteen (15) or more employees must comply with the Act as of July 26, 1994.

C. Are insurance plans and fringe benefits affected by the ADA?

1) The ADA prohibits an employer from participating in a contractual relationship that has the effect of discriminating against a protected individual, including a contractual relationship with an “organization providing fringe benefits to an employee of the covered entity.” (42 U.S.C. § 12112(b)(2).) Fringe benefits are also considered a term or condition of employment that cannot be denied to qualified disabled individuals. (H. Rpt. 101-485, Part 2 at 55 and Part 3 at 35.)

2) At the same time, the ADA is not intended to interfere with the ability of insurers or employers to devise benefit or insurance plans that comply with state laws and regulations and are based on sound actuarial practices. The ADA, therefore, provides that nothing in the Act shall be construed to prohibit or restrict:

a) an insurer (or other entity administering benefit plans) from underwriting risks, classifying risks, or administering risks that are based on or not inconsistent

with state law;

b) a covered entity from establishing or administering a bona fide benefit plan that is based on underwriting risks, classifying risks or administering risks that are based on or not inconsistent with state law; or

c) a covered entity from establishing or administering a bona fide benefit plan that is not subject to state laws that regulate insurance provided that the exceptions are not used as a subterfuge to evade the protections of the ADA.

While the insurance provision is vague and will be clarified only through regulations and litigation, the Committee reports (H. Rpt. 101-485 Part 2 at 136-37 and Part 3 at 70-71) provide the following guidance:

a) an employer cannot deny a qualified applicant a job because the employer's current insurance plan does not cover the person's disability or because of the increased costs of the insurance;

b) a plan may limit coverage based on classification of risk and may contain pre-existing condition clauses, even though such clauses eliminate benefits for a specified time period for persons with disabilities;

c) an employer may not have a health plan which denies coverage completely to an individual based on diagnosis.

