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A collaborative program between the
Southwest ADA Center, Great Lakes ADA Center and members of the ADA National Network

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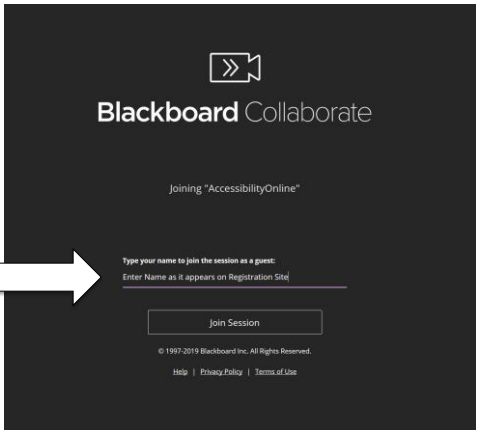

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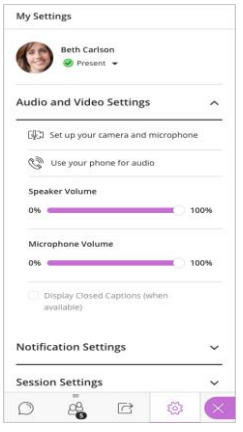

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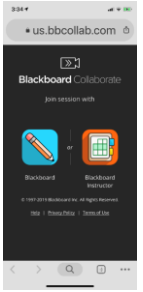

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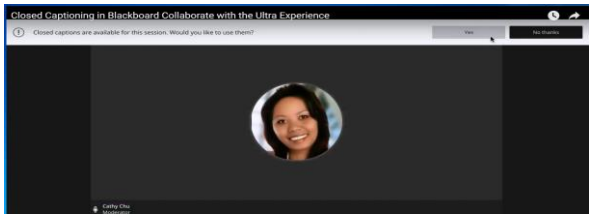

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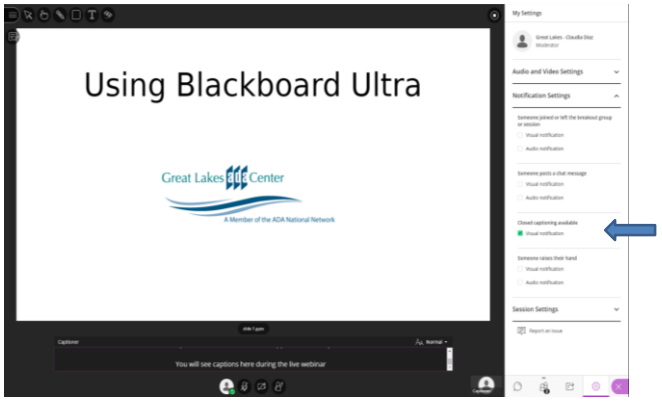

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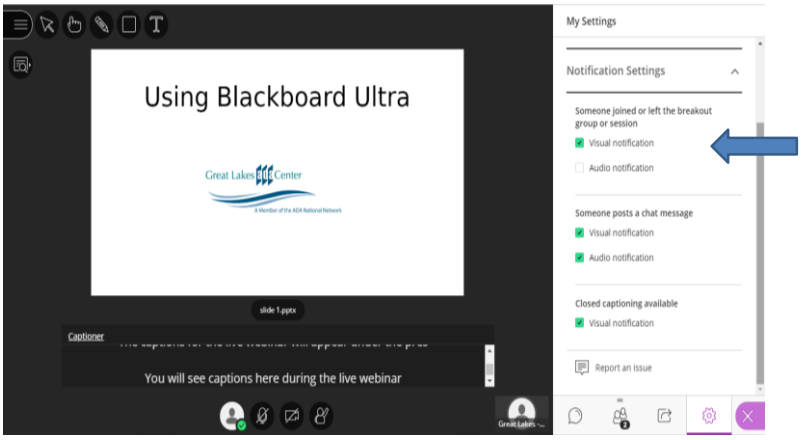

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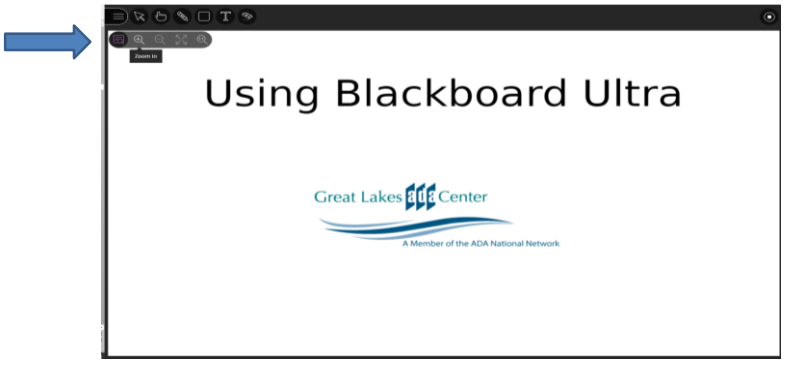

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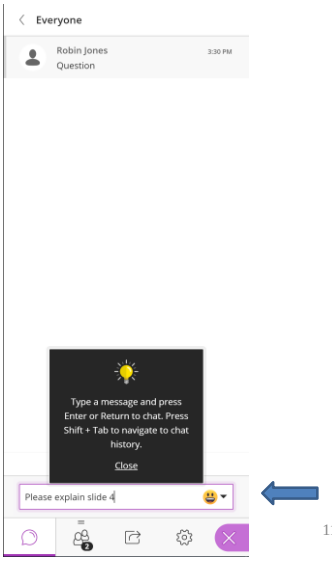

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Drugs, Alcohol and Conduct Rules

Presented by Equip for Equality
Barry C. Taylor, VP for Civil Rights and Systemic Litigation
Rachel M. Weisberg, Staff Attorney / Employment Rights Helpline Manager

Thanks to Annie Gallerano, EFE Notre Dame Shaffer Fellow and Staff Attorney for her valuable assistance

January 15, 2020

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Continuing Legal Education Credit for Illinois Attorneys

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Common Questions

- **Alex** uses medical cannabis to treat his disability. He applies for a new job, but the employer has a drug-free workplace policy. Does the ADA protect him if he is not hired?
- **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 opioid-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?

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Outline of Today's Webinar

- ADA coverage issues
  - Exemption for individuals currently engaging in the illegal use of drugs
- Medical exams, disability inquiries and drug tests
- Reasonable accommodations
- Direct threat
- Conduct and performance rules
- State cannabis laws
- Questions

- **Note:** Legal brief includes Title II/III Issues

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ADA Coverage Issues

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Definition of Disability
"Actual Disability" or "Record of"

Common limitations in major life activities:

- Caring for themselves, thinking, concentrating and sleeping
- Emphasis on physical impact

Lankford v. Reladyne LLC

2015 WL 7295370 (S.D. Ohio Nov. 19, 2015)

- Employee was fired shortly after returning from an approved medical leave to undergo treatment for alcohol dependency
- **Court:** Employee provided evidence that his alcohol dependency substantially limited major life activities
  - Resulted in frequent intoxication and black outs
  - Restricted his ability to care for himself and concentrate
  - Caused constant gastrointestinal issues, requiring surgery at 30

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Regarded As: Alcohol/Drug-Related Requirements

Plaintiffs often able to show "regarded as" when alcohol- or drug-related conditions are placed on future employment

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

- Unlike actual/record of, able to show "regarded as" because employer offered last-chance agreement with conditions related to his alcoholism (ex: Alcoholics Anonymous, random drug tests)

Farr v. S.C. Elec. & Gas Co.
2018 WL 3120672 (D.S.C. Jan. 12, 2018)

- Various reasons, including employer requirement that he undergo a fitness for duty, cooperate with substance abuse professionals, attend medical visits, and refrain from using controlled substances

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Exception: Currently Engaging in the Illegal Use of Drugs (Not Alcohol)

Picture of Cabela's store here

- ADA does not apply to:
  - An employee or applicant who is "**currently engaging** in the **illegal use** of drugs, when the covered entity **acts on the basis of such use**."
- This exception does not apply to an individual who is **no longer engaging** in the illegal use of drugs **and**
  - Is participating in a supervised drug rehabilitation program;
  - Has successfully completed a supervised drug rehabilitation program; or
  - Has otherwise been rehabilitated successfully
- **This exception does NOT apply to employees or applicants who currently use alcohol**

42 U.S.C. § 12114(a)-(b)

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Currently Engaging

What does "currently engaging" mean?

- If an individual fails a drug test, 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)
- More complicated question:
  - How long does an individual have to be drug-free to no longer be considered currently engaging in the illegal use of drugs?
- No categorical rules

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Currently Engaging

Courts/EEOC: 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.

Mauerhan v. Wagner Corporation
649 F.3d 1180 (10th Cir. 2011)

- Reviewed legislative history about meaning of currently engaging:
  - 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.

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Currently Engaging

- **Factors to consider:**
  - 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
- **Court:** Employee was still currently engaging
  - Employee had been drug-free for one month
  - Statements that "prognosis based on history and response to treatment [was] guarded"
  - Addiction specialist testified that treatment for someone like the plaintiff would typically require approximately three months

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Currently Engaging & Rehabilitation "Safe Harbor"

Quinones v. University of Puerto Rico
2015 WL 631327 (D.P.R. Feb. 13, 2015)

- Medical resident had addiction to various prescription drugs, including Soma, Ambien, and Adderall and alcohol
- Had been drug free for three months when she was dismissed from the program
- **Court:** Resident is currently engaging
  - Emphasized that the plaintiff's position "required a great deal of care and skill … [and] any mistakes could gravely injure [the plaintiff's] patients."

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Currently Engaging & Rehabilitation "Safe Harbor"

Suarez v. Pennsylvania Hospital of Univ. of Penn. Health System
2018 WL 6249711 (E.D. Pa. Nov. 29, 2018)

- Plaintiff completed 29 days of intensive inpatient treatment
- Five and a half months later, she was fired from her job as a nurse
- Employer argued: Drug use was recent enough to justify hospital's belief that her usage was an ongoing problem
- **Court:** Found for employee
  - Plaintiff was "recovering" and covered by ADA
  - When nurse was discharged from treatment program, it was recommended that she return to the practice of nursing two weeks after the date of her release
  - She entered into a monitoring contract that required her to attend group or individual therapy, which she did

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Illegal Use of Drugs

Two important principles:

- "Illegal use of drugs refers both to the use of unlawful drugs, such as cocaine, and to the unlawful use of prescription drugs."
  - 29 C.F.R. Pt. 1630, app. § 1630.3(a)–(c).
- Whether any particular substance is "illegal" depends on whether it is illegal as defined by the federal Controlled Substances Act (CSA).
  - CSA: Marijuana is an illegal controlled substance with no exception for medicinal use
  - Even though many states have legalized medical/recreational marijuana/cannabis, courts have uniformly concluded that such substances are "illegal drugs" under the ADA
  - **Some individuals have successfully pursued claims under state law (stay tuned!)**

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Action on the Basis of Such Use

An employee who uses illegal drugs can bring ADA claims if she is discriminated against for another reason

- Issue often involves whether employer's reason is pretextual

EEOC v. Pines of Clarkston

2015 WL 1951945 (E.D. Mich. Apr. 29, 2015)

- Employee with epilepsy who used medical marijuana was fired
- **Employer:** Fired for use of illegal drugs – no ADA protections
- **Employee:** Not true. Really fired due to epilepsy
- **Court:** Found for employee - jury could find reason was pretextual
  - Employee was "grilled about her epilepsy" - told that "the position would be too stressful for her based on her medical condition"
  - Employer also said it fired employee for failing to disclose medications, suggesting it was dishonest

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Rehabilitation "Safe Harbor"

Recently applied to individuals participating in medication-assisted treatment (MAT) programs, often used to treat opioid addiction.

- Compliance with MAT can show rehabilitation

EEOC v. SoftPro, LLC

5:18-cv-00463 (E.D.N.C. consent decree August 16, 2019)

www.eeoc.gov/eeoc/newsroom/release/8-16-19.cfm

- Employee with a history of opiate addiction participated in MAT
- Took leave, admitted himself to inpatient treatment to eliminate need for MAT; completed treatment; attempted to return to work
- Employer asked about reason for leave
- Employee explained and was fired
- EEOC entered into consent decree

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Limits to ADA Exception: Rehabilitation

Consent decree requires SoftPro to:

- Pay $80,000 to the employee
- Revise, implement and distribute policies stating that the company does not exclude employees based on participation in MAT
- Post notices to employees about settlement
- Report to EEOC negative employment actions the company takes against employees with history of substance abuse disorder, who are participating in or successfully completed drug rehab program

***See also EEOC v. Appalachian Wood Products, Inc.*, 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)

- www.eeoc.gov/eeoc/newsroom/release/8-6-19a.cfm

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ADA LEGAL WEBINAR SERIES

Disability-Related Inquiries and Drug and Alcohol Testing

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Exams/Inquiries about Illegal Drugs

Illegal Drugs

- **Tests** to determine the illegal use of drugs are not medical exams and thus, not subject to the ADA's rules on medical exams
  - **42 U.S.C. § 12114(d); 29 C.F.R. §1630.16(c)**
- **Questions** about use of illegal drugs are disability-related inquiries if the questions elicit information about a disability
  - Ex: prior treatment /counseling, number of times drugs used

Common question = What happens if a test reveals legal drugs?

- ***Turner v. Phillips 66*, 2019 WL 5212903 (10th Cir. Oct. 16, 2019)**
  - Oil refinery worker took test for illegal drugs, which revealed use of amphetamines – argued this was actually a medical exam
  - "test for illegal use of drugs does not necessarily become a medical examination if it reveals the potential legal use of drugs"

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Exams/Inquiries about Illegal Drugs

That does not mean that tests for illegal drugs are never actually medical examinations

Bates v. Dura Automotive Systems, Inc.

767 F.3d 566 (6th Cir. 2014)

- Employer required employees to submit to drug testing
- Several employees tested positive due to legal use of prescription drugs – oxycodone, Cymbalta, Didrex, Lortrab, Soma and Xanax
- Employees were all removed from workplace
- **Issue:** Is employer-drug test really a medical exam?
- **6th Circuit:** Reasonable jury could find either way
  - No inquiry about underlying medical conditions; but test was administered in quasi-medical setting, with medical equipment and health professionals interpreted the result

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Tests for Illegal Drugs that Reveal Legal Drugs

Even if a test for illegal drugs is not a medical exam, ADA still limits how an employer can use information

Connolly v. First Personal Bank

623 F. Supp. 2d 928 (N.D. Ill. 2008)

- Plaintiff offered job of Senior Vice President if she passed drug test
- She told company about medications, legal drug Phenobarbital
- Drug test was positive and job offer was rescinded
- Plaintiff's doctor tried to send a letter explaining nature of the lawfully prescribed medication - not addressed
- **Court:** 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."

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Legal Drugs and Alcohol: Pre-Employment

Legal Drugs and Alcohol

- Tests for legal drugs and alcohol = Medical exams
- Inquiries about legal drugs = Disability inquiries
- Inquiries about alcohol = Depends if inquiry elicits information about alcoholism (ex: past treatment, how much an individual drinks)

ADA's rules for inquiries and exams

- **Before a conditional offer of employment** employers may not ask disability-related inquiries or require medical examinations

EEOC v. Appalachian Wood Products, Inc.

3:18-cv-00198 (W.D. Pa. consent decree August 2019)

- Employer unlawfully required applicants to disclose medications, including Suboxone, before making a conditional job offer

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Legal Drugs and Alcohol: Pre-Employment

Employers can ask about lawful drug use to verify drug test results – but with limits

Harrison v. Benchmark Electronics Huntsville, Inc.

593 F.3d 1206 (11th Cir. 2010)

- Temp employee with epilepsy sought permanent employment
- Drug test revealed his use of barbiturates – explained he had a Rx
- Asked a series of questions by medical review officer
  - How long he had been disabled, what meds he took, how long
- **Court:** Jury could find pre-employment inquiry was unlawful
  - 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."

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Legal Drugs and Alcohol: Post-Offer / Pre-Employment

After extending a conditional job offer, before employee begins:

- Employers may ask questions or require tests if:
  - Done for all entering employees
  - The information is maintained in confidence
  - Results are used in a manner that is consistent with the ADA (actions must be job-related, consistent with business necessity)

Sumler v. University of Colorado Hospital Authority

2019 WL 6652000 (10th Cir. Dec. 6, 2019)

- Employer required all candidates for employment to complete a health questionnaire after receiving a conditional job offer
- Based on algorithm, employer required certain applicants to undergo further health screening or medical examination

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Legal Drugs and Alcohol: Post-Offer / Pre-Employment

Sumler continued

- Health screening asked whether individual uses narcotics, antidepressants, tranquilizers, or muscle relaxers
- Plaintiff applied for job as sonographer
- Challenged these additional requirements
- **Court:** Found for employer
  - Required for all entering employees in the same job category
  - Used in a manner consistent with the ADA
    - Criteria that triggered an additional evaluation – use of narcotics, antidepressants, tranquilizers, or muscle relaxers – were **job-related and consistent with business necessity**
    - Sonography requires a great amount of mental acuity and uninterrupted concentration

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Legal Drugs and Alcohol: Post-Offer / Pre-Employment

Cannon v. Jacobs Field Services North America, Inc.

813 F.3d 586 (5th Cir. 2016)

- During medical exam, plaintiff disclosed that he had an inoperable rotator cuff injury and previously took an opioid
- No longer took opioid and passed drug test
- Company doctor cleared him to work with restrictions, including no driving company vehicles or working with hands above shoulder
- Ultimately, employer rescinded job offer
- **District court:** Found for employer – plaintiff could not drive due to opioid prescription (granted summary judgment)
- **5th Cir.:** Reversed - reasonable jury could find for employee
  - Evidence that plaintiff was not still taking medication or, at least, could have stopped taking it once he started working

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Legal Drugs and Alcohol: Employment

Current employees:

- Employers may ask disability inquiries and require medical exams if the request is job-related and consistent with business necessity.
- 42 U.S.C. § 12112(d)(4)

Lewis v. Government of D.C.

282 F. Supp. 3d 169 (D.D.C. 2017)

- Plaintiff worked as an HR advisor
- Various offices combined in consolidated lab—included a number of safety sensitive jobs and positions
- As a condition of continued employment, all relocating employees would be subject to random drug and alcohol testing
- Arguably also required disclosure of prescription medications
- Plaintiff refused to comply with this requirement – fired and sued

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Legal Drugs and Alcohol: Employment

- **Court:** Found for employee (denied summary judgment)
  - Case rises and falls with business necessity inquiry
  - The business necessity standard is "quite high" and "not to be confused with mere expediency"

***EEOC v. M.G. Oil*, 16-cv-4131 (Happy Jack's Casino)**

(D.S.D. consent decree May 18, 2018)

www.eeoc.gov/eeoc/newsroom/release/5-18-18.cfm

- Company policy required all employees to report prescription and non-prescription medications they were taking
- Requires employer to revise 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

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Reasonable Accommodations

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Reasonable Accommodations

- **Common = Leave for drug or alcohol treatment programs**
  - EEOC specifically identified "additional unpaid leave for necessary treatment" as a potential reasonable accommodation under the ADA.
    - 29 C.F.R. Pt. 1630, app.
  - ***Adams v. Persona, Inc.*, 124 F.Supp.3d 973 (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)

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Reasonable Accommodations

Other examples of accommodations

Torzewski v. Cosco Shipping Lines N.A. Inc.

2019 WL 4735486 (N.D. Ill. Sept. 27, 2019)

- Sales director took FMLA leave for treatment for alcoholism
- Employer claimed his department was restructured during his leave and insisted he could return only if he relocated from Chicago to NJ
- Employee asked to keep working in Chicago so he could remain close to his medical providers and support group – request denied
- **Court:** Found for employee (denied motion to dismiss)
  - Employee sufficiently alleged that he requested a reasonable accommodation under the ADA regarding his alcoholism
  - Rejected employer argument that request was unreasonable

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Reasonable Accommodations for Drug Testing

Matthews, Sr. v. Amtrak National Railroad Passenger Corp.

402 F. Supp. 3d 930 (E.D. Cal. 2019)

- Railway clerk required to pass random drug tests
- Unable to provide a urine sample - sent for a "shy bladder" medical exam with a doctor (which had happened before) but said doctor refused to follow proper procedures with his catheter
- Employee asked to take blood test; Request was denied; Fired
- **Court:** Found for employee (denied motion for summary judgment)
  - Evidence railway failed to provide reasonable accommodation of a blood test or otherwise engage in the interactive process

See also EEOC v. Kmart Corp. (resolving case where applicant unable to provide urine sample due to kidney disease; request for alternative drug test was denied) **www.eeoc.gov/eeoc/newsroom/release/1-27-15b.cfm**

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Direct Threat

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Direct Threat

- "A significant risk of substantial harm to the health or safety of the individual or others……that cannot be eliminated or reduced by reasonable accommodation."
- Requires an "individualized assessment…based on a reasonable medical judgment that relies on…the most current medical knowledge and/or on the best available objective evidence."
- 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.

42 U.S.C. §§ 12111, 12113; 29 C.F.R. §1630.2(r)

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Individualized Assessment

Breaux v. Bollinger Shipyards

2018 WL 3329059 (E.D. La. July 5, 2018)

- Welder used Suboxone to aid his withdrawal from painkillers
- 2011: Rehired at Bollinger and did not disclose Suboxone use
  - Policy: Employees in safety sensitive jobs may not take a safety sensitive medication while working unless the drug is taken eight hours before a shift
- 2016: Employer learned that welder was taking Suboxone
  - Restricted from safety-sensitive job duties while on meds
  - Welder requested to return and provided clearance from doc
  - Employer denied request – offered six-months of job-protected leave to enable welder to wean himself from medication
  - After six months, welder was fired

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Individualized Assessment

- **Court:** Found for plaintiff on ADA claims (denied summary judgment)
- Did Plaintiff pose a **direct threat?**
  - While Suboxone can cause sedation, analgesia and other symptoms, no evidence that it caused symptoms for plaintiff
  - He took medication throughout employment without incident
  - Treating doctor cleared his return without restrictions

***See also EEOC v. Volvo Group*, 17-cv-2889 (D. Md. Jan. 2018)**
(resolving case for $70,000 and other relief when laborer's conditional job offer revoked due to Suboxone-use without individualized inquiry)
www.eeoc.gov/eeoc/newsroom/release/1-19-18a.cfm

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Individualized Assessment

EEOC v. Foothills Child Development Center

18-cv-12555 (D.S.C. consent decree May 2018)

www.eeoc.gov/eeoc/newsroom/release/5-15-18.cfm

- Preschool teacher fired for using legally-prescribed Suboxone to treat opioid addiction; no individualized inquiry
- **Consent decree:** $5,000 to employee; Training and reporting
  - Amend drug policy for clear/specific exclusion for people who use legally-obtained meds in a lawfully-prescribed manner
  - Create ADA procedure for conducting individualized assessment of individuals enrolled in rehabilitation programs to determine whether the employee is qualified

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Conduct and Performance Standards

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ADA Conduct Rules about Drugs and Alcohol

Employers may:

- Prohibit illegal use of drugs and use of alcohol at work
- Require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace
- Require that employees behave in conformance with the Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 et seq.)
- 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

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

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Misconduct: Violating Policies about Alcohol or Illegal Drug Use

Employers may discipline employees who violate policy prohibiting alcohol or illegal drugs in the workplace, so long as policy is applied in a non-discriminatory manner

- ***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)
- ***O'Brien v. R.C. Willey Home Furnishings*, 748 F. App'x 721 (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)

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Misconduct Caused by Alcoholism

Dennis v. Fitzsimons

2019 WL 4201476 (D. Colo. Sept. 5, 2019)

- Sheriff deputy placed on administrative leave after criminal charges filed against him – during leave, he was considered to be on-duty
- Deputy arrived at arraignment intoxicated
- **Court:** Found for employer
  - Difference between decisions based on an alcoholism status and unsatisfactory conduct caused by alcoholism
  - Deputy failed to show he was treated differently than others
  - One colleague whom plaintiff drank with in the evening, but there was no evidence that he was intoxicated on duty
  - Other colleague admitted to a DUI, but no evidence of alcohol level, he drank off-duty, had different supervisors and experience

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Employee Assistance Program & "Last Chance" or "Firm Choice" Agreements

Generally, failure to comply with terms is lawful basis for discipline

Jacobson v. City of West Palm Beach

749 F. App'x 807 (11th Cir. 2018)

- Firefighter used marijuana off duty
- Referred to mandatory EAP that required six therapy sessions
- He missed one, which was reported to his employer
- **CBA:** Failure to comply with an EAP "will result" in termination
- **11th Circuit:** Employer's reason for termination –employee failed to comply with the terms of the EAP program – was not discriminatory

***Christensen v. City of Omaha,* 2019 WL 1766161 (D. Neb. Apr. 22, 2019)**
(police officer with alcoholism's failure to comply with agreed-upon terms for continued employment was non-discriminatory reason for termination)

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Demonstrating Pretext

Conduct rules must be actual basis for discipline and not used as a pretextual reason to discriminate

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

- Individual with history of opioid addiction, as well as depression, anxiety and ADHD was fired after taking leave to care for her mom
- Employer: Fired for violating workplace policy – took two days of unexcused leave and did not appear interested in position
- **Court:** Found for employee (denied summary judgment)
  - Evidence that reason was pretextual
  - Supervisor commented on the cost of Suboxone medication
  - CFO's attitude changed drastically after she disclosed addiction
  - Singled out and subject to "nitpicking"

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State Marijuana Laws

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Medical Cannabis Cases for Employee

Many states have now legalized medical marijuana

- State laws sometimes include anti-discrimination language
- Given this trend, important to examine state law

Whitmire v. Wal-Mart Stores, Inc.

359 F.Supp.3d 761 (D. Ariz. 2019)

- Customer Service Supervisor held a medical marijuana card to help treat chronic pain due to arthritis and prior shoulder surgery
- Given drug test after workplace accident – tested positive & fired
- Claims under state laws, including Arizona Medical Marijuana Act
  - AMMA prohibits employment discrimination
  - Exception if employee uses, possesses, or is impaired on employer's premise or during work hours

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Medical Cannabis Cases for Employee

- But – impairment can't be based solely on presence of metabolites of marijuana in insufficient concentration to cause impairment
- Here, no expert testimony about concentration level
- Wal-Mart moved for summary judgment – good faith of impairment
- **Court:** For employee (granted summary judgment *sua sponte*)
  - Firing a "registered qualifying patient" who tests positive regardless of level of marijuana detected is a complete a bright line disregard of the state law
  - Test itself insufficient without expert testimony

***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)

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Medical Cannabis Cases for Employee

Noffsinger v. SSC Niantic Operating Co. LLC

273 F.Supp.3d 326 (D. Conn. 2017)

- Job offer rescinded for applicant with PTSD due to med marijuana
- **Court:** ADA does not preempt state medical marijuana law

Callaghan v. Darlington Fabrics

2017 WL 2321181 (R.I. Super. May 23, 2017)

- Applicant with medical marijuana card was denied employment
- **Court:** Violated state medical marijuana law
  - Employer should have engaged in the interactive process to determine if reasonable accommodations were available
  - CSA did not preempt the anti-discrimination provisions of the state law as the laws have different purposes

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Medical Cannabis Cases for Employee

Success based on state anti-discrimination law

Barbuto v. Advantage Sales and Marketing,

477 Mass. 456 (July 17, 2017)

- Plaintiff with Crohn's disease used medical marijuana legally, but denied employment after failing drug test
- Claim under state anti-discrimination law and medical marijuana law
- **Supreme Court of Mass:** Found for employee (reversed MTD)
  - Plaintiff has viable claim under state anti-discrimination law
  - Rejected argument that medical marijuana use is *per se* unreasonable because marijuana is a federal crime
  - Permitting off-site use of medical marijuana may be reasonable or unreasonable (safety, statutory obligation, etc.)
  - No claim under state medical marijuana law

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Medical Cannabis
Courts Disagreeing With One Another

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

- Employee required to undergo drug test after workplace incident
- Tested positive for Rx and marijuana – suspended due to marijuana
- Claim under NJ medical marijuana law and anti-discrimination law
- **Court:** NJ state laws do not require employers to accommodate medical use of marijuana
  - Employer not qualified because cannot pass drug test

***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)

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Medical Cannabis
Cases for Employer

A number of other states have found for employers

- ***Garcia v. Tractor Supply Co*., 154 F.Supp.3d 1225 (D.N.M. 2016)**
  - New Mexico's medical marijuana and civil rights laws do not require an employer to accommodate medical marijuana
- ***Curry v. MillerCoors*, 2013 WL 4494307 (D.Colo. Aug. 21, 2013)**
  - "[D]ischarging 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)**
  - Washington law "does not … protect an employee from being discharged because of authorized medical marijuana use"
- ***Casias v. Wal-Mart Stores*, 764 F.Supp.2d 914 (W.D. Mich. 2011)**
  - Michigan law "does not regulate private employment"

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Questions?

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