

# PUBLICATION

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## On Drugs and at Work: Keeping Your Work Force Safe and ADA-Compliant in the Opioid Abuse Problem

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According to research conducted by the Mayo Clinic, seventy percent of Americans are on at least one prescription drug, and more than half receive at least two prescriptions. Twenty percent of U.S. patients are on five or more prescription medications. This same study found that the most common prescription drug is cholesterol-lowering medication followed by anti-depressants. The third most common are opioids. What does that mean in terms of how many Americans are using prescription opioid painkillers? A *Consumer Reports* survey found that, of the Americans who use prescription drugs, about one in three take prescription opioids. These statistics necessarily mean that a significant portion of employees are reporting to work under the influence of prescription opioids that carry worrisome side effects of drowsiness, dizziness and impaired cognitive ability. Notably, the American College of Occupational and Environmental Medicine (ACOEM) updated its opioid practice guidelines in 2014 to advise against the use of opioids in safety-sensitive jobs.

At the same time, however, the Equal Employment Opportunity Commission (EEOC) has aggressively gone after companies that prohibit employees from working in a class of jobs merely because they take prescription opioids on the grounds that such policies violate the Americans with Disabilities Act (ADA). So what's an employer to do? Follow these five tips to keep your workforce safe and ADA-compliant.

1. **Be wary of overly expansive pre-employment drug screens.** The ADA prohibits pre-employment medical examination or medical inquiries that are likely to yield information about disabilities. The ADA expressly exempts tests which are designed to detect the illegal use of drugs. However, drug testing has become increasingly sophisticated with laboratory companies offering tests that can detect a variety of drugs – both legal and illegal. Employers need to ensure that they can prove the drug test is designed to detect the illegal substances and not medications, which could be readily linked to a disabling condition.
2. **Keep drug test results confidential.** The ADA and implementing regulations only require that employers keep results from a medical examination or inquiry, such as a post-offer medical exam, in a separate file. Because tests to detect illegal drugs are expressly excluded from the definition of a medical exam under the ADA, it does not necessarily violate the law to keep drug screen results in the personnel file. However, if the test or any information received from the employee thereafter reveals prescription medications for a disabling condition, employers should keep that information in a separate, confidential medical file.
3. **Leave follow-up inquiries to a designated medical review officer.** The EEOC's published guidance provides that inquiries into what medications an employee is taking is likely to reveal information about an employee's disability. At the same time, however, the EEOC acknowledges that it is permissible to ask an employee who fails a drug screen a follow-up question as to whether the employee is taking prescribed medications that may have caused the positive result. Any questions beyond that gets into dangerous territory. The best practice is to delegate those inquiries to a trained medical review officer. This way an employer can insulate itself from knowledge about an employee's specific medications or medical conditions.

4. **Avoid blanket prohibitions against prescription medications.** Even companies with safety-sensitive work have found themselves on the wrong end of an EEOC lawsuit because they refused to hire applicants taking prescription opioids. Employers must show that employees will pose a "direct threat" to themselves or others to avoid hiring someone who takes prescription opioids for a disabling condition. The regulations provide that a "direct threat" determination must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. The assessment must be based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. Blanket prohibitions do not allow for an individualized assessment and thus should be avoided unless there are other applicable regulations (e.g., Department of Transportation regulations for commercial drivers) that prohibit the use of certain medications.
5. **Conduct individualized assessments for employees who appear to be impaired.** If an employee appears visibly impaired and drugs are suspected, employers should not immediately terminate or interrogate the employee about his or her medical conditions. Such actions could lead to a "regarded as" disability discrimination claim. If the impairment is obvious so that one could reasonably conclude the employee poses a safety risk, it is permissible to refer the employee to "for cause" drug testing or to have the employee medically examined at the employer's expense.

In sum, employers should exercise extreme caution when questioning employees about medical conditions and prescription medications. Any employment actions taken, based upon prescription medications, should be carefully weighed and discussed with legal counsel.