Addiction and the ADA

How are employees with alcohol or drug addictions protected under current law?

On July 26, 1990, then-President George H.W. Bush signed the Americans with Disabilities Act of 1990.[1] The bill was a major bipartisan effort designed to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for [individuals with disabilities]."[2] Title I of the ADA makes it unlawful for a covered employer to discriminate against a qualified individual with a disability in matters related to employment.[3] Under the ADA, a person is an individual with a disability if he or she has a medical condition which substantially limits one or more major life activities, or has a record of such a limiting impairment.[4] A person is considered substantially limited where he or she is substantially limited "as compared to most people," and a disability does not have to prevent or severely limit an activity to be substantially limiting.[5] A person may also be considered an individual with a disability if he or she is "regarded as" disabled; that is being subjected to an action prohibited under the ADA "due to an actual or perceived impairment that is not both transitory and minor."[6] Under the "regarded as" prong, an individual is not entitled to receive an accommodation.[7]

A qualified individual is an individual who, with or without a reasonable accommodation, can perform the essential functions of the position he or she holds or desires.[8] Essential functions are those functions which are integral to the position; a court looks to the employer's judgment regarding essential functions, but typically considers a variety of factors.[9] Employers also have defenses to liability under the ADA, including that an accommodation would be an undue hardship to the employer, or that an individual with a disability poses a direct threat to the safety of themselves or others.[10]

In 2008, Congress passed the ADA Amendments Act in response to the Court's interpretation of the Act, which severely restricted coverage under the statute.[11] The Act was

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[1] Presidential Statement upon Signing S. 993, The Americans with Disabilities Act of 1990, 26 **Weekly Comp. Pres. Doc.** 1165 (July 26, 1990). When signing the bill into law, President George H. W. Bush declared the act "signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life." Id.

[2] 42 U.S.C. § 12101(a)(7) (2009).

[3] 42 U.S.C § 12112(a) (2009). The full text reads: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Id.

[4] 29 C.F.R. § 1630.2(g)(i)-(ii) (2012).

[5] 29 C.F.R. § 1630.2(j)(ii).

[6] 29 C.F.R. § 1630.2(g)(iii) (internal citations omitted). A transitory impairment is one that is expected to last six months or less. 29 C.F.R. § 1630.15(f) (2011).

[7] 29 C.F.R. § 1630.9(e) (2011).

[8] 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m) (2011).

[9] 29 C.F.R. § 1630.2(n).

[10] 29 C.F.R. § 1630.15(b)(2), (d) (2011).

[11] Legislators were particularly concerned with Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) and Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002). The bill's findings noted that "as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities . . . ."154 Cong. Rec. S8342-01, (daily ed. Sept. 11, 2008) (statement of Sen. Harkin), 154 Cong. Rec. S8342-01, at *S8342-S8343 (Westlaw).

remedial; Congress specifically rejected the demanding standards the courts had placed upon ADA plaintiffs, and ensured the Act achieved its goals through broader coverage.[12] The ADAAA clarified that a "substantial limitation" for purposes of the Act did not have to prevent or severely restrict a major life activity, only to cause a substantial limitation as opposed to the rest of the population.[13] Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working and major bodily functions (including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions).[14] Furthermore, courts were not to consider mitigating measures in their determinations,[15] and an episodic disease, such as cancer, would be considered substantially limiting if it was substantially limiting while active.[16] Congress also expanded the list of major life activities to include the operation of major organ systems.[17]

Alcoholism and drug addiction are generally considered impairments which may rise to the level of a disability.[18] Like all other medical conditions under the Act, an individual's drug or alcohol addiction must substantially limit a major life activity to qualify as a disability for the purposes of the ADA.[19] However, unlike other impairments, alcoholism or drug addiction presents unique challenges for employees seeking accommodations for these impairments.

DRUGS

Courts have recognized addiction to drugs as a disability for purposes of the act, where it substantially limits a major life activity. However, where an individual is still considered a "current" user of illegal drugs, he or she is not protected under the ADA.[20] 42 U.S.C. § 12114(a) expressly prohibits protecting current use of illegal drugs: "[A] qualified individual with a

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[12] See, 42 U.S.C. § 12102 (4)(A) (2009). When determining whether an individual is covered by the Act, the definition of disability "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted. . . ." Id. See generally, Alex B. Long, *INTRODUCING THE NEW AND IMPROVED AMERICANS WITH DISABILITIES ACT: ASSESSING THE ADA AMENDMENTS ACT OF 2008,* 103 **Nw. U. L. Rev.** Colloquy 217 (2008); Equal Employment Opportunity Commission, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC.gov, n.d. (last visited Aug. 3, 2017).

[13] 29 C.F.R. § 1630.2(j)(ii).

[14] https://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm

[15] 42 U.S.C § 12102(4)(E)(i)(I-V) (2009). In Sutton, the Supreme Court had held that the respondent's glasses could be considered in determining disability. 527 U.S. at 488-89. The narrow exception for glasses and contact lenses remains. See, 42 U.S.C. § 12102(4)(E)(ii).

[16] 42 U.S.C. § 12102(4)(D).

[17] 42 U.S.C. § 12102(2)(B).

[18] Drug addiction and alcoholism are included in the list of impairments contemplated by the legislature. H.R. REP. 101-485, at 51.

[19] H.R. Rep. 101-485, at 52. See also, Cunningham v. Nature's Earth Pellets, L.L.C., 433 F. App'x 751, 752 (11th Cir. 2011) ("[Plaintiff] failed to establish that [her anti-depressant addiction and other conditions] were or were regarded as substantially limiting."); Neilson, 162 F.3d at 611 (finding an employee could state a claim based upon his employer's perception of alcoholism only where the perceived disability was substantially limiting).

[20] 42 U.S.C. § 12114(a). See, Jones v. City of Boston, 752 F.3d 38, 59 (2014) (Use of illegal drugs is distinguished from an addiction which can constitute a disability.)

disability shall not include any employee or applicant who is *currently* engaging in the illegal use of drugs, *when the covered entity acts on the basis of such use*." § 12114(a) (emphasis added).

- **What is considered "current use" under 42 U.S.C. § 12114(a)?**

Because the ADA does not protect "any employee or applicant who is currently engaging in the illegal use of drugs,"[21] how courts define whether an individual is a "current" user will determine whether he or she is protected under the "safe harbor" created by the ADA for employees who are no longer using illegal drugs.[22] However, to date "none of the circuits have articulated a bright-line rule" to interpret the scope of "current" use.[23]

Generally, the touchstone of the analysis is whether it is reasonable for an employer to believe the employee is still engaging in illegal use of drugs.[24] Although, theoretically, an individual who has undergone rehabilitation in a thirty-day program and made a sincere resolution to discontinue his or her illegal use of drugs would be considered a former user, courts have not accepted this argument.[25] However the court may articulate its standard, it is accepted that a significant period of time is necessary to qualify for the "safe harbor" exception.[26] Depending upon the facts and circumstances, this could be as recently as one year.[27]

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[21] 42 U.S.C § 12114(a).

[22] Congress has carved out special protection for former users of illegal drugs who have successfully completed or have entered treatment, and for individuals who are regarded as using illegal drugs. 42 U.S.C. § 12114(b). See, Mauerhan v. Wagner Corp., 649 F.3d 1180, 1185 (10th Cir.2011). In Mauerhan, the 10th Circuit acknowledged that although the ADA does not protect current users of illegal drugs, "the ADA . . . creates a 'safe harbor' for those who are not currently engaging in the illegal use of drugs." Id.

[23] See, Mauerhan, 649 F.3d 1180 at 1186 ("None of our sister circuits have articulated a bright-line rule for when an individual is no longer "currently" using drugs, as defined by the ADA"). The 10th Circuit declined to adopt a per se rule; rather, the safe harbor provision merited an individualized inquiry. Id. at 1188 (citing Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 520 (2d Cir. 1991) (finding "current use" is a question of fact)). The Circuits apply different, but similar standards. See, Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th Cir.2001) ("'Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem'" (citing H.R. Conf. Rep. No. 101–596, at 64 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 565, 573)); Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir.1999) (Under the ADA, "currently" means that the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem."); Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir.1997), abrogated on other grounds by Baird ex rel. Baird v. Rose, 192 F.3d 462 (4th Cir.1999) ("Here, 'currently' means a periodic or ongoing activity in which a person engages . . . that has not yet permanently ended.")

[24] See supra note 23 and accompanying text.

[25] See, Mauerhan, 649 F.3d 1180 at 1189 (finding that a plaintiff who had completed a thirty-day rehabilitation program was not a former drug user for the purposes of the ADA); Quigley v. Austeel Lemont Co., 79 F. Supp. 2d 941, 946 (N.D. Ill. 2000) (observing that although "[the plaintiff] was drug free for a total period of one month before Austeel terminated his employment," he was not considered a former user.); Shafer, 107 F.3d at 278 (plaintiff enrolled in a rehabilitation program and drug-free for one month was not a former user); Brown v. Lucky Store, Inc. 246 F.3d 1182,1188 (9th Cir. 2001) (When the employer reasonably believes that drug use remains an ongoing problem, participation in a rehabilitation program is not enough to protect an employee under 42 U.S.C § 12114(b)).

[26] See supra notes 25 and accompanying text.

[27] See, United States v. S. Mgmt. Corp., 955 F.2d 914, 923 (4th Cir. 1992) ([T]he Board's clients are not excluded from the definition of "handicap.") In Southern Management Corp., the plaintiffs sued under the Fair Housing Act, which incorporates similar exclusions with regard to current illegal use of drugs as in the ADA. See, 42 U.S.C. § 3602(h) (1990). The plaintiffs, who had entered a rehabilitation program, were drug-free for one year before applying to rent apartments.

While a former drug user who "is no longer engaging in illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use; is participating in a supervised rehabilitation program and is no longer engaging in such use; or is erroneously regarded as engaging in such use" can be a qualified individual with a disability. [28] Courts analyze whether an individual is protected by the "exception to the exception" provided under § 12114(b) on a case-by-case basis, and no circuit has articulated a hard rule.

The individual exceptions are discussed below:

(b)(1): The employee has completed a successful rehabilitation program.
An individual who has successfully completed a rehabilitation program or otherwise been rehabilitated and is no longer engaging in the illegal use of drugs is protected.[29]

In applying the "reasonable" standard, one court held that it is not enough that an employee be drug-free on the day they are fired to qualify for the exception. Another court held that being drug-free for one month did not qualify the employee as a former drug user.[30]

(b)(2): The employee is currently participating in a rehabilitation program.

The mere fact that an employee is currently in a rehabilitation program does not guarantee coverage under this subsection.[31] This is particularly true where the employee enters a rehabilitation program at an employer's request, rather than voluntarily.[32]

(b)(3): The employee is erroneously regarded as engaging in the use of illegal drugs.

Where an employee is erroneously regarded as using drugs, he or she will be protected under the Act.[33] However, the employee must still prove that his or her employer regarded the perceived addiction as substantially limiting; where an employee is thought not to have a

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[28] 42 U.S.C. § 12114(a). Use of illegal drugs is distinguished from an addiction which can constitute a disability. See, Jones v. City of Boston, 752 F.3d 38, 59 (2014) ([T]he evidence is that the department directly trained its efforts at identifying users, whether addicts or not.") See also, Lopez v Pac. Mar. Ass'n, 657 F.3d 762, 764 (9th Cir. 2011) (finding that an employer's "one strike" rule regarding drug use was not discriminatory because it denied employment on the basis of drug use, rather than addiction).

[29] 42 U.S.C. § 12114(b)(1). See also, Salley v. Circuit City Stores, 160 F.3d 977, 981 (3rd Cir. 1998) (noting that plaintiff, a former heroin addict who relapsed during his employment, was protected by the statute prior to resuming his drug use).

[30] See, Collings v. Longview Fibre Co., 63 F.3d 828, 833 (9th Cir. 1995) ("[T]he fact that the employees may have been drug-free on the day of their discharge is not dispositive."); Shafer, 107 F.3d at 278 (plaintiff who was drug-free for one month was still a "current" use).

[31] Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1188 (9th Cir. 2001) (Enrolling in rehabilitation did not render employee a "former" user); Shafer, 107 F.3d at 278 (Allowing "an employee discovered engaging in the illegal use of drugs [to] escape responsibility for his actions by immediately enrolling in a drug rehabilitation program" is inimical to the purposes of the ADA); Quinones v. Univ. of Puerto Rico, Civil No. 14–1331 (JAG), 2015 WL 631327, at *6 (D.P.R. 2015) (Plaintiff's participation in Narcotics Anonymous did not negate her status as a user)

[32] Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir.1997) (Plaintiff only entered her rehabilitation program following a confrontation with coworkers).

[33] Neilson, 162 F.3d at 611.

"substantially limiting" drug or alcohol addiction, it is not a disability as defined by the ADA.[34] The 10th Circuit held that an Employee could survive summary judgment where "perceived use was severe enough to substantially limit one or more of his major life activities."[35]

- **What is considered "illegal" for the purposes of 42 U.S.C. § 12114(a)?**

The Controlled Substances Act provides the starting point for determining what constitutes a drug and illegal use of drugs.[36] The legislature has drawn a clear line between "illegal drugs" and "illegal use of drugs." Illegal use of drugs refers to using drugs in a manner in which the possession or distribution is unlawful under the CSA.[37] Illegal use does not include the use of a drug taken under the supervision of a licensed healthcare professional or other uses authorized by law. Conversely, inappropriate use of an otherwise valid prescription is also considered illegal use under the Act.[38]

- **Employee Protection Under State Statutes For Medical Marijuana Use**

States have also begun to pass legislation authorizing the use of marijuana, which is considered a Schedule I substance under the CSA with no accepted medical use.[39] While some states have recognized protections for workers under state laws regarding medical marijuana use, other states have not extended the protections provided by their marijuana use statutes to the employment context.[40]

For the most part, the courts have concluded that CSA's preempt state medical marijuana statutes. However, these cases have not been about statutes with specific anti-discrimination provisions. Cases concerning statutes that clearly and explicitly provided employment protections for medical marijuana users have reached a different result. The Rhode Island state

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[34] Id.

[35] See, Neilson v. Moroni Feed Co., 162 F.3d 604, 611 (10th Cir. 1998).

[36] See, 29 C.F.R. § 1630.3(a)(1-2) (2011). Drugs are "controlled substances as defined in schedules I-V of the [CSA] . . . ." 29 C.F.R. § 1630.3(a)(1) (citing 21 U.S.C. § 812 (2012)). Illegal use is defined as "the use of drugs the possession or distribution of which is unlawful under the [CSA]." Id. at § 1630.3(a)(2).

[37] 29 C.F.R. § 1630.3(a)(2) ("[Illegal use of drugs] does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.")

[38] See, 29 C.F.R. § 1630.3(a)(1). The improper use of a prescription would be unlawful. Id. See also, Quinones v. Univ. of Puerto Rico, Civil No. 14–1331 (JAG), 2015 WL 631327, at *4 (D.P.R. 2015) (finding that a former medical student who had abused her prescription medications was engaging in the illegal use of drugs and therefore not protected under the ADA).

[39] 21 U.S.C. § 812 Schedule I (a)(1)(C)(10). § 812(b)(1)(C) states that Schedule I substances "[have] no currently accepted medical use in treatment in the United States." See generally, Russel Rendall, *MEDICAL MARIJUANA AND THE ADA: REMOVING BARRIERS TO EMPLOYMENT FOR DISABLED INDIVIDUALS* 22 **Health Matrix** 315, 324-26 (2012) (discussing the conflict between state and federal law regarding marijuana use).

[40] Roe v. TeleTech Customer Care Mgmt., 257 P.3d 586, 595 (Wash. 2011) (finding "the [Washington State Medical Use of Marijuana Act] does not proclaim a public policy prohibiting the discharge of an employee for medical marijuana use."); Johnson v. Columbia Falls Aluminum Co., No. DA 08–0358, 2009 WL 865308, at *2 (Mont. Mar. 31, 2009) (finding Montana's medical marijuana statute does not require an accommodation for marijuana use in the workplace). The state statutes that specifically provide protection to workers regarding medical marijuana use: AZ, CT, DE, IL, ME, MN, and NY.

court recently held that the CSA does not preempt the anti-discrimination-in-employment provision of Rhode Island's medical marijuana statute.[41] Similarly, the Supreme Judicial Court of Massachusetts concluded, "[u]nder Massachusetts law, as a result of the act, the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication."[42] The court noted "the marijuana act itself, which declares that patients shall not be denied 'any right or privilege' on the basis of their medical marijuana use"[43] and under the state law a handicap employee has the "right and privilege" to a reasonable accommodation, which includes the lawful use of medical marijuana.

- **When are individuals using prescription drugs protected under the ADA?**

Generally, prescribed drugs, when used as directed by a medical professional, will not deprive a person of coverage under the Act.[44] Employers may prohibit illegal use of drugs in the workplace, including illegal use of prescription drugs.[45] However, a policy prohibiting all medications may violate the ADA.[46] Additionally, tests for illegal drugs which may collect information on legal prescription drug use can violate the ADA.[47] However, an employer is free to make policies prohibiting abuse of prescription drugs as long as the policy is narrowly tailored not to encroach on employee's rights .[48]

ALCOHOL

Alcohol use is distinguished from illegal use of drugs, and is not encompassed by § 12114(a).[49] Although alcoholism and drug addiction are both considered disabilities under the

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[41] See Callaghan v. Darlington Fabrics Corp., 2017 WL 2321181, at *13–14 (R.I. Super. 2017).
[42] Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456, 78 N.E.3d 37 (2017).
[43] Id.
[44] 29 C.F.R. § 1630.3(a)(2) ("[Illegal use of drugs] does not include the use of a drug taken under the supervision of a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.")
[45] 42 U.S.C. § 12114(c)(1). See also, Bates v. Dura Auto. Sys., Inc., 767 F.3d 566, 575 (6th Cir. 2014). In Bates, the Sixth Circuit rejected the lower court's reasoning that prescription medication was not encompassed by the ADA's medical testing exception for illegal use of drugs: "By permitting testing as to the 'illegal use of drugs,' . . . as opposed to the use of illegal drugs—the exemption contemplates circumstances where employees abuse medications not prescribed to them." Id.
[46] See, Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221, 1230 (10th Cir. 1997) (affirming that a policy requiring employees to disclose all medications to management as a condition of employment, including prescription medications, violated the ADA).
[47] Roe v. Cheyenne, 124 F.3d at 1230; E.E.O.C. v. Grane Healthcare Co., 2 F. Supp. 3d 667, 703 (W.D. Pa. 2014) (Pre-employment examinations "designed to elicit medical information extending far beyond evidence of illegal drug use" violated ADA); Connolly v. First Pers. Bank, 623 F. Supp. 2d 928, 931 (N.D. Ill. 2008) ("A pre-employment drug test may not be administered under the guise of testing for illicit drug use when in fact the results are used to make employment decisions based on both legal and illegal drug use alike.")
[48] Meyer v. Qualex, Inc., 388 F. Supp. 2d 630, 636 (E.D.N.C. 2005). The employer's drug-free workplace policies in Meyer prohibited "abuse of prescription drugs which includes exceeding the recommended prescribed dosage or using others' prescribed medications", and "failure to advise a supervisor or manager of the use of a prescription or over-the-counter drug which may alter the employee's ability to perform the essential function of his or her job" (internal citations omitted). The court found this narrowly-tailored policy complied with the ADA. Id.
[49] See, 29 C.F.R. § 1630.3(a)(1) (alcohol not included in the definition of "drug" for the purposes of § 12114(a)).

ADA, the disabilities are treated differently for the obvious reason that the use of alcohol in most instances is legal under federal and state law. In contrast to someone who is using illegal drugs, an alcoholic who continues to abuse alcohol may be protected by the ADA. An alcoholic who is viewed as having a disability **may** be entitled to consideration of an accommodation as long as the employee can perform the essential functions of the job.

Under the ADA, an employer will likely have to accommodate an employee seeking treatment for alcoholism. An employer's obligation to accommodate an employee's alcoholism, however, is distinguishable from other disabilities because the employer does not have to accommodate an employee's poor behavior caused by the alcoholism. For example: an employee that requests the employer to overlook his tardiness because of his addiction to alcohol would not constitute a reasonable accommodation. While the same request made by a narcoleptic may be considered a reasonable accommodation. This distinction will be discussed in more detail below.

How does the use of illegal drugs or alcohol affect other aspects of employment?

MEDICAL TESTING

Generally, a test to determine illegal use of drugs is not a medical examination for the purposes of the Act, and an employer may make decisions based upon such use.[50] An employer may create and administer policies regarding illegal use of drugs in the workplace to determine whether an individual is engaging in the illegal use of drugs.[51] However, a test for alcohol use is considered a medical examination.[52] An employer subject to the Department of Transportation's (DOT) authority is free to "remove from safety sensitive positions" any employee under the influence of either drugs or alcohol in compliance with DOT regulations.[53]

Where an individual is taking physician-prescribed controlled substances, medical testing may be impermissible.[54] A pre-employment drug test "may not be administered under the guise of testing for illicit drug use when in fact the results are used to make employment decisions based on both legal and illegal drug use alike."[55] Individuals using alcohol who are not subject to DOT regulations or regulations set by another agency are still protected under the ADA's usual

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[50] 42 U.S.C. § 12114(d)(1)-(2); 29 C.F.R. § 1630.3(c) (2012); 29 C.F.R. § 1630.16(c)(1) (2011).
[51] 42 U.S.C. § 12114 (b)(3), (d)(2); 29 C.F.R. § 1630.16(c)(1).
[52] See, *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations Employees Under the Americans with Disabilities Act (ADA)* (2000), available at https://www.eeoc.gov/policy/docs/guidance-inquiries.html (alcohol testing included among prohibited pre-employment medical tests). An employer may still maintain alcohol-free workplace policies, and may test employees if they have a reasonable belief the employee is under the influence of alcohol at work. Id. at n. 26.
[53] 42 U.S.C. § 12114(e)(1)-(2). See also, Jarvela v. Crete Carrier Corp., 776 F.3d 822, 831 (11th Cir. 2015) (holding that an employer does not violate the ADA when it fires an employee for failure to comply with DOT regulations).
[54] Connolly, 623 F. Supp. 2d at 931. In Connolly, the court denied dismissal, noting that because the employer had not made an effort to determine whether the drug use was legal, or allowed the employee an opportunity to explain the test results, a question of fact existed as to whether the denial of employment was discriminatory. Id. "The exemption for drug testing was not meant to provide a free peek into a prospective employee's medical history and the right to make employment decisions based on the unguided interpretation of that history alone." Id.
[55] Id.

standards for medical testing, and an employer may not make medical inquiries unless they are consistent with business necessity.[56]

Qualification Standards, Performance, and Misconduct

Under 42 U.S.C 12114(c)(4), an employer "may hold an employee who engages in the illegal use of drugs or who is an alcoholic" to the same standards of as every employee, even where his or her conduct is a result of a drug or alcohol addiction.[57] The illegal use of drugs is the "one area" where both the ADA and the Rehabilitation Act "recognize a dichotomy between the disability and the disability-caused misconduct . . . ."[58] An employer may also create work rules which prohibit "the illegal use of drugs and the use of alcohol in the workplace."[59] This could require employees are not under the influence of alcohol while at work, or are not engaging in the illegal use of drugs while at work.[60]

Discipline under an employer's conduct rules, for both individuals engaging in the use of illegal drugs or using alcohol, is not prohibited where the individual receives the same punishment other employees not suffering from addiction would have received.[61] For example, where an alcoholic employee is routinely late to work, or routinely absent, he or she may be terminated or disciplined in accordance with the employer's policies.[62] However, if the employer knows an individual is an alcoholic, and he or she is disciplined while other, non-alcoholic employees routinely arrive late, the employer has discriminated on the basis of the employee's disability, rather than conduct.[63]

Leave

In many instances where leave is required to undergo rehabilitation for an alcohol or drug addiction, leave can be a reasonable accommodation.[64] However, an employer may not have to

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[56] See, Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221, 1230 (10th Cir. 1997); *EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations Employees Under the Americans with Disabilities Act (ADA)* (2000), available at https://www.eeoc.gov/policy/docs/guidance-inquiries.html.

[57] 42 U.S.C 12114(c)(4) (2009).

[58] Neilson v. Moroni Feed Co., 162 F.3d 604, 611 (10th Cir. 1998).

[59] 42 U.S.C 12114(c)(1)-(2).

[60] Id.

[61] See, EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), available at https://www.eeoc.gov/policy/docs/accommodation.html#types. The guidance provides the following explanation regarding discipline:

> An employer never has to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means, for example, that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability. Id.

[62] Id.

[63] Id.

[64] 42 U.S.C. § 12111(9)(B) (providing examples of reasonable accommodations); 29 C.F.R. 1630.2(o) (discussing reasonable accommodations); Dark v. Curry Cty., 451 F.3d 1078, 1090 (9th Cir. 2006)
(Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." (citing Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999)).

grant leave where to do so creates an undue hardship.[65] An employer is not required to grant paid leave, or to grant leave flowing from an individual's misconduct, such as absenteeism.[66]

Last Chance Agreements

An employer may offer an employee with alcoholism or drug addiction a "last chance" or "firm choice" agreement rather than termination.[67] A "last chance" agreement is an agreement in which an employee consents to seek treatment, undergo periodic drug testing, maintain sobriety in the workplace, or comply with other conditions in exchange for continuing his or her employment.[68] These agreements are generally construed as valid contracts, and may be invalidated like other contracts.[69]

However, a last chance agreement is invalid under the ADA where such an agreement is pretext for discrimination.[70] In O'Riley v. U.S. Bakery, a truck driver with post-traumatic stress disorder was routinely asked about his condition by supervisors and told that "people like [him]" scared other employees.[71] Despite exemplary work in the past, the employee was eventually placed on a last chance agreement, removed from his regular route, and told not to discuss suicide with customers following leave for treatment.[72] The court denied summary judgment for the employer, because a reasonable factfinder could conclude that the plaintiff had been discriminated against on the basis of his disability.[73]

Rehiring Policies

In Raytheon Co. v. Hernandez, the Supreme Court found than an employer's unwritten policy of refusing to rehire individuals who had previously resigned (in lieu of termination) due to illegal use of drugs was a legitimate, nondiscriminatory reason that satisfied the defendant's burden of production.[74] Rejecting the lower court's erroneous application of a disparate impact analysis, the Court remanded the case to determine whether the given reason was pretext.[75]

The lower courts have reached similar conclusions; an employer has no obligation to rehire an employee it lawfully discharged for violating workplace rules, such as those relating to drug or alcohol use.[76] Further, a "second chance" is not an accommodation as defined by the

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[65] Dark v. Curry Cty., 451 F.3d at 190. See also, Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990). Here, the court rejected the plaintiff's contention that his employer should not have terminated him after he reentered treatment: "[Plaintiff] also contends that he entered a treatment program before his removal became effective and that the Postal Service should have awaited the outcome of this treatment or reinstated him. . . . [R]easonable accommodation did not require such an action." In contrast to Dark, where a question of fact existed as to whether leave was reasonable, Fuller involved an employee who had previously taken leave for unsuccessful treatment.

[66] Brown, 246 F.3d at1188.

[67] Longen v. Waterous Co., 347 F.3d 685, 689 (8th Cir. 2003)"[A]ll return-to-work agreements, by their nature, impose employment conditions different from those of other employees [and] courts have consistently found no disability discrimination in discharges pursuant to such agreements." Id.

[68] Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1184 (6th Cir. 1997).

[69] Longen, 347 F.3d at 689 ("; Mararri, 130 F.3d at 1184.

[70] O'Riley v. U.S. Bakery, No. CV–01–1705–ST., 2002 WL 31974407, at *11 (Dec. 23, 2002 D. Or.).

[71] Id. at *3.

[72] Id. The agreement said the plaintiff would "keep a clean record regarding performance issues" (internal citations omitted). However, at his termination meeting the plaintiff was told he had violated his last chance agreement because "[he] talked about suicide[.]" Id. at *4.

[73] Id. at *11.

[74] 540 U.S. 44, 53 (2003).

[75] Id. at 55.

[76] Flynn v. Raytheon Co., 94 F.3d 640 (1st Cir. 1996)

ADA.[77] An employer's "no strike" policies must still comply with the requirements of the statute, however.[78] Where such a policy results in a failure to rehire an individual because of his or her history of addiction or alcoholism, the employer may have violated the ADA.[79] For example, in Flynn v. Hughes Missile Co., upon remand from the Supreme Court, the Circuit upheld its denial of summary judgment.[80] Noting that human resources personnel had access to letters from the plaintiff's doctors and Alcoholics Anonymous contacts, the court found that a reasonable jury could find the employer had refused to hire the plaintiff due to his disability of alcoholism, rather than previous misconduct.[81]

How are medical marijuana users affected under 42 U.S.C. § 12114(a)?

As noted above, the ADA looks to the Controlled Substances Act to determine which drugs, and what uses, are illegal for the purposes of 42 U.S.C. § 12114(a).[82] This has caused considerable confusion in recent years as states have moved to legalize marijuana under their laws.[83] Marijuana has been legalized for medical use in several states and the District of Colombia.[84] Some states, in interpreting their own statutes regarding marijuana use, have held that their legislatures meant to eradicate criminality of marijuana to encourage medical use, but that the statutes do not speak to workplace policies.[85]

The Supreme Court has addressed the issue of conflict of federal laws with states' marijuana use statutes, but not in the employment context. In Gonzales v. Raich, a plaintiff with a license to cultivate marijuana for personal medical use in California objected to the federal seizure of her five marijuana plants (which were later returned due to an injunction filed pending the case's resolution), claiming that Congress did not have the authority to regulate the use or ownership of prescribed marijuana for personal home use, which was not intended for the interstate market.[86] The Court disagreed, finding that because growing marijuana was a "quintessentially economic" activity, which could, in the aggregate, burden interstate commerce, Congress had authority to regulate that activity.[87] Finally, California's laws were subject to the Supremacy Clause, and could not abrogate superseding federal laws.[88]

In James v. City of Costa Mesa, the Ninth Circuit addressed the issue of conflicting federal and state laws regarding marijuana use under Title II of the ADA.[89] Plaintiffs sued the

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[77] Flynn, 94 F.3d 640 (1st Cir. 1996) ("The ADA does not require an employer to rehire a former employee who was lawfully discharged for repeated disability-related failures to meet its legitimate job requirements."). See also, Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir.1995);

[78] See supra note 19.

[79] Flynn,

[80] Id.

[81] Id.

[82] 29 C.F.R. § 1630.3(a)(1).

[83] See supra note 27.

[84] See generally, Elizabeth Rodd, Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination, 55 B.C. L. Rev. 1759, 1794 n.8 (2014) (discussing current and pending medical marijuana legislation in state jurisdictions and the District of Columbia).

[85] See supra note 28.

[86] 545 U.S. 1, 5-8 (2005).

[87] Id. at 17 (citing Wickard v. Filburn, 317 U.S. 111, 128-129 (1942)).

[88] Id. at 29. The Court dismissed the Respondent's contention that compliance with state law was sufficient: "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is 'superior to that of the States to provide for the welfare or necessities of their inhabitants[.]' " (internal citations omitted). Id.

[89] James, 700 F.3d at 397.

City of Costa Mesa and the City of Lake Forest, alleging that aggressive campaigns in both cities to shut down marijuana collectives violated their rights as individuals with a disability under Title II through discriminatory provision of public services.[90] The Court disagreed:

> We recognize that the plaintiffs are gravely ill, and that their request for ADA relief implicates not only their right to live comfortably, but also their basic human dignity. We also acknowledge that California has embraced marijuana as an effective treatment for individuals like the plaintiffs who face debilitating pain. Congress has made clear, however, that the ADA defines "illegal drug use" by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use. We therefore necessarily conclude that the plaintiffs' medical marijuana use is not protected by the ADA.[91]

Later cases reached similar conclusions. In Steele v. Stallion Rockies Ltd., the court affirmed summary judgment for the employer, which had terminated the plaintiff following his positive drug test.[92] The plaintiff objected on the grounds that he was a medical marijuana user, but the court found his non-compliance with the employer's workplace policies a valid reason for termination: "[A]ntidiscrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct."[93]

However, an employer may not use an employee's illegal use of drugs as a pretext to discriminate on the basis of a covered disability.[94] In EEOC v. Pines of Clarkston, for example, the court denied summary judgment for the employer because although the employee used medical marijuana to treat her epilepsy, evidence within the record suggested that the employer's termination of the employee following a positive drug test was pretext.[95] The employee stated that she was "grilled" during interviews regarding her epilepsy, and that her employer expected her to reveal information regarding her lawful medication use and treatment.[96] Thus, a reasonable jury could conclude the employee was fired due to her epilepsy, rather than her drug use.[97]

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[90] Id.
[91] Id.
[92] Steele v. Stallion Rockies Ltd., 106 F.Supp.3d 1205, 1208 (D.Colo. 2015).
[93] Steele, 106 F.Supp.3d 1205, 1208 (internal quotations omitted) (quoting Curry v. MillerCoors, Inc., No. 12–cv–02471–JLK, 2013 WL 4494307, at *3 (D.Colo. Aug. 21, 2013)). See also, EEOC v. Pines of Clarkston, No. 13-CV-14076, 2015 WL 1951945, at *5 (E.D. Mich. Apr. 29, 2015) ([D]efendant is no doubt correct that discharge for illegal drug use is a permissible nondiscriminatory reason . . . .")
[94] EEOC v. Pines of Clarkston, No. 13-CV-14076, 2015 WL 1951945, at *5 (E.D. Mich. Apr. 29, 2015).
[95] Id.
[96] Id.
[97] Id.