

*Presenting a live 90-minute webinar with interactive Q&A*

## **ADA and FMLA Compliance Challenges With Employee Substance Abuse**

Minimizing EEOC and DOL Enforcement Actions and Worker Lawsuits On Accommodation and Leave

---

WEDNESDAY, FEBRUARY 8, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

---

Today's faculty features:

Joyce Walker-Jones, Senior Attorney Advisor, ADA Policy Division,  
Equal Employment Opportunity Commission, Washington, D.C.

Katherine C. Huibonhoa, Partner, **Paul Hastings Janofsky & Walker**, San Francisco

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 10.**

## *Conference Materials*

---

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the + sign next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- Close the notification box
- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the SEND button beside the box

## *Tips for Optimal Quality*

---

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-258-2056** and enter your PIN -when prompted. Otherwise, please **send us a chat** or e-mail **[sound@straffordpub.com](mailto:sound@straffordpub.com)** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

# Substance Abuse Under the ADA Amendments Act (ADAAA)

Joyce Walker-Jones  
Office of Legal Counsel  
EEOC



# Part I: Legal Principles



A Brief Overview

# Outline

---

## ■ Part I:

- How does Title I of the ADA apply to drug and alcohol use in the workplace?
- What changes were made to the ADA by the amendments?
- Is an individual who uses alcohol or drugs protected by the ADA?

# Outline (cont.)

---

## ■ Part II:

- Does the ADA restrict an employer's ability to test applicants and employees for substance use or abuse?
- May an employer discipline an employee for performance or conduct issues stemming from substance use or abuse?
- When does an employer have to accommodate a substance abuser?



# Facts About Title I of the ADA

---

- Applies to employers with **15 or more** employees
- Prohibits discrimination based on **disability** in all aspects of employment
- Requires employers to provide reasonable accommodation to qualified **applicants** and employees with disabilities (**no minimum work requirement**)
- Provides that an individual with a disability may be entitled to **more than 12 weeks** of leave as a **reasonable accommodation** absent undue hardship

# Facts About Title I of the ADA (cont.)

---

- Limits disability-related inquiries and medical examinations of applicants and employees at three stages: pre-offer, post offer, and during employment
- Allows employers to maintain qualification standards related to performance and conduct, including requiring employers to refrain from drinking during working hours
- Permits employers to adopt or administer reasonable policies or procedures, including drug testing, designed to ensure that employees are not currently engaging in the illegal use of drugs and/or are participating in a drug treatment program if they are recent users
- Permits employers to comply with federal regulations regarding the illegal use of drugs and alcohol use, such as regulations established by the Department of Defense, the Nuclear Regulatory Commission, or the Department of Transportation

# Recent Changes to the ADA

---

- Congress intended the ADA definition of disability to be construed broadly but courts were finding too many people outside the ADA's protections
- Congress wanted to make it much easier for persons with a wide range of impairments to establish disability without much analysis

# Definition of “Disability”

---

- Same basic three-part definition:
  - A physical or mental impairment that substantially limits a major life activity
  - A record of such an impairment
  - Being regarded as having a disability
- Congress changed the meanings of key terms used in these definitions

# Major Life Activities

---

- Include **but are not limited**

to:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Learning
- Reading
- Concentrating
- Thinking
- Interacting with others
- Working

# Major Life Activities Also Include Major Bodily Functions

---

- New category of major life activities will make it easier for individuals with many different types of impairments to establish disability
  - Examples include functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, **neurological, brain,** respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, reproductive
  - Also includes operations of an individual organ within a body system, such as the operation of **kidney, liver, or pancreas**

# Major Life Activities (cont.)

---

- Individual can show substantial limitation (or record of) in just **one** major life activity **from either category**
- Regulations state that in determining other examples of major life activities, “the term ‘major’ shall not be interpreted strictly to create a demanding standard for disability”
- Whether something is a major life activity is not determined by reference to whether it is of “central importance to daily life”

# “Record of” a Disability

---

- 2<sup>nd</sup> definition of disability
- All of the changes made to 1<sup>st</sup> definition apply to “record of” prong
- Individuals with “record of” disability may be entitled to reasonable accommodation



# “Regarded as” Having a Disability

---

- 3rd definition of disability completely new
- Covers anyone subjected to an action “prohibited by this Act” because of an **actual or perceived** physical or mental impairment
- For example, applies to actions such as hiring, demotion, promotion, termination, discipline, annual evaluation, compensation decisions

# “Regarded as” (cont.)

---

- Regarded as coverage no longer requires a showing that an employer **believed** the impairment substantially limited a major life activity
- Only two elements:
  - Employer took employment action
  - Because of an individual’s actual or perceived impairment

# “Regarded as” (cont.)

---

- Employer can challenge a claim it regarded person as having a disability by showing that the impairment at issue is **both** transitory and minor
- Transitory: Lasting six months or less
- Whether impairment is transitory and minor determined objectively

# “Regarded as” (cont.)

---

- Regarding person as having a disability does not mean employer violated the ADA
- Employer may defend its employment action and if the action taken for lawful reasons, then no discrimination
- Individuals covered only under “regarded as” definition are **not** entitled to reasonable accommodation

# Does the ADA Protect Individuals “Currently Engaging in the Illegal Use of Drugs?”

## ■ No!

- Despite the ADAAA’s broadening of the definition of disability, a person who is currently using drugs illegally is still **excluded** from the definition of “qualified individual with a disability.”
- “Drug” means a “controlled substance,” as defined in schedules I through V of Section 202 of the **Controlled Substances Act (CSA)**.
- “Illegal use of drugs” means the use of drugs the possession of which is unlawful under the CSA (**including medical marijuana**). This term does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the CSA or other provisions of federal law.

# What Constitutes “Current” Illegal Use?

- EEOC has stated that “current” in the context of a drug user means “recently enough” to justify the employer’s reasonable belief that drug use is an ongoing problem. See Appendix to 29 C.F.R. §1630.3.
- In Disbennett v. Millcraft Paper, 2008 WL 4372657 (S.D. Ohio 2008), the court noted that the term “currently engaging” is “not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before the employment act in question.” Rather, the provision is “intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.”

# Does the ADA Protect an Individual With a “Record” of Drug Addiction or Who Is “Regarded as” Having Such Addiction?

---

## ■ Yes!

The terms “disability” and “qualified individual with a disability” do **not** exclude an individual who:

- Has successfully completed a supervised drug rehabilitation program and is **no longer engaging** in the illegal use of drugs;
- Is participating in a supervised rehabilitation program and is no longer engaging in such use;
- Is **erroneously regarded** as engaging in such use, but is not engaging in such use.

# Does the ADA Protect Current and Former Alcohol Users?

## ■ Yes!

- In contrast to the exclusion of individuals currently engaging in the illegal use of drugs, alcohol users are **not** automatically denied protection.
- EEOC regulations state that: “Individuals disabled by **alcoholism** are entitled to the same protections accorded other individuals with disabilities.”
- Although courts generally have declined to consider alcoholism a “per se” disability, an alcoholic is a person with a disability when the condition (i.e., impairment) substantially limits him in at least one major life activity from either category.
- The ADA also protects individuals who do not currently drink alcohol but have a record of alcoholism.



# Ames v. Home Depot U.S.A., Inc., 2011 WL 31855 (7th Cir. 2011)

---

- Diane Ames sued Home Depot after she was terminated for coming to work under the influence of alcohol and failing a blood alcohol test
  
- **Facts:**
  - When Ames was hired, she received a copy of HD's Code of Conduct, which listed "Major Work Rule Violations" terminable upon a first offense. One of these violations was having detectable levels of alcohol as determined by a blood alcohol test.
  - After working for almost 5 years without incident, Ames told a store manager that she had an alcohol problem and needed assistance through HD's Employee Assistance Program (EAP). At this point, her alcohol problem had not yet affected her work.

# Ames v. Home Depot (cont.)

- After a one-month leave of absence, Ames passed a drug and alcohol test and was allowed to return to work.
- Shortly after returning to work, Ames was pulled over by the police and arrested for driving under the influence of alcohol.
- One month later when Ames returned to work, an assistant manager reported that she was acting differently, smelled of alcohol, and was slurring her words. She was given a blood test that later tested positive for alcohol.
- Following the test, Ames grew increasingly anxious that she would lose her job if the test result was positive and began drinking more.
- HD fired her for violating its substance abuse policy.

# Ames v. Home Depot (cont.)

## ■ Court's holding:

- A substantial limitation is a limitation that renders an individual unable to perform a major life activity or that “significant restricts an individual in performing a major life activity.”
- Ames cannot show that her alcoholism is an ADA disability because there is no evidence that it substantially limited any of her major life activities and she insisted that her alcohol problem did not affect her work performance.
- Ames also did not establish that she had a “serious health condition” under the FMLA.

# Ames v. Home Depot (cont.)

- How case may have been decided differently under the ADAAA:
  - Ames might have argued that she only had to show that her alcoholism substantially limited one or more major life activities and did not have to show that it **prevented** or **severely restricted** her in such performance.
  - She might also have argued that she was substantially limited in a **major bodily function** and, therefore, did not have to show that she was limited in a major life activity in the the first category (e.g., caring for herself, sleeping, eating, working).

# What About Nicotine Addiction?

---

- While conditions that develop as a result of smoking (e.g., emphysema, lung cancer) would certainly be considered a disability under the ADAAA, EEOC has not taken a position on whether addiction to nicotine itself is an impairment or a disability.
- Arguably, nicotine addiction may be an impairment; however, it would seem unlikely that a rejected applicant or terminated employee could demonstrate that the addiction substantially limits any major life activities.
- The most likely theory of coverage would be under the “regarded as” prong of the definition of disability.

**ADA and FMLA Compliance Challenges  
with Employee Substance Abuse**

**Katherine C. Huibonhoa**

**(415) 856-7035**

**[katherinehuibonhoa@paulhastings.com](mailto:katherinehuibonhoa@paulhastings.com)**

**February 8, 2012**

# Overview Of The Family Medical Leave Act (FMLA)

- Qualified employees are entitled to 12 weeks of unpaid leave per year for qualifying events:
  - birth of a child
  - adoption of a child or placement of a foster child
  - care of a spouse, parent, or child with a serious health condition
  - recovery from an employee's own serious health condition
  - Military exigency leave
  - Military caregiver leave (26 weeks)

- Employer must maintain pre-existing health coverage
- Employer must reinstate to the same or an equivalent job position



- Employers with 50 or more employees
  
- Employees who:
  - have worked at least 12 months for the employer (even if not consecutive)
  - have worked at least 1,250 hours during the 12 months immediately preceding the leave
  - are employed at a worksite where 50+ employees are employed by the same employer within 75 miles of that worksite

# FMLA Leave For Employee's Own Serious Health Condition

- Leave is available to an employee rendered incapable of performing the functions of his/her job due to own serious health condition
  - unable to work at all
  - unable to perform any one of the “essential functions” (under the ADA)

# FMLA Leave For An Employee's Own Serious Health Condition, cont'd

- “Serious health condition”
  - an illness, injury, impairment or physical or mental condition that involves either:
    - “inpatient care”
      - any period of incapacity or treatment in connection with or consequent to inpatient care (*i.e.*, overnight stay) in a hospital, hospice, or residential medical care facility
    - “continuing treatment by a health care provider”

# Legal Treatment of Employee Substance Abuse Under The FMLA

- Substance abuse may be a “serious health condition” if the conditions of sections 825.113 through 825.115 are met. 29 C.F.R. 825.119(a).
  - 825.113 defines “serious health condition”
  - 825.114 defines “inpatient care”
  - 825.115 defines “continuing treatment”

- “Inpatient Care”
  - any period of incapacity or treatment in connection with or consequent to inpatient care (*i.e.*, overnight stay) in a hospital, hospice, or residential medical care facility

- “Continuing Treatment” by a Health-Care Provider
  - any period of incapacity requiring absence from work, school or other regular daily activity of more than 3 consecutive days;
  - and any subsequent treatment or period of incapacity relating to the same condition that also involves:
    - 2+ or more visits to a health care provider within the first 30 days of incapacity
    - at least one visit to a health care provider, within 7 days of incapacity, resulting in a regimen of supervised, continuing treatment

# Leave For Treatment Of Substance Abuse Is Covered

- Only available if treatment is administered by:
  - a health care provider, or
  - a provider of health care services on referral by a health care provider.
  
- Leave to care for a covered family member who is receiving treatment for substance abuse is also covered

# Leave Unrelated To Treatment Is Not Covered

- Absences that are not related to the treatment are not covered – even if they are related to the underlying addiction
  - Absences due to the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave. 29 C.F.R. 825.119(a).



# Leave Unrelated To Treatment Is Not Covered, cont'd

– *For example:*

- *Scobey* (absences due to intoxication)
- *Jeremy* (absences due to DUI incarceration)
- *Gilmore* (habitual tardiness due to drug use)

# Leave Unrelated To Treatment Is Not Covered, cont'd

- Absences attributable to making arrangements for treatment, scheduling appointments for referrals to treatment, obtaining insurance approval for treatment, etc. does not qualify for FMLA leave
  - *Darst* (treatment for alcoholism did not begin with employee's first call to health care provider to make appointment for evaluation – notwithstanding employee's treating physician's belief that "treatment" begins "when the patient takes the first step towards seeking professional help").

# Substance Abuse Does Not Immunize Employee From Discipline

- Employer cannot take action against employee because he/she has exercised right to take FMLA leave for treatment

# Substance Abuse Does Not Immunize Employee From Discipline, cont'd

- But, employer can apply an established policy – for example, a policy that provides for discipline or termination for substance abuse. For example:
  - excessive absenteeism
  - inadequate notice of absence/compliance with no call/no show policy
  - termination for substance abuse unless employee completes rehabilitation program
  - drunkenness at work
  - policy against use of substances at work or during work-related activities

# Substance Abuse Does Not Immunize Employee From Discipline, cont'd

- Courts agree:
  - *Ames* (drunk at work)
  - *Renaud* (drunk at work)
  - *Pinto* (drinking in employer-sponsored vanpool)

# “Last Chance” Agreements

- For example: Agreement that employee complete a treatment or rehabilitation program, and undergo drug testing, to return to work and avoid termination
- Generally not found to support claims for retaliation/interference under FMLA

- Initial Certification
  - Employer may require initial certification
  - Employee must provide the completed certification within 15 days of employer's request
  
- Insufficient Certifications
  - An “insufficient certification” is one where the information provided is “vague, ambiguous or non-responsive”
  - Employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency

- Content of medical certification:
  - name, address, telephone number, and fax number of health care provider and type of medical practice/specialization
  - date on which the serious health condition commenced
  - probable duration of condition
  - A statement that, due to the serious health condition, the employee is unable to perform the function of his/her position
  - Employer may not require additional information
  - Employer may contact health care provider for clarification or authentication *after* giving the employee an opportunity to cure any deficiencies. (This contact may not be made by the employee's supervisor)



# Responding To Requests For FMLA Leave – Recertification

- Employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.
- However, if medical certification indicates that minimum duration of leave will be more than 30 days, employer must wait until minimum duration expires before requesting a recertification
- Employer may request recertification in less than 30 days if:
  - employee requests an extension of the leave
  - circumstances in the original certification change
  - employer has information casting doubt on the continuing validity of the original certification
- When need for leave lasts beyond a single leave year, employer may require annual recertification

# Responding To Requests For FMLA Leave – Second Opinions

- If employer questions the validity of the initial certification:
  - It may require a second opinion at its own expense
  - Until obtained, employee is provisionally entitled to benefits
  - Employer may designate own health care provider, but not one regularly employed by or regularly contacted by the employer
  - Not allowed for certification of condition of employee's family member

# Responding To Requests For FMLA Leave – Third Opinions

- If the initial and second certification differ, employer may:
  - Require a third opinion at its own expense
  - Third opinion is final and binding
  - Employer and employee jointly designate the provider
  - Not allowed for certification of condition of employee's family member

- Employee is entitled to be restored to the same or an “equivalent” position with the same seniority rights and benefits the employee had when the leave commenced
  
- Equivalent position:
  - Same pay
  - Same benefits
  - Same working conditions (including benefits, perquisites and status)

- But reinstatement is not required where:
  - Employee is unable to perform an essential function of the position, *i.e.*, poor performance
  - If the employee would no longer be employed at the time of reinstatement due to layoff or other reasons
  - Employee engages in insubordination, fraud or other prohibited conduct

- Employer may require a “Fitness For Duty” (Return-to-Work) certification as a *condition of reinstatement*
  - policy must be uniformly-applied requiring all similarly-situated employees who took leave for such conditions
  - certification is at the employee’s expense
  - only as to the medical condition that caused the need for leave
  - must abide by requirements of the ADA:
    - ◆ job-related; and
    - ◆ consistent with business necessity
  - Can require that certification address ability to perform essential job functions

# “Fitness For Duty” Certifications, cont’d

- With employee’s authorization, employer may, through its health care provider, seek clarification
- Not permitted for employee who takes intermittent leave
- Employer may not require a second or third opinion

# “Fitness For Duty” Certifications, cont’d

- Employer must provide notice of the requirement for Fitness for Duty Certification
- Notification must be given at the time the request for leave is given or immediately thereafter
- Employer may deny reinstatement pending a Fitness for Duty Certification
- Employer may terminate an employee who has failed to provide the Fitness for Duty Certification at the time the leave ends



- Regulations do not prohibit an employer from requiring an employee to submit to an “in-house” examination – such as a drug test – upon returning to work
  - provided such examination is uniformly applied and complies with the “job-related” and “consistent with the business necessity” requirements of the ADA
- Employer may not refuse to return the employee to work following the completion of FMLA leave pending an “in-house” examination. Rather, the “in-house” examination may be conducted on the first day the employee returns to work.

## NORTH AMERICA

### Atlanta

600 Peachtree Street, N.E.  
24th Floor  
Atlanta, GA 30308  
Telephone: +1 404 815 2400  
Facsimile: +1 404 815 2424

### Chicago

191 North Wacker Drive  
30th Floor  
Chicago, IL 60606  
Telephone: +1 312 499 6000  
Facsimile: +1 312 499 6100

### Los Angeles

515 S. Flower Street  
25th Floor  
Los Angeles, CA 90071  
Telephone: +1 213 683 6000  
Facsimile: +1 213 627 0705

### New York

Park Avenue Tower  
75 East 55th Street, 1st Floor  
New York, NY 10022  
Telephone: +1 212 318 6000  
Facsimile: +1 212 319 4090

### Orange County

695 Town Center Drive, 17th Floor  
Costa Mesa, CA 92626  
Telephone: +1 714 668 6200  
Facsimile: +1 714 979 1921

### Palo Alto

1117 S. California Avenue  
Palo Alto, CA 94304  
Telephone: +1 650 320 1800  
Facsimile: +1 650 320 1900

### San Diego

4747 Executive Drive  
12th Floor  
San Diego, CA 92121  
Telephone: +1 858 458 3000  
Facsimile: +1 858 458 3005

### San Francisco

55 Second Street  
24th Floor  
San Francisco, CA 94105  
Telephone: +1 415 856 7000  
Facsimile: +1 415 856 7100

### Washington, D.C.

875 15th Street, N.W.  
Washington, DC 20005  
Telephone: +1 202 551 1700  
Facsimile: +1 202 551 1705

## ASIA

### Beijing

19/F, Yintai Center Office Tower  
2 Jianguomenwai Avenue  
Chaoyang District  
Beijing 100022, China  
Telephone: +86 10 8567 5300  
Facsimile: +86 10 8567 5400

### Hong Kong

21-22/F, Bank of China Tower  
1 Garden Road  
Hong Kong  
Telephone: +852 2867 1288  
Facsimile: +852 2526 2119

### Shanghai

35/F Park Place  
1601 Nanjing West Road  
Shanghai 200040, China  
Telephone: +86 21 6103 2900  
Facsimile: +86 21 6103 2990

### Tokyo

34F Ark Mori Building  
12-32 Akasaka 1-chome  
Minato-ku, Tokyo 107 6034, Japan  
Telephone: +81 3 6229 6100  
Facsimile: +81 3 6229 7100

## EUROPE

### Brussels

Avenue Louise 480  
Boîte 5B  
1050 Brussels, Belgium  
Telephone: +32 2 641 7460  
Facsimile: +32 2 641 7461

### Frankfurt

Siesmayerstrasse 21  
60323 Frankfurt am Main  
Germany  
Telephone: +49 69 90 74 85-0  
Facsimile: +49 69 90 74 85-499

### London

Ten Bishops Square, 8th Floor  
London E1 6EG  
United Kingdom  
Telephone: +44 203 023 5100  
Facsimile: +44 203 023 5109

### Milan

Via Rovello, 1  
20121 Milan, Italy  
Telephone: +39 02 30414 000  
Facsimile: +39 02 30414 005

### Paris

96, boulevard Haussmann  
75008 Paris, France  
Telephone: +33 1 42 99 04 50  
Facsimile: +33 1 45 63 91 49

For further information, you may visit our home page at [www.paulhastings.com](http://www.paulhastings.com) or email us at [info@paulhastings.com](mailto:info@paulhastings.com).



## Part II: Testing, Performance and Conduct, Reasonable Accommodation



What's Permitted and/Required  
and What's Not

# Disability-Related Inquiries and Medical Examinations

---

## ■ Pre-Offer

- Under the ADA, an employer may not ask disability-related questions (i.e., questions likely to elicit information about a disability) or conduct any medical examinations until after it makes a conditional offer of employment

## ■ Post-Offer

- Inquiries and medical examinations are permitted as long as all applicants in same job category are asked the same questions and subjected to same tests/exams

## ■ During Employment

- Inquiries and exams must be job-related and consistent with business necessity

# Inquiries and Medical Examinations Relating to Drug and Alcohol Use

---

## ■ Pre-Employment:

- Employers may ask applicants about current illegal drug use but **not** about past **drug addiction**
- Employers may test an applicant's blood, urine, or breath for the illegal use of drugs
- Employers may ask an applicant whether she drinks alcohol or whether she has been arrested for driving under the influence of alcohol but may not ask whether the applicant currently is an alcoholic or has a record of alcoholism
- Employers may **not** test applicants for alcohol use
- Employers may not ask if applicant is taking any prescription medications or whether she has taken such drugs in the past

# Inquiries and Medical Examinations Relating to Drug and Alcohol Use

---

## ■ During employment:

- Employers may ask employees about current illegal drug use but **not** about past **drug addiction**
- Employers may test an employee's blood, urine, or breath for the illegal use of drugs
- Employers may ask if employee has been drinking and may conduct alcohol testing for this purpose if it has a reasonable belief that employee may be under the influence of alcohol at work
- Employers may not ask if applicant is taking any prescription medications or whether she has taken such drugs in the past
- Employers may test for alcohol use when it has reason to believe that employee may not be able to do his job or may pose a direct threat because of alcoholism

# Performance and Conduct Issues

---

- The ADA provides that employers may require an employee who is alcoholic or who engages in the illegal use of drugs to meet the same standards of performance and behavior as other employees.
- Employers do not have to tolerate poor job performance or unsatisfactory behavior (**such as absenteeism, tardiness, insubordination, or on-the-job accidents**) related to an employee's alcoholism or illegal use of drugs if similar performance or conduct would not be tolerated in other employees.
- The ADA specifically permits employers to prohibit the use of alcohol or drugs in the workplace and to discipline employees for such use.
- Employers may require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988.

# Requests for Reasonable Accommodation

---

- Generally, an individual with a disability must request reasonable accommodation
- A request for reasonable accommodation is a request for some **change in the workplace or in the way things are done** that is needed for a medical condition
- Do not have to be in writing
- Do not have to use “magic words” (e.g., Employee may simply state: “I need to seek help for a drinking problem.” )
- May come from a third party (e.g., an employee’s family member, doctor, substance abuse counselor)



# Timing of Requests

---

- May be made at any time during the application process or during employment
  - Employee does not lose the right to request an accommodation because he did not do so during application stage
- Employees may make more than one request for reasonable accommodation

# What if Employee Mentions Drug Addiction or Alcoholism in Response to Discipline for Unacceptable Performance or Conduct?

---

- The employer may impose the same discipline that it would for any other employee who fails to meet the performance standard or who violates a uniformly applied conduct rule.
- An employee whose poor performance or conduct is attributable to the **current illegal use of drugs** is not covered by the ADA and, therefore, is not entitled to a reasonable accommodation.
- An employee whose performance or conduct is due to **alcoholism** may be entitled to reasonable accommodation, separate from any disciplinary action the employer chooses to impose.

# Example 1

---

- A federal police officer is involved in an accident on agency property for which he is charged with **driving under the influence of alcohol (DUI)**. Approximately one month later, the employee receives a termination notice stating that his conduct makes it inappropriate for him to continue his job. The employee states that this incident made him realize that he is an alcoholic; he also states that he is obtaining treatment and wants to remain in his job.
- The employee may proceed with the termination.

## Example 2

- An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating that one more late arrival will result in termination. The employee tells the employer that she is an **alcoholic**, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment.
- The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee's drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, **absent undue hardship**, the employer must grant the employee's request to take leave for the next month to enter a rehabilitation program.

# Interactive Process

---

- Employer should engage in an interactive process with the individual asking for an accommodation
- May involve determining whether the individual has a disability, what accommodations are possible, or both

# Documenting Disabilities

---

- An employer may obtain reasonable documentation that an employee has a disability and needs an accommodation if the disability and/or need for accommodation are not obvious
- Employer may require that documentation of the existence of an impairment come from a health care professional

# Documenting Disabilities (cont.)

---

- Documentation under ADAAA will probably be different:
  - Will focus on limitation individual would experience without mitigating measures
  - May include more information about how **major bodily function** (e.g., kidney, bladder function) is substantially limited

# Choosing an Accommodation

---

- Primary consideration should be given to the employee's choice
- Employer may ultimately choose from among accommodations, as long as the one provided is effective



# Questions to Consider

---

- What limitations is employee with alcohol addiction or dependence experiencing? (Is the employee's kidney, bladder, or liver function impaired or does the employee have trouble concentrating or getting along with others?)
- Does employee's alcoholism affect her job performance or behavior at work? (e.g., Is employee frequently absent or late? Is she unable to stay organized or meet deadlines?)
- Has the employee relapsed before?
- Can the employee perform the essential functions of his position or meet the employer's conduct rules with an accommodation?

# Types of Accommodations

---

- Leave
  - Medical treatment for alcoholism or past drug addiction
  - Substance abuse counseling
- Last Chance Agreement
- Modified work schedule
- Job restructuring

# Actions not Required

---

- Lowering production or performance standards
- Excusing violations of conduct rules that are job-related and consistent with business necessity (e.g., frequent absences or lateness, being under the influence of alcohol at work, sleeping on the job)
- Removing an essential function

# Undue Hardship

---

- Means “significant difficulty or expense”
- Consider the following factors:
  - Nature and cost of accommodation
  - Resources available to employer (e.g., EAP, Job Accommodation Network)
  - Impact of the accommodation on the employer’s operations

# Going Beyond Legal Obligations

---

- Employers may take actions that are not required as reasonable accommodations
- Employer will not be deemed to have regarded an individual as having a disability just because it exceeded its legal obligations
- Employer may inform an employee that it is taking an action beyond what the ADA requires

# Going Beyond Legal Obligations (cont.)

---

- Examples of situations in which any employer may exceed its obligations include:
  - Providing a temporary measure while considering a request for reasonable accommodation
  - “Accommodating” a temporary, non-chronic condition or a long-term condition that is not substantially limiting (e.g., casual illegal drug use or “binge drinking”)

# What if an Employee Will Not Accept Accommodation?

---

- Employer may not require someone to accept a reasonable accommodation
- Someone who does not accept an accommodation and, as a result, cannot do the job, meet conduct and performance rules, or would pose a “direct threat” will not be considered qualified

# A Word About “Blanket Exclusions”

## ■ EEOC v. Old Dominion Freight Line

EEOC filed suit after the employer refused to allow a truck driver, who self-reported alcohol abuse, to return to driving even if he successfully completed a substance abuse program

- ADA mandates that persons with disabilities have an equal opportunity to achieve in the workplace.
- Old Dominion’s policy and practice of never returning an employee who self-reports an alcohol problem to a driving position violates that law.
- EEOC also looked at OD’s “across-the-board” policy banning drivers who self-report alcohol abuse from driving again because it does not encourage a case-by-case interactive approach with the idea of reaching a reasonable accommodation.



# Blanket Exclusions (cont.)

---

- Presumably, OD's employment decision was based on the potential "direct threat" self-reported alcoholic would create by driving under the influence of alcohol.
- But, without a **particularized assessment**, it is not possible to correctly assess this situation.

# For More Information

---

- Please see EEOC's website [www.eeoc.gov](http://www.eeoc.gov)
- Or, contact:

Joyce Walker-Jones

Senior Attorney Advisor

[Joyce.Walker-Jones@eeoc.gov](mailto:Joyce.Walker-Jones@eeoc.gov)

(202) 663-7031