



## The ADA, Addiction, Recovery and Employment

The Americans with Disabilities Act (ADA) addresses addiction to alcohol, illegal drugs, and the unlawful use of legal drugs in each stage of employment:

1. Application and interview
2. After a job offer, but before starting work
3. On the job

The ADA ensures that people with disabilities, including people with addiction to alcohol have the same rights and opportunities as everyone else. These protections also apply to people who experience prescription drug use disorder and opioid use disorder.

- The ADA prohibits discrimination against a “qualified person with a disability” in all stages of employment. A qualified person with a disability is a person who possesses the skills, experience, and education that will facilitate the successful performance of the “essential functions” of the job with or without reasonable accommodation (e.g. a schedule change, leave to attend AA/NA meetings or treatment at a rehabilitation program).
- The ADA applies to private employers with 15 or more employees and all state and local governments. State non-discrimination law sometimes covers private employers with less than 15 employees.

### Definition of Disability

A person has a disability under the ADA if the person:

1. Has a physical or mental impairment that substantially limits one or more **major life activities**, e.g. someone with bi-polar disorder, diabetes or addiction to alcohol; or
2. Has a **history** of an impairment that substantially limited one or more major life activities, e.g. someone who is in remission from cancer or someone in recovery from the illegal use of drugs; or
3. Is **regarded** as having such an impairment, e.g. An employer assumes an employee has an addiction to drugs (whether or not person actually has an addiction), and takes a negative employment action based on that belief, such as refusal to promote, a poor performance rating, or termination.

**Major life activities** include, but are not limited to: walking, seeing, caring for oneself, learning, working, thinking, communicating and also the operation of bodily functions, such as neurological and brain functions.

Addiction is generally considered a disability because it is an impairment that affects brain and neurological functions.



The ADA applies to addiction to alcohol and to the illegal use of drugs differently. Addiction to alcohol is generally considered a disability whether use of alcohol is in the present or in the past. For people with an addiction to opioids and other drugs, the ADA protects a person in recovery who is no longer engaging in the current illegal use of drugs.

## Stages of Employment

### Application and Interview

- Whether on the application or during the interview, the ADA prohibits all disability-related questions, medical inquiries and exams, even *if* they are related to the job.
- An employer may not ask an applicant about the existence, nature, or severity of a disability.

#### What are disability-related questions? Questions such as:

- Are you taking prescription drugs?
- Do you have a disability, illness or condition that will prevent you from doing this job?
- Have you ever been treated for addiction to alcohol, opioids or other drugs?

#### Pre-Offer Employment Inquiries and Addiction to Alcohol

**Scenario:** Antonio has a job interview. His resume shows gaps in employment. These gaps are due to his addiction to alcohol and recovery process. He calls the ADA Center and asks, “Can the interviewer ask about the gaps in my employment history? If I’m asked about the gaps, do I have to mention my addiction to alcohol?”

**Does Antonio have protections under the ADA?** The interviewer can ask about gaps in employment. Antonio can tell the interviewer that he had an illness, is fully recovered and excited about the opportunity to work for the company. This allows him to be honest without disclosing a specific disability. However, if Antonio is asked a specific question about his disability, he must answer the question honestly even though the question is illegal. If an applicant lies, it is a legitimate reason for not hiring. However, the applicant can then file a complaint for being asked a disability-related question at this stage.

#### Pre-Offer Inquiries and Illegal Use of Drugs

The ADA protects a person in recovery who is no longer currently engaging in the illegal use of drugs and who can show that they meet the definition of disability.

#### Illegal use of drugs means:

1. Use of illegal drugs such as heroin or cocaine.
2. Use of prescription medications such as opioids or morphine
  - BUT the person has no prescription;
  - OR has a fraudulent prescription;
  - OR is using more than is prescribed.

#### In recovery means:

1. Is in recovery from substance use disorder and is no longer engaging in the illegal use of drugs; or
2. Is participating in a supervised rehabilitation program and is no longer using drugs illegally.



### What does “current” mean?

1. Use occurred recently enough to justify a reasonable belief that a person’s drug use is a real and ongoing problem.
2. Whether someone is currently using drugs illegally is decided on a case-by-case basis.

**Scenario:** Lily has been **cocaine-free** for three years. She applies for a job that she is qualified to do. The interviewer finds out about her past addiction and asks about it.

**Does Lily have protections under the ADA?** Yes, she does have protections. Questions about past addiction to illegal drugs or whether Lily participated in a rehabilitation program are prohibited. These questions are disability-related because past drug addiction generally is a disability.

- Questions about **use** of alcohol or illegal drugs are permissible.
  - Have you ever used or do you currently use heroin? A positive or negative answer does not reveal a disability.
- Questions about **extent or frequency of use** of alcohol or illegal drugs are unlawful.
  - How much alcohol or illegal drugs did you consume? How often do/did you drink alcohol or use illegal drugs? These questions may reveal an addiction.

### Pre-Offer Inquiries and Medication to treat Substance Use Disorders

People who experience opioid use disorder may be prescribed medication to treat their addiction. In these cases, a person is prescribed medication by a doctor such as Suboxone, methadone, or Vivitrol to treat their addiction. These are legally prescribed medications used to treat addiction, just like insulin is legally prescribed to treat diabetes.

**Scenario:** Marc is receiving medication to treat substance use disorder and is not currently engaged in the illegal use of opioids. When he applies to fire-fighter academy, he is required to undergo a medical exam as part of his application, before an offer has been made. If he does not undergo the medical exam, he will not be considered for the academy.

During the exam, the doctor asks, “Are you taking any prescription drugs?” Even though this question violates the ADA, Marc responds honestly, “Yes, Suboxone.”

**Does Marc have protections under the ADA?** Yes, Marc is a person with a disability and has protections under the ADA. Medical exams and disability-related question that seek information about physical or mental impairments, including questions about prescriptions during the pre-offer stage are prohibited. For Marc, the medical exam required that he divulge prescription medications that reveal impairment.

### After a Job is Offered, but Before Starting a Job

- An employer may:
  - Make medical inquiries, require medical exams and ask disability-related questions provided it does so for all individuals within a job category.
  - Ask questions about use of alcohol or drugs, or extent of use, or diagnosis of addiction to alcohol or drugs are lawful.
- At this stage, the individual must disclose a disability if asked.



**Scenario:** Five years ago, Sarah became addicted to opioids after shoulder surgery. When her prescription ran out, she obtained oxycodone illegally. Two years ago, she started her recovery, which included a prescription for Suboxone. Does Sarah have to disclose her addiction?

**Does Sarah have any protections under the ADA?** Yes, Sarah is a person with a disability, and if she is asked, she must be honest about her addiction. However, if she is not asked and does not need a reasonable accommodation, she does not have to disclose her disability (addiction).

### On the Job

At this stage, an employer may **only** make disability-related inquiries and require medical exams if they are job-related and consistent with business necessity. Basically, this means an employer can only ask questions when it has objective reasons for thinking a disability might be affecting or could affect job performance or public safety. Employees need to disclose their disabilities if they need to request an accommodation.

**Scenario:** Binh's supervisor notices changes in his behavior. She sees Binh sleeping at his desk, hears him slurring his speech on the phone, and notices that he has lost weight. In addition, his work productivity is lower. She speaks with Binh about his behaviors and job performance. Binh tells her that he is using heroin and needs to go to treatment.

**Does Binh have any protections under the ADA?** No, Binh is not protected by the ADA. Binh's performance and conduct is due to his **current illegal use of drugs**, therefore, the employer has no legal obligation to provide a leave of absence and may take whatever disciplinary actions it deems appropriate. Under the company's drug use policy, Binh can be fired for using illegal drugs at work. However, nothing in the ADA would limit the company's ability to offer leave or other assistance that may enable Binh to receive treatment if it chooses.

### Last Chance Agreement

- When an employee can be fired, an employer may offer a "last chance agreement."
- An employer agrees not to terminate the employee in exchange for an employee's agreement to receive treatment and avoid further workplace problems.
- A violation of the agreement usually warrants termination because the employee failed to meet the conditions for continued employment.

### Legal Use of Drugs and Addiction

**Scenario:** Alex became addicted to Percocet while taking the medication in a prescribed manner and in prescribed amounts.

**Is Alex protected under the ADA?** Yes, Alex is a person with a disability (addiction) under the ADA because she is legally using a drug as prescribed for an underlying condition. However, if she takes more than prescribed (illegal use), she may not be covered under the ADA.

### The ADA, Medical Marijuana and State Law

Medical marijuana is illegal under Federal law and therefore the ADA, which must follow Federal law, offers no protection if an employer makes decisions against an individual based on his/her use of medical marijuana. However, under some state laws, recreational and medical marijuana use is legal. If medical marijuana is legal under state law, employers may need to consider reasonable



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accommodations under a state disability discrimination law for offsite use. Check state law. Know what the law states as there is a wide variance in what these laws say and what type of protection they may extend to job applicants and employees.

### Need More Information?

Addiction and recovery in the employment setting is a complicated area of the ADA due to continuing changes in state laws – both marijuana laws and disability discrimination laws -- and developing court cases. If you have questions about your rights or obligations under the ADA, contact your local ADA Center toll-free at 1-800-949-4232. Each center has ADA specialists who provide information and guidance on the ADA. You can also email your local center by clicking the following link and completing the form: <https://adata.org/email>. All calls and emails are treated anonymously and confidentially.



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