Commonly-asked Questions About Drug Testing and the ADA

Does the ADA protect people with substance abuse disorders?

It depends on whether the individual is currently illegally using drugs. The employment provisions of the ADA protect qualified individuals with a disability.

What is considered illegal drug use?

The illegal use of drugs include the use, possession, or distribution of drugs which are unlawful under the Controlled Substances Act. It includes the use of illegal drugs and the misuse of prescription drugs that are "controlled substances". The illegal use of drugs does not include drugs taken under supervision of a licensed health care professional, including experimental drugs for people with AIDS, epilepsy, or mental illness.

Are recovering drug addicts covered by the ADA?

Yes. In general, a person with a drug addition who is currently in a drug rehabilitation program or has successfully completed rehabilitation and has not used drugs illegally for some time is covered by the ADA. Rehabilitation programs can include inpatient and outpatient substance abuse programs, Narcotics Anonymous, Alcoholics Anonymous and Employee-Assistance Programs. The ADA also protects a person who has a history of addition or if s/he is mistakenly regarded by the employer as having a drug addition. However, an employer may be able to fire or refuse to hire a person with a recent history of illegal drug use, even if the person no longer uses drugs, in specific occupations, such as law enforcement or public transportation, when an employer can show that this policy is job-related and consistent with business necessity. For local governments, this means the positions must be required by law to be tested or must be “safety sensitive” under the federal court interpretations. A person who casually used drugs illegally in the past but did not become addicted is not an individual with a disability based on the past drug use. For a person to be protected as a person with a disability, s/he must have an addition rather than have been a casual drug user.

John applied for a job as a finance consultant and in order for him to be considered for the position, the company has a policy that all applicants are required to take a drug test. The results of John's drug test come back negative but during the interview the employer asks John if he ever used drugs in the past. He answers yes, but that he successfully completed a rehabilitation program and has not used illegal drugs for 3 years. The employer denies John the position because he is afraid that John will start using drugs again and be a liability to the company. In this situation the employer violated the ADA. First, the employer may not ask applicants about past drug use because it is an illegal question. Second, the employer denied him the position on the basis of a history of a disability.
What does current drug use mean?

An individual will be considered a current drug user under the ADA if a drug test correctly indicates that the individual is currently engaging in the illegal use of a controlled substance at a legally detectable level. "Current" drug use also means that the illegal use of drugs occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem. It is not limited to the day of use, or recent weeks or days, in terms of an employment action. It should be determined on a case-by-case basis. Although the ADA does not give a specific length of time, some courts have concluded that enrolling into a rehabilitation program did not automatically convert a person to a non-user. Some courts have found people to be current users when the last use was several months ago. A few courts have looked at how long the individual has been using drugs, the risk of relapse, and how long the individual has been in recovery. These are generally questions to be resolved by the MRO or an drug abuse expert. Although the ADA appears to protect persons with substance abuse disorders in treatment, the courts have made it an unsettled area of the law. Therefore, supervisors should consult with HR and or the Attorney before using this information as part of a “reasonable suspicion” decision.

Can an employer require an applicant or employee to take a drug test?

Yes. Generally, an employer may, under the ADA, conduct drug tests to detect illegal use of drugs. There are exceptions to the general rule that employers may require drug tests. For example, a governmental employer such as a county, state, city, or community college district or school district may not require a drug test without an individualized suspicion of illegal drug use by that employee.

The ADA does not prohibit, require, or encourage drug tests. Although an employer may not require an applicant to pass a medical examination prior to a job offer, drug tests are not considered medical examinations, and an applicant can be required to take a drug test before the employer has offered to hire the applicant.

On the other hand, a test to determine the blood alcohol of an individual would be considered a medical examination and can only be required by an employer after a job offer under special conditions.

Steve applied for a position as a clerk in a grocery store. It is the store's policy to conduct a drug screening test for all applicants. Steve refuses to take the test and a position is not offered to him because of his refusal. In this situation, the employer has the right to refuse Steve the position because of his failure to take a drug test.

Alberto applies for a position as a chauffeur at a hotel resort. The employer required all applicants to submit to a drug test and a blood alcohol test to ensure applicants are not under the influence. The employer may require the drug test before offering Alberto a job. However, it is a violation of the ADA to require a blood alcohol test before making him a job offer.

Recently the 10th Circuit Court of Appeals found that a resort operating in Colorado with over 500 employees violated the ADA with its drug and alcohol policy. The policy required all
employees to report all prescription drugs that were "present in their body system" and only allowed employees to use medication if that employee had reported and received approval by the supervisor. This policy violated the ADA because it required disclosure of medical information without proving it was necessary for business or related to the specific job the individual was performing. *Roe v. Cheyenne Mountain Conference Resort, Inc.* (10th Cir. 1997)

**Why can an employer require an applicant to undergo a drug test prior to hiring?**

The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other Federal laws and regulations regarding alcohol and drug use.

**Are individuals who are properly prescribed medications required to inform the prospective employer prior to the drug test and/or hiring of their medication?**

No. Under the ADA, an applicant who is taking properly prescribed medication is not required to disclose this information to his/her prospective employer. In addition, an employer is not permitted to ask questions concerning any medications that an applicant is taking or has taken in the past. If a person tests positive for illegal drug use, an employer must offer the employee or applicant an opportunity to explain a positive result, such as lawful use of a controlled substance or other treatment that might cause a false positive test result. On the other hand, if an applicant voluntarily discloses this information at the time of the drug test, it may avoid any misunderstandings concerning positive results from a drug-screening test between the employee and his/her employer. On a job application or in an interview the following questions are not permitted under the ADA:

- *Are you currently a drug user?*
- *Have you ever taken illegal drugs in the past?*
- *Have you ever misused properly prescribed medications in the past?*
- *Have you ever been hospitalized for substance abuse treatment?*
- *Have you ever undergone substance abuse treatment?*

Joe is currently on a methadone treatment plan to assist in his heroin addition. He applied for a job at a construction site and was offered a position. Before starting work, he was required to submit to a drug-screen. The results of the test showed that he had methadone in his system. The employer withdrew the job offer and asked Joe, "Why didn't you tell me about the methadone?" "I would have never offered you the job." The employer violated the ADA by withdrawing the job offer because he used methadone. The employer also wrongly accused Joe of withholding information. Joe was not required to disclose this information prior to a job offer.

Mary is currently taking an herb treatment for her diagnosed Hepatitis C disability. This treatment is not considered a controlled substance by the law but did result in a false positive under a drug-screening test. Mary applied for a job at a department store and takes a subsequent drug test, which shows a positive result. The employer offered Mary an opportunity to explain these positive results and checked with her doctor and the lab to verify that this treatment could cause a positive test result. Mary's employer acted properly under the ADA.
Can an employer terminate an employee who is currently engaging in the illegal use of drugs?

Yes. An employer may refuse to hire an applicant or discharge or discipline an employee based upon a test result that indicates the illegal use of drugs. The employer may take these actions even if an applicant or employee claims that s/he recently stopped illegally using drugs. An employer has no obligation toward individuals who are currently using illegal drugs, regardless of whether such individuals are addicts or casual users of drugs, and regardless of whether the illegal drug use impacts upon the individuals' behavior or job performance. For example, courts have upheld termination of employees who sold drugs in the workplace; sexually harassed a co-worker at a company party while under the influence; lost their driver's license because of DUI's where a driver's license is necessary; was visibly intoxicated while working with customers; had possession of unlawful drugs at work; and went to work under the influence.

Are the results of a drug test confidential?

Yes. Under Colorado law the employee has the right to a copy of the written results of his/her test only. The prospective employer must keep all information received through a substance abuse testing program confidential.

A drug test may indirectly reveal that an individual is HIV positive, has epilepsy or diabetes because a prescribed medicine used to treat a particular condition shows up in the test. Under the ADA, an employer who obtains information about disabilities or medical conditions through drug testing is also required to treat this information confidentially under the ADA. To satisfy these requirements, an employer must keep information about disabilities, such as medical documentation regarding the need for an accommodation or medical examination, in a locked, separate file apart from the personnel records. Only specific people must have access to the medical records. Co-workers must not have access to the medical records or the information contained in these records, except for

- supervisors or managers who must be informed **ONLY** about work limitations or the need for accommodations;
- first aid or safety personnel who might be required to give emergency treatment or to develop emergency evacuation procedures; and
- government officials investigating whether an employer is following the ADA or other state and federal laws, insurance companies for provision of benefits, or worker's compensation offices for benefits.

In each instance, it is a duty of the employee who has access to the confidential medical information to keep it private and only use it for the work-related purpose for which it is known.

What actions can an employer take based on positive results of a drug test?

- In Colorado, an employer covered by state law can discipline or terminate the employee if the results are positive for detectable limits of illegal drugs. The employer must have a written policy that has been distributed to employees stating what tests an employee may
be subject to and what action the employer may take if test results are positive. Neither Colorado nor federal law mandates any particular action, but allows the employer to choose the action s/he will take. The ADA does not require that the employer have a written policy about drug testing and the consequences of a positive drug screen. However, the ADA does not take away additional rights afforded by Colorado law. Federal laws under some programs, such as the CDL programs or the Department of Justice programs, may require a written policy about drug testing and the consequences.

**Does the ADA protect people who are recovering alcoholics?**

A person who is an alcoholic is an individual with a disability under the ADA and may be entitled to consideration of reasonable accommodation, if s/he is qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to a person who is alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not qualified to perform the essential functions of a job or who drinks alcohol during work hours. This would be demonstrated by a positive alcohol test at legally established detectable limits.

**Can employers make workplace rules regarding alcohol or illegal drug use?**

Yes. The ADA does not interfere with employers' programs to combat the use of drugs and alcohol in the workplace. The Act specifically provides that employers may: (1) prohibit the use of drugs and alcohol in the workplace; (2) require that employees not be under the influence of alcohol or drugs in the workplace; and (3) require that employees who illegally use drugs or alcohol meet the same qualification and performance standards applied to other employees. For example, an employer can require that employees not come to work or return from lunch under the influence of alcohol (or drugs used illegally). An employer could also prohibit an employee from bringing alcohol to work or to work-related functions, or drinking during working hours.

**Can people who have alcoholism be held to the same performance standards as their co-workers?**

Yes. Employees who have alcoholism and do not perform up to the standards required by their employers can be discharged from their employment. Under the ADA the employer is allowed to terminate and not accommodate an employee with alcoholism, if the employee does not perform up to the same standards as all other employees, even if the behavior is related to the alcoholism. If an employee is often late or does not show up for work because of alcoholism, an employer may take direct action based on the conduct. However, an employer would violate the ADA if s/he treated an employee with alcoholism more harshly than s/he treated other employees for the same misconduct. An employer must make reasonable accommodations for employees who have alcoholism, such as making a flexible schedule that allows the employee to attend AA meetings.

*Thomas, who has alcoholism often arrives at work late and fails to finish his job responsibilities. His employer gives Thomas a poor evaluation in this area and does not award him a merit increase. His supervisor also warns him that he could be fired if this is not corrected. Other*
people who were late were treated similarly to Thomas. Under these conditions, the employer has probably not violated the ADA.

Yvette is a recovering alcoholic. She works as a counselor at a job placement service for a temp agency. She would like to continue to attend her group therapy meetings that are held at 4 p.m. on Wednesdays. She asks her supervisor if she could change her work schedule on Wednesday to work during lunch and leave work at 3:30 on Wednesdays. Unless this would be a hardship for the employer, this would be a reasonable accommodation.

Must employers provide substance abuse rehabilitation to recovering alcoholics or drug users?

No. Many employers have established employee assistance programs for employees who abuse drugs or alcohol that are helpful to both the employee and employer. However, the ADA does not require an employer to provide an opportunity for rehabilitation in place of discipline or discharge. The ADA does require that an employer consider reasonable accommodations for a person addicted to drugs who is rehabilitated and not using drugs or an alcoholic who remains a qualified individual with a disability. For example, a modified work schedule, to permit the individual to attend an on-going self-help program, might be a reasonable accommodation for an employee who has completed substance abuse treatment. An employer may also be required to provide unpaid or accrued leave for treatment under the ADA or the Family and Medical Leave Act (FMLA).

How Do I Know if An Employee is Protected by the ADA?

Generally, a line supervisor will NOT know if an employee has a medical condition, takes prescription drugs, or has a health condition that mimics (looks or appears like) illegal drug use or alcohol use. For this reason, supervisors may refer any employee to reasonable suspicion testing once those standards have been met and verified, by two separate trained detectors.

For the ADA to apply to an employment situation each of the following has to be true:

- the employer is a covered employer;
- the employee or applicant has a disability according to the ADA;
- the employee or applicant is qualified to perform the job; and
- the employer discriminates against an applicant or employee on the basis of disability.

If an employee verbally raises an objection based on the alleged legal use of prescription drugs, past illegal drug addiction (not current addiction and not marijuana use) or current alcoholism that information should be passed, in writing, to the drug lab and HR, along with the reasonable suspicion checklist for medical assessment by the MRO and for HR assessment by HR and/or the appropriate legal counsel.