



***Welcome to* KNOW YOUR
RIGHTS:**

**Employment Discrimination Against
People with Alcohol/Drug Histories**

WEBINAR

WELCOME to the Know Your Rights Webinar Series!

Presented by:



Today's presenters are:

- Sally Friedman, Esq.
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WELCOME to the Know Your Rights Webinar Series! (cont.)

Funded by:



“Partners for Recovery” is an initiative of the federal government’s Center for Substance Abuse Treatment

WELCOME to the Know Your Rights Webinar Series! (cont.)

Who is the Legal Action Center?

- National non-profit law firm
- Policy and legal work on anti-discrimination issues affecting people with
 - Alcohol or drug histories
 - Criminal records or
 - HIV/AIDS

Today's Materials

- *Know Your Rights: Are You in Recovery from Alcohol or Drug Problems?*
- This PowerPoint presentation
- Download them on <http://www.pfr.samhsa.gov> or <http://www.lac.org>. On the LAC site, click on "Trainings and Technical Assistance," and then "Alcohol & Drugs /Criminal Record."

WELCOME to the Know Your Rights Webinar Series! (cont.)



Recording of this webinar

- Available at <http://www.lac.org>

Who's today's audience?

This training is for . . .

- People in treatment or recovery from alcohol or drug problems
- Anyone supporting the rights of people with current/past alcohol or drug problems
- Employers and others who want to comply with anti-discrimination laws
- Anyone else interested in the topic.

This training is about . . .

- Federal laws prohibiting **employment** discrimination against people with disabilities and
- How these laws protect people with alcohol or drug problems.

Today's training objectives

1. Understand rights under federal anti-discrimination laws to be free from employment discrimination.
2. Understand how to exercise those rights
3. Know how to help others understand and exercise those rights.



Sounds familiar?

- Some information same as others in series.
- But pay close attention – there are differences.
- This webinar has much more about **employment** discrimination.

Part 1



What Is Discrimination?

DISCRIMINATION IS . . .

treating a person less favorably/differently
because of his/her **STATUS**

. . . when the law does not permit it.

DISCRIMINATION IS . . .

Examples of status protected by law:

- Race
- Age
- Disability
- Gender
- Religion

DISCRIMINATION: Examples

- Employer fires someone because that person is in recovery from alcoholism.
- Employer refuses to hire someone because they are over 40 years old.

DISCRIMINATION: CASE-BY-CASE DECISION

- Should look at each person individually.
- Should *not* make generalizations about a person based on status (e.g., based on the mere fact that the person has a disability or is a certain race or religion).

DISCRIMINATION *IS NOT* . . .

treating a person less favorably/differently because of his/her **CONDUCT**.

It's *not* discrimination to . . .

- Fire a person who causes an accident at work because she is under the influence of alcohol or drugs.
- Fire a person for repeated no-shows at work due to alcoholism.

Today's Presentation/Discussion

Focuses on discrimination in Employment



Part 2



Which Laws Prohibit **EMPLOYMENT** Discrimination Against People with Alcohol/Drug Histories?

WHICH LAWS APPLY?



FEDERAL LAWS

Americans with Disabilities Act – “ADA”

(42 U.S.C. § 12101 *et seq.*)

- Applies to private employers with more than 15 employees. They are covered by “Title I” of the ADA
- State and local government agencies. They are covered by “Title II” of the ADA.

WHICH LAWS APPLY?

Rehabilitation Act of 1973 – “Rehab Act”

(29 U.S.C. § § 701-794)

- Applies to the federal government
- Groups/agencies/programs that receive federal funding, either directly or indirectly



WHICH LAWS APPLY? (cont.)

FEDERAL LAWS (cont.)

Workforce Investment Act – “WIA”

- Applies to workforce development programs funded by the federal government



WHICH LAWS APPLY? (cont.)

Family and Medical Leave Act – “FMLA”

- Applies to private employers with at least 50 employees
- Any public agency

WHICH LAWS APPLY? (cont.)

States and cities also have laws prohibiting discrimination.

How do you find out if your State/locality has applicable laws?



WHICH LAWS APPLY? (cont.)

One way: Contact the State agency that oversees alcohol and drug treatment programs. They might know of local resources.

For a directory of such state agencies, visit <http://www.samhsa.gov/Grants/ssadirectory.pdf>.

WHICH LAWS APPLY? (cont.)

Another way: Every State has an agency charged with enforcing State anti-discrimination laws. Some cities have them as well.

To find your State's or City's agency, you can:

- Do an Internet search typing the name of your state or city and the words "human rights agency"

more...

WHICH LAWS APPLY? (cont.)

Another way (cont.):

- Ask your State's Attorney General's office
- Ask the local or regional office of the federal Equal Employment Opportunity Commission – the agency that enforces federal anti-discrimination laws. Visit <http://www.eeoc.gov> for local/regional office information.

WHICH LAWS APPLY? (cont.)

Another way (cont.):

The Legal Action Center has compiled information about anti-discrimination laws in a number of states. If your state appears on the list on the next slide, you can obtain a summary of the relevant laws on our website.

Go to <http://www.lac.org>. Click on “Trainings and Technical Assistance,” “Training Materials” and then “Alcohol/Drugs & Criminal Record.”

WHICH LAWS APPLY? (cont.)

State law information available for:

- Alaska
- California
- Colorado
- Connecticut
- Georgia
- Illinois
- Indiana
- Kentucky
- Maryland
- Massachusetts
- Minnesota
- New Mexico
- New York
- North Carolina
- Oregon
- Pennsylvania
- Texas

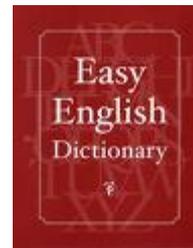
Part 3

WHO IS PROTECTED BY THESE LAWS?



Who is Protected?

- Proving “disability” under anti-discrimination laws is **NOT** same as proving “disability” for government benefit programs, like SSI.



Who is Protected? (cont.)

What is a “disability”?

- “a physical or mental impairment that substantially limits one or more major life activities” (“**current**”)
- a **history** (“record of”) such an impairment *or*
- being “**regarded as**” having such an impairment

Who is Protected? (cont.)

What is a “disability”? (cont.)

- Court will make an **individualized determination**.
No automatic disabilities.
- Must prove impairment that **substantially limits** – or once limited – **one or more of *her or his* major life activities**, such as caring for self, walking, talking, working, and major bodily functions.

Who is Protected? (cont.)

Alcoholism – Joseph

- Alcohol problem but no problems on the job.
- Boss hears about Joseph's alcoholism treatment
- Fires him: “I don't want any alcoholics working here.”

Do you think Jose is a person with a “disability” under these federal anti-discrimination laws?

Who is Protected? (cont.)

Likely **YES**. **Alcoholism** generally is a “disability” regardless of whether it is:

- *Past or Current*

BUT Joseph still must prove that his alcohol abuse/alcoholism substantially limits or limited one or more of *his* major life activities.

Who is Protected? (cont.)

2008 Amendments to the ADA

- It's now easier to prove "disability" as a result of the ADA Amendment Acts of 2008.
- This law – which took effect 1/1/09 – clarifies that Congress meant the term "disability" to be interpreted broadly.

Who is Protected? (cont.)

Julie has been in recovery from cocaine addiction for 5 years, and at her job for the past 3 years. Her work performance has been outstanding. But her boss just found out that she is in recovery and is thinking of firing her because of her past drug addiction.

Do you think Julie is protected by these federal anti-discrimination laws?

Who is Protected? (cont.)

Likely **YES**.

- Has “**record of**” **addiction** (in past – to cocaine). People with a **past** drug addiction have a “disability” if –

it **substantially limited** one or more of that person’s major life activities

Who is Protected? (cont.)

Method of recovery is irrelevant to proving “disability.” Irrelevant whether:

- successfully completed drug treatment
- currently in treatment
- achieved recovery without treatment

Who is Protected? (cont.)

But what about Tammy? She uses cocaine after work, but has no problems on the job. Her boss finds out about her cocaine use and fires her.

Do you think Tammy is protected by these federal anti-discrimination laws?

Who is Protected? (cont.)

Tammy (cont.)

NO

Federal laws do not protect individuals who are “**currently engaging in the illegal use of drugs.**”

WHO IS PROTECTED (cont.)?

What does “illegal use” mean?

- Use of Illegal drugs (e.g., heroin, cocaine)
- Unlawful use of prescription drugs:
 - no prescription
 - fraudulent prescription

WHO IS PROTECTED (cont.)?

What does “illegal use” mean?

- What if became addicted to Percocet while taking the medication in prescribed manner and prescribed amounts?
 - Not “illegal” use, so are protected.

Who is Protected? (cont.)

When is illegal use of drugs “current”?

No black & white definition.

Question is: is the use recent enough so that it is reasonable to assume that it is an ongoing problem?

More...

Who is Protected? (cont.)

When is illegal use of drugs “current”? (cont.)

- Many courts have found it reasonable to assume that illegal use of drugs was “current” *if*:
 - used within the last few months
 - risk of relapse/pattern of relapse may support conclusion that use is ongoing problem.

Who is Protected? (cont.)

What about relapse?

- What if relapse after 2 years of recovery?
Protected?

No.

Part 4

What Employment RIGHTS Do These Laws Give People With Past or Current Alcohol/Drug Problems?



What employment rights do these laws give?

The basics:

1. May not deny person a job or fire person just because s/he is in treatment or recovery.
2. Must provide “reasonable accommodation” for the individual with a disability.
3. Must keep health information confidential.
4. Limits on questions about disabilities.

What employment rights do these laws give? (cont.)

No employer may discriminate against a “qualified individual with a disability.”

What employment rights do these laws give? (cont.)

What does “**qualified**” mean?

- Able to **perform essential job duties** with or without “**reasonable accommodation.**” (See next slide.)



What employment rights do these laws give? (cont.)

What is a “reasonable accommodation”?

What employment rights do these laws give? (cont.)

Answer:

- Change(s) to work setting, hours or workplace rules made so that a person with a disability can perform job duties
- **Must not** cause employer “undue hardship” – e.g., significant cost, need for fundamental change to way company operates.

What employment rights do these laws give? (cont.)

Answer (cont.):

- Individual with a disability must ***request*** the reasonable accommodation unless employer is aware of the disability and the need for an accommodation.

What employment rights do these laws give? (cont.)

Answer (cont.):

- Employer and employee should engage in “**interactive process**,” where employer may –
 - Require reasonable documentation of disability and the need for an accommodation
 - Suggest a different accommodation than the one employee wants, if effective.

What employment rights do these laws give? (cont.)

Paula

- Works 7 am to 3 pm shift at garage
- Group counseling session 4 to 6 pm
- Job changes her work shift to 3 to 10 pm.

Do YOU think Paula is entitled to “reasonable accommodation” of shift change?

What employment rights do these laws give? (cont.)

ANSWER – Paula

It depends. Paula may ask her employer for a **reasonable accommodation** to allow her to change her shift so she can attend the group counseling session. The employer may need to provide her an accommodation, **but...**

What employment rights do these laws give? (cont.)

ANSWER – Paula (cont.)

Employer does not need to provide Paula with this accommodation if it would cause the employer “undue hardship” (i.e., would be too expensive or difficult for the employer).

And...

What employment rights do these laws give? (cont.)

ANSWER – Paula (cont.)

- Employer may suggest other accommodations (e.g., the overnight shift).
- Employer may ask Paula for documentation from her treatment provider.

What employment rights do these laws give? (cont.)

More reasonable accommodations:

- **Change in job duties**, if necessary to enable employee to perform essential job duties
- Allowing **leave of absence** for alcoholism treatment – especially if employer permits leave for individuals with other disabilities

What employment rights do these laws give? (cont.)

Family and Medical Leave Act

- Up to 12 weeks unpaid leave for “serious health condition”
- Illegal for employer to take action against employee for requesting or taking FMLA leave

What employment rights do these laws give? (cont.)

Employer has right to monitor recovery:

Example:

- require “fitness for duty” evaluation
- request documentation from treatment provider

What employment rights do these laws give? (cont.)

- Employer must maintain the **confidentiality** of health information – including alcohol & drug treatment information.

What employment rights do these laws give? (cont.)

- **This means:** if your drug or alcohol program gives your employer a report about your treatment, the supervisor may not share that information with your co-workers.

Part 5

Limits on Medical Questions/Exams

What may employers ask about your alcohol/drug history?



Limits on Medical Questions/Exams



There are different rules depending on the stage of employment.

Limits on Medical Questions/Exams

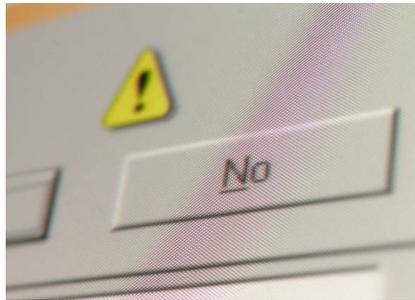
What may employers ask

BEFORE the job offer?

Limits on Medical Questions/Exams Before Job Offer

In general . . .

- **no** questions about disability (current or past)
- **no** questions about alcohol or drug dependence or treatment (current or past)



Limits on Medical Questions/Exams *Before Job Offer*

Example – Raul

Raul has been in recovery for just over a year. He is applying to work as a salesman in a store. The job application asks, “Have you ever had a drug or alcohol problem?”

Is this question legal?

Limits on Medical Questions/Exams *Before Job Offer*

ANSWER – Raul

No. Employers may not ask applicants about disabilities.

So what should Raul do?

Limits on Medical Questions/Exams *Before Job Offer*

ANSWER – Raul (cont.)

- Lying is never a good idea – employers can legally deny someone a job for falsifying an application.
- It's hard to know what to do when you encounter an illegal question.

More...

Limits on Medical Questions/Exams *Before Job Offer*

ANSWER – Raul (cont.)

Raul could-

- ask to take the application with him to fill out, and
- then seek legal counsel who may be able to intervene and advise the employer that the question is illegal.

More...

Limits on Medical Questions/Exams *Before Job Offer*

ANSWER – Raul (cont.)

- **OR** Raul could answer the question truthfully and explain that he is in recovery, knowing that he is protected by the ADA if the employer discriminates against him based on his answer to this question.

Limits on Medical Questions/Exams *Before Job Offer*

Raul

The application also asks, "**Do you currently use drugs or drink alcohol?**"

Is this question legal? Does Raul have to answer it?

Limits on Medical Questions/Exams *Before Job Offer*

ANSWER – Raul

Yes. It is permissible for employers to ask applicants if they currently use illegal drugs or drink alcohol because use doesn't mean addiction.

BUT ...

Limits on Medical Questions/Exams *Before Job Offer*

ANSWER – Raul

BUT it is not okay to ask how much or how often one drinks alcohol because those questions can elicit information revealing that a person has a disability (e.g., alcohol or drug dependence).

Limits on Medical Questions/Exams *Before Job Offer* (cont.)

May employers give **drug tests** before a job offer?



Limits on Medical Questions/Exams Before Job Offer (cont.)

ANSWER

Yes. Employer may conduct drug tests before hiring and may condition employment on a clean test (i.e., test revealing no illegal use of drugs).

Drug tests are not considered to be a medical exam.

Limits on Medical Questions/Exams *Before Job Offer* (cont.)

- It is very important to disclose methadone and/or other prescribed medication ***prior to*** drug test.
- Give lab letter from physician verifying prescription(s). Letter should attest to participation in methadone treatment if methadone is being taken to treat opiate dependence.
- Have tester document the medications prescribed.
- Lab may not disclose prescriptions to employer.

Limits on Medical Questions/Exams *After* Job Offer – Before Start

What about AFTER the job offer?
May the employer ask more
questions then?

Limits on Medical Questions/Exams Case Study (cont.)

Raul

What if Raul is offered the job, but the company tells him he must pass a medical examination and a drug test before being able to start work.

Is the company allowed to require a medical exam and drug test at this stage?

Limits on Medical Questions/Exams Case Study (cont.)

ANSWER – Raul

Yes. Once an employer offers an applicant a job, the employer is allowed to require the applicant to pass a medical examination and drug test *as long as* everyone offered the position is required to pass the same exam.

More on next slide...

Limits on Medical Questions/Exams Case Study (cont.)

ANSWER – Raul (cont.)

For example, in this case the employer could not require Raul to undergo the medical exam and drug test just because he disclosed that he is in recovery.

Limits on Medical Questions/Exams of *Employees*

What about after someone starts working? What may employers find out about ***employees***' disabilities?

Limits on Medical Questions/Exams of *Employees* (cont.)

Employers may require medical exams and ask *employees* about disabilities only if the exam or question is “**job-related and consistent with business necessity.**”

Limits on Medical Questions/Exams of *Employees* (cont.)

When would a medical exam or inquiry be justified?

Examples:

- Employee routinely nods off at work, which raises questions about drug use
- Employee smells of alcohol after lunch every day

Part 6

Responding to Violations of Your Rights Under Anti-Discrimination Laws

REMEDIES



Robert

When Robert asked his employer for a leave of absence for alcoholism treatment, his employer fired him. Robert thinks that his employer violated the ADA, but feels that because he can't afford a lawyer, there is nothing he can do.

Does Robert need a lawyer to exercise his rights?

REMEDIES

Informal resolution

- Always worthwhile to try **informal** resolution .
- Attorney assistance is valuable, but you can do it on your own too.

REMEDIES

Robert can EDUCATE the employer

- Violation of anti-discrimination laws is often due to ignorance.
- Educating an employer can sometimes result in the changes you want.

REMEDIES (cont.)



FORMAL CHALLENGE

You can challenge the violation of your rights in two **formal** ways:

1. **File a discrimination complaint with the federal government agency** that is charged with enforcing the anti-discrimination laws (e.g., federal Equal Employment Opportunity Commission). You do not need a lawyer for this “administrative” complaint.

REMEDIES (cont.)



Formal challenge (cont.)

- 2. In most cases, you also can file a discrimination lawsuit in federal court.**

A lawyer is generally critical to success in a lawsuit.

REMEDIES (cont.)

NOTE: To bring an employment discrimination lawsuit under the ADA, **you must first file** an administrative complaint with the U.S. Equal Opportunity Employment Commission (EEOC).

Visit <http://www.eeoc.gov> to find the EEOC office nearest you.

REMEDIES (cont.)

Do not sleep on your rights!



- **Learn deadlines** for filing complaints with government agencies *and* filing lawsuits in court.

Time limit for the EEOC is generally 180 days.

Or 300 days if covered by state or local anti-discrimination law too.

REMEDIES (cont.)

Remember!



Your state and city may have additional discrimination laws and procedures to enforce them.

Check with your state/local agency to learn about any time limits.

HAVE QUESTIONS?

Visit our website. We will post answers to questions submitted during today's webinar.

Go to <http://www.lac.org>. Click on "Trainings and Technical Assistance" and look for the "training materials" section.

WANT MORE INFORMATION?

Visit the websites of:

- *Partners for Recovery* (PFR)
<http://www.pfr.samhsa.gov>
- Legal Action Center, <http://www.lac.org>
- Both websites contain the Know your Rights materials developed under PFR and other useful information.

Thank you

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