

WEDNESDAY, AUGUST 26, 2020

PERSPECTIVE

EEOC issues guidance on accommodation of employee opioid addiction

By Nicole Legrottaglie Wohl

As the COVID-19 pandemic approaches its sixth month, Americans continue to struggle with its devastating impact. According to the Centers for Disease Control and Prevention, over 175,000 Americans have died from COVID-19. Those who have recovered or who have been fortunate enough to avoid contracting this deadly virus are still left to grapple with the economic and emotional implications of this pandemic. It has been reported that over 57 million workers have lost their jobs and filed for unemployment. A fear of what the future holds, combined with feelings of isolation and loneliness as a result of social distancing, have put those struggling with addiction at risk for relapse. This poses unique challenges for employers.

On Aug. 5, the U.S. Equal Employment Opportunity Commission released a pair of new technical assistance guidance documents to address concerns about the employment provisions of the Americans with Disabilities Act and the opioid epidemic. Opioids include prescription drugs such as codeine, morphine, oxycodone (OxyContin, Percodan, Percocet), hydrocodone (Vicodin, Lortab, Lorcet), and meperidine (Demerol), as well as illegal drugs like heroin.

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guidance does not set forth new policy but rather is intended to provide clarity regarding existing principles already established in the ADA's statutory and regulatory provisions as well as previously issued guidance.

Guidance for Employees

In its first guidance, "Use of Codeine, Oxycodone, and Oth-

er Opioids: Information for Employees," the EEOC makes clear that illegal use of opioids is not a covered disability under the ADA. Thus, employers may terminate an employee or take other adverse action against an employee based on illegal use of opioids, even if the employee does not have performance or safety problems. Employers are also permitted to disqualify employees if another federal law requires them to do so.

In contrast, if an employee is not disqualified by federal law and the opioid use is legal, an employer cannot automatically disqualify an employee because of opioid use without considering if there is a way

for the employee to do the job safely and effectively. The EEOC's guidance provides that individuals who are lawfully using opioid medication, are in treatment for opioid addiction and are receiving medication assisted treatment, or have recovered from their addiction, are protected from disability discrimination. These employees also may be eligible for reasonable accommo-

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dations if needed due to their lawful use of such medication or the underlying medical condition(s) necessitating the need for the medication (such as major depression and PTSD). The EEOC further notes that opioid addiction (sometimes called "opioid use disorder" or "OUD") is itself a diagnosable medical condition that can be a disability under the ADA.

Accommodations may include a different break or work schedule, a temporary leave of absence, a change in shift assignment or a temporary transfer to another position. Importantly, the EEOC's guidance makes clear that an employer never has to lower production or performance standards,

eliminate essential functions of a job, pay for work that is not performed, or excuse illegal drug use on the job as a reasonable accommodation.

If an employee is not disqualified by federal law or because he or she is using opioids illegally, the employer may have concerns that the employee cannot perform the job safely, even with a reasonable accommodation. To remove the employee from the job for safety reasons, the employer must demonstrate that the employee poses a significant risk of substantial harm. The employer may request that the employee undergo a medical evaluation to determine what the employee can safely and effectively do.

With respect to drug testing, the EEOC states that employers should give employees an opportunity to provide information about lawful drug use that may cause a drug test result that shows opioid use. Employers may ask employees before administering the test whether they take medication that could cause a positive result, or it may ask all people who test positive for an explanation.

Guidance for Health Care Providers

The second set of guidance, entitled "How Health Care Providers Can Help Current and Former Patients Who Have Used Opioids Stay Employed," provides health care providers

with information regarding their patients' legal rights in the workplace. The guidance explains how providers can help a patient get a reasonable accommodation and recommendations on how to draft medical documentation to support the patient's request for reasonable accommodation. The guidance recommends that healthcare providers explain, in plain language:

- The provider's professional qualifications and the nature and length of relationship with the patient;
- The nature of the patient's medical condition;
- The patient's functional limitations in the absence of treatment;
- The need for a reasonable accommodation and how the patient's medical condition makes changes at work necessary;
- Suggested accommodations.

Additionally, the guidance stresses the importance of providing medical documentation to help an employer decide whether the patient's disability

poses a safety risk significant enough to justify suspension or other adverse action under the law. It explains that adverse action is warranted when an employee poses a "direct threat," which means a significant risk of substantial harm to self or others that cannot be eliminated or reduced to an acceptable level with a reasonable accommodation. For this reason, the EEOC encourages providers to provide information that will help employers assess the level of risk posed by the disability, taking into account the probability that harm will occur, the imminence of the potential harm, the duration of the risk, and the severity of the potential harm

The guidance also provides that where relevant, the provider should consider and assess any risks the patient's condition may present in light of the type of work the patient performs on a day-to-day basis; the type of equipment he or she uses; his or her access to harmful objects or substances; any safeguards in place at the worksite; the type of injury or

other harm that may result if one of the identified medical events or behaviors occurs; and the likelihood that injury or other harm would in fact occur as a result of the event or behavior. If the provider does not have this information but needs it to make an accurate assessment, the provider should request it from the employer.

Although the EEOC's latest guidance is directed to employees and health care providers, employers, particularly those who handle requests for accommodation within an organization, should carefully review both sets of technical assistance documents. The guidance provides employers useful information on how to handle requests for accommodation from an employee who is taking lawfully prescribed opioid medications, or who is recovering or has recovered from opioid use. The guidance also provides helpful insight into what medical documentation may support an employee's request, what information should be provided for an employer to assess whether an

employee poses a safety risk, and what evidence employers must show to deny a request. ■

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