

Arizona Center for Disability Law

Protection and Advocacy System for Arizona

Drug and Alcohol Testing Under the Americans with Disabilities Act

A Self-Advocacy Guide

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Federal and state law can change at any time. If there is any question about the continued validity of any information in the handbook, contact the Arizona Center for Disability Law or an attorney in your community.

The purpose of this guide is to provide general information to individuals regarding their rights and protections under the law. It is not intended as a substitute for legal advice. You may wish to contact the Arizona Center for Disability Law or consult with a lawyer in your community if you require further information.

This guide is available in alternative formats upon request.

**DRUG AND ALCOHOL TESTING UNDER THE
AMERICANS WITH DISABILITIES ACT**

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A. Introduction to the Americans with Disabilities Act (ADA) and this Guide

1. What the ADA covers

On July 26, 1990 the ADA was passed by Congress. The ADA provides major civil rights protections to individuals with disabilities. The intent of this federal law is to reduce barriers to persons with disabilities and provide equal opportunity in employment, public accommodations, public services, transportation, and telecommunications. The various titles of the ADA affect many aspects of the lives of people with disabilities.

§ Title I makes it unlawful to discriminate against qualified people with disabilities in employment.

§ Title II makes it unlawful for state and local governments and their agencies to discriminate in programs and services, including state or county medical services and substance abuse clinics.

§ Title III prohibits discrimination in access and enjoyment of public accommodation and commercial facilities, such as hotels, motels, restaurants, professional offices, lawyers' offices, convention centers, stores, banks, museums, parks, schools, and recreation facilities, and substance abuse clinics.

§ Title IV requires accessibility of telecommunication services to people who are deaf or hearing impaired.

2. How the Arizona Center for Disability Law Assists People with Disabilities

If you believe you have been discriminated against on the basis of a disability in employment or access to public services, public accommodations, public transportation or telecommunication services, staff at the Arizona Center for Disability Law can provide you with information about the ADA and enforcing your rights under the ADA. The Arizona Center for Disability Law is a non-profit, public interest law firm providing free advocacy, information and referral services, legal research, community legal education, and,

in selected cases, legal representation to individuals with disabilities and advocacy organizations throughout Arizona. The Center is the designated protection and advocacy (P&A) system providing services for Arizonans with a wide range of physical and mental disabilities, including people with drug addictions and alcoholism. Assistance is provided for disability-related issues in established priority areas.

Information about the eligibility requirements and priorities are available from the Center upon request. Assistance is provided according to program eligibility requirements, priorities and staff availability.

3. This Guide is not a Substitute for Legal Advice

The Arizona Center for Disability Law recommends that persons obtain professional legal advice to resolve a legal dispute regarding discrimination on the basis of a disability. This guide is not a substitute for legal advice. This guide is meant to provide people with disabilities with information and examples about employment protections under the ADA.

4. Why the ADA Includes Employment Protections

Oftentimes, people with disabilities do not have an equal opportunity to work or advance in their employment. People with disabilities are often restricted in employment opportunities by many different kinds of barriers. For example, some are excluded because of rigid work schedules or leave policies which do not permit flexibility for people to get necessary treatment for alcoholism or drug addiction.

In some cases, people are denied opportunities because of prejudice. These are the barriers in other people's minds: fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or lack of acceptance by co-workers and customers of people with drug addictions and alcoholism.

Congress enacted the ADA to eliminate these barriers to equal opportunity in employment. The ADA makes it unlawful for an employer covered by the law to discriminate against applicants and employees with disabilities. The United States Equal Employment Opportunity Commission (EEOC) is responsible for enforcing this law. People with disabilities also have the right to bring private lawsuits against employers who discriminate against them if they first file a charge of discrimination with the EEOC within the time limits set out by the ADA. See the Center's guide, *How to Enforce Employment Rights under the ADA*, for more information about the requirements for filing a charge. However, the U.S. Supreme Court

recently ruled that private individuals may not sue state employers for money damages under the ADA. Individuals may still file charges of discrimination with the EEOC against their state employer for other relief, such as court orders to stop discrimination. The U.S. Government can still file lawsuits against states for violating the ADA.

This guide will provide the reader with information about how the ADA applies to drug and alcohol testing in an employment situation. The list of guides available through the Center about employment rights under the ADA include:

- \$ *An Overview of the Employment Protections of the ADA*
- \$ *The ADA and the Job Applicant*
- \$ *The ADA and Reasonable Accommodations*
- \$ *How to Enforce Employment Rights under the ADA*
- \$ *Drug & Alcohol Testing Under the ADA*
- \$ *The ADA and Medical Examinations*
- \$ *The ADA and Confidentiality of Medical Records*
- \$ *The ADA and Disability-Related Harassment*

5. When the Employment Protections of the ADA Apply

The ADA does not cover every employment situation between an applicant or employee and an employer. For the ADA to apply to an employment situation each of the following has to be true:

- \$ the employer is a *covered employer*;
- \$ the employee or applicant has a *disability* according to the ADA;
- \$ the employee or applicant is *qualified* to perform the job; and
- \$ the employer *discriminates* against an applicant or employee *on the basis of disability*.

The terms “covered employer” and “disability” are discussed below.

6. Employers Covered By the Employment Protections of the ADA

! **The ADA applies to private employers with 15 or more employees.**

- \$ Includes employment agencies and labor unions.
- \$ Includes a location or facility of a business with less than 15 employees whose total

number of employees for the company in all locations and facilities combined equal 15 or more.

Other local laws may apply to persons with disabilities who are employed by smaller businesses. For more information contact the Arizona Center for Disability Law or a private attorney.

! The ADA applies to state and local governments.

\$ Includes all state and local governmental agencies, departments and entities regardless of their size or number of employees. Although the ADA applies to state employers, the U.S. Supreme Court recently ruled that employees (and applicants) cannot sue state employers in court for money damages. Individuals can still file charges of discrimination with the EEOC against their state employer. Individuals can still sue to require state employers to take action or stop discriminatory action. The U.S. Government can still file lawsuits against state employers under the ADA.

\$ Examples of state and local employers include: public schools, public universities, police and fire departments, public libraries, public museums, public parks and recreation facilities, and social welfare offices.

! The ADA does NOT apply to the federal government.

The ADA does apply to employees of the U.S. Senate. However, generally if a person with a disability works or applies for a job with the federal government, a federal agency, or a fully owned U.S. Government corporation, then the ADA does not apply. However, the Rehabilitation Act of 1973 is another anti-discrimination law that offers employment protections for people with disabilities. For more information about the Rehabilitation Act, contact the Arizona Center for Disability Law, an EEO officer of the federal agency, or a private attorney.

! Title I (Employment) of the ADA does NOT apply to Indian Tribes.

However, tribes may have their own affirmative action or anti-discrimination laws which may address discrimination on the basis of disability. Some tribes have adopted tribal laws

or entered into agreements to abide by federal discrimination laws similar to the ADA. Contact a tribal legal office for more information about the tribal laws or agreements that may apply.

7. Applicant or Employees With a Disability

The ADA protects qualified individuals with a disability. Disability is defined under the ADA as:

(1) a physical or mental impairment that substantially limits an individual in the ability to perform major life activities, such as:

- | | | |
|----------------|----------------------------|----------------------------|
| \$ seeing | \$ hearing | \$ walking |
| \$ working | \$ learning | \$ thinking |
| \$ reading | \$ lifting | \$ concentrating |
| \$ procreation | \$ performing manual tasks | \$ interacting with others |

- (2) a history of a substantially limiting impairment, or
(3) being regarded as having a substantially limiting impairment.

However, persons who are currently illegally using drugs are not protected under the ADA. A person is qualified under the ADA if s/he has all of the skills, education, and experience required for the position and is able to perform the essential functions of the job with or without reasonable accommodations. For more information about what these special terms mean, see the Center's guide, *An Overview of the Employment Protections of the ADA*.

8. Scope of this Guide

The information in this guide applies to the employment protections of the ADA, not to the following matters. First, this guide does not cover discrimination on the basis of substance abuse by social service agencies, medical facilities, educational facilities, or professional licensing agencies. If you believe that you have been discriminated against in an area outside of employment, you should contact the Center staff for more information about your rights. Second, this guide does not cover employment laws other than the ADA. It is possible that individuals may have other claims related to drug and alcohol testing in the workplace. You should contact a private attorney specializing in employment law to determine if you have other claims and the deadlines for making those claims.

B. Commonly-asked Questions About Drug Testing and the ADA

1. Does the ADA protect people with substance abuse disorders?

It depends on whether the individual is currently illegally using drugs. The employment provisions of the ADA protect qualified individuals with a disability. See Section A-7. However, the ADA specifically excludes people who are currently illegally using drugs from these protections. Individuals who have alcoholism are covered under the ADA if they are able to meet the employment standards at the workplace.

2. What is illegal drug use?

The illegal use of drugs includes the use, possession, or distributions of drugs which are unlawful under the Controlled Substances Act. It includes the use of illegal drugs and the misuse of prescription drugs that are “controlled substances.” The illegal use of drugs does **not** include drugs taken under supervision of a licensed health care professional, including experimental drugs for people with AIDS, epilepsy, or mental illness.

3. What does current drug use mean?

An individual will be considered a current drug user under the ADA if a drug test correctly indicates that the individual is engaging in the illegal use of a controlled substance. “Current” drug use also means that the illegal use of drugs occurred recently enough to justify an employer’s reasonable belief that involvement with drugs is an on-going problem. It is not limited to the day of drug use, or even drug use in recent weeks. It should be determined on a case-by-case basis. Although the ADA does not give a specific length of time, some courts have concluded that enrolling into a rehabilitation program did not automatically convert a person to a non-user. Some courts have found people to be current users when the last use was several months ago. A few courts have looked at how long the individual has been using drugs, the risk of relapse and how long the individual has been in recovery. Although the ADA appears to protect persons with substance abuse disorders in treatment, the courts have made it an unsettled area of the law.

4. Are recovering drug addicts covered by the ADA?

Yes. In general, a person with a drug addiction who is currently in a drug rehabilitation program or has successfully completed rehabilitation and has not used drugs illegally for some time is covered by the ADA. Rehabilitation programs can include inpatient and outpatient substance abuse programs, Narcotics Anonymous, Alcoholics Anonymous and Employee-Assistance Programs. The ADA also protects a person who has a history of addiction or if s/he is mistakenly regarded by the employer as having a drug addiction. However, an employer may be able to fire or refuse to hire a person with a recent history of illegal drug use, even if the person no longer uses drugs, in specific occupations, such as law enforcement or public transportation, when an employer can show that this policy is job-related and consistent with business necessity. A person who casually used drugs illegally in the past but did not become addicted is not an individual with a disability based on the past recreational drug use. For a person to be protected as a person with a disability, s/he must have an addiction rather than have been a casual drug user.

John applied for a job as a finance consultant and in order for him to be considered for the position; the company has a policy that all applicants are required to take a drug test. The results of John's drug test come back negative but during the interview the employer asks John if he ever used drugs in the past. He answers yes, but that he successfully completed a rehabilitation program and has not used illegal drugs for 3 years. The employer denies John the position because he is afraid that John will start using drugs again and be a liability to the company. In this situation the employer violated the ADA. First, the employer may not ask applicants about past drug use because it is an illegal question. Second, the employer denied him a position on the basis of a history of a disability.

Alison applies for a job as a sales clerk and is hired. She is talking to a co-worker when she tells him that she used marijuana in college. A supervisor overhears Alison and decides to terminate her because the management does not tolerate drug use or disrespect for the law. Alison is probably not protected by the ADA because she was fired on the basis of her casual drug use during college not because of a substantially limiting impairment.

5. Can an employer require an applicant or employee to take a drug test?

Yes. Generally, an employer may under the ADA conduct drug tests to detect illegal use of drugs. The ADA does not prohibit, require, or encourage drug tests. Although an employer may not require an applicant to pass a medical examination prior to a job offer, drug tests are **not** considered medical examinations, and an **applicant** can be required to take a drug test before the employer has offered to hire the applicant. Also, **employees** can be required to take a drug test, whether or not such a test is job-related and necessary for the business. On the other hand, a test to determine the blood alcohol of an individual would be considered a medical examination and can only be required by an employer after a job offer under special conditions.

There are exceptions to the general rule that employers may require drug tests. For example, a governmental employer such as a county, state, city, or community college district or school district may not require a drug test without an individualized suspicion of illegal drug use by that employee.

Steve applied for a position as a clerk in a grocery store. It is the store's policy to conduct a drug screening test for all applicants. Steve refuses to take the test and a position is not offered to him because of his refusal. In this situation, the employer has the right to refuse Steve the position because of his failure to take a drug test.

Alberto applies for a position as a chauffeur at a hotel resort. The employer requires all applicants to submit to a drug test and a blood alcohol test to ensure applicants are not under the influence. The employer may require the drug test before offering Alberto a job. However, it is a violation of the ADA to require a blood alcohol test before making him a job offer.

Recently the 10th Circuit Court of Appeals found that a resort operating in Colorado with over 500 employees violated the ADA with its drug and alcohol policy. The policy required all employees to report all prescription drugs that were "present in their body system" and only allowed employees to use medication if that the employee had reported and received approval by a supervisor. This policy violated the ADA because it required disclosure of medical information without proving it was necessary for business or related to the specific job the individual was performing. Roe v. Cheyenne Mountain Conference Resort, Inc. (10th Cir. 1997)

6. Why can an employer require an applicant to undergo a drug test prior to hiring?

The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other Federal laws and regulations regarding alcohol and drug use.

7. Are individuals who are taking properly prescribed medications required to inform the prospective employer prior to the drug test and/or hiring of their medication?

No. Under the ADA, an applicant who is taking properly prescribed medication is not required to disclose this information to his/her prospective employer. In addition, an employer is not permitted to ask questions concerning any medications that an applicant is or has taken in the past. If a person tests positive for illegal drug use, an employer must offer the employee or applicant an opportunity to explain a positive result, such as lawful use of a controlled substance or other treatment that might cause a false positive test result. On the other hand, if an applicant voluntarily discloses this information at the time of the drug test, it may avoid any misunderstandings concerning positive results from a drug-screening test between the employee and his/her employer. On a job application or in an interview the following questions are not permitted under the ADA:

Are you currently a drug user?

Have you ever taken illegal drugs in the past?

Have you ever misused properly prescribed medications in the past?

Have you ever been hospitalized for substance abuse treatment?

Have you ever undergone substance abuse treatment?

Joe is currently on a methadone treatment plan to assist him in his heroin addiction. He applied for a job at a construction site and was offered a position. Before starting work, he was required to submit to a drug-screen. The results of the test showed that he had methadone in his system. The employer withdrew the job offer and asked Joe "Why didn't you tell me about the methadone?" "I would have never offered you the job." The employer violated the ADA by withdrawing the job offer because he used methadone. The employer also wrongly accused Joe of withholding information. Joe was not required to disclose this information prior to a job offer.

Mary is currently taking an herb treatment for her diagnosed Hepatitis C disability. This treatment is not considered a controlled substance by the law but did result in a false positive under a drug-screening test. Mary applies for a job at a department store and takes a subsequent drug test, which shows a positive result. The employer offered Mary an opportunity to explain these positive results and checked with her doctor and the lab to verify that this treatment could cause a positive test result. Mary's employer acted properly under the ADA.

8. Can an employer terminate an employee who is currently engaging in the illegal use of drugs?

Yes. An employer may refuse to hire an applicant or discharge or discipline an employee based upon a test result that indicates the illegal use of drugs. The employer may take these actions even if an applicant or employee claims that s/he recently stopped illegally using drugs. An employer has no obligation toward individuals who are currently using illegal drugs, regardless of whether such individuals are addicts or casual users of drugs, and regardless of whether the illegal drug use impacts upon the individuals' behavior or job performance. For example, courts have upheld termination of employees who sold drugs in the workplace; sexually harassed a co-worker at a company party while under the influence; lost their driver's license because of DUI's where a driving license is necessary; was visibly intoxicated while working with customers; had possession of unlawful drugs at work; and went to work under the influence.

9. Are the results of a drug test confidential?

Yes. Under Arizona state law the test results will **ONLY** be provided to:

- \$ the tested employee or prospective employer (or person designated **IN WRITING** by the employee or prospective employer);
- \$ the person designated by the employer to receive the results and hear any explanatory comments by the employee; and
- \$ an arbitrator, court or government agency as authorized by law.

The employee has the right to a copy of the written results of his/her test only. Confidentiality

regarding the results of others (even if tested at the same time) must be strictly maintained.

A drug test may indirectly reveal that an individual is HIV positive, has epilepsy or diabetes because a medicine prescribed used to treat a particular condition shows up in the test. Under the ADA, an employer who obtains information about disabilities or medical conditions through drug testing is also required to treat this information confidentially under the ADA. To satisfy these requirements, an employer must keep information about disabilities, such as medical documentation regarding the need for an accommodation or medical examination, in a locked, separate file apart from the personnel records. Only specific people must have access to the medical records. Co-workers must not have access to the medical records or the information contained in these records, except for

- \$ supervisors or managers who must be informed about work limitations or the need for accommodations;
- \$ first aid or safety personnel who might be required to give emergency treatment or to develop emergency evacuation procedures; and
- \$ government officials investigating whether an employer is following the ADA or other state and federal laws, insurance companies for provision of benefits, or worker's compensation offices for benefits.

10. What actions can an employer take based on positive results of a drug test?

In Arizona, an employer covered by state law (including most employers, except governmental employers) can discipline or terminate the employee if the results are positive AND if the employer has a written policy that has been distributed to employees as to what action the employer may take under these circumstances. Arizona law does not mandate any particular action, but allows the employer to choose the action s/he will take. The ADA does not require that the employer have a written policy about drug testing and the consequences of a positive drug screen. However, the ADA does not take away additional rights afforded by Arizona law.

11. Does the ADA protect people who are recovering alcoholics?

A person who is an alcoholic is an individual with a disability under the ADA and may be entitled to

consideration of reasonable accommodation, if s/he is qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to a person who is alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not qualified to perform the essential functions of a job or who drinks alcohol during work hours.

12. Can employers make workplace rules regarding alcohol or illegal drug use?

Yes. The ADA does not interfere with employers' programs to combat the use of drugs and alcohol in the workplace. The Act specifically provides that employer may: (1) prohibit the use of drugs and alcohol in the workplace; (2) require that employees not be under the influence of alcohol or drugs in the workplace; and (3) require that employees who illegally use drugs or alcohol meet the same qualification and performance standards applied to other employees. For example, an employer can require that employees not come to work or return from lunch under the influence of alcohol (or drugs used illegally). An employer could also prohibit an employee from bringing alcohol to work, drinking during working hours or to work-related functions.

13. Can people who have alcoholism be held to the same standards as their co-workers?

Yes. Employees who have alcoholism **and** do not perform up to the standards required by their employers can be discharged from their employment. Under the ADA the employer is allowed to terminate and not accommodate an employee with alcoholism, if the employee does not perform up to the same standards as all other employees, even if the behavior is related to the alcoholism. If an employee is often late or does not show up for work because of alcoholism, an employer may take direct action based on the conduct. However, an employer would violate the ADA if s/he treated an employee with alcoholism more harshly than s/he treated other employees for the same misconduct. An employer must make reasonable accommodations for employees who have alcoholism, such as making a flexible schedule that allows the employee to attend AA meetings.

Thomas, who has alcoholism often arrives at work late and fails to finish his job responsibilities. His employer gives Thomas a poor evaluation in this area and does not award him a merit increase. His supervisor also warns him that he could be fired if this is not corrected. Other people who were late were treated similarly to Thomas. Under these conditions, the employer has probably not violated the ADA.

Yvette is a recovering alcoholic. She works as a counselor at a job placement service for a temp agency. She would like to continue to attend her group therapy meetings that are held at 4 p.m. on Wednesdays. She asks her supervisor if she could change her work schedule on Wednesday to work during lunch and leave work at 3:30 on Wednesdays. Unless this would be a hardship for the employer, this would be a reasonable accommodation.

14. Must employers provide substance abuse rehabilitation to recovering alcoholics or drug users?

No. Many employers have established employee assistance programs for employees who abuse drugs or alcohol that are helpful to both the employee and employer. However, the ADA **does not require** an employer to provide an opportunity for rehabilitation in place of discipline or discharge. The ADA, however, does require that an employer consider reasonable accommodations for a person addicted to drugs who is rehabilitated and not using drugs or an alcoholic who remains a qualified individual with a disability. For example, a modified work schedule, to permit the individual to attend an ongoing self-help program, might be a reasonable accommodation for an employee who has successfully completed substance abuse treatment. An employer may also be required to provide unpaid or accrued leave for treatment under the ADA or the Family and Medical Leave Act (FMLA). For more information about FMLA, contact Center staff or the U.S. Department of Labor.

C. Summary

The following are examples of how an employer's drug testing and policies would violate the ADA:

- C An injured worker tests positive not because of illegal drugs, but because of medications for his/her injury prescribed by the treating physician. The employer disciplines or fires the employee because of the positive test result.
- C A covered employer detects an underlying disability because medication taken for the disability is caught on the drug screen and then fires the employee because of the disability.
- C A covered employer releases confidential information to co-workers about a disability revealed during a drug test.
- C A covered employer singles out only people with disabilities or suspected of having a disability for drug tests.
- C A covered employer does not offer employees an opportunity to explain a positive result related to medication for a disability.
- C A covered employer asks illegal questions such as about past drug use or admissions to rehabilitation treatment centers on an employment application or during a job interview.
- C A covered employer terminates an employee or takes other adverse employment action, such as refuses to hire an applicant on the basis of medication taken under a lawful prescription.
- C A covered employer refuses to accommodate an employee with alcoholism who needs to go for treatment or counseling when the accommodation would not be a hardship.

- \$ A covered employer releases confidential information about a past drug addiction to a prospective employer.
- \$ A covered employer makes a discriminatory job qualification that an employee never have engaged in illegal drug use.
- \$ A covered employer has a blanket policy that no applicant will be hired who is on methadone.

These are only examples of possible discriminatory actions by an employer related to drug testing and drug and alcohol policies. Other conduct may also be discriminatory. If you believe that you have been discriminated against by an employer, you may file a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC). Filing a charge of discrimination generally is a necessary step to later be able to file a lawsuit under the Americans with Disabilities Act or Arizona's Civil Rights Act. In general, charges must be filed within 300 days from the date of the discrimination (unless based on a mental disability, then a shorter deadline of 180 days from the date of discrimination may apply). For more information about filing a charge of discrimination and the deadlines that apply, see the Center's guide, ***How to Enforce Employment Protections under the ADA***. If you have not filed within the deadlines, you should still contact the EEOC because there may be grounds for an extension of the deadline.