



**Questions and Answers from
Webinar: *Know Your Rights: Employment Discrimination Against
People with Alcohol/Drug Histories***

NOTE: We answered a substantial number of the questions received; however, we did not answer questions that did not directly relate to the topics of the webinar series. We also did not answer questions that were unclear – which can easily happen in a webinar because the presenter does not know at what point the question was asked. We apologize, but hope that the many questions we did answer will be helpful.

Questions Regarding Who Must Comply With the ADA and Other Federal Laws Prohibiting Disability-Based Discrimination

Q: May employers with fewer than 15 employees discriminate against an employee based on race, age, etc.?

A: The 15-employee threshold discussed during the Employment Discrimination webinar was limited to the Americans with Disabilities Act (ADA), which prohibits private employers from discriminating based on a *disability* (such as a drug or alcohol history). Race and age discrimination are covered under other federal laws that may have their own employee thresholds. See the website of the U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/facts/qanda.html>.

Q: Is the ADA’s 15-employer limit applicable to nonprofits receiving federal funds under the Rehabilitation Act?

A: The ADA’s 15-employer limit applies to any private employer – regardless of whether the employer is also covered by the Rehabilitation Act because it receives federal funds. An entity may be liable under both laws.

Questions Regarding Who Has a “Disability”

Q: If a person is actively using alcohol, would s/he be protected since alcohol is not illegal?

A: Maybe. Alcohol use alone does not mean someone has a “disability” under federal anti-discrimination laws. However, if the person has an alcohol addiction that substantially limits one or more major life activities, then yes, that person is protected. But remember that individuals with a disability also must be “qualified” for employment,

with or without a reasonable accommodation. If someone is not adequately performing his/her job, then the fact that the person has a disability does not excuse the poor job performance.

Q: Is an employee who currently abuses *alcohol* during non-working hours protected against discrimination under the law?

A: Yes, assuming the employee's alcohol abuse constitutes a "disability" because it substantially limits or once limited one or more major life activities, or the employer regarded it as substantially limiting one or more major life activities and that the person is adequately performing his/her job.

Q: What if she became addicted to a prescription drug while under a doctor's care?

We assume you are asking whether such person would be excluded from ADA protection because of current "illegal use of drugs." If someone became addicted to a prescription drug while under a doctor's care, she could still be protected by the ADA (and not considered to currently engaging in the illegal use of drugs) if she were using the drugs as directed. The use of drugs would not be "illegal." However, if the person were using the prescription medication in any way other than prescribed, this would be considered current illegal use of drugs, and the person would *not* be protected.

Q: What is needed to establish that a person who achieved recovery without treatment was, at one time, substantially limited in a major life activity?

A: There are many ways people can prove that their alcohol/drug addiction once substantially limited one or more major life activities. For example, someone could testify or write an affidavit about how his/her own addiction, at one time, made him unable to care for himself or his family or substantially limited one or more major bodily functions. The person also could provide affidavits or testimony of family members or others. It is not necessary to provide evidence from a treatment program, though that certainly can be helpful.

Q: If someone is over 20 years in recovery, are they still covered under ADA?

A: Yes. The ADA considers an individual to have a "disability" even if the individual does not have a current impairment, but only a "record of" an impairment (e.g., alcohol or drug addiction) that substantially limited one or more major life activities. The individual also is protected if the employer "regards" the individual as having such an impairment.

Q: If a person has been in treatment for a year and is protected by the ADA, then has a relapse and has current usage, is s/he still protected?

A: Yes, for an alcohol relapse but probably not if the relapse involves the illegal use of drugs. While there is no clear answer on what constitutes "current" illegal drug

use, a recent relapse (e.g. within the last few weeks or months), is likely going to be deemed “current,” and therefore the individual would not be protected under the ADA.

Q: Can a person who has been in recovery, but then relapses and tests positive to a drug test, still be protected?

A: No, assuming that the negative job action was based on the person’s current illegal use of drugs. See the answer to the previous question.

Q: Being an "illegal" drug user, past or present, implies a person broke the law at some point. The ADA and the ability to dismiss on this basis are in direct conflict. Couldn't an employer dismiss a person based on past illegal behavior?

A: We believe you are asking how to reconcile the ADA’s prohibition on firing someone because of a past drug addiction (including illegal drug use), with the ability of employers to fire people because of the illegal conduct itself. Couldn’t an employer avoid violating the ADA by saying that the reason for the termination is the illegal conduct and not the former drug addiction? The answer is that if the termination is really based on the illegal conduct, and not the disability, then the termination would not violate the ADA. Note, however, that in some states, it is also illegal discrimination to fire someone based on a criminal conviction. Those issues are covered in a different webinar in our series, “*Know Your Rights: Legal Rights of People with Criminal Records.*”

Q: Is there case law that examines the "beyond three months as current use" language?

A: There is some case law examining what constitutes “current” illegal use of drugs. Courts look at a variety of factors, including patterns of relapse and severity and length of addiction.

Q: Why is the person who relapses with alcohol still protected, while someone with a drug relapse is no longer protected under the ADA?

A: If you are asking why, in writing these laws, Congress excluded from protection people who currently engage in the illegal use of drugs, the short answer is that Congress historically has been unwilling to enact laws that are seen as supporting and protecting current illegal drug users.

Q: Is an offender in a community corrections residential program in treatment covered?

Yes, if that person can prove the essential requirements of “disability” – a past or current alcohol problem or past drug addiction that substantially limits, or once limited, one or more major life activities, or that an employer regarded the person as having such an impairment. The mere fact that someone is still undergoing treatment is not enough to

disqualify someone as a “current” illegal user of drugs. If someone is only recently in treatment for a drug addiction, however, s/he may be seen as “currently” engaging in the illegal use of drugs.

Questions Regarding What Type of Discrimination is Illegal

Q: Is the employer in violation of the law if he/she is aware of the disability and the employee has requested an accommodation, which is reasonable, but the employer does not provide the accommodation necessary for the person to perform the job?

A: Yes, assuming the requested accommodation does not impose an undue hardship (e.g. cost the employer too much money). But remember, the employer may also propose an alternate accommodation. It does not necessarily have to be the one the person requested.

Q: Who is considered to be the employer? The company president? Direct supervisor?

A: The “employer” could be any number of these people depending on how the company is structured. In all likelihood, a decision to discriminate by terminating employment or refusing to hire someone with a disability by a supervisor or even someone in the human resources department could be attributed to the “employer.” So it’s important for all employees to know and understand a company’s policies on these issues.

Q: Although they can't ask about alcohol or drugs on job application, employers often do ask about convictions and that often gives the same information about having a disability, correct?

A: Not necessarily. A conviction related to drug or alcohol use does not necessarily mean the job applicant has a current or past drug or alcohol problem. For example, some individuals sell illegal drugs even though they, themselves, do not use them. Or someone might have a DUI conviction and not be addicted to or abuse alcohol. But, on the other hand, an employer might infer that individuals with such convictions have an alcohol/drug problem. Note that some states limit what employers may ask about a criminal history and how they may use the information. Those issues are covered in a different webinar in our series, “*Know Your Rights: Legal Rights of People with Criminal Records.*”

Q: When interviewing someone for the position of drug/alcohol counselor, may the interviewer ask if the applicant is in recovery?

Not if the question is asked before a conditional job offer has been made. While being in recovery may be an asset for a drug and alcohol counselor, drug and alcohol programs must also comply with the federal anti-discrimination laws and may not ask about a

person's disability (in this case, alcoholism or past drug addiction) during the application process. An employer (including alcohol/drug programs) may invite voluntary self-identification as part of an affirmative action program, but in so doing, must state clearly on any written questionnaire or state orally that the information will be used solely in connection with its affirmative action efforts, *and* state clearly that the information is being requested on a voluntary basis, that it will be kept confidential, and will be used in accordance with the ADA. Once a conditional job offer is made, however, programs may ask whether someone is in recovery as long as they ask it of all persons in the same job category.

Q: If the employer is a treatment facility, can they set a minimum requirement for years of sobriety with alcohol or drugs?

No. Any type of flat rule requiring a minimum number of years of sobriety is potentially discriminatory because it does not allow for individualized consideration. This same issue was discussed in a different webinar in our series, *Know Your Rights: Housing and Other Forms of Discrimination Against Individuals with Alcohol/Drug Histories*, in the context of State-issued credentials or certification for alcohol/drug counselors.

Q: If an employee who has had repeated performance problems has not yet been terminated but the supervisor is considering this option, and then the employee tests positive for illegal drugs after an employer required random drug test, and discloses at this time s/he has a disability, what are the employer's options?

A: An employer in this situation could, in all likelihood, legally terminate the employee without violating federal anti-discrimination laws for two legitimate reasons: (1) repeated poor performance on the job; and (2) the positive drug test. Both of these grounds are legitimate even if the employee disclosed his/her disability.

Q: Do state laws always supercede federal laws on discrimination in the workplace?

A: No. People may avail themselves of whichever law provides the greatest protection. For example, if a state or local law provides greater protections to persons with disabilities than the federal laws, then people may exercise their rights under these state or local law despite the weaker federal law. The converse is also true.

Q: Our problem seems to be with getting people the jobs in the first place. What can you do if someone is denied a job based on age/drug history discrimination, but the employer says another person was better for the job, or gives no response at all?

A: It can be quite frustrating when you believe that someone's disability is the real basis for a negative employment decision, but you have no proof. Employers are within their rights to hire someone who is "better qualified" for a job. Unless the employer has done something to suggest that the real reason for not hiring a person is their disability (i.e., drug or alcohol history) or some other illegal reason, such as race,

religion, or age, then there is little an applicant can do. Many states are “at will” states, which means the employer may hire or fire any person as long as the reason is not illegal (in this case discriminatory). You may wish to have a meeting with some of the employers in your area to find out whether they are amenable to hiring people in recovery. You also should ensure that employers are not asking illegal questions in order to ascertain an individual’s disability.

Q: Is there any remedy for employers who discriminate but does not do so blatantly, i.e., the job offer disappears for a vague reason?

A: Not if you do not have evidence of discrimination. See answer to the previous and following questions.

Q: How do you prove the discrimination? Most companies will not say “I am not going to hire you because of disability.”

A: There are different ways people can prove that discrimination occurred even if the employer does not admit that the person’s disability was the reason for the negative employment action. For example, someone can show that people with similar qualifications or work performance histories who did not have that disability were not subject to the same negative employment action. To be realistic, it is not usually easy to gather such proof, but in any many cases, people do succeed with such indirect proof of discrimination. People who are not sure whether they have enough evidence, or can gather enough evidence, of discrimination, should get the advice of a lawyer or their local EEOC office or state/local human rights agency. These organizations can better help a person determine whether she or he may have faced discrimination.

Q: Did the ADA Amendment Acts that went into effect on 1/1/09 impact a person’s ability to collect disability insurance benefits if in recovery from alcohol/substance abuse?

A: Not clear. While there is no specific provision in the ADA Amendments Act pertaining to discrimination in insurance coverage, the new provisions do require courts to interpret the ADA’s protections broadly, and they make it easier for anyone with a disability to establish that they are protected by the ADA. It is possible that the amendments’ mandate to interpret the ADA broadly also will help people challenge the denial of disability insurance benefits. We cannot provide more details without knowing more about the particular situation you describe.

Q: We are a nonprofit agency that provides job training and receive government funding. Should we remove questions related to current and past substance use habits from our admission application?

A: The limitations on pre-employment questions apply to employers and to postsecondary education institutions providing “vocational education programs.” Without more information, it’s not clear whether your job training program would be

considered a “vocational educational program.” Even though your question may not violate federal anti-discrimination laws, however, you should still reevaluate the need for it. Note also that even though pre-employment and pre-admission inquiries about disability are generally prohibited, such inquiry is permitted when the employer or recipient of federal financial assistance is taking remedial action to correct the effects of past discrimination, subject to certain limitations.

Q: If an employee tests positive for illegal drugs, completes a return to work agreement and then tests positive a second time, even if they participated in treatment for an addiction, can the employer terminate their employment because s/he is not "fit for duty?"

A: The ADA does not prohibit an employer for terminating an employee for testing positive for illegal drugs and/or violating the terms of a “second chance” or other agreement governing the terms of the employee’s return to work. But make sure to carefully review the return to work agreement to see what protections, if any, may be in place for the employee.

Q: If a person was accepted to a training program and has been in the program for three weeks, can the program tell her she cannot continue because she answered “yes” to the question, “do you have an addiction to any illegal drugs?”

A: Yes, assuming the “training program” you are referring to is a work-related training program. This is because federal anti-discrimination laws do not protect people from discrimination based on their current illegal use of drugs. It does not matter that the person here answered truthfully or that the employer/training program ignored it at first, even though this understandably seems unfair.

Q: Since THC stays in the users system for at least 90 days from the last day of use, if an employee has not used at work, can the employer terminate that individual for a positive urine test?

A: While there are some ways to challenge an employer’s termination for a positive drug test, the fact that the illegal drugs were not used at work and were used many weeks earlier, is not a valid basis for challenging the termination. Ways to successfully challenge a job termination based on a positive drug test include showing that the test was defective or that the substance that appeared in the test was taken legally, pursuant to prescription.

Q: Are there hostile work environment claims under ADA?

A: Yes. Though the ADA itself does not expressly prohibit harassment (hostile work environment), some courts have held that the ADA does prohibit harassment. This is because the ADA is modeled after Title VII of the Civil Rights Act, which has been construed to prohibit harassment.

Q: How do the HIPAA laws come into play with all of this?

A: We are not sure exactly what you mean, but assume that you are asking how HIPAA applies in the workplace. HIPAA is the federal law that protects the privacy of “personal health information” maintained by some health care providers, health plans and healthcare clearing houses. HIPAA generally does *not* apply to information that employers obtain or maintain about employees and job applicants. However, HIPAA does have a few workplace impacts. For example, outside health care providers who perform job-related examinations generally will need your written consent before disclosing your “personal health information” to your employer.

Questions Regarding Exercising Your Rights

Q: I have a person who filed five EEOC complaints and one New York State Human Rights complaint. The consumer never received the proper representation due to not being able to obtain all correct information from the agency. What can he do to obtain justice?

A: Your question is probably better directed at the relevant agencies who received your clients’ complaints. Your client also might benefit from speaking to an attorney who specializes in employment discrimination law and who may be able to determine what went wrong with the complaints and whether it is possible to file a new one that may have better success. To find legal representation, your client can visit <http://www.lawhelp.org> or contact your local or state bar association.

Q: I had a customer who was refused a job because of past alcohol use. The EEOC told him the ADA does not cover alcohol addictions. What should the customer do as his next step?

A: The ADA does protect individuals with a past alcohol addiction, though as with any disability, the applicant would need to prove that his/her past alcohol addiction substantially impaired one or more major life activities or the employer regarded it as such. If the client is unsatisfied with the EEOC’s response, s/he can contact a local attorney (see below for information about finding an attorney) or contact the state or local human rights agency for further assistance. The customer could also provide the EEOC with a copy of the federal government’s brochure, “*Are You in Recovery from Alcohol or Drug Problems? Know Your Rights,*” which explains how the ADA applies to individuals in recovery.

Q: Is there a statute of limitations on violations of the ADA?

A: Yes. Recall that you may not file a lawsuit in court challenging employment discrimination under the ADA unless you first filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC deadline is 180 days from the date of the violation, unless the charge is also covered by a state or local anti-

discrimination law, in which case the deadline is extended to 300 days. If the EEOC decides not to pursue the case and issues a “right to sue” letter, then you have 90 days to file a lawsuit in court.

Q: Is there any recourse if you miss the 180 day period for filing a complaint with the Equal Employment Opportunity Commission?

A: The deadline to file a complaint with the EEOC for violation of the ADA is 180 days, but is extended to 300 days if your state and/or local laws cover this type of discrimination. If state or local laws do cover this type of discrimination, you also may be able to file with the state or local agencies that enforce those laws, and their deadlines may be different. If you miss all of the filing deadlines, however, then there is no recourse. More information is on the EEOC’s website at http://eoc.gov/charge/overview_charge_filing.html.

Q: Is the time limit deadline for filing a complaint with the Equal Employment Opportunity Commission applicable to the incident or to the time you *realize* your rights were violated?

Time limits (a.k.a statutes of limitations) begin running from the date the discrimination occurred, not from the time or date you realize it.

Q: Is the deadline for filing a complaint with a City human rights agency according to the city which the employee lives or the city in which the employee works?

A: The deadline for filing state or local discrimination complaints is usually determined by the city or state in which the person works or where the discrimination occurred. A complaint for violations of federal law (e.g. ADA or Rehabilitation Act) can also be filed in the region where the employee works.

Q: Are there legal services that offer free assistance to low income employees that wish to file a complaint with the EEOC?

A: It is best to check with your local bar association, EEOC office or other local or state human rights agencies to see what resources are available in your area. You can also visit <http://www.lawhelp.org>. Resources vary greatly from region to region.

Q: We would like to file in federal court. We need a contact for consultation.

A: See answer to the prior question.

Questions Regarding Discrimination Based on a Criminal Record

Q: May a landlord evict a tenant for an arrest for selling drugs out of his apartment?

A: The answer depends on the type of housing at issue and, in many cases, whether the arrest resulted in a criminal conviction. The presence of drugs in an apartment, may be enough to lawfully evict a person, especially in public housing. For public housing, consult your public housing agency's Administrative Plan. For private housing, consult your state and localities' housing and eviction laws .

The important distinction here is that a person who has an addiction cannot be discriminated against based on that addiction alone – i.e. based on *status* – but if the addiction results in objectionable *conduct*, eviction may be legal.

Q: To clarify the landlord question: must there be a conviction to evict or can a simple arrest warrant a legal eviction?

A: See answer to the prior question.

Q: Can an employer not hire someone because they have a felony?

A: Your question is about employment discrimination against people with criminal conviction histories, not disabilities. Those issues are covered in a different webinar of our series, “*Know Your Rights: Legal Rights of People with Criminal Records*,” available on our website.

Q: What is the legal right for a person who has a DUI on his record, applies for a job that he has been working as a temp for 6 or more months with an outstanding record and the job does not require the person to drive the company vehicle or drive on company business?

A: Your question is about employment discrimination against people with criminal conviction histories, not disabilities. Those issues are covered in a different webinar of our series, “*Know Your Rights: Legal Rights of People with Criminal Records*.”

Q: Can we learn how to do fingerprints to send for people's legal histories (rap sheets)? Can we get a waiver for indigent/low income clients for the fee?

A: Your question is about employment discrimination against people with criminal conviction histories, not disabilities. Those issues are covered in a different webinar of our series, “*Know Your Rights: Legal Rights of People with Criminal Records*.”