EMPLOYMENT
Legal Briefings
Great Lakes ADA Center

Drugs, Alcohol and Conduct Rules Under the ADA

By Equip for Equality[1]

Employees and employers alike have endless questions about how the Americans with Disabilities Act ("ADA") applies to individuals who use alcohol and drugs, given the complicated and unique situations that often arise.

Common questions include:

- Alex uses medical cannabis to treat his disability. Medical cannabis is legal under his state law. He applies for a new job, and the employer has a drug-free workplace policy. Does the ADA protect him? What if he stops using cannabis and is in a treatment program?
- Jane has an opioid addiction. She is in medication-assisted treatment ("MAT"), where she uses opioids lawfully, as prescribed by her doctor. Does she need to disclose her use when applying for a job? What about after she is given a job offer? Does the ADA protect her if she is fired?
- Seth was arrested for driving while intoxicated outside of work hours. If Seth can show that he has alcoholism, does the ADA protect him? Does this diagnosis matter?

This Legal Brief will address these questions—and more—by examining the ADA, its implementing regulations, recent case law, and important settlement agreements. This Legal Brief is divided into seven parts.

Part I addresses how the ADA's definition of disability applies to individuals with an alcohol or drug addiction, including how the ADA exempts individuals "currently engaging" in illegal drugs. Part II discusses how the ADA's rules about medical examinations and disability-related inquiries apply to drug and alcohol use, including when employers can require drug testing, fitness-for-duty examinations, and information about an employee's rehabilitation. Part III looks at the concept of reasonable accommodations for protected individuals. Part IV considers how the concept of "direct threat" has been evaluated for individuals with drug- or alcohol-related disabilities. Part V focuses on conduct and performance rules, both inside and outside the workplace.

Part VI examines the issue of medical cannabis in the workplace, and Part VII provides a brief overview of issues outside of the employment context.

I. Definition of Disability

To qualify for protection under the ADA, individuals with an addiction to drugs or alcohol – like others seeking ADA protection – must show that they have a disability as defined by the law.[2] To do so, the individual must show that they have: (1) a physical or mental impairment that substantially limits one or more major life activities ("actual disability"); (2) a record of such an impairment ("record of"); or (3) been regarded as having such impairment ("regarded as").[3]

A. Actual Disability and Record of Disability

Individuals with drug- or alcohol-related disabilities who pursue ADA claims are often able to demonstrate that they have disabilities, as defined by the ADA, by explaining the significant limitations caused by their impairments. While addiction impacts individuals differently, many employees have successfully shown that their addictions cause substantial limitations in the major life activities of caring for themselves, thinking, concentrating and sleeping. Some individuals have also included allegations or evidence that their addictions resulted in physical limitations.

For example, in ***Lankford v. Reladyne LLC,* 2015 WL 7295370 (S.D. Ohio Nov. 19, 2015)**, the plaintiff, who was fired shortly after returning from an approved medical leave to undergo treatment for alcohol dependency, provided evidence that his alcohol dependency substantially limited major life activities.[4] Specifically, he provided evidence that his alcoholism resulted in frequent intoxication and black outs, which significantly restricted his ability to care for himself and concentrate. The court also cited the fact that the plaintiff's history of alcohol abuse caused him constant gastrointestinal issues, requiring surgery at the age of 30.

Similarly, in ***Quinones v. University of Puerto Rico*, 2015 WL 631327 (D.P.R. 2015)**, a resident at the University of Puerto Rico School of Medicine who was terminated from her residency program sufficiently alleged that her addiction to prescription drugs caused her substantial limitations in major life activities.[5] The plaintiff, who was addicted to Soma, Ambien, and Adderall, alleged not only that her addiction adversely affected her ability to comply with the program, but also that her addiction caused her to experience visual disturbances, speech problems, and dizziness, all of which substantially impacted the major life activities of work, concentration, school attendance, learning, and social interactions. ***See also Fowler v. Westminster College of Salt Lake*, 2012 WL 4069654 (D. Utah Sept. 17, 2012)** (finding a supervisor of a college mailroom for 21 years who was fired for unlawful opioid-use demonstrated that his addiction substantially limited his ability to think and sleep).

While many plaintiffs demonstrate that they are disabled as a result of their addiction, other plaintiffs have asserted that they are covered by the ADA as a result of an underlying impairment that necessitates the use of medication, such as opioids. For instance, in ***Cannon v. Jacobs Field Services North America, Inc*., 813 F.3d 586 (5th Cir. 2016),** the plaintiff asserted that he was covered by the ADA because he had a shoulder injury that substantially limited his ability to perform physical tasks, such as lifting, pushing or pulling.[6] As a result, the plaintiff was prescribed an opioid that ultimately led to his failure to hire case.

Even though the ADA Amendments Act ("ADAAA") made clear that the question of whether an individual's "impairment is a disability under the ADA should not demand extensive analysis,"[7] it remains imperative for individuals pursuing ADA cases to be clear about how their impairment limits them, as diagnoses alone are generally not sufficient to ensure ADA protection. Courts have dismissed a number of cases brought by individuals with drug or alcohol addictions because the plaintiff did not provide sufficient evidence to support a substantial limitation in a major life activity.

For instance, in ***Chamberlain v. Securian Financial Group, Inc.*, 180 F. Supp. 3d 381 (W.D.N.C. 2016),** the court concluded that the plaintiff did not establish that he had an "actual disability" as a result of his alcoholism because he testified and stated repeatedly that he had no limitations.[8] Without any limitations in any major life activities, the court held that despite his history of alcoholism, the plaintiff failed to establish that he had a "record of" an impairment. ***See also Kitchen v. BASF*, 343 F. Supp. 3d 681 (S.D. Tex. 2018)** (finding the plaintiff was not considered to have a disability under the ADA, where the plaintiff's alcoholism did not impair a major life activity at the time of the plaintiff's termination); ***Glover v. Fibercorr Mills, LLC*, 2018 WL 6831141, at *5 (N.D. Ohio Dec. 28, 2018)** (plaintiff testified that his "drug abuse problem did not interfere with his daily life in any way").

B. Regarded As

The ADA's "regarded as" prong aims to protect people from discriminatory actions based on myths, fears, and stereotypes about a disability that may occur even when a person does not have a substantially limiting impairment.[9]

The ADAAA redefined this prong. Now, under the ADAAA, an individual only needs to show that he is "regarded as" having an impairment, regardless of whether the impairment is perceived to limit a major life activity or perceived to be substantially

limiting.[10] As a result, the regarded as prong is often the default prong used to pursue ADA coverage, especially for individuals with drug or alcohol addiction.

These principles were reconfirmed in ***Alexander v. Washington Metropolitan Area Transit Authority*, 826 F.3d 544 (D.C. Cir. 2016)**, where the D.C. Circuit stated that the "'regarded-as-prong' has become the primary avenue for bringing" most claims of discrimination.[11] In ***Alexander***, an employee with alcoholism had used alcohol at work, was suspended and returned to work subject to periodic alcohol tests. After failing a test, he was fired, but told that he could reapply after one year if he completed an intensive alcohol dependency treatment program. After the employee finished the intensive treatment, he reapplied for his former position, but was not rehired and filed suit. On appeal, the issue before the D.C. Circuit was whether the employee was a person with a disability under the ADAAA. The district court concluded that the employee was not because the employee's alcoholism did not substantially limit one or more major life activities. The D.C. Circuit reversed the decision, and made a number of strong statements about the breadth and scope of the "regarded as" prong. It reasoned that here, there was no dispute that alcoholism is an impairment under the ADAAA and that all the employee needed to do was show that the employer took a prohibited action against an employee (i.e. not re-hiring the plaintiff) because of a perceived impairment, which the employee did.

As in ***Alexander***, one reason individuals with addiction bring claims under the "regarded as" prong is because in many cases, employers impose conditions on employees related to their use of drugs or alcohol. As a result, it is clear that the employer knew about the individual's impairment. For instance, in ***Chamberlain v. Securian Financial Group, Inc.*, 180 F. Supp. 3d 381 (W.D.N.C. 2016)**, referenced above, although the plaintiff was unable to demonstrate that he had a substantial limitation in a major life activity, he was able to show that he was "regarded as" having a disability.[12] His employer offered him a last-chance agreement that had various conditions related to his alcoholism, including attendance at Alcoholics Anonymous and random drug tests. ***See also Farr v. S.C. Elec. & Gas Co.,* 2018 WL 3120672 (D.S.C. Jan. 12, 2018) (adopted by *Farr v. S.C. Elec. & Gas Co*, 2018 WL 1418183 (D.S.C. Mar. 21, 2018))** (concluding that an individual with an opioid dependence was "regarded as" having an impairment for a number of reasons, including the requirement that he undergo a fitness for duty, cooperate with substance abuse professionals, attend medical visits, and refrain from using controlled substances).

Not all courts are as willing to reach that conclusion, however. In ***Kitchen v. BASF*, 343 F. Supp. 3d 681 (S.D. Tex. 2018),** discussed above, in addition to concluding that the

plaintiff did not fall within the "actual disability" prong as a result of his alcoholism, it also found that he was not "regarded as" having an impairment.[13] It reached this conclusion despite the fact that the company knew that the plaintiff was a recovering alcoholic, required him to submit to alcohol tests, and allowed him to participate in the Employee Assistance Program. In response to the plaintiff's argument that this was enough, the court concluded: "if the Court accepts [plaintiff's] theory, every employee ever subjected to alcohol testing or placed on leave for drinking at work necessarily would be disabled under the statute."[14]

C. Exemption for Illegal Drug Use

The ADA does not protect "any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[15]

This exemption creates an additional hurdle for individuals with drug addiction to obtaining ADA coverage. Notably, this exemption does not apply if the individual is no longer engaging in the illegal use of drugs *and* is either participating in a supervised drug rehabilitation program, has successfully completed a supervised drug rehabilitation program, or has otherwise been rehabilitated successfully.[16] Whether an individual falls within the "currently engaging" exemption or whether she is covered as a result of the rehabilitation exception is the topic of a number of cases.

1. Currently Engaging

The next question is who is considered to be currently engaging in the illegal use of drugs?

On one end of the spectrum, if an individual fails a drug test, then courts easily reach the conclusion that they are currently engaged in the use of illegal drugs. ***See e.g., Daniels v. City of Tampa*, 2010 WL 1837796 (M.D. Fla. Apr. 12, 2010)** (finding the plaintiff to be "currently engaged" in the illegal use of drugs when the plaintiff was involved in a vehicle accident and the required post-accident drug/alcohol test was positive for cocaine); ***Compare McFarland v. Special-Lite, Inc.*, 2010 WL 3259769 (W.D. Mich. Aug. 17, 2010)** (denying summary judgment for employer despite the fact that the employee admitted that a drug test "might" be positive when the test was, in fact, negative).

The more complicated question is how long an individual has to be drug-free to no longer be considered "currently engaging" in the illegal use of drugs. Both the courts and the EEOC have explained that this inquiry is, like many aspects of the ADA, a fact-intensive inquiry that is not subject to categorical rules and that must be determined on a case-by-case basis. The guiding principle offered is that an applicant's or employee's drug use is current if it occurred recently enough to justify an employer's reasonable belief that the individual's involvement with drugs is an ongoing problem.

In an often-cited older case, ***Mauerhan v. Wagner Corporation*, 649 F.3d 1180 (10th Cir. 2011)**, the Tenth Circuit reviewed the ADA's legislative history and surveyed court cases from various circuits' decisions and held "[n]o formula can determine if an individual . . . is "currently" using drugs."[17] It quoted the following piece of legislative history:

> The provision excluding an individual who engages in the illegal use of drugs from protection . . . is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person's drug use is current.[18]

The Tenth Circuit outlined a number of factors to consider when determining whether an individual's use of illegal drugs is current, including the severity of the employee's addiction and relapse rates for whatever drugs were used; the level of responsibility entrusted to the employee; the employer's applicable job and performance requirements; the level of competence ordinarily required to adequately perform the task in question; and the employee's past performance record.

Relying on these factors, the court in ***Mauerhan*** concluded that an employee who had been drug-free for one month was still "currently" using drugs because there was evidence that the plaintiff's "prognosis based on history and response to treatment [was] guarded" and that an addiction specialist testified that treatment for someone like the plaintiff would typically require approximately three months.[19]

The court in ***Quinones v. University of Puerto Rico*, 2015 WL 631327 (D.P.R. Feb. 13, 2015)** also analyzed these factors and concluded that an individual in a medical residency program was currently engaged in the illegal use of drugs even though she had been drug-free for a little over three months at the time of her termination.[20] The court concluded that three months was not long enough to be classified as a recovering

drug user. It also suggested that the nature of the resident's position contributed to its conclusion by emphasizing that the plaintiff's position "required a great deal of care and skill … [and] any mistakes could gravely injure [the plaintiff's] patients."[21]

Just as negative comments about an individual's prognosis and likely response to treatment can suggest that he is "currently engaging" in the illegal use of drugs, positive comments can suggest the opposite. One example of this comes from ***Suarez v. Pennsylvania Hospital of University of Pennsylvania Health System*, 2018 WL 6249711 (E.D. Pa. Nov. 29, 2018)**.[22] The plaintiff was fired from her job as a nurse about five and a half months after she completed twenty-nine days of intensive inpatient treatment for substance abuse disorder. The nurse filed an ADA lawsuit, and her employer argued that she was not covered by the ADA because her drug use was recent enough to justify the hospital's belief that her usage was an ongoing problem. The court disagreed and concluded that a reasonable jury could find that the plaintiff was "recovering" and thus, covered by the law. It cited the fact that when the nurse was discharged from her treatment program, it was recommended that she return to the practice of nursing two weeks after the date of her release. Moreover, she entered into a monitoring contract that required her to attend group or individual therapy, which she did, and she did not use illegal drugs at any time during the five and a half months between her treatment and termination.

A related topic is whether an individual's diagnosis renders them unqualified for a position. For instance, in ***Jarvela v. Crete Carrier Corporation*, 776 F.3d 822 (11th Cir. 2015)**, a commercial motor vehicle driver sought to return to work after taking leave to undergo treatment for alcoholism.[23] He had been diagnosed with alcoholism seven days prior. His employer did not permit his return, asserting that his diagnosis rendered him unqualified under the federal regulatory requirement that he not have "a current clinical diagnosis of alcoholism." 49 C.F.R. § 391.41(b)(13). The court upheld this determination finding that he could not perform the essential functions of a commercial motor vehicle driver job. An issue of interest in this case, but not one that was ultimately compelling to the court, was that the Department of Transportation itself reviewed the plaintiff's history and cleared him to return. Nevertheless, the court upheld the employer's decision.

2. Illegal Drug Use

There are two important principles to consider when discussing the phrase "illegal drug use."

First, the phrase "illegal drug use … refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use [or abuse] of prescription drugs."[24] ***Quinones v. Univ. of Puerto Rico*, 2015 WL 631327 (D.P.R. Feb. 13, 2015)** (stating "[I]t is worth recognizing 'that the illegal use of drugs includes the unlawful use of legal prescription drugs'" (citing 29 C.F.R. Part 1630, App. § 1630.3)).

Second, whether any particular substance is "illegal" depends on whether it is illegal as defined by the federal Controlled Substances Act ("CSA"). The CSA classifies marijuana as an illegal controlled substance with no exception for medicinal use.[25] Accordingly, despite the fact that numerous states are legalizing the use of medical and recreational marijuana/cannabis, courts have uniformly concluded that such substances are "illegal drugs" under the ADA. ***See, e.g., Johnson v. Columbia Falls Aluminum Co., LLC,* 213 P.3d 789, *4 (Mont. 2009)** ("a failure to accommodate use of medical marijuana does not violate [state law] or the ADA since an employer is not required to accommodate an employee's use of medical marijuana"); ***Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010)** (relying on and considering the ADA when holding that "because employee was currently engaged in the illegal use of drugs and employer discharged him for that reason, the protections of [state law], including the obligation to engage in a meaningful interactive discussion, do not apply").

Notably, there have been a number of successful lawsuits brought by users of medicinal cannabis under *state* anti-discrimination and medical marijuana laws. These issues are discussed in Part VI, below.

3. Acts on the Basis of Such Use

This exemption does not necessarily mean that the ADA can never protect an individual who currently uses illegal drugs; instead, the exemption applies only if the employer's action is based on such use.

As explained by the ADA legislative history: "If an individual who uses or is addicted to illegal drugs also has a different disability, and is subjected to discrimination because of that particular disability, that individual remains fully protected under the ADA."[26]

As a result, cases can turn on whether an employer's stated reason for an adverse action is truthful or pretextual. For instance, in ***EEOC v. Pines of Clarkston*, 2015 WL 1951945 (E.D. Mich. Apr. 29, 2015)**, an employee with epilepsy who used medical marijuana was fired from her job as a nursing administrator.[27] In its motion for summary judgment, the employer defended the termination by arguing that it fired the employee

due to her use of illegal drugs and therefore, she fell outside the scope of the ADA's protection. However, the EEOC and employee provided sufficient evidence to suggest that the employer's explanation was pretextual and she was really terminated because of her epilepsy. The employee testified that during her employment interview, she was "grilled about her epilepsy" and told that "the position would be too stressful for her based on her medical condition."[28] The employer separately stated that it fired the employee for failing to voluntarily disclose the medications she takes, suggesting that she was being dishonest. Given these changing explanations, the EEOC and employee demonstrated that a reasonable jury could conclude the true reason for the employee's termination was her epilepsy—not her use of medical marijuana. Accordingly, the court held that she arguably did not fall within the scope of the ADA's exemption because she presented sufficient evidence that the employer's action was not based on her use of an illegal drug.

4. Rehabilitation Exception to the Exemption

As explained above, individuals can still obtain ADA protection if they are no longer using illegal drugs and are participating in a rehabilitation program, have completed a rehabilitation program, or otherwise show they have been rehabilitated. Courts often blend the analysis about whether someone is currently engaging in the illegal use of drugs with the analysis about whether someone falls within the rehabilitation exception. ***See, e.g., Suarez v. Pennsylvania Hosp. of Univ. of Pennsylvania Health System*, 2018 WL 6249711 (E.D. Pa. Nov. 29, 2018**) (analyzing whether the employee was currently engaging in the illegal use of drugs or had been rehabilitated).

It is not surprising that an individual will not be covered by the rehabilitation exception if they did not complete the rehabilitation program. For example, in ***Shirley v. Precision Castparts Corp.*, 726 F.3d 675 (5th Cir. 2013)**, the plaintiff worked for 12 years as an operator at an extrusion press before he requested medical leave to undergo treatment for drug addiction.[29] His company's policy permitted employees to disclose issues with drugs or alcohol confidentially to the human resources manager to pursue treatment. The policy also stated, however, that if an employee rejects treatment or leaves treatment prior to being properly discharged, it will result in termination. Here, the plaintiff twice failed to complete a drug rehabilitation program, insisted that he remain on an opiate pain reliever, and continued to use Vicodin following his initial detox. He was ultimately fired. The question before the court was whether the plaintiff was a current user of illegal drugs, or whether he fell within the ADA's rehabilitation exception, also referred to as a "safe harbor" exception. The Fifth Circuit affirmed the decision of the district court, which found that the plaintiff's failure to complete an inpatient treatment

program, unwillingness to stop taking an opiate pain reliever, and continued use of Vicodin following detox indicated that he was a current drug user and that his drug use was still an issue at the time of termination. The Fifth Circuit added that a significant period of recovery is required for an employee to qualify for the safe harbor provision.

Recently, the rehabilitation exception has been applied to individuals participating in medication-assisted treatment ("MAT") programs, which are often used to treat opioid addiction. MAT is a treatment that combines the use of FDA-approved medications (i.e., suboxone, naltrexone, methadone) with counseling and behavioral therapies to treat opioid as well as other substance abuse disorders. Courts and the EEOC alike have treated MAT participation as evidence of rehabilitation since the use of drugs is both lawfully prescribed and under medical supervision.

In ***EEOC v. SoftPro, LLC,* 5:18-cv-00463 (E.D.N.C. consent decree August, 16 2019)**, an employee with a history of opiate addiction participated in MAT to treat his addiction.[30] The employee then took leave and admitted himself into inpatient treatment to eliminate his need for MAT. The employee completed the inpatient treatment and returned to work. Upon the employee's return, SoftPro inquired into the reason for the employee's leave, and the employee disclosed his treatment. SoftPro then fired the employee because it perceived him as an individual with a disability. The EEOC reached a resolution in this case, requiring SoftPro to: (i) pay $80,000 in damages to the employee; (ii) revise, implement and distribute personnel polices stating that the company does not exclude employees based on their participation in a MAT program; (iii) post a notice to all employees regarding the settlement; and (iv) report all negative employment actions the company takes against employees who have a record of substance abuse disorder, who are currently participating in or have successfully completed a drug rehab program to the EEOC. ***See also EEOC v. Appalachian Wood Products, Inc.*, Civil Action No. 3:18-cv-00198 (W.D. Pa. consent decree August 2019)** (resolving case where employer required applicants to disclose their use of medications – including Suboxone – prior to making a conditional job offer).

II. Disability-Related Inquiries, Drug and Alcohol Testing, and Confidentiality

The ADA places restrictions on the medical examinations and disability-related inquiries employers can impose on applicants and employees.[31] There are different restrictions based on the stage of employment at issue. The three different stages are (i) before a conditional job offer has been extended; (ii) after a conditional job has been extended, but before beginning work; and (iii) once an employee has begun work.

Regardless of the stage of employment, however, the ADA's rules apply only to disability-inquiries and medical examinations.

A. Illegal Drugs

Whether questions about the illegal use of drugs are disability-related inquiries depend on whether such questions may elicit information about a disability.[32] As a result, employers are permitted to ask about an individual's prior or current use of illegal drugs, they should not ask questions about prior treatment or counseling received, or inquire about the number, times, or dates that they used illegal drugs.

Tests for illegal drugs are not considered medical examinations under the ADA.[33] Thus, the ADA does not prohibit employers from requiring applicants or employees to undergo testing for the current use of illegal drugs.

But what happens when an employer requires an individual to undergo tests for illegal drugs and the test reveals the use of a lawful substance? At what point might it become a medical exam subject to the ADA's restrictions? Even if the test itself is not deemed a medical exam, what limitations are placed on an employer's use of such information?

The EEOC has set forth the following factors to use to determine whether an examination is a medical exam: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment of physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (6) whether the test normally is given in a medical setting; and (7) whether medical equipment is used.[34]

These EEOC factors were analyzed in ***Bates v. Dura Automotive Systems, Inc.*, 767 F.3d 566 (6th Cir. 2014)**.[35] There, due to concerns about illegal drug use in the workplace, the employer required employees to submit to drug testing. Several employees tested positive due to their legal use of prescription drugs such as oxycodone, Cymbalta, Didrex, Lortrab, Soma and Xanax. Although none of these drugs were illegal, all employees were still removed from the workplace. The Sixth Circuit examined the seven factors set forth by the EEOC and held that a genuine issue of material fact existed as to whether the drug test was a medical examination and disability inquiry under the ADA. On one hand, the employer did not inquire into the

employee's underlying medical conditions. On the other, the test was administered in a quasi-medical setting, with medical equipment and health professionals interpreted the result. Accordingly, it vacated the district court's grant of judgment to plaintiffs on this question and remanded this issue for trial. The Sixth Circuit affirmed a jury verdict finding that assuming the drug test was a medical examination, it was not job-related and consistent with business necessity.

One recent court concluded that a drug test for illegal drugs does not become a medical examination simply because it reveals other medications. In ***Turner v. Phillips 66 Co.*, 2019 WL 5212903 (10th Cir. Oct. 16, 2019)**, an oil refinery worker was fired after testing positive for amphetamines during a random drug test.[36] The employee argued that he was subjected to an impermissible medical examination, as the test revealed his current medications and, thus, should be considered a medical examination. The Tenth Circuit rejected this argument. It cited the EEOC regulations that explained *if* the "'results reveal information about an individual's medical condition beyond whether the individual is currently engaging in the illegal use of drugs,' such as 'the presence of a controlled substance that has been lawfully prescribed for a particular medical condition, this information is to be treated as a confidential medical record.'"[37] Based on this language, the Tenth Circuit held that a "test for the illegal use of drugs does not necessarily become a medical examination simply because it reveals the potential legal use of drugs."[38] Note that in ***Turner***, the employer had a policy categorically prohibiting the use of amphetamines. The court cited this as the non-discriminatory basis for the worker's termination; it is unclear whether the plaintiff argued that this policy in and of itself was potentially problematic under the ADA.

Other courts have analyzed what limitations are placed on an employer's user of information about an individual's lawful use of medication during a test for illegal drugs. An older case aptly explains the issue. In ***Connolly v. First Personal Bank*, 623 F. Supp. 2d 928 (N.D. Ill. 2008)**, the plaintiff was offered a position of Senior Vice President, contingent on her satisfactory completion of a drug test.[39] Prior to the drug test, the plaintiff informed the company that she had recently undergone a medical procedure that might result in additional medication showing up on the test. The test showed a positive result for Phenobarbital, and the company rescinded its offer of employment. The company declined to open a letter from the plaintiff's doctor explaining the nature of the lawfully prescribed medication she was taking at the time of the drug test. The district court denied the defendant's motion to dismiss, holding that although tests to determine illicit drug use are clearly not medical examinations, "the exemption for drug testing was not meant to provide a free peek into a prospective employee's

medical history and the right to make employment decisions based on the unguided interpretation of that history alone."

Employers who establish that they have a protocol to ensure that any lawfully-prescribed medications or controlled substances are not used as a basis for an adverse employment decision have used such practices when defending ADA cases challenging their use of drug tests. For example, compare two cases brought by the EEOC.

In ***EEOC v. M.G. Oil*, 16-cv-4131 (D.S.D. consent decree May 18, 2018),** the company rescinded a job offer for a cashier at one of its casinos after her drug test identified the lawful presence of a prescribed medication.[40] The individual was prescribed hydrocodone for back and neck problems. The third-party testing vendor informed the employer about the applicant's drug test and, as a result, the applicant's offer was revoked without any opportunity to provide an explanation or rebut the finding.

On the other hand, in ***EEOC v. Grane Healthcare Co.*, 2015 WL 5439052 (W.D. Pa. Sept. 15, 2015),** following a bench trial, the court concluded that the employer's pre-offer drug test was a test for illegal drugs.[41] The employer showed that the test screened for various controlled substances, including ones that are always illegal, such as cocaine, and ones that are not, such as opiates. If an applicant tested positive for a controlled substance, the company cross-checked the positive results for controlled substances with the applicant's list of medications and made decisions based only on illegal drug use. The court held this process to be acceptable under the ADA and that the EEOC failed to prove that Grane terminated any individual for their legal use of prescription drugs.

B. Legal Drugs and Alcohol

Unlike questions and examinations about illegal drugs, examinations and inquiries about legal drug use are subject to the ADA's restrictions on medical exams and disability inquiries.[42]

The general rule is that alcohol tests are medical examinations, as are examinations regarding legal drug use.[43] Questions about legal drug use are disability inquiries, as they may elicit information about a disability.[44] Whether questions about alcohol are disability inquiries depend on whether they elicit information about alcoholism.[45] For example, while questions about whether an applicant drinks alcohol may not elicit any disability-related information, questions about how much an applicant drinks or whether they have participated in an alcohol rehabilitation program may.[46]

Prior to extending a conditional job offer, employers may not ask disability-related inquiries or require medical examinations.[47] The EEOC recently resolved a case where the employer was engaging in this type of illegal inquiry. In ***EEOC v. Appalachian Wood Products, Inc.*, Civil Action No. 3:18-cv-00198 (W.D. Pa. consent decree August 2019)**, the defendant required applicants to disclose their use of legal medications, including Suboxone, prior to making a conditional job offer. As part of its consent decree, the company will no longer make medical inquiries or examinations before making a condition job offer.

A related question is, despite the general prohibition of seeking disability related information in the pre-offer stage, if an employee tests positive for illegal drugs, may an employer then ask a prospective employee if there is a disability-related reason. The answer is yes, but with limits.

In ***Harrison v. Benchmark Electronics Huntsville, Inc*., 593 F.3d 1206 (11th Cir. 2010)**, the plaintiff worked in a temporary position and sought permanent employment.[48] The plaintiff had epilepsy and took barbiturates. In his effort to transition to permanent employment, he was given a drug test, which revealed barbiturates. The employer informed the plaintiff that he had tested positive for barbiturates, and the plaintiff responded by explaining that he had a prescription. He was then asked a series of questions by the medical review officer, in the presence of another employee, including how long he had been disabled, what medication he took, and how long he had taken it. The plaintiff did not receive the job. In his ADA lawsuit, the court found that a jury could find the questions posed an unlawful pre-employment inquiry. It explained that while the employer "was permitted to ask follow-up questions to ensure that [plaintiff's] positive drug test was due to a lawful prescription, a jury may find that these questions exceeded the scope of the likely-to-elicit standard."[49]

After extending a conditional job offer, but before the employee begins the position, employers may ask any questions about an individual's use of lawful substances or alcohol or require any testing for lawful drugs or alcohol, so long as it has the same requirements for all entering employees; the information is maintained in confidence; and the results are used in a manner that is consistent with the ADA.[50] In other words, the results cannot be used to support an adverse employment action unless such action is job-related and consistent with business necessity.

The court found that an employer properly followed these requirements in ***Sumler v. University of Colorado Hospital Authority,* 2018 WL 5043907 (D. Colo. Oct. 17, 2018), *aff'd,* 2019 WL 6652000 (10th Cir. Dec. 6, 2019).** Here, the employer required

all candidates for employment to complete a health questionnaire after receiving a conditional job offer. Then, based on an algorithm, the employer required certain applicants to undergo further health screening or medical examination, based on whether the individual identified using medications that are narcotics, antidepressants, tranquilizers, or muscle relaxers. The plaintiff had applied for a position of sonographer and challenged these additional requirements. The court upheld the employer's practice, explaining that the employer properly conditioned its offer of employment on the results of such examination because all entering employees in the same job category were subjected to it. It further concluded that the criteria that triggered an additional evaluation – use of narcotics, antidepressants, tranquilizers, or muscle relaxers – was job-related and consistent with business necessity because sonography requires a great amount of mental acuity and uninterrupted concentration.

Compare that to ***Cannon v. Jacobs Field Services North America, Inc*., 813 F.3d 586 (5th Cir. 2016),** where the plaintiff was given a conditional offer of employment conditioned on his passing an employment physical.[51] During the examination, the plaintiff disclosed that he had an inoperable rotator cuff injury for which he had previously taken an opioid. The plaintiff explained that while he has the prescription, he no longer takes it. He also passed the drug test. The company doctor cleared the plaintiff to work with various restrictions, including no driving company vehicles and no working with his hands above shoulder level. The company appeared to have various concerns and asked the employee to clarify whether he was still taking the opioid and whether he could climb a ladder. The employer then informed the employee that it was rescinding the job offer based on his inability to climb a ladder. The employee tried to explain he was capable of climbing a ladder and event sent a video of him climbing a ladder, but received no response. The plaintiff filed this ADA case and the district court granted summary judgment to the employer. The district court held that driving was an essential function of the job because of the vastness of the worksite and the plaintiff could not perform this job due to his opioid prescription. The Fifth Circuit reversed that decision. It explained that there was sufficient evidence that the plaintiff was able to drive. It noted that the employer has an unwritten policy that prohibits employees who are taking narcotics from operating company vehicles, but that there was a question here about whether the plaintiff was actually taking the opioid or, at the least, whether he could have stopped taking it when he started working given that his prescription was "as needed."

The employer also defended its action by citing a federal mining regulation that states intoxicating beverages and narcotics shall not be permitted in or around mines. The court rejected this defense given that it was unclear whether this regulation even

applied to the plaintiff's position (which is not in mines) and whether it applied only to those "under the influence" as opposed to those who have a prescription who may no longer be using it.

For current employees, whether an employer can require medical examinations or pose disability inquiries depends on whether the request is job-related and consistent with business necessity.[52] In ***Lewis v. Government of D.C.,* 282 F.Supp.3d 169 (D.D.C. 2017)**, the city announced that the plaintiff's office was moving to another facility that had different security requirements.[53] As a condition to retaining employment during the move, the city required all staff to submit to a number of background tests, including a drug test. The staff was also required to disclose all medications they were on, or risk being terminated. The plaintiff refused to comply with this requirement and alleged she was retaliated against repeatedly for doing so and ultimately terminated. The plaintiff then brought suit against the city alleging, in part, that she was subject to an improper medical inquiry under the ADA. In denying the employer's motion, the court noted that "[t]he business necessity standard is quite high, and is not to be confused with mere expediency" and that employer failed to establish beyond dispute that the medical inquiries met this standard. ***See also EEOC v. M.G. Oil*, 16-cv-4131 (D.S.D. consent decree May 18, 2018)** (revising employer policy so that it no longer requires employees to report prescription medications unless the employer has "reasonable suspicion" that the medication may affect an employee's performance).

C. Confidentiality Obligations

The ADA requires employers to keep an employee's medical and disability-related information confidential. This requires employers to keep all information regarding an applicant or employee's medical condition or history on separate forms and in separate medical files and to treat such information as confidential medical records.[54] This protection covers all applicants and employees, regardless of whether they are a qualified individual with a disability under the ADA.[55]

However, the ADA carves out three exceptions from the general confidentiality mandate: (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this provision of the ADA shall be provided relevant information upon request.[56]

The unauthorized disclosure of one individual's alcohol-related disability was found to be reasonable in ***Foos v. Taghleef Industries, Inc.*, 132 F.Supp.3d 1034 (S.D. Ind. 2015)**.[57] The plaintiff worked at a factory that used dangerous heavy machinery. After taking FMLA leave due to injuries that had been incurred during a bar fight, the plaintiff requested additional FMLA leave. In support, he provided a certificate from his doctor indicating that he had alcoholic pancreatitis. The factory's health and wellness manager then disclosed this information to plaintiff's supervisor, concerned that the plaintiff may be arriving to work impaired. The court found that given the legitimate safety concern of an impaired employee around heavy machinery, this disclosure qualified as notifying a supervisor of a necessary work restriction that was permissible under the ADA. This reasoning is analytically imperfect—there is no indication that the plaintiff had any on-the-job restrictions due to alcoholic pancreatitis—but it is comprehensible when viewed through the lens of the plaintiff's supervisor needing to know the information for purposes of operational safety.

The established rule is that health information is only confidential under the ADA if it was provided to the employer in response to a medical inquiry or exam concerning the applicant or employee.[58] This means that information provided to employers either voluntarily or as the result of a non-medical inquiry is not considered confidential under the ADA and may be disclosed by the employer.

III. Reasonable Accommodation[59]

One common accommodation that has been mandated by courts is leave for drug or alcohol treatment programs. The EEOC specifically identified "additional unpaid leave for necessary treatment" as a potential reasonable accommodation under the ADA.[60] ***See, e.g., Adams v. Persona, Inc.*, 124 F.Supp.3d 973, 981 (D.S.D. 2015)** (holding that a request for leave to attend rehabilitation for alcohol dependency qualifies for ADA protection as a request for accommodation); ***Lankford v. Reladyne LLC,* 2015 WL 7295370 (S.D. Ohio Nov. 19, 2015)** (finding that the plaintiff's request for medical leave to attend an alcohol rehabilitation program was not only a leave requested under the FMLA, but also under the ADA).

The standard principles related to reasonable accommodations apply to those whose requests are related to drugs or alcohol. For example, it is well-established that indefinite leave is not considered reasonable. Accordingly, if an individual requests indefinite leave, such request will most likely be found unreasonable. ***See*, *e.g.*, *Larson v. United Natural Foods West Inc.,* 518 Fed. Appx. 589 (9th Cir. 2013)** (finding truck driver with alcoholism's request for "an indefinite, leave of absence to permit him to fulfill

the SAP's treatment recommendations" so that he might eventually be physically qualified under the DOT regulations unreasonable").

While leave for treatment is the most common accommodation request, individuals with drug and alcohol-related disabilities may need a whole range of accommodations. Another example of a recent accommodation request can be found in ***Torzewski v. Cosco Shipping Lines N.A. Inc.,* 2019 WL 4735486 (N.D. Ill. Sept. 27, 2019).**[61] A sales director had taken leave under the FMLA to undergo treatment for alcoholism. During his leave, the employee's department was restructured and the employer informed the employee that his reinstatement was contingent on his willingness to relocate from Chicago to New Jersey, where the company was headquartered. The employee requested to continue working from Chicago so he could remain close to his medical providers and support group. The employer filed a motion to dismiss, asserting that the plaintiff's proposed accommodation was unreasonable. The court held that the employee stated a claim and sufficiently alleged that he requested a reasonable accommodation under the ADA regarding his alcoholism.

The ADA's reasonable accommodation requirement extends to any requirement that an individual undergo a test for illegal drugs. In other words, if an individual cannot provide a test sample through ordinary means due to a disability, the employer should work with the applicant or employee to determine whether an alternative means of testing is proper as a reasonable accommodation.

For instance, in ***Matthews Sr. v. Amtrak National Railroad Passenger Corporation,* 402 F. Supp. 3d 930 (E.D. Cal. 2019),** after failing a return-to-work physical by testing positive for cocaine-use, the plaintiff, a railway clerk, was required to pass random drug tests.[62] At one test, he was unable to provide a urine sample. He was sent for a "shy bladder" medical examination and the doctor determined that he had a condition that prevented him from producing a urine sample. This happened a second time, but that time, the doctor allegedly refused to follow proper procedures regarding the employee's catheter and then terminated the exam. The plaintiff asked to take a blood test, but this request was denied. He was then fired for refusing a drug test. In his ADA lawsuit, the court denied the employer's motion for summary judgment. The court explained that was a genuine issue of fact as to whether the railway failed to provide him with the reasonable accommodation of a blood test or otherwise engage in the interactive process.

Similarly, in a settlement between the ***EEOC and Kmart Corporation*****,** an applicant informed the Kmart hiring manager that he was unable to provide a urine sample because of his kidney disease.[63] The applicant requested an alternative test in the form of a blood, hair, or other drug test, but Kmart refused and did not hire the applicant. The EEOC filed a lawsuit and in January 2015, announced that a settlement of $102,048 in monetary relief for the applicant, as well as equitable relief in the form of policy changes and training.

IV. Workplace Performance and Conduct Rules

Employers are allowed to prohibit employees from using drugs or alcohol in the workplace and generally otherwise comply with non-discriminatory performance and conduct standards. The text of the ADA and the EEOC regulations have adopted identical language, stating that an employer:[64]

- May prohibit the illegal use of drugs and the use of alcohol at the workplace by employees
- May require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace
- May require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 et seq.)
- May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

Employers may discipline employees who violate a workplace policy prohibiting alcohol or illegal drugs in the workplace, so long as the employee is subject to the same discipline as any other employees. Courts regularly uphold employers' decisions to terminate an employee for violating a drug-free workplace rule. ***See, e.g., Jones v. City of Boston*****, 752 F.3d 38 (1st Cir. 2014)** (affirming court decision finding a group of officers who were fired after testing positive for cocaine use was not in violation of the ADA).

This is true even if an employee's violation of a drug or alcohol policy stems from addiction. One recent case example is ***Dennis v. Fitzsimons*****, 2019 WL 420146 (D. Colo. Sept. 5, 2019)**, where the court distinguished between employment decisions

made based on an individual's status as an alcoholic and decisions made based on unsatisfactory conduct caused by an individual's alcoholism.[65] In ***Dennis***, after criminal charges were filed against a sheriff deputy, his employer placed him on administrative leave to conduct an investigation. During this leave, the deputy was considered to be on-duty and needed to check in regularly with his commander. The deputy got drunk the night before he was required to attend his arraignment; when he arrived at the arraignment, he was given a breathalyzer as part of the intake process. This test revealed a blood-alcohol level over the permissible limit, which was later confirmed with a blood test. The deputy was fired for reporting to his arraignment intoxicated. The court found that his termination did not violate the ADA because it was a result of disability-caused misconduct. The plaintiff attempted to show that he had been treated more severely than other employees, but the court found the other named individuals were not similarly situated. First, the plaintiff pointed to a colleague with whom he drank the night before his arraignment; however, there was nothing to suggest that this colleague was intoxicated on-duty or at the arraignment. The plaintiff also pointed to another colleague who had admitted to driving under the influence. However, given a number of factors, including that there was no confirmation of the colleague's blood alcohol level, the two had different supervisors, the colleague drank while off duty, and that the other colleague was more junior, he was perhaps not held to the same standards. ***See also O'Brien v. R.C. Willey Home Furnishings*, 748 F. App'x 721, 723–24 (9th Cir. 2018)** (finding the employer's stated reason for terminating the employee – the results of his breathalyzer tests and his violation of alcohol policy – was not discriminatory).

This is also true even when an employee is using marijuana lawfully under state law. In ***Steele v. Stallion Rockies, Ltd*., 106 F.Supp.3d 1205 (D. Colo. 2015),** the employer conducted across-the-board drug testing at one of its facilities.[66] The plaintiff, a truck driver with lumbar degenerative disc disease, reminded his employer that he used medical marijuana pursuant to state law and was fired. The court dismissed the plaintiff's case finding that the plaintiff did not have a disability under the ADA, but that even if he did, "antidiscrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct."[67]

In another recent case, the court upheld a termination when an employee admitted to using illegal drugs in violation of company policy, even though it turned out that the employee did not use illegal drugs. In ***Cruz v. Federal Express, Corp.*, 2019 WL 451529 (M.D. Fla. Jan. 25, 2019)**, FedEx had a drug policy that prohibited the nonprescription use of controlled substances, including narcotics and addictive drugs prohibited by Department of Transportation regulations at any time, on or off duty.[68] The

plaintiff used prescription hydrocodone to alleviate back pain and informed FedEx of the prescription. Later, the plaintiff forgot his prescription and took pills for his back pain while at a family member's home. As a result, the plaintiff told FedEx that he could not take a drug test because he feared he would fail it based on his ingestion on someone else's prescription narcotic – a clear violation of FedEx's policy. The pills ended up being Aleve, an over the counter pain medication, but that did not matter because the plaintiff told FedEx that he had engaged in the illegal use of drugs in violation of company policy, which constituted a terminable offense. The court explained that even though the ADAAA provides protection for individuals who are erroneously regarded as engaging in illegal drug use, this is not such a circumstance given that the employee was the one who told his employer that he had ingested someone else's prescription narcotic.

Conduct rules can also apply to off-duty conduct. The overwhelming majority of cases about off-duty conduct relate to police officer conduct. In ***Budde v. Kane County Forest Preserve*, 597 F.3d 860 (7th Cir. 2010)**, the plaintiff, a police chief with alcoholism, was terminated after he was involved in an off-duty car accident and was charged with driving under the influence.[69] The plaintiff was not yet convicted of the DUI when he was terminated, but his license had already been revoked. The court granted a motion for summary judgment in favor of the defendant, finding that the employer did not violate the ADA because the plaintiff violated a standard operating procedure that "all employees and members of the Department . . . may be made the subject of disciplinary action for violating any Federal, State, County, or Municipal law."[70]

Often, employers who learn of an employee's drug- or alcohol-addiction opt to refer the employee to an Employee Assistance Program ("EAP") instead of, or in conjunction with, discipline.[71] This protocol is not required, but is permitted under the ADA. Likewise, employers also often offer employees a "firm choice" or "last chance agreement" in lieu of immediate termination for performance reasons resulting from alcohol or drug addiction.[72] These agreements generally safeguard an employee from termination in exchange for agreeing to treatment, abstaining from further use, and avoiding further workplace misconduct.

There have been a number of cases where employees violate the terms of their firm choice or last chance agreement. In such cases, courts generally find for the employers. For instance, in ***Jacobson v. City of West Palm Beach*, 749 F. App'x 807 (11th Cir. 2018),** a firefighter with anxiety and depression self-medicated with marijuana, although he did not use marijuana while on duty.[73] He self-reported his marijuana-use to his employer and was referred to a mandatory EAP program that required him to attend six

therapy sessions with the goal of eliminating his use of marijuana. He missed one therapy session, which his therapist reported to the EAP case manager, then to human resources, and then to the Fire Chief. The City's collective bargaining agreement stated that failure to comply with an EAP "will result" in termination so the City intended to terminate the plaintiff's employment; though the parties dispute whether the firefighter choose to resign. The Eleventh Circuit affirmed the decision for the employer, finding that the employer's stated reason for termination – that the employee failed to comply with the terms of the EAP program – was not discriminatory.

Another recent example comes from ***Christensen v. City of Omaha*, 2019 WL 1766161 (D. Neb. Apr. 22, 2019)**.[74] In this case, a police officer with a history of alcoholism, who was observed drinking and driving and being publicly intoxicated while off-duty and during FMLA leave to undergo treatment, was required to agree to various requirements prior to returning to work. Such requirements included participating in an intensive outpatient/relapse prevention program, contacting his Alcoholic Anonymous ("AA") sponsor as well as providing their name with a release permitting the City to speak to them, attending AA meetings daily for 90 days, and meeting with his therapist. It was later discovered that the officer failed to comply with these terms, was given a citation for driving under the influence, and placed on administrative leave. At this point, the officer continued to fail to participate in the required treatment plan. The City then gave the officer the option to retire or be fired. Accordingly, the court found the City gave a non-discriminatory reason for ending the employment of the police officer that was not in violation of the ADA.

In at least one case, the employee's decision to reject the offer of a last-chance agreement was itself a non-discriminatory reason for termination. In ***Chamberlain v. Securian Financial Group, Inc.*, 180 F. Supp. 3d 381 (W.D.N.C. 2016),** instead of immediately terminating an employee who engaged in various inappropriate activities leading to him being removed from a cruise ship, the company offered the employee the opportunity to remain if he entered into a last chance agreement.[75] The last chance agreement required the individual to provide proof of regular attendance at Alcoholics Anonymous, agree to random drug tests and comply with a zero tolerance policy for drug- and alcohol-use both on and off the job. The court cited the fact that other courts have found that an employee's failure to comply with the terms of a last chance agreement constitute a legitimate reason for terminating an employee. The court acknowledged that the individual here chose not to sign an agreement in the first instance, but found "that distinguishing fact [not] to be overly significant."[76]

Similarly, the ADA does not protect employees who violate workplace performance or conduct rules, even if the employees' problematic performance or conduct is caused by disability, provided the rules are job-related and consistent with business necessity.[77] ***See, e.g., Dovenmuehler v. St. Cloud Hospital*, 509 F.3d 435 (8th Cir. 2007)** (upholding termination of nurse with a chemical dependency for stealing prescription medications).

Conduct rules, of course, must be universally enforced to provide a non-discriminatory reason for discipline. Sometimes employees with a drug- or alcohol-related disability can continue with an ADA case because their employer's stated reason for an adverse action was pretextual. In ***Rumph v. Randazzo Mech. Heating & Cooling, Inc.*, 2018 WL 5845898 (E.D. Mich. Nov. 8, 2018),** an individual with a history of opioid addiction, as well as depression, anxiety and ADHD, was fired after taking leave to care for her mother.[78] Her employer asserted that she was terminated for non-discriminatory reasons because she took two days of unexcused leave and did not appear interested in a new position. However, the plaintiff produced evidence that these stated reasons were pretextual. Specifically, she noted that her supervisor commented on the cost of her Suboxone medication, that the company's CFO's attitude toward her changed drastically after she disclosed her opioid addiction and that she was singled out and subject to "nitpicking," and subjected to comments about using Vicodin. ***See also Farr v. S.C. Elec. & Gas Co.,* 2018 WL 3120672 (D.S.C. Jan. 12, 2018) (adopted by *Farr v. S.C. Elec. & Gas Co.*, 2018 WL 1418183 (D.S.C. Mar. 21, 2018))** (finding defendant's stated reason for certain discipline pretextual given different discipline imposed on individual with history of opioid addiction and similarly situated employees without such addiction).

V. Direct Threat

An employer may be justified in conducting medical inquiries or examinations, terminating or refusing to hire an individual with a disability if the disability poses a "direct threat" to the safety of the individual or others and cannot be reduced or eliminated by a reasonable accommodation.[79] Under the direct threat analysis, the following factors are considered: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.[80] Direct threat is a high standard for employers to meet. It must be based on "an individualized assessment of the employee's present ability to perform the essential functions of the job safely, considering reasonable

medical judgment that relies on the most current medical knowledge and/or the best available objective evidence."[81]

The importance of the individualized assessment in the direct threat analysis is illustrated by a recent case involving an individual with a past addiction to opioids. In ***Breaux v. Bollinger Shipyards*, 2018 WL 3329059 (E.D. La. July 5, 2018)**,[82] a welder was prescribed Suboxone to help him withdraw from prescribed painkillers. The defendant had a policy that employees in safety sensitive jobs may not take a safety-sensitive mediation while working unless the drug is taken eight hours prior to a shift. When the defendant learned of the welder's Suboxone use, they restricted the welder from safety-sensitive job duties while on the medication. The welder requested to return to safety-sensitive job duties and provided clearance from his doctor. Bollinger denied this request and offered the welder six months of job-protected leave to enable the welder to wean himself from the medications. After that leave ended, Bollinger terminated the welder. Both parties stipulated to the fact that the welder was disabled due to his opioid dependency. However, they differed on whether the welder was qualified for his job. Bollinger offered no evidence to show their policy was job-related and consistent with business necessity. The welder provided his medical clearance. Ultimately, the court found that the welder did not pose a direct threat because while Suboxone can cause sedation, analgesia and other symptoms, there was no evidence that it caused those symptoms for the welder.

Similarly, in ***EEOC v. Foothills Child Development Center*, No. 6:18-cv-01255 (D.S.C. consent decree May 2018)**, a preschool teacher was fired after disclosing his participation in MAT and his prescription of Suboxone to treat opioid addiction. There, the EEOC contended that the defendant failed to conduct an individualized assessment to determine whether the teacher posed a direct threat.[83] Ultimately, the consent decree between the EEOC and Foothills included: (i) $5000 to the employee; (ii) amendments to Foothill's drug policy to include a clear and specific exclusion for people who use legally-obtained medications; and (iii) Foothills to create an ADA procedure for conducting individualized assessments of individuals enrolled in rehabilitation programs to determine whether the employee is qualified. ***See also EEOC v. Volvo Group*, 17-cv-2889 (D. Md. 2018)** (resolving case for $70,000 and other relief when laborer's conditional job offer was revoked due to Suboxone-use without an individualized inquiry to determine whether the laborer posed a direct threat); ***EEOC v. Appalachian Wood Products, Inc.*, 3:18-cv-00198 (W.D. Pa. consent decree August 2019)** (settling case where defendant refused to hire an applicant for a factory position because he was taking Suboxone to treat an opioid addiction without considering whether the Suboxone use affected the applicant's ability to perform the job safely).

VI. State Marijuana Laws

As explained above, the ADA does not protect individuals with disabilities who use marijuana lawfully under state law.

A majority of states have legislation authorizing the legal use of medical marijuana, and there have been a number of cases finding for individuals with disabilities who use medical marijuana under state law. This trend in the case law suggests that employers will need to examine their state law closely, take greater care to engage in the interactive process with employees who are medical marijuana users, and be prepared to accept this use at least in certain cases as a reasonable accommodation.

Some successful plaintiffs have brought claims under the anti-discrimination provisions of the state medical cannabis law. Of the different state laws, Arizona currently has one of the strongest protections for employees and thus, it is not surprising that one of the strongest cases arose from that law. In ***Whitmire v. Wal-Mart Stores, Inc.,* 359 F.Supp.3d 761 (D. Ariz. 2019),** a customer service supervisor held a medical marijuana card to help treat chronic pain due to arthritis and prior shoulder surgery.[84] She had a workplace accident and was given a drug test. Though she was not responsible for the accident, because she tested positive due to her use of medical marijuana, the employee was fired. She brought claims under Arizona state law, including the Arizona Medical Marijuana Act ("AMMA") which, notably, prohibits discrimination based on positive drug test. The law states that while there is an exception if an employee uses, possesses, or is impaired on the employer's premise or during work hours, such impairment cannot be based solely on the presence of metabolites of marijuana that appear in insufficient concentration to cause impairment. Wal-Mart filed a motion for summary judgment and the court denied Wal-Mart's motion and, *sua sponte*, granted summary judgment to the plaintiff. The court held that the undisputed facts demonstrated that she was fired based exclusively on the positive drug test, which was in violation of the state law.

One issue that sometimes arises is whether the ADA or CSA preempts the applicable state medical marijuana law's protections. Many courts that have considered this question have said no. In ***Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017)**, the court ruled in favor of a medical marijuana-user whose employment was terminated after she tested positive for marijuana in the course of the job application process.[85] The court found that the ADA did not preempt the state medical marijuana law's anti-discrimination in employment provision, and that the state

statute did not conflict with the relevant federal laws because the latter were not intended to preempt state anti-discrimination laws.

Similarly, in ***Callaghan v. Darlington Fabrics Corp.*, 2017 WL 2321181 (R.I. Super. May 23, 2017)**, the court found that an employer had violated the anti-discrimination provisions of the state's medical marijuana law by denying employment to an applicant who held a state-issued medical marijuana card.[86] In its ruling, the court noted that the plaintiff's possession of the card should have put the employer on notice of the plaintiff's status as a person with a disability (in this case, a chronic and debilitating medical condition), which the employer should have recognized was the basis on which the plaintiff had qualified for the card in the first place. This in turn placed an obligation upon the employer to engage in the interactive process with the plaintiff and to provide reasonable accommodations. The defendant's failure to do either constituted disability discrimination. Furthermore, the court found that the CSA did not preempt the anti-discrimination provisions of the state law, as the purposes of the state and federal laws are different. ***See also Chance v. Kraft Heinz Foods*, 2018 WL 6655670 (Del. Super. Ct. Dec. 17, 2018)** (finding a private right of action in Delaware state law protecting medical marijuana cardholders; finding state law is not preempted by any other law, including the Controlled Substances Act).

Other individuals have successfully brought claims for discrimination based on medical-marijuana use under their state anti-discrimination law. For instance, in ***Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (Mass. 2017)**, the defendants terminated the plaintiff after the plaintiff's drug examination tested positive for cannabis, even though the plaintiff informed the defendants of her medical marijuana prescription.[87] The defendants contended that because the prescribed medication is marijuana, which is illegal under federal law, an accommodation that would allow the employee to continue using marijuana would be per se unreasonable. However, the court looked to Massachusetts state law to determine the unreasonableness and subsequently found that the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication. Therefore, the court allowed the case to proceed under state discrimination law without even discussing the ADA.

This does not mean that all states that have legal marijuana have employment protections. For instance, in ***Cotto v. Ardagh Glass Packing, Inc.*, 2018 WL 3814278 (D. N.J. Aug. 10, 2018)**, an employee was required to undergo a drug test after a workplace incident where he hit his head on a forklift.[88] As a result of a neck and back injury a number of years prior, the employee used prescription drugs for pain

management, such as Percocet, Gabapentin, as well as marijuana, which was lawful under New Jersey state law. He disclosed this information to his employer; his employer was concerned only about his use of marijuana and placed him on suspension until he could pass a drug test. The employee then brought a claim arguing that the New Jersey Compassionate Use Medical Marijuana Act, together with the New Jersey Law Against Discrimination, compels his employer to waive the drug testing requirement. The court disagreed, stating that these state laws – unlike others with explicit anti-discrimination provisions for users of medical marijuana – do not require employers to accommodate the medical use of marijuana in any workplace. This court, then, concluded that the employee was not qualified due to his inability to pass the drug test. For similar reasons, it separately held that the employee cannot bring a claim for failure to accommodate (as state law does not require an employer to waive a drug test as a condition of employment) and retaliation (as refusing to take a drug test is not a protected activity under state law). ***But see Wild v. Carriage Funeral Holdings*, 458 N.J. Super. 416 (2019)** (finding that although NJ medical marijuana law does not require employment accommodations, it does not immunize employers from obligations already imposed elsewhere, like anti-discrimination law). The disconnect between these two courts interpreting the same statute

A number of other states have reached similar conclusions. ***See, e.g., Garcia v. Tractor Supply Co*., 154 F.Supp.3d 1225 (D.N.M. 2016)** (finding New Mexico's medical marijuana law does not "combine" with its civil rights statute to require an employer to accommodate medical marijuana); ***Curry v. MillerCoors, Inc.,* 2013 WL 4494307 (D.Colo. Aug. 21, 2013)** ("discharging an employee under these circumstances is lawful, regardless of whether the employee consumed marijuana on a medical recommendation, at home or off work"); ***Roe v. TeleTech Customer Care Mgmt (Colorado) LLC*, 171 Wash. 2d 736 (2011)** (holding that the Washington Medical Use of Marijuana Act "does not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use"); ***Casias v. Wal-Mart Stores, Inc.*, 764 F.Supp.2d 914 (W.D. Mich. 2011)** (finding that the Michigan Medical Marijuana Act "does not regulate private employment").

Given the different results outlined here, it is critical to review the statutory language of state law and corresponding case decisions to determine whether anti-discrimination protections apply in each state.

VII. Drug and Alcohol Issues Under Titles II and III

There are a number of interesting and current issues involving drug- and alcohol-use outside of the employment context. This Legal Brief will focus on two – discrimination against individuals with opioid use disorder in access to healthcare and discrimination in zoning.

A. Discrimination against Individuals with Opioid Use Disorder (OUD)

In recent years, issues related to individuals with OUD, as well as discrimination against such individuals, have received significant attention. The Department of Justice ("DOJ") has prioritized cases protecting the rights of individuals with OUD from discrimination. It has entered into a number of recent settlement agreements making its position on this issue clear.

One example is the ***Settlement Agreement Between the United States of America and Selma Medical Associates*** from December 2018.[89] The DOJ received a complaint from an individual with OUD who used Suboxone to treat it. The complainant attempted to schedule an appointment with a family healthcare practice, but was turned away as a result of his Suboxone-use due to its office policy. The DOJ concluded that the complainant is a person with a disability because he has OUD, that he was discriminated against solely due to his use of Suboxone, that the office policy imposed unnecessarily and impermissible eligibility criteria and did not permit policy modifications. As a result, the DOJ reached a settlement agreement where the medical practice had to pay $30,000 in monetary damages and a $10,000 civil penalty, and also had to revise its policies, publicize its new policies both on its website, in its reception area and to employee, and had to provide training for all managers and employees who interacted with patients.

A similar settlement, ***Settlement Agreement Between the United States of America and Charlwell Operating, LLC***, illustrates the vital importance of training employees who make decisions, in addition to having strong anti-discrimination policies.[90] In May 2018, the DOJ entered into an agreement with Charlwell Operating, which provides skilled nursing services, post-acute medical services, and rehabilitation programs. Although this nursing facility had a written policy that stated that it would maintain the use of physician prescribed treatments for OUD for individuals prescribed such medications prior to admission and cited a state regulation clarifying that the facility is expected to admit residents and provide for the administration of medication assisted

treatment for OUD, it rejected a patient due to the individual's use of Suboxone. As a result of DOJ's investigation, the nursing facility agreed to make further revisions to its policy, provide regular training to all employees and contractors involved with admissions, and update all training manuals and materials. In addition, the facility is required to maintain logs available for DOJ review documenting the name of each admissions intake where a prospective patient has OUD or is on MAT and, if an individual makes a complaint, to provide written notification to the DOJ within 21 days. ***See also Settlement Agreement Between the United States of America and Athena Health Care Systems, September 2019*** (agreeing to same terms of settlement to resolve complaint by individuals that the skilled nursing facility refused to accept a patient for treatment due to fact that patient was being treated with medication used to treat OUD).[91]

Another area that has seen recent litigation is that of incarcerated individuals who are prohibited from accessing their prescribed treatment for OUD. There have also been recent cases regarding whether the ADA prohibits prisons from denying inmates access to such care. A number of courts have agreed.

For instance, in ***Smith v. Aroostook Cty.*****, 376 F. Supp. 3d 146 (D. Me. 2019),** ***aff'd,*** **922 F.3d 41 (1st Cir. 2019)**, the plaintiff with a history of OUD was prescribed buprenorphine. She was due to be incarcerated for 40 days. The jail had a policy generally prohibiting MAT and instead requiring anyone with opiates in their system to experience withdrawal and then be treated accordingly. The plaintiff had previously been incarcerated without such medication for a short period of time and testified that she experienced the worst pain she had ever experienced and considered suicide for the first time in her life. In light of this, and various other aspects of the plaintiff's medical history, the plaintiff's doctor opined that forced and immediate withdrawal would cause painful symptoms and increased risk of relapse, overdose, and death. The plaintiff filed a motion for preliminary injunction, asking the court to require the jail to provide her medication upon incarceration. The plaintiff provided testimony that many correctional facilities oppose providing MAT because they equate it to giving addicted individuals drugs as opposed to treatment as well as purported security concerns about the presence of opiates in the jail setting. In a strongly worded opinion, the district court granted the plaintiff's motion for immediate relief, and the First Circuit affirmed the decision. The court held that the plaintiff would likely be able to prove discrimination based on a disparate treatment theory, in light of the jail's apparent stigma against MAT, concluding that it made treatment decisions on stereotypes. The court also, alternatively, concluded that the plaintiff would be able to succeed on a

theory that she was denied a reasonable accommodation. She specifically requested that she be exempted from the jail's practice of prohibiting MAT and instead undergoing withdrawal. This will deprive the plaintiff with meaningful access to the jail's services. ***See also Pesce v. Coppinger*, 355 F. Supp. 3d 35 (D. Mass. 2018)** (granting preliminary injunction for individual seeking access to methadone treatment during his impending incarceration).

B. Zoning Issues

Whether zoning restrictions discriminatorily screen out homes for people with drug or alcohol addiction is a very complicated area of law, but one where the courts are getting many challenges. Such cases are typically brought under both Title II of the ADA as well as the Fair Housing Act. Some cases turn on whether there is a zoning ordinance that itself is discriminatory, while others turn on whether the municipality should have granted an exception or modification.

One example of a case that discusses both is ***Sunlight of Spirit House, Inc. v. Borough of N. Wales, Pennsylvania*, 2019 WL 233883 (E.D. Pa. Jan. 15, 2019)**. There, the plaintiffs, a nonprofit corporation that provides sober housing for recovering persons with alcoholism or drug addiction, applied to the Borough's Zoning Hearing Board ("the ZHB") requesting a special exception so that the plaintiffs could open a sober house in a residential zone. The zoning ordinance at issue restricted the location of the proposed sober house in an area limited to family dwellings and on a street limited to permit parking. The ordinance's definition of family included more than three unrelated persons occupying a dwelling unit as a family so long as the ZHB grants them a special exception after determining "that the dwelling unit has adequate off-street parking facilities, living space, indoor plumbing, and operating as a single, nonprofit and non-transient housekeeping units."[92] Further, the ordinance noted that family shall not include activities that require treatment on the premises and uses which meet the definition of "boardinghouse," "dormitory," "motel," or "hotel" or "treatment center." Last, the ordinance defined a function family equivalent as "[p]ersons living and cooking together as a single, nonprofit and non-transient housekeeping unit and having facilities to do their cooking on the premises."[93]

The nonprofit's application for the special exception requested the definition of a family to permit up to 10 residents in the home. However, the ZHB denied the application because: (1) the proposed special exception was contrary to public interest (i.e., detrimental to the appropriate use of the property; undue congestion of pedestrian and vehicular traffic); (2) the residents of the sober living facility did not meet the definition of "family"; (3) the proposed use of the home was considered transient since residents only live in the home temporarily; and (4) the use of the home does not meet ZHB's definition of "nonprofit." The plaintiffs then alleged discrimination because the ZHB voted against the special exception by failing to discount the prejudices of neighborhood residents and failing to allow the residents to be considered a family as a reasonable accommodation. Ultimately, the court found disputed material facts regarding both the discrimination and reasonable accommodation claims and denied both parties' motions for summary judgment. ***See also 901 Ernston Rd., LLC v. Borough of Sayreville Zoning Bd. of Adjustment*, 2018 WL 2176175 (D.N.J. May 11, 2018)** (granting immediate relief for a neighborhood-based recovery campus serving people with alcoholism where the zoning board rejected their application to use property for a treatment facility without demonstrating that the campus' request was unreasonable)**.**

Some cases in the zoning context turn on whether the municipality needed to grant a request for a modification to an otherwise neutral ordinance. In ***Oxford House, Inc. v. Browning*, 266 F. Supp. 3d 896 (M.D. La. 2017)**, the Fire Marshal denied the operator of a group home for individuals recovering from alcohol and drug addictions permission to operate legally as a single-family home.[94] There, the Fire Marshal was statutorily charged to enforce the Life Safety Code, which provided the minimum fire safety standards for all structures in Louisiana. The requirements primarily depended on the structure's occupancy type and became more demanding as the number of occupants in and the public access to a structure increase. Oxford House made a reasonable accommodation request under the Fair Housing Act for the Fire Marshal to waive the maximum number of unrelated persons who can reside together under the Life Safety Code and treat the Oxford House's use as the functional equivalent of a family and the use of the property as a single-family home. Oxford House never received a response to this request. When Fire Marshal employees inspected Oxford House, after the receipt of a civilian complaint, employees determined that the Oxford House's occupancy type was a lodging or rooming house since six unrelated persons resided in the house. The Fire Marshal then ordered Oxford House to reduce its occupancy to three persons within 24 hours and to submit a plan to the Fire Marshal to change the occupancy type of the house from a one-family dwelling to a lodging or rooming house. Oxford House alleged that the Fire Marshal's response to their request constituted a refusal of a reasonable accommodation in violation of the Fair Housing Act, the Rehabilitation Act and the ADA. The court found that the Fire Marshal had violated the ADA by refusing

the operator's request for an accommodation, which was both reasonable and necessary.

On the other hand, in ***Tri-Cities Holdings LLC v. Tennessee Admin. Procedures Div.*, 260 F. Supp. 3d 913 (E.D. Tenn. 2017), *aff'd*, 726 F. App'x 298 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 126, 202 L. Ed. 2d 33 (2018)**, the court found that the plaintiffs' request for a "blanket exception" to the state's certificate of need ("CON") program's statutory and regulatory criteria was not a reasonable accommodation, where such an accommodation would be so at odds with the purpose behind the rule that it would be a fundamental and unreasonable change.[95] There, a company seeking to establish an opioid treatment center and opiate-addicted residents who were prospective patients of the treatment center requested an accommodation in the form of a modification of one or all of the CON criteria related to need, economic, and orderly development and approval of their CON application. This followed after the company's CON application was denied due to the company's failure to meet the majority of the criteria and standards for the type of facility their application proposed. The application failed to clearly establish the need for the treatment center as well as show that the project contributed to the overall and orderly development of healthcare in the region.

Similarly, some requests for accommodations are not found to be reasonable. For instance, in ***Summers, et al. v. City of Fitchburg, et al.*, 940 F.3d 133 (1st Cir. 2019),** the owner of four sober homes was required, pursuant to state law that applied to dwellings with six or more unrelated residents, to install sprinkler systems in the homes.[96] The owner brought a lawsuit under the ADA and FHA arguing that such installation was unreasonably costly and would result in him raising prices or reducing housing occupancy, which would impair the ability of individuals to enjoy the benefit of sober homes. The First Circuit affirmed summary judgment to the City, which had concluded that this request was not reasonable as it was so at odds with the purposes behind the rule – which included safety – that it would be a fundamental and unreasonable change and that the owner had failed to demonstrate how the financial burden of compliance outweighed the safety justification of the law.

Because many of these cases are decisions following a request for preliminary relief, one necessary element is demonstrating irreparable harm. Plaintiffs were not successful at demonstrating such likelihood in ***Metro Treatment of Maine, LP v. City of Bangor*, 2016 WL 6768929 (D. Me. Nov. 15, 2016).**[97] There, the plaintiffs argued that the City violated the ADA because its ordinance was discriminatory on its face and because the City Council acted with discriminatory intent when denying the plaintiffs' request to expand its methadone clinic. There, the City had an ordinance that barred the

establishment of methadone clinics and the expansion of existing methadone clinics. The ordinance did permit existing facilities to apply to the City for a license to increase their patient numbers so long as certain criteria were met.[98]

While the plaintiffs alleged they met the criteria, the City voted against the expansion due to reservations about the need for additional methadone treatment slots in the City. The plaintiffs then moved for a preliminary injunction to enjoin the City from enforcing the ordinance. However, the plaintiffs' motion eventually failed on the irreparable harm prong of the preliminary injunction factors. The plaintiffs asserted that a violation of the ADA is presumed to cause irreparable harm since the ADA is a civil rights statute. However, the court rejected this. While the First Circuit had yet to address whether a court should presume irreparable harm when there is an ADA violation, it had suggested that a court cannot eliminate the irreparable harm requirement without explicit statutory limitations on a court's discretion to issue injunctions. Since the ADA lacks such limitations, the court found that the plaintiffs both failed to establish that they had suffered irreparable harm from the application denial and that their clients would suffer such harm.

Conclusion

While issues regarding alcoholism and drug addiction have also posed unique issues and challenges under the ADA, this issue has become even more important and complicated in light of the recent opioid epidemic as well as proliferation of states legalizing medical and recreational marijuana. It is critical for all ADA stakeholders to understand both the ADA and their state and local laws to completely understand their rights and responsibilities. As attitudes and practices toward certain drugs evolve, it is also critical that employers and public entities make decisions based on individualized as opposed to generalized assumptions of the impact of such medications. This is an area of the law that is likely to see more action in coming years.

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[1] This legal brief was written by Barry C. Taylor, Vice President of Civil Rights and Systemic Litigation and Rachel M. Weisberg, Staff Attorney and Manager, Employment Rights Helpline. The authors thank Annie Gallerano, Notre Dame Shaffer Fellow, Equip for Equality, for her valuable assistance. Equip for Equality is the protection and advocacy system for the State of Illinois and is providing this information under a subcontract with Great Lakes ADA Center.

[2] Americans with Disabilities Act, 42 U.S.C. § 12102. While the ADA Amendments Act did not explicitly add protections for individuals with addition to alcohol or drugs, it expanded coverage for this class through its rules of construction. *Id*. at § 12102(4).

[3] 42 U.S.C. § 12102(1).

[4] *Lankford v. Reladyne LLC*, 2015 WL 7295370 (S.D. Ohio Nov. 19, 2015).

[5] *Quinones v. Univ. of Puerto Rico*, 2015 WL 631327 (D.P.R. Feb. 13, 2015).

[6] *Cannon v. Jacobs Field Servs. N. Am., Inc*., 813 F.3d 586, 592–93 (5th Cir. 2016).

[7] 42 U.S.C. § 12101(b)(5)

[8] *Chamberlain v. Securian Financial Group, Inc*., 180 F. Supp. 3d 381, 398 (W.D.N.C. 2016).

[9] 42 U.S.C. § 12012(3).

[10] In *Ferrari v. Ford Motor Co.*, 826 F.3d 885 (6th Cir. 2016), the Sixth Circuit concluded that the employee could not bring a claim that she was regarded as disabled because she did not demonstrate that Ford regarded her as substantially limited in working as a result of her opioid addiction. Under the ADAAA, the relevant issue, however, is whether an employer perceived an individual to have an impairment—not a substantially limiting impairment. However, this case appears to be an outlier as other courts have interpreted the "regarded as" prong consistently with the Congressional directive in the ADAAA.

[11] *Alexander v. Wash. Metro. Area Transit Authority*, 826 F.3d 544 (D.C. Cir. 2016).

[12] *Chamberlain v. Securian Financial Group, Inc*., 180 F. Supp. 3d 381, 398 (W.D.N.C. 2016).

[13] *Kitchen v. BASF*, 343 F. Supp. 3d 681, 689 (S.D. Tex. 2018).

[14] *Id*.

[15] 42 U.S.C. § 12114(a).

[16] *Id*. at § 12114(b).

[17] *Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1188 (10th Cir. 2011).

[18] *Id.*

[19] *Id*. at 1189.

[20] *Quinones v. Univ. of Puerto Rico*, 2015 WL 631327, at *4-5 (D.P.R. 2015).

[21] *Id*. at *6.

[22] *Suarez v. Pennsylvania Hosp. of Univ. of Pennsylvania Health System*, 2018 WL 6249711 (E.D. Pa. Nov. 29, 2018).

[23] *Jarvela v. Crete Carrier Corp.*, 776 F.3d 822, 831 (11th Cir. 2015).

[24] 29 C.F.R. Pt. 1630, app. § 1630.3(a)–(c).

[25] 21 U.S.C. § 812.

[26] Remarks of Sen. Kennedy, 135 Cong. Rec. S10,775 (daily ed. Sept. 7, 1989).

[27] *EEOC v. Pines of Clarkston*, 2015 WL 1951945, at *5 (E.D. Mich. Apr. 29, 2015).

[28] *Id.*

[29] *Shirley v. Precision Castpats Corp.*, 726 F.3d 675 (5th Cir. 2013).

[30] *EEOC v. SoftPro, LLC*, Civil Action No. 5:18-cv-00463 (E.D.N.C. consent decree August 2019).

[31] 42 U.S.C. § 12112(d). For a detailed discussion on the ADA's restrictions on medical examinations and inquiries, please see Equip for Equality's Legal Brief and Webinar: Disability Related Questions and Medical Exams (Sept. 2018), *available at* https://www.accessibilityonline.org/ada-legal/archives/110680.

[32] EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations ("EEOC Preemployment Guidance"), *available at* http://www.eeoc.gov/policy/docs/preemp.html.

[33] 42 U.S.C. § 12114(d) ("For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination."); *See also* 29 C.F.R. §1630.16(c) ("a test to determine the illegal use of drugs is not considered a medical examination").

[34] EEOC Preemployment Guidance.

[35] *Bates v. Dura Automotive Systems, Inc*., 767 F.3d 566 (6th Cir. 2014).

[36] *Turner v. Phillips 66 Co.*, 2019 WL 5212903, at *7 (10th Cir. Oct. 16, 2019).

[37] *Id*. (citing 29 C.F.R. Pt. 1630, App.).

[38] *Id*.

[39] *Connolly v. First Personal Bank*, 623 F. Supp. 2d 928 (N.D. Ill. 2008).

[40] *EEOC v. M.G. Oil*, 16-cv-4131 (D.S.D. consent decree May 8, 2019), press release *available at* www.eeoc.gov/eeoc/newsroom/release/5-18-18.cfm.

[41] *EEOC v. Grane Healthcare Co.*, 2015 WL 5439052, at *38 (W.D. Pa. Sept. 15, 2015). Interestingly, prior to this bench trial, the court in *EEOC v. Grane Healthcare Co.*, 2 F. Supp. 3d 667 (W.D. Pa. 2014), responded to the parties' cross-motions for summary judgment by denying the defendant's motion and granting the EEOC's motion, in part, to enjoin Grane from conducting any illegal medical examinations prior to extending a conditional job offer.

[42] EEOC Preemployment Guidance.

[43] EEOC Preemployment Guidance.

[44] 42 U.S.C. § 12112(d)(2). Note the EEOC acknowledges an exception to this is if an employer is administering a test for illegal drugs, to which an employee tests positive. Then, the employer may validate a positive result by asking the employee about lawful drug use or other explanations for the positive result. EEOC Preemployment Guidance.

[45] EEOC Preemployment Guidance.

[46] *Id.*

[47] 42 U.S.C. § 12112(d)(2).

[48] *Harrison v. Benchmark Elecs. Huntsville, Inc*., 593 F.3d 1206, 1215-16 (11th Cir. 2010).

[49] *Id*. at 1216. Another interesting issue in this case was that although the plaintiff had epilepsy, he was found not to have an ADA-covered disability, as this case arose before the ADA Amendments Act. Nonetheless, as discussed below, the Court determined that the ADA's protections about medical exams and inquiries extend to everyone, even individuals without disabilities.

[50] 42 U.S.C. § 12112(d)(3).

[51] *Cannon v. Jacobs Field Services North America, Inc*., 813 F.3d 586 (5th Cir. 2016).

[52] 42 U.S.C. § 12112(d)(4).

[53] *Lewis v. Gov't of D.C.*, 282 F. Supp. 3d 169 (D.D.C. 2017).

[54] 42 U.S.C. § 12112(d)(3)(B); §12112(d)(4)(C).

[55] *McPherson v. O'Reilly Automotive, Inc.*, 491 F.3d 726 (8th Cir. 2007).

[56] 42 U.S.C. § 12112(d)(3)(B)(i)-(iii).

[57] *Foos v. Taghleef Industries, Inc.*, 132 F.Supp.3d 1034 (S.D. Ind. 2015).

[58] *Taylor v. City of Shreveport*, 798 F.3d 276 (5th Cir. 2015) (citing *EEOC v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012)). *See also*, *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1046-1048 (10th Cir. 2011).

[59] For a detailed discussion on the ADA and reasonable accommodations, please see Equip for Equality's Legal Brief and Webinar: Reasonable Accommodation Update (Sept. 2017), *available at* https://www.accessibilityonline.org/ada-legal/archives/110609.

[60] 29 C.F.R. Pt. 1630, App.

[61] *Torzewski v. Cosco Shipping Lines N.A. Inc.*, 2019 WL 4735486 (N.D. Ill. Sept. 27, 2019).

[62] *Matthews Sr. v. Amtrak National Railroad Passenger Corporation*, 402 F. Supp. 3d 930 (E.D. Cal. 2019).

[63] EEOC Press Release, Kmart Will Pay $102,048 to Settle EEOC Disability Discrimination Lawsuit, U.S. Equal Employment Opportunity Commission, January 27, 2015, http://www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm.

[64] 42 U.S.C. § 12114(c); 29 C.F.R. § 1630.16(b)(4).

[65] *Dennis v. Fitzsimons*, 2019 WL 420146 (D. Colo. Sept. 5, 2019).

[66] *Steele v. Stallion Rockies, Ltd*., 106 F.Supp.3d 1205 (D. Colo. 2015).

[67] *Id*. at 1212 (citing *Curry v. MillerCoors, Inc*., 2013 WL 4494307, at *3 (D. Colo. Aug. 21, 2013)).

[68] *Cruz v. FedEx*, 2019 WL 451529 (M.D. Fla. Jan. 25, 2019).

[69] *Budde v. Kane County Forest Preserve*, 597 F.3d 860 (7th Cir. 2010).

[70] *Id.* at 1141 (internal quotation marks omitted).

[71] *Id.*

[72] *Id.* at Question 29.

[73] *Jacobson v. City of W. Palm Beach*, 749 F. App'x 807 (11th Cir. 2018).

[74] *Christensen v. City of Omaha*, 2019 WL 1766161 (D. Neb. Apr. 22, 2019).

[75] *Chamberlain v. Securian Financial Group, Inc*., 180 F. Supp. 3d 381, 398 (W.D.N.C. 2016).

[76] *Id*. at 401-402.

[77] EEOC Guidance Document: The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities ("EEOC Conduct Guidance"), at Question 9, *available at* http://www.eeoc.gov/facts/performance-conduct.html.

[78] *Rumph v. Randazzo Mech. Heating & Cooling, Inc.*, 2018 WL 5845898 (E.D. Mich. Nov. 8, 2018).

[79] *See* 42 U.S.C. §§ 12111, 12113.

[80] 29 C.F.R. § 1630.2(r).

[81] *Id*.

[82] *Breaux v. Bollinger Shipyards*, 2018 WL 3329059 (E.D. La. July 5, 2018).

[83] *EEOC v. Foothills Child Development Center*, Civil Action No. 6:18-cv-01255-AMQ-KFM (D.S.C. consent decree May 2018), press release *available at* https://www.eeoc.gov/eeoc/newsroom/release/5-15-18.cfm.

[84] *Whitmire v. Wal-Mart Stores, Inc.*, 359 F.Supp.3d 761 (D. Ariz. 2019).

[85] *Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017).

[86] *Callaghan v. Darlington Fabrics Corp*., 2017 WL 2321181 (R.I.Super. May 23, 2017).

[87] *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (Mass. 2017).

[88] *Cotto v. Ardagh Glass Packing, Inc.*, 2018 WL 3814278 (D.N.J. Aug. 10, 2018).

[89] *Settlement Agreement Between the United States of America and Selma Medical Associates, Inc,* www.ada.gov/selma_medical_sa.html (Dec. 2018).

[90] *Settlement Agreement Between the United States of America and Charlwell Operating, LLC,* available at www.ada.gov/charlwell_sa.html (May 2018).

[91] *Settlement Agreement Between the United States of America and Athena Health Care Systems,* available at www.ada.gov/athena_healthcare_sa.html (Sept. 2019).

[92] *Sunlight of Spirit House, Inc. v. Borough of N. Wales, Pennsylvania*, 2019 WL 233883 at *2 (E.D. Pa. Jan. 15, 2019).

[93] *Id.*

[94] *Oxford House, Inc. v. Browning*, 266 F. Supp. 3d 896 (M.D. La. 2017).

[95] *Tri-Cities Holdings LLC v. Tennessee Admin. Procedures Div.*, 260 F. Supp. 3d 913 (E.D. Tenn. 2017), *aff'd*, 726 F. App'x 298 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 126, 202 L. Ed. 2d 33 (2018).

[96] *Summers, et al. v. City of Fitchburg, et al.*, 940 F.3d 133 (1st Cir. 2019).

[97] *Metro Treatment of Maine, LP v. City of Bangor*, 2016 WL 6768929 (D. Me. Nov. 15, 2016).

[98] The criteria included: (1) The property is adequate to accommodate the proposed increase, including providing sufficient interior space to avoid patient queuing on sidewalks, parking area, and other areas outside of the facility; (2) The treatment program is able to hire and retain adequate numbers of qualified staff to meet applicable state and federal standards of care; (3) The applicant has demonstrated a need for increased services that cannot be reasonably met except by the increase in the permitted number of patients at its existing location; (4) The applicant is in compliance with all state or federal laws, rules or regulations regarding its opioid treatment program; and (5) The applicant is in compliance will [sic] all City codes and ordinances.