



## **ADA Live! EPISODE 68:**

### **Opioid Addiction and the ADA with the Department of Justice**

**Event Date:** May 1, 2019

**Presenters:** Stephanie Berger and Savannah Weston, Disability Rights Section (DRS) of the Civil Rights Division of the Department of Justice

**Host:** Rebecca Williams, Southeast ADA Center

**Stephanie:** Hi, I'm Stephanie Berger.

**Savannah:** And I'm Savannah Weston with the Disability Rights Section of the Department of Justice, and you're listening to ADA Live!

**Music by 4WheelCity playing:** [Car starting] Yo. [Car starting, engine whirling] [Music] [Car starting] All right, let's roll. Let's go. Wel-come to / Here we come [Music fades out].

**Rebecca:** Good afternoon on behalf of the Southeast ADA Center, the Burton Blatt Institute of Syracuse University and the ADA National Network. Welcome to episode 68 of ADA Live! Hello, everybody. I'm Rebecca Williams, a training specialist and technical assistant in the Southeast ADA Center. Before we move on, you can ask questions about the ADA and opioid addiction at any time at [adalive.org](http://adalive.org).

Welcome, Stephanie and Savannah, and thanks for speaking to us on this very important topic. It seems to be in the media every day. Statistics indicate that more than 115 people in the United States die from overdosing on opioids. When we look at that figure on an annual basis, that's 470,500 people annually. An addiction to opioids, including misuse of painkillers, such as fentanyl -- the Centers for Disease Control estimates that the total economic burden of prescription opioid misuse alone in the United States is 78.5

billion a year, and that includes the costs of health care, lost productivity, addiction treatment, and the criminal justice involvement. Stephanie and Savannah, perhaps a good place to start our discussion today is to talk about the Disability Rights Section of the Civil Rights Division of the Department of Justice and the role it plays in the current opioid crisis in the United States.

**Stephanie:** Sure. So, the Disability Rights Section works to achieve equal opportunity for people with disabilities in the United States by implementing the Americans with Disabilities Act. With respect to the opioid epidemic, the Disability Rights Section is focused on eliminating discriminatory barriers to treatment and recovery for people with opioid use disorder who are not currently engaging in illegal drug use. The Disability Rights Section's efforts are just one part of a larger response to the opioid epidemic by the Department of Justice. The Department of Justice's overall response to the opioid epidemic has three prongs: Prevention, enforcement, and treatment. While much of the Department of Justice's efforts are focused on cutting off supply and bringing criminal prosecutions, the Disability Rights Section is focused on reducing discriminatory barriers to treatment. People with opioid use disorder frequently face discrimination and stigma related to previous illegal use of drugs or the use of medication-assisted treatment, or MAT. The ADA can be an important tool when discrimination, which is frequently fueled by stigma, myths, and stereotypes, serve as a barrier to treatment or sustained recovery.

**Rebecca:** Thanks. It's great to know about the DOJ's three-pronged approach to the opioid epidemic. You shared this under what circumstances -- can you share with us under what circumstances drug addiction is a disability?

**Stephanie:** The Department of Justice's Title II and Title III regulations specifically include drug addiction in the definitions of mental or physical impairment. Opioid use disorders are a type of addiction and therefore impairments under the ADA. Individuals with substance abuse disorders that substantially limit one or more of their major life activities are generally considered to have a disability under the ADA, but note that this is subject to an important exclusion regarding current illegal drug use. Major life activities include caring for one's self, learning, concentrating, communicating, working and the

operation of major bodily functions. Social interactions and parenting have also been recognized by some courts as major life activities that may be affected by substance abuse disorders.

**Rebecca:** Thank you for that explanation. Will you now tell us a little bit more about current illegal drug use exclusions?

**Savannah:** Yes. So, the ADA provides that an individual with a disability does not include an individual who is currently engaged in the illegal use of drugs when the covered entity acts on the basis of such use. So, what this means is that if an individual is currently engaged in the illegal use of drugs and a covered entity takes adverse action against that person on the basis of that use, this is not a violation of the ADA.

Current illegal drug use is defined as the illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current, or that continuing use is a real and ongoing problem. Whether an individual's illegal drug use stopped long enough ago for the person to be protected by the ADA depends on several factors. Some key questions are, number one, does the illegal use of drugs remain a problem? And, two, how much time has passed since the individual illegally used drugs? Some courts have interpreted current use to include the weeks and months prior to the alleged discriminatory act, while other courts have found that as few as 30 days free of illegal drug use is no longer currently engaged in illegal use.

**Rebecca:** That's interesting, Savannah. It seems as though at this time, interpretation of current use is open to each judge's interpretation.

Medical-assisted treatment is something we are starting to hear more and more about. Just what is medication-assisted treatment?

**Savannah:** That's a great question. So, medication assisted treatment, or MAT, refers to treatment for an opioid use disorder which combines the use of medications, such as methadone, Buprenorphine, or naltrexone with counseling and behavioral therapy. It is important to note that MAT does not fall under the illegal use of drugs exclusion under the

ADA, because the illegal use of drugs does not encompass the use of a drug tape under the supervision of a licensed health care professional.

**Rebecca:** So, it sounds as though the key here is under care of physician when looking at medication-assisted treatment.

Can you now give us an example of the kinds of cases or complaints the Department of Justice is hearing in relation to the ADA and opioid use?

**Stephanie:** Sure, we can give you a few examples. So, first, in May of 2018, the Department of Justice entered into a settlement with Charlwell Operating, which is a company that operates a skilled nursing facility in Massachusetts under Title III of the ADA, which covers public accommodations. In this matter, the complainant alleged that in 2017, this skilled nursing facility denied him a bed because he was using Suboxone, which was division prescribed and for his opioid use disorder. Through its investigation, the Department learned that this skilled nursing facility did not admit any patients that had physician-prescribed medication for their opioid use disorder, including Suboxone and methadone in the year of 2017.

The Department alleged that Charlwell's denial imposed eligibility criteria that screened out individuals with opioid use disorder and denied the patient the opportunity to receive their services on the basis of disability and in violation of the ADA. The settlement requires Charlwell to adopt a nondiscrimination policy, provide training on the ADA and OUD to admissions personnel and to pay a civil penalty of \$5,000 to the United States.

In addition, in January of this year [2019], the department entered into another settlement agreement with another Title III entity, Selma Medical Associates, which is a private medical facility that provides primary and specialty care in Virginia. And in this matter, the complainant alleged that Selma Medical refused to accept him for a new family practice appointment solely because he was being treated for OUD with Suboxone. Like in the case we just talked about, Charlwell, in this case, the department alleged that Selma Medical imposed eligibility criteria that was in violation of the ADA. This settlement agreement requires Selma to pay \$30,000 in damages to the complainant and a \$10,000

civil penalty to the US, as well as to adopt new policies and conduct training in order to ensure that it complies with the ADA in the future.

Also, in a Title II context, which covers state and local governments, discrimination may arise in the areas of zoning and child welfare. City or locality may violate the ADA if it adopts and enforces zoning rules that reject residential substance abuse programs to a more rigorous approval process than what would be required of similar entities. For example, in 2012, the department successfully challenged the city of Baltimore's discriminatory zoning rules, which subjected residential substance use disorder programs to a burdensome approval process. So the Baltimore zoning code had required residential substance abuse treatment programs, but not other similar programs, to obtain a conditional ordinance, so the department alleged that this requirement discriminated against individuals receiving treatment in the residential substance abuse treatment program in violation of Title II of the ADA, and also under the Fair Housing Act. The Court found the city's requirement to be overbroad and discriminatory and ordered that the zoning code be amended through legislation or court order.

Title II of the ADA also covers child welfare agencies and courts' interactions with parents who are in recovery or who have already recovered from an OUD. Child welfare agencies and court systems should not subject parents to blanket eligibility criteria that screens out individuals with disabilities from participation in their programs, services or activities. So, for example, we are aware of some allegations that some courts and agencies have blanket policies that prohibit parents from using medication-assisted treatment in order to retain custody of their children, and really it's these blanket policies that may draw a challenge under the ADA.

**Rebecca:** Well, those are certainly -- excuse me -- those are certainly interesting cases, Stephanie. Thanks.

It sounds as though the Department of Justice is really serious about nondiscrimination when medication-assisted treatment is involved.

Now let's talk a little bit about Title I, the employment Title of the ADA. What are some examples of discrimination against individuals with opioid use disorder that can occur in this context?

**Stephanie:** Yeah, this is another really active area under the law when it comes to opioid use disorder discrimination. The EEOC has entered into several settlements regarding applicants who received a job offer but then whose offer was withdrawn when the employer found out, either through the applicant's voluntary disclosure or through a pre-employment drug test that the applicant was using medication-assisted treatment. So, for example, in a case called EEOC versus Baldo group, which settled in January of 2018, the EEOC alleged that Baldo had conditionally offered an applicant a laborer position and later withdrew that offer when the applicant disclosed at his physical that he was using doctor prescribed Suboxone. There was also an allegation of not determining what effects, if any, on the medication to impair the applicant to do their job. Baldo paid \$70,000 to the individual and amended its policy.

Employment discrimination could also occur in the context of a denial of a reasonable accommodation, so, for example, an employee who is using medication-assisted treatment might request a different schedule so that he or she can visit a clinic each day in order to receive a dose of methadone, or maybe to be allowed to stand instead of sit when working due to muscle pain. The same reasonable accommodation rules would apply here. Once an employer determines an accommodation is reasonable, the employer must provide it, unless they can prove that the accommodation would pose an undue hardship, a determination that needs to be made on a case-by-case basis.

**Rebecca:** Thanks for that information about employment, Stephanie. I do have another question about employment. Do employers have to provide time off for employees to attend treatment, counseling, or medication-assisted treatment programs?

**Stephanie:** That's a good question. Time off may be a reasonable accommodation under the ADA for an individual with opioid use disorder, such as leave to attend medical appointments related to an individual's ongoing addiction treatment. So, for example, an

individual may need to visit a clinic each day to obtain his medication-assisted treatment or to attend therapy.

Even though the ADA doesn't cover individuals who are currently illegally using drugs, it is important to remember that some individuals may stay in treatment for addiction long after their illegal use of drugs ceases. In addition, some employees may want to request a reasonable accommodation of leave to attend rehab, even though they are not currently engaging in the illegal use of drugs, so, maybe preemptively before their illegal use becomes a problem or while they are legally using medication-assisted treatment. In these scenarios, it may be a violation for the employers to deny their accommodations or to fire employees, because to do so would discriminate against them on the basis of their disability of opioid use disorder, not on the basis of current illegal drug use.

**Rebecca:** Wow, great information, Stephanie. Another question here about employment: If an employee has been written up or fired for poor work performance, and then after the fact they disclose the opioid use disorder, does the employer have to rescind the action?

**Stephanie:** Probably not, as long as the action was taken because of the employee's poor work performance and not because of the employee's use disability. However, if the employer uses a made up or exaggerated report because the employer thinks that the employee has OUD and wants to fire them because of it, that would be discrimination under the ADA. But in the scenario that you have described, where the employer doesn't know that the employee has an opioid use disorder until after the fact, the employer's adverse action would not give rise to an ADA violation.

**Rebecca:** There really are a lot of issues around employment and opioid use and opioid use disorder.

We have another question here. If an employee tests positive for a controlled substance, may an employer ask whether the employee is taking the drug under the care of a physician? Or would this be viewed as asking disability-related information?

**Stephanie:** So, a test to determine whether an employee is engaged in the illegal use of drugs is not considered a medical examination under the ADA. 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. If use of an opioid that is commonly used as medication-assisted treatment is revealed during a routine drug test, the employer should give the employee an opportunity to explain whether the drug detected is medication-assisted treatment being taken under the supervision of a physician before they take any adverse action.

If this inquiry reveals information about an individual's disability or medical condition, such as revealing that the individual has OUD, this information should be treated as confidential medical record.

**Rebecca:** Thanks so much, Stephanie, for all of that great information as it relates to opioid use disorder.

ADA Live! audience, if you have questions about the Disability Rights Section in the Department of Justice and their role in reducing barriers to people with opioid use disorder, you can submit questions at any time online at [adalive.org](http://adalive.org). Now let's take a quick break.

**[Music by 4WheelCity playing.]**

**VOICE OVER:** The Disability Rights Section works to achieve equal opportunity for people with disabilities in the United States by implementing the Americans with Disabilities Act, ADA. Through its multifaceted approach towards achieving compliance with the ADA, this Section works to make this goal a reality. The Section's enforcement, regulatory coordination and technical assistance activities required by the ADA, combined with an innovative mediation program, provide a cost effective and dynamic approach for carrying out the ADA's mandates.

The Section also carries out responsibilities for coordinating the consistent interpretation of Section 504 of the Rehabilitation Act across the government. Section activities affect millions of business and is nonprofit agencies. Thousands of units of state and local government, over 40 million people with disabilities, and over a hundred federal agencies and commissions in the executive branch.

You can find out more by visiting [www.ada.gov](http://www.ada.gov).

**Rebecca:** Welcome back. We are speaking with Stephanie Berger and Savannah Weston with the Disability Rights Section of the United States Department of Justice. Stephanie and Savannah, unfortunately we are just about out of time. I want to offer you an opportunity to share any additional information with our listening audience before we have to go.

**Savannah:** Thank you. We want to let listeners know that the Department of Justice offers a toll free line for an opportunity to answer questions about these or any other ADA topics. Listeners can call 1-800-514-0301 or 1-800-514-0383 for TTY.

In addition, we want to make listeners aware of our website, [www.ada.gov](http://www.ada.gov), which is -- which is a great resource and includes information about how to file an ADA complaint with the Department of Justice.

Employment-related complaints should be sent to the Equal Opportunity Employment Commission, EEOC.

**Rebecca:** Thank you so much, ladies. That was all absolutely great and extremely helpful information. Listeners, our guests for this episode of ADA Live! Have been Savannah Weston and Stephanie Berger, attorney advisors with the Disability Rights Section of the Civil Rights Division in the United States Department of Justice. As always, we thank you for joining us for this episode of ADA Live!

This episode and all previous ADA Live! episodes are available on our website at [ADALive.org](http://ADALive.org).

All of our episodes are archived in a variety of formats, including streamed audio and accessible transcripts. You can also download the podcasts. It's as easy as going to the podcast icon on the mobile device and searching for ADA Live!

Remember, if you have any questions on the Americans with Disabilities Act, you can submit your questions any time on-line at [ADALive.org](http://ADALive.org) or contact your regional ADA center at 1-800-949-4232. And, remember, all calls are free and are confidential.

ADA Live! is a program of the Southeast ADA Center. Our producer is Celestia Ohrazda, with Beth Harrison, Mary Morder, Emily Rueber, Marsha Schwanke, and Barry Whaley. Our music is from 4 Wheel City, the Movement for Improvement. We'll see you next episode. [Music]

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