

EEOC: Accommodate Individuals Who Are Lawfully Using Opioids

By Allen Smith, J.D.

August 6, 2020

As opioid use reportedly has risen during the coronavirus pandemic, the Equal Employment Opportunity Commission (EEOC) clarified on Aug. 5 that individuals who are lawfully using opioid medication, are in treatment for opioid addiction or have recovered from their addiction must be reasonably accommodated.

However, current illegal drug use is not a covered disability, the EEOC noted in one set of questions and answers

([https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees?](https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

[utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=](https://www.eeoc.gov/laws/guidance/use-codeine-oxycodone-and-other-opioids-information-employees?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)).

In a separate set of questions and answers (https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=), the EEOC provided guidance on what health care providers should include in the documentation to be submitted to an employer to help an employee request an accommodation.

"There have been many recent news stories (<https://www.aamc.org/news-insights/covid-19-and-opioid-crisis-when-pandemic-and-epidemic-collide>) [reporting] that the opioid epidemic has worsened since the COVID-19 pandemic started," said Kathryn Russo, an attorney with Jackson Lewis in Melville, N.Y. "My guess is that that fact spurred the EEOC to publish guidance for opioid users to advise them that they may be able to request accommodations at work, and to publish additional guidance for health care providers to assist their patients in seeking such accommodations."

Reasonable Accommodations When There Are Safety Concerns

If an employer suspects that an individual's opioid use could interfere with safe and effective job performance, it still may have to provide a reasonable accommodation if the person requests one after the employer shares its concern.

Reasonable accommodations may include:

- A different break or work schedule, such as scheduling work around treatment, a support group meeting or therapy session.
- A change in shift assignment.
- A temporary transfer to another position.

What if the employee thinks he or she can do the job safely with a reasonable accommodation but the employer disagrees? The EEOC said that to remove the individual from a position, the employer must have objective evidence that the person can't do the job or poses a significant safety risk, even with a reasonable accommodation.

The employer might require the individual to undergo a medical examination to obtain enough objective evidence about what the employee can safely do, the EEOC said in its first set of questions and answers.

If the person can't do the job safely now, the employer might still be required to hold the job while the individual takes leave for treatment or recovery, the agency added.

If the individual is permanently unable to do his or her regular job, that person may ask to be reassigned to a job that he or she can perform, if one is available.

Accommodations for Individuals in Pain

An individual using opioids to treat pain could be entitled to a reasonable accommodation if the condition causing the pain constitutes a disability under the Americans with Disabilities Act (ADA). "A medical condition does not need to be permanent or stop you from working to be an ADA disability," the EEOC said. "Many conditions that cause pain significant enough for a doctor to prescribe opioids will qualify."

Accommodations for Those Who Are Addicted

An addiction to opioids might entitle someone to a reasonable accommodation because it is a diagnosable medical condition that can be an ADA disability—opioid use disorder—the EEOC stated. Medical conditions often associated with opioid addiction, such as major depression and post-traumatic stress disorder, may be disabilities, too, the agency noted.

Nonetheless, an employer may deny an accommodation if someone is using opioids illegally, even if he or she has an opioid use disorder.

Open Questions

Employers still have unanswered questions about accommodating individuals who use opioids, according to James Reidy, an attorney with Sheehan Phinney in Manchester, N.H. These questions include:

- What should an employer do when an accommodation might conflict with the organization's drug and alcohol policy?
- How long should an employer permit an accommodation?
- What are the agency's suggestions for how employers should monitor the employee's job performance and compliance with safety policies without triggering a disability discrimination or "regarded as" disabled claim? Under the ADA, an employer can be liable when it discriminates against someone the business regards as having a disability.

Drug Tests

The EEOC also provided guidance in the first set of questions and answers on drug tests. "Historically, the EEOC always has had an interest in litigating cases in which employers refused to hire applicants after testing positive on a drug test for an opioid medication or after disclosing that they use opioid medications," Russo said.

An employer must give anyone subject to drug testing the chance to provide information about lawful drug use that may cause a drug test result showing opioid use, the EEOC said. An employer may do this by asking before the test is administered whether an individual has taken medication that could cause a positive result or by asking all people who test positive for an explanation.

Asking about medication before the test is administered seems like a change in EEOC policy, and policies can't be changed through Q&As, according to David Fram, director of ADA services for the National Employment Law Institute in Golden, Colo. So, asking all people who test positive for an explanation may be the less litigious option.

[Need help with legal questions? Check out the new SHRM LegalNetwork (www.shrm.org/ResourcesAndTools/business-solutions/Pages/LegalNetwork.aspx)]

utm_source=shrm_article&utm_medium=shrm.org&utm_campaign=growth~legalnetwork~pressrelease,)]

Documentation from Health Care Providers

In its second set of questions and answers, the EEOC recommended that health care providers describe an employee's medical condition, articulate the limitations caused by the condition and suggest accommodations, Russo noted.

"Moreover, the EEOC states that when there may be a safety risk, the health care provider should provide details to help the employer make the direct threat assessment required by the ADA," she said. Employers need information to help them assess the level of risk, she explained.

To the extent that the second set of questions and answers tells health care providers why their input is important and provides examples of accommodations, that is helpful, said Nancy Delogu, an attorney with Littler in Washington, D.C.

Employers, employees and health care providers "may be uncertain how the ADA applies to the use—and abuse—of opioid medications," she said. "The guidance may be helpful to clarify that there are differences in the law depending on how the opioids are being used."

HR DAILY NEWSLETTER

News, trends and analysis, as well as breaking news alerts, to help HR professionals do their jobs better each business day.

Email Address

**CONTACT US (WWW.SHRM.ORG/ABOUT-SHRM/PAGES/CONTACT-US.ASPX) | 800.283.SHRM
(7476)**

© 2020 SHRM. All Rights Reserved

SHRM provides content as a service to its readers and members. It does not offer legal advice, and cannot guarantee the accuracy or suitability of its content for a particular purpose.

[Disclaimer \(www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer\)](http://www.shrm.org/about-shrm/Pages/Terms-of-Use.aspx#Disclaimer)