

KD Alert: EEOC Guidance: Employee Opioid Use

During the 30th anniversary year of the Americans with Disabilities Act (ADA), the U.S. Equal Employment Opportunity Commission (EEOC) has tackled the opioid epidemic sweeping the country by issuing guidance in the form of two “technical assistance” documents. The two documents, titled *Information for Employees* and *Information for Health Care Providers*, respectively, are “intended only to provide clarity to the public regarding existing requirements under the law” as to the use of illegal drugs in the workplace.

The EEOC defines the term “opioid” to include many common prescription drugs such as oxycodone (OxyContin®, Percodan®, Percocet®), hydrocodone (Vicodin®, Lortab®, Lorcet®), meperidine (Demerol®), buprenorphine (Suboxone® or Subutex®) and methadone, which can be prescribed to treat opioid addiction in a Medication Assisted Treatment (“MAT”) program, as well as illegal drugs like heroin.

Unlawful Use of Opioids and the Employer's Rights

The EEOC guidance states that employers are permitted to terminate and/or take other adverse action against an employee for the use of opioids in the workplace, regardless of whether the employee has performance or safety problems. If an employee is using opioids during work – whether lawfully prescribed or not - the employer is not required to provide the employee with an accommodation that lowers production or performance standards, eliminates essential functions of the job, pay for work that is not performed, or tolerate illegal drug use on the job.

The Interactive Process

If an employee's use of opioids is legal, (i.e. there is a valid prescription for the drugs and/or the use of the opioid medication is directed by a MAT program), an employer must consider if there is a way for the employee to do the job safely and effectively before taking any adverse action. This is when the “interactive process” is triggered. An employee cannot be denied a job or terminated from a position because they are in a MAT program, unless the employee is unable to do the job safely and effectively, or is disqualified under another federal law.

Lawful Use and Reasonable Accommodations

While the guidance reinforces the notion that an employer does not have to tolerate illegal drug use at any time, the EEOC has carved out certain lawful uses of opioids, thereby entitling employees to protection from disability discrimination under the ADA. In this regard, employees who are currently using opioids, are addicted to opioids or were addicted to opioids in the past, but are not currently using opioids illegally, may be entitled to reasonable accommodations, provided neither safety nor performance are compromised. The EEOC provides the following examples of reasonable accommodations: change in break/work schedules, a change in shift assignment, or a temporary transfer to another position.

An employer may also have to provide a reasonable accommodation if:

- The employee takes prescription opioids to treat pain for a medical condition and the underlying medical condition qualifies as a “disability” under the ADA;
- The opioid medication the employee is taking interferes with their everyday functioning;
- The employee has an opioid addiction (but not if the employee is using opioids illegally, even if they have an opioid addiction);
- The employee had an opioid addiction in the past and needs an accommodation to help avoid relapse; or
- The employee has a medical condition that is related to opioid addiction and the condition is a “disability” under the ADA.

The EEOC also describes the process for requesting a reasonable accommodation and provides guidance to employees on how to report if they believe their rights have been violated. Moreover, the guidance provides “a brief explanation of the health provider’s role under the ADA when a patient who uses opioids needs a reasonable accommodation and when questions arise about a patient’s ability to perform a job safely.” The health care provider’s role includes but is not limited to providing documentation to an employer (with the employee’s approval) to support the request for an accommodation. The EEOC encourages health care providers to provide the following information, if requested:

- *The health care provider’s qualifications and the nature and length of the health care provider’s relationship with the employee;*
- *The nature of the employee’s medical condition;*
- *The employee’s functional limitations in the absence of treatment;*
- *An explanation on how the employee’s medical condition makes changes at work necessary;*
- *A suggested accommodation.*

Employers may then use this information to evaluate whether to provide a reasonable accommodation to an employee, and, if so, which accommodation to offer.

Employers should review their policies and procedures regarding handling requests for an accommodation and ensure those in managerial positions are aware of their obligations under the ADA and relevant state and local laws (i.e. for New York employers either the interactive process or the cooperative dialogue). For more information about this alert or an employee’s request for a reasonable accommodation, please contact Keith Gutstein or Erika Rosenblum by email at KGutstein@kaufmandolowich.com, ERosenblum@kaufmandolowich.com, or by phone at (516) 681-1100, or any member of Kaufman Dolowich & Voluck’s Labor & Employment Law Practice Group.