

# **Addiction in the Workplace:**

## **Understanding Your Rights and the Limitations of the Law**

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### **Introduction**

Employment is an integral component of recovery from addiction - a hardly revolutionary notion. Having a job allows an individual to provide for oneself, develop autonomy and accountability, while also embarking on a personal journey toward a larger purpose. As young people in or seeking recovery enter - or re-enter - the workforce, understanding workplace protections against discrimination is critical to ongoing recovery support because the law is commonly what stands between gainful employment and termination when the issue arises - more commonly ending in termination. As the law currently stands, limited protections - to put it mildly - are afforded to workers with addiction issues. However, as addiction continues to be better understood as a medical issue, rather than strictly a performance issue, workplace protections will ideally improve via advocacy and lobbying efforts, which is why having a basic understanding of the legal landscape is important.

In general, the law attempts to balance employer and employee interests; many would say far from equally. For employers, the law is what primarily enables them to - within certain limits - cultivate and maintain a productive work environment, so as to, for example, not increase workplace productivity at the expense of worker safety. When addiction issues arise at the workplace, it commonly results in lost productivity to the employer and job loss to the employee. Therefore, developing a workplace sensitivity to the interests of employees with addiction issues will improve workplace productivity and employee well-being - as well as combat stigma as a reflection of our values. This may look like having an awareness of the many pathways to recovery, such as understanding medication assisted treatment and harm reductive methods. However, the law must strike a fair balance between employer and employee interests, as to not unfairly protect one party at the expense of the other. As of now, the law provides no protection for employees with addictions to illegal drugs such as heroin or cocaine.

The goal of this paper is to provide an introductory overview, in plain language, of three federal laws that affect addiction in the workplace. The information presented in this paper is not meant to be an exhaustive account of every law that affects these workers. Rather, in the interest of

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providing a concise yet comprehensive overview of the several complicated laws affecting addiction in the workplace, this paper focuses primarily on federal instead of state law. It begins with a discussion as to why laws that affect addiction in the workplace are important to know; and continues with outlines of various federal anti-discrimination laws and how they apply to employees with addiction issues, before concluding with an analysis of how these laws could be improved and strike a balance between employer and employee interests.

### **What is the impact of addiction in the workplace?**

According to a report published by the Substance Abuse and Mental Health Services Administration (SAMHSA)<sup>1</sup>:

- Employees' drug and alcohol use, and related problems, costs U.S. companies billions of dollars each year; and
- Combined data from 2008 to 2012 indicate that an annual average of:
  - 8.7 percent of full-time workers aged 18 to 64 used alcohol heavily in the past month;
  - 8.6 percent used illicit drugs in the past month; and
  - 9.5 percent were dependent on or abused alcohol or illicit drugs in the past year.

Therefore, having laws that foster a work environment that encourages employees to seek the help they may need is critical to improving workplace productivity and employee well-being. However, the current laws fall short of providing equal protection for all addictions, as discussed below.

### **What laws impact employees with addiction issues?**

There are three prominent laws in this section we will discuss: The Americans with Disabilities Act (“ADA”) and the Rehabilitation Act of 1973, and the Family Medical Leave Act (FMLA”). Important things to understand while reading this section are to whom these laws apply, what type of substance is at issue, when the addiction occurred, and when these laws were enacted

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<sup>1</sup>D.M. Bush and R.N. Lipari. *The CBHSQ Report: Substance Use and Substance Use Disorder, by Industry*. Rockville: Substance Abuse and Mental Health Services Administration, Center for Behavioral Health Statistics and Quality, 2015. Accessed March, 20 2017.  
[https://www.samhsa.gov/data/sites/default/files/report\\_1959/ShortReport-1959.html](https://www.samhsa.gov/data/sites/default/files/report_1959/ShortReport-1959.html).

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because this is an area of law ripe for improvement and overdue for advancement.

### Key Laws and Facts:

#### Americans with Disabilities Act (“ADA”)<sup>2</sup>:

- Enacted in 1990 and amended in 2008<sup>3</sup>.
- Prohibits employers from making certain employment-related decisions on the basis of a person’s disability. These decisions generally include the hiring, promoting, and firing process<sup>4</sup>.
- Applies to private employers with 15 or more employees<sup>5</sup>.
- Applies to state and local governments, regardless of size<sup>6</sup>.
- Does not apply to federal employers<sup>7</sup>.

#### The Rehabilitation Act of 1973:

- Enacted 1973, amended in 1993 and 1998<sup>8</sup>.
- Applies to federal employers<sup>9</sup>.
- Since the amendments of the Rehabilitation Act were enacted, all legal definitions of the ADA apply to federal employers<sup>10</sup>.

NOTE: All the legal standards and concepts discussed below apply whether the ADA or the Rehabilitation Act of 1973 apply. Therefore, this paper will be referring to just the ADA, which

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<sup>2</sup> "The ADA Amendments Act: An Overview of Recent ... - Georgetown Law." <http://www.law.georgetown.edu/archiveada/documents/benferadadaa.pdf>. Accessed 20 Mar. 2017.

<sup>3</sup> "The ADA Amendments Act: An Overview of Recent ... - Georgetown Law." <http://www.law.georgetown.edu/archiveada/documents/benferadadaa.pdf>. Accessed 20 Mar. 2017.

<sup>4</sup> "ADA - Your Employment Rights as an Individual With a Disability - EEOC." 21 Mar. 2005, <https://www.eeoc.gov/facts/ada18.html>. Accessed 20 Mar. 2017.

<sup>5</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 20 Mar. 2017.

<sup>6</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 20 Mar. 2017.

<sup>7</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 20 Mar. 2017.

<sup>8</sup> "Rehabilitation Act of 1973 - House Office of the Legislative Counsel." 7 Jan. 2016, <https://legcounsel.house.gov/Comps/Rehabilitation%20Act%20Of%201973.pdf>. Accessed 20 Mar. 2017.

<sup>9</sup> "Rehabilitation Act of 1973 - House Office of the Legislative Counsel." 7 Jan. 2016, <https://legcounsel.house.gov/Comps/Rehabilitation%20Act%20Of%201973.pdf>. Accessed 20 Mar. 2017.

<sup>10</sup> "Rehabilitation Act of 1973 - House Office of the Legislative Counsel." 7 Jan. 2016, <https://legcounsel.house.gov/Comps/Rehabilitation%20Act%20Of%201973.pdf>. Accessed 20 Mar. 2017.

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will include the Rehabilitation Act of 1973.

### The Family Medical Leave Act

- Enacted in 1993.
- Applies to private employers with 50 or more employees<sup>11</sup>.
- Applies to all federal, state, and local government<sup>12</sup>.
- Allows for 12 weeks leave for “serious health condition”, which includes treatment for addiction<sup>13</sup>.
- Leave must be for actual treatment, and may not be used as a cover for continued drug or alcohol use<sup>14</sup>.
- To use the FMLA, an employee must be employed for at least 12 months, worked a minimum of 1,250 hours during the 12 months prior to requesting the leave, and worked at a site with a minimum of 50 employees or within 75 miles of that site<sup>15</sup>.
- If medical condition qualifies as a “serious health condition”, employers must grant the leave and may not take action against an employee for requesting or taking leave<sup>16</sup>.

### Is addiction considered a disability under the law?

Generally, yes. For an addiction to be considered a disability, it must meet the ADA’s definition of disability, meaning the addiction must “substantially limit one or more major life activities”<sup>17</sup>, such as walking, performing manual tasks, caring for oneself<sup>18</sup>, and so on. But an employee must also be a “qualified worker”, meaning, the disability must not affect a person’s ability to

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<sup>11</sup> US Dept. of Labor: Wage and Hour Division "Fact Sheet #28: The Family and Medical Leave Act of 1993." Washington: 2012. Accessed 20 Mar. 2017. <https://www.dol.gov/whd/regs/compliance/whdfs28.pdf>

<sup>12</sup> US Dept. of Labor: Wage and Hour Division "Fact Sheet #28: The Family and Medical Leave Act of 1993." Washington: 2012. Accessed 20 Mar. 2017. <https://www.dol.gov/whd/regs/compliance/whdfs28.pdf>

<sup>13</sup> "Know Your Rights - SAMHSA Store." <https://store.samhsa.gov/shin/content/PHD1091/PHD1091.pdf>. Accessed 20 Mar. 2017.

<sup>14</sup> "Know Your Rights - SAMHSA Store." <https://store.samhsa.gov/shin/content/PHD1091/PHD1091.pdf>. Accessed 20 Mar. 2017.

<sup>15</sup> "Know Your Rights - SAMHSA Store." <https://store.samhsa.gov/shin/content/PHD1091/PHD1091.pdf>. Accessed 20 Mar. 2017.

<sup>16</sup> "Know Your Rights - SAMHSA Store." <https://store.samhsa.gov/shin/content/PHD1091/PHD1091.pdf>. Accessed 20 Mar. 2017.

<sup>17</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 19 Mar. 2017.

<sup>18</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 19 Mar. 2017.

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perform the “essential job functions” with or without “reasonable accommodations”. However, alcohol use alone is not considered a disability, so an employee who, for example, infrequently drinks and misses work due to a hangover may not claim he/she has a disability to avoid disciplinary action.

Understanding Key Concepts:

- “Substantially limits one or more major life activity”
- “Qualified worker”
- “Essential job functions”
- “Reasonable accommodations”

These vague legal standards are not black-and-white, and are hard to define because the law is applied on a case-by-case basis<sup>19</sup>, meaning, each case is different, so the law must be flexible. Therefore, an addiction does not automatically qualify as a disability. Rather, a person must still be qualified for the job, and the addiction must “substantially limit one or more major life activity”.

### **What are “qualified workers” and “essential job functions”?**

For the ADA to apply, a person must first be a qualified worker. A qualified worker is a person who can perform the essential job functions of a particular position despite their disability<sup>20</sup>. In other words, a person must be able to do the work. The essential job functions are the functions that usually require special expertise and that are specifically written into the job description, although employers are not necessarily required to have a written job descriptions.

### **What are “reasonable accommodations”?**

A reasonable accommodation is any modification or adjustment to a job or workplace that allows an applicant with a disability to apply for a job or allows an employee who is qualified for the job to perform the essential job functions<sup>21</sup>. The ADA requires employers to provide reasonable

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<sup>19</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 19 Mar. 2017.

<sup>20</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 10 Mar. 2017.

<sup>21</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 10 Mar. 2017.

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accommodations for qualified workers with disabilities that allows them to perform their essential job functions<sup>22</sup>.

However, an employer is not required to provide reasonable accommodations if it would be too costly or disruptive for the business - otherwise known as an “undue hardship”<sup>23</sup>.

In situations involving addiction, reasonable accommodations generally include a modified work schedule so the employee can attend support services or a leave of absence so a person can go to treatment<sup>24</sup>. Importantly, a reasonable accommodation does not include employer-provided treatment, but may include providing a leave of absence to seek treatment<sup>25</sup>. Further, an employer may – but is not required to – offer an employee assistance program (“EAP”), which is different than treatment<sup>26</sup>. An EAP is a short term program offered by the employer that may include limited addiction counseling, among various other services. However, an employer is not required to offer an EAP, or some form of rehabilitation, in place of disciplining an employee for misconduct related to drug and alcohol use<sup>27</sup>.

### **Is an addiction to alcohol treated the same as an addiction to drugs under the law?**

No. The ADA does not treat all addictions the same. The ADA distinguishes between alcohol and illegal drug use, generally offering more protection for alcohol addiction than illegal-drug addiction<sup>28</sup>. The presumed reason for this is straightforward: Because alcohol is legal to consume (for non-minors) and most drugs are not legal. In other words, a law that provides legal protection for the illegal use of drugs would run contrary to current public policy. Thus, the ADA specifically excludes employees who currently use illegal drugs from protection against employment discrimination. Therefore, expanding protections in a way that strikes a balance

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<sup>22</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 10 Mar. 2017.

<sup>23</sup> "Americans with Disabilities Act." <https://www.ada.gov/>. Accessed 10 Mar. 2017.

<sup>24</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

<sup>25</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

<sup>26</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

<sup>27</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

<sup>28</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

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between employer and employee interests so that employees addicted to illegal substances are also encouraged to seek help is an area of the law that demands improvement.

### Current versus Past Use

The ADA also distinguishes between *current* and *past* use<sup>29</sup>. For example, the ADA may protect a person who is currently addicted to alcohol, who is qualified for the job, and who can meet the ADA's definition of "disability"<sup>30</sup>. In contrast, the ADA does not protect an individual who currently engages in the illegal use of drugs, such as heroin or cocaine<sup>31</sup>. The law is not definitive on what exactly the threshold time limit is between current and past use, so it's determined on a case-by-case basis.

Importantly, certain non-substance related addictions are specifically excluded from protection under the ADA, such as gambling and sexual disorders such as voyeurism and pedophilia<sup>32</sup>.

### Does my client need to tell my employer about their recovery or addiction status?

It depends. If your client thinks he/she will need a reasonable accommodation in order to perform essential job functions, the client should inform the employer that an accommodation will be needed, such as a modified work schedule or a leave of absence to seek treatment. Employers are required to provide reasonable accommodation **only** for a disability of which the employer is aware<sup>33</sup>. Generally, it is the responsibility of the employee to inform the employer that an accommodation is needed<sup>34</sup>. For example, if an employee is repeatedly late due to drinking the night before, and the employer takes disciplinary action against the employee (but does not terminate him/her), and the employee then informs the employer that the employee has

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<sup>29</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

<sup>30</sup> "Applying Performance And Conduct Standards To Employees - EEOC." 20 Jan. 2011, <https://www.eeoc.gov/facts/performance-conduct.html>. Accessed 10 Mar. 2017.

<sup>31</sup> "Applying Performance And Conduct Standards To Employees - EEOC." 20 Jan. 2011, <https://www.eeoc.gov/facts/performance-conduct.html>. Accessed 10 Mar. 2017.

<sup>32</sup> "The Americans with Disabilities Act and the Age..." <http://www.ilnd.uscourts.gov/assets/documents/forms/legal/AmericanDisabilityAct/2005ADADEAMANUALedits.pdf>. Accessed 19 Mar. 2017.

<sup>33</sup> "ADA - Your Employment Rights as an Individual With a Disability - EEOC." <https://www.eeoc.gov/eeoc/publications/ada18.cfm>. Accessed 20 Mar. 2017.

<sup>34</sup> "ADA - Your Employment Rights as an Individual With a Disability - EEOC." <https://www.eeoc.gov/eeoc/publications/ada18.cfm>. Accessed 20 Mar. 2017.

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an addiction to alcohol, the employer will probably be required to grant leave to the employee to seek treatment, but will not have to rescind disciplinary action.

### **Can an employer fire my client for being addicted to alcohol?**

Maybe. If an employee poses a direct threat to the health or safety of others as a result of alcohol use, an employer may take action against the employee.

A “direct threat” is a legal defense used by employers in response to a claim of discrimination against an employee with a disability<sup>35</sup>. A “direct threat” is a threat that poses a risk or danger to oneself, other workers, or the workplace that cannot be eliminated by reasonable accommodation<sup>36</sup>. The employer may allege that an employee addicted to drugs or alcohol posed a direct threat to others or the workplace that a reasonable accommodation could not eliminate, whereas the employee alleging discrimination argues he/she posed no risk. This an example of the push-pull that employers and employees may potentially engage in claims of discrimination.

For example, if you were routinely drinking at the workplace and operating dangerous equipment in the presence of other workers, that would likely be a direct threat that would justify the employer in taking action against the employee using alcohol. If an employee’s job is to operate heavy machinery, and he/she is habitually impaired by the use of alcohol, this would affect the employee’s ability to perform the necessary tasks of the job.

### **Can an employer take any action against my client who was a past drug user?**

Probably not. If a person has not used illegal drugs for a significant amount of time is generally protected. For example, an upon discovering an employee used heroin 10 years ago, but has not used heroin since, an employer may not terminate the employee based solely on a stereotype (e.g. “heroin junkie”) or stigma regarding people with such a history. Further, an employer may not terminate a person from a position based solely on the employer falsely thinking an employee is using heroin (or other illegal substance), when in fact the employee has never used

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<sup>35</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

<sup>36</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.



heroin.

### **Can an employer hold my client to the same work performance standards as other employees without an addiction?**

Yes. An important rule to remember is that employers are allowed to hold all employees to the same work performance standards<sup>37</sup>. This is important because addiction commonly affects people's behavior and ability to perform their job duties, which underscores the complicated balance between employer and employee interests. Under the ADA, employers are specifically allowed to hold employees with addiction issues to the same work performance standards and behaviors as other employees<sup>38</sup>. For example, an employer does not have to tolerate work performance behaviors such as repeated absences or lateness, insubordination or causing on-the-job accidents, that are a result of an employee's drug or alcohol use<sup>39</sup>. Interestingly, however, if an employer allows other non-addicted employees to routinely come in late or miss days without consequence, the employer may not single out and terminate a person with an addiction who engages in similar behavior<sup>40</sup>. In other words, an employer does not need to tolerate such behavior, but the employer must treat all employees the same.

EEOC's website offers the following examples:

*Example 1: "An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee's tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy. The supervisor's actions violate the ADA because the employer is holding an employee with a disability to a higher standard than similarly*

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<sup>37</sup> "Applying Performance And Conduct Standards To Employees - EEOC." 20 Jan. 2011, <https://www.eeoc.gov/facts/performance-conduct.html>. Accessed 10 Mar. 2017.

<sup>38</sup> "Applying Performance And Conduct Standards To Employees - EEOC." 20 Jan. 2011, <https://www.eeoc.gov/facts/performance-conduct.html>. Accessed 10 Mar. 2017.

<sup>39</sup> "Applying Performance And Conduct Standards To Employees - EEOC." 20 Jan. 2011, <https://www.eeoc.gov/facts/performance-conduct.html>. Accessed 10 Mar. 2017.

<sup>40</sup> "Chapter 4: Substance Abuse under the ADA - U.S. Commission on ...." <http://www.usccr.gov/pubs/ada/ch4.htm>. Accessed 10 Mar. 2017.

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*situated workers.<sup>41</sup>”*

*Example 2: “An employer has warned an employee several times about her tardiness. The next time the employee is tardy, the employer issues her a written warning stating one more late arrival will result in termination. The employee tells the employer that she is an alcoholic, her late arrivals are due to drinking on the previous night, and she recognizes that she needs treatment. The employer does not have to rescind the written warning and does not have to grant an accommodation that supports the employee’s drinking, such as a modified work schedule that allows her to arrive late in the morning due to the effects of drinking on the previous night. However, absent undue hardship, the employer must grant the employee’s request to take leave for the next month to enter a rehabilitation program.<sup>42</sup>”*

### **Can an employer fire my client if he/she wants to go to treatment?**

For alcohol, generally, no - so long as the alcohol use qualifies as a disability, poses no direct threat, and does not create an undue hardship for the employer. Further, the employee may be able to seek leave under the FMLA, too. However, if the employee is addicted to an illegal drug, such as heroin or cocaine, the employee is not protected. Therefore, an employer may fire an employee who informs the employer of an addiction to an illegal drug.

### **My client has been prescribed medication, can the employer take action against him/her?**

No. If an employee has been prescribed medication by a doctor, whether it’s methadone, suboxone, a narcotic, or otherwise, the employee is protected, so long as the medication is being taken as prescribed<sup>43</sup>. Therefore, if the prescribed medication is not being taken as prescribed, and an employee is taking more than the prescribed dosage, the employee is not protected under the law because such use would be considered the illegal use of drugs. For example, if an employee is taking medication as prescribed, but is nodding off at work due to the prescribed

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<sup>41</sup> "Applying Performance And Conduct Standards To Employees - EEOC." 20 Jan. 2011, <https://www.eeoc.gov/facts/performance-conduct.html>. Accessed 10 Mar. 2017.

<sup>42</sup> "Applying Performance And Conduct Standards To Employees - EEOC." 20 Jan. 2011, <https://www.eeoc.gov/facts/performance-conduct.html>. Accessed 10 Mar. 2017.

<sup>43</sup> "Enforcement Guidance on Disability-Related Inquiries and ... - EEOC." 24 Mar. 2005, <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>. Accessed 20 Mar. 2017.

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dosage amount, the employee may need the dosage or medication adjusted. In this situation, the employee is protected.

### **If my client relapsed, can he/she be fired?**

Maybe. If the employee is using illegal drugs, regardless of whether it's a relapse, and the employer finds out, the employee may be fired because the employee would be considered a current user of illegal drugs. Further, an employer may take action against an employee who poses a direct threat to the safety and health of others. On the other hand, If the employee with an addiction to alcohol relapses, he/she may be protected if the alcohol use qualifies as a disability and the employer is aware of the disability, so long as the employee does not pose a direct threat to the workplace. In such a case, an employer may be required to grant a reasonable accommodation, such as leave of absence or a modified work schedule to attend support groups.

### **But who determines whether an employee's work performance is the result of an addiction to alcohol or drugs?**

For better or worse, the employer wields initial discretion making these determinations (before involving the EEOC or the courts), which puts the employee at a severe disadvantage. The employee is the party out of a job potentially for months, or years, regardless of whether the employer did or did not violate the law by, for example, unlawfully firing an employee addicted to alcohol. If an employer did violate the law, a resolution does not generally occur for months, sometimes years, after the incident. However, sometimes the employer and employee can resolve the case through the EEOC's mediation process within a several months<sup>44</sup>, but sometimes it takes lengthy and costly litigation - resources for which not many people can afford (although there are legal aid organizations and clinics in many states that take these cases pro bono). And there is no guarantee that the employee will be successful in the challenge. Therefore, if an employee wants to fight an alleged discriminatory act, he/she should be aware of what to expect.

### **My clients wants to fight the case, what should he/she do?**

Generally speaking, trying to informally resolve alleged claims of discrimination before getting

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<sup>44</sup> "What You Can Expect After a Charge is ...." <https://www.eeoc.gov/employers/process.cfm>. Accessed 20 Mar. 2017.

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the law involved, may be the most effective way to handle the situation. This may be done in accordance with an employer's internal policy regarding claims of discrimination, if such a policy exists. Alternatively, it may be done by having a simple discussion with the person or their supervisor. However, this may not also be practical or advised if reporting the claim would be risky or even dangerous to the employee.

Filing a formal charge or complaint of unlawful discrimination is typically handled by the Equal Employment Opportunity Commission ("EEOC"), which is the federal agency charged with enforcing federal civil rights laws in the workplace<sup>45</sup>. However, for non-federal employees, some states require these claims to be filed first with the state agency in charge of handling claims of discrimination, while other states require the opposite<sup>46</sup>. Generally, the EEOC refers to these state agencies as Fair Employment Practice Agencies ("FEPA"), although the state may refer to these agencies by a different name, they are one in the same<sup>47</sup>. In many states, the EEOC has working agreements with the FEPA to prevent duplicate claims<sup>48</sup>. A person can find out whether to first file a charge with the EEOC or a FEPA, and the contact information of a FEPA in a particular state, by contacting the EEOC's national helpline at 1-800-669-4000<sup>49</sup>.

The process for filing a claim differs depending on whether the ADA or Rehabilitation Act of 1973 applies. In other words, the process for filing a claim is different for federal employees than for everyone else<sup>50</sup>. Federal employees and job applicants should refer to the EEOC's website for instructions on [how to file a "complaint"](#)<sup>51</sup>, whereas everyone else should refer to the EEOC's website on [how to file a "charge"](#)<sup>52</sup> of unlawful discrimination.

The timeline for filing either a complaint or charge is critical. For federal employees, to file a

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<sup>45</sup> "About the EEOC: Overview." <https://www.eeoc.gov/eeoc/>. Accessed 10 Mar. 2017.

<sup>46</sup> "How to File a Charge of Employment Discrimination - EEOC." <https://www.eeoc.gov/employees/howtofile.cfm>. Accessed 10 Mar. 2017.

<sup>47</sup> "How to File a Charge of Employment Discrimination - EEOC." <https://www.eeoc.gov/employees/howtofile.cfm>. Accessed 10 Mar. 2017.

<sup>48</sup> "How to File a Charge of Employment Discrimination - EEOC." <https://www.eeoc.gov/employees/howtofile.cfm>. Accessed 10 Mar. 2017.

<sup>49</sup> "Contact Us - EEOC." <https://www.eeoc.gov/contact/>. Accessed 10 Mar. 2017.

<sup>50</sup> "Filing a Lawsuit - EEOC." <https://www.eeoc.gov/employees/lawsuit.cfm>. Accessed 10 Mar. 2017.

<sup>51</sup> "Filing a Formal Complaint - EEOC." [https://www.eeoc.gov/federal/fed\\_employees/filing\\_complaint.cfm](https://www.eeoc.gov/federal/fed_employees/filing_complaint.cfm). Accessed 10 Mar. 2017.

<sup>52</sup> "How to File a Charge of Employment Discrimination - EEOC." <https://www.eeoc.gov/employees/howtofile.cfm>. Accessed 10 Mar. 2017.

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complaint, a person has 45 calendar days from the day the alleged discrimination occurred to contact an Equal Employment Opportunity Counselor, who will then talk to the person about their rights and responsibilities and record some basic information about the situation<sup>53</sup>. To file a charge, a person has 180 calendar days from the day the discrimination took place<sup>54</sup>. The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis<sup>55</sup>.

Whether filing a charge or complaint, the EEOC will conduct an investigation<sup>56</sup>. If the EEOC's investigation shows that that a person's rights were unlawfully discriminated against, it notifies the person alleging discrimination and the employer of its findings<sup>58</sup>. The EEOC then works with the employer to try to develop a remedy for the discrimination. If a remedy can not be agreed upon, the EEOC decides whether to file a lawsuit against the employer in federal court<sup>60</sup>. However if the EEOC and the employer identify a remedy for your problem, the person alleging discrimination may not file a lawsuit. But he/she can file a lawsuit if the employer doesn't live up to its agreement with the EEOC. For non-federal employees, if the EEOC finds no "reasonable cause" that discrimination did occur, it issues a "right to sue" letter, and the person is free to hire an attorney and file a lawsuit in federal court if they wish<sup>61</sup>. The individual must generally do so within 90 days of receiving the letter<sup>62</sup>.

**My client is asking me if he/she has a case of unlawful discrimination, would I be giving**

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<sup>53</sup> "Filing a Formal Complaint - EEOC." [https://www.eeoc.gov/federal/fed\\_employees/filing\\_complaint.cfm](https://www.eeoc.gov/federal/fed_employees/filing_complaint.cfm). Accessed 10 Mar. 2017.

<sup>54</sup> "Filing a Charge - EEOC." <https://www.eeoc.gov/employees/charge.cfm>. Accessed 10 Mar. 2017.

<sup>55</sup> "Filing a Charge - EEOC." <https://www.eeoc.gov/employees/charge.cfm>. Accessed 10 Mar. 2017.

<sup>56</sup> "What You Can Expect After You File a Charge - EEOC." <https://www.eeoc.gov/employees/process.cfm>. Accessed 10 Mar. 2017.

<sup>57</sup> "Overview Of Federal Sector EEO Complaint ...." [https://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm). Accessed 10 Mar. 2017.

<sup>58</sup> "Overview Of Federal Sector EEO Complaint ...." [https://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm). Accessed 10 Mar. 2017.

<sup>59</sup> "What You Can Expect After You File a Charge - EEOC." <https://www.eeoc.gov/employees/process.cfm>. Accessed 10 Mar. 2017.

<sup>60</sup> "Filing a Lawsuit - EEOC." <https://www.eeoc.gov/employees/lawsuit.cfm>. Accessed 10 Mar. 2017.

<sup>61</sup> "What You Can Expect After a Charge is Filed - EEOC." <https://www.eeoc.gov/employers/process.cfm>. Accessed 10 Mar. 2017.

<sup>62</sup> "What You Can Expect After a Charge is Filed - EEOC." <https://www.eeoc.gov/employers/process.cfm>. Accessed 10 Mar. 2017.

## **Addiction in the Workplace**

### **legal advice if I answered?**

It depends. There's a fine line between "knowing your rights" and "giving legal advice". A general rule of thumb is if a client is asking you to apply the law to the specific facts of their case, that would be legal advice. Do not do this because such an act could be illegal and be considered the unauthorized practice of law, which is a criminal offense in many states.

Therefore, the client should just be informed of the general law, meaning, do not give specific advice on how the law does or does not apply to a client's particular situation. Rather, without applying the law to the specific facts of a case, you can provide general information regarding what federal law states about addiction, when an addiction qualifies as a disability, and in what situations an addiction may be protected. If the client is interested in pursuing a potential claim of unlawful discrimination against an employer, the client should be encouraged to seek the advice of an attorney or he/she can contact the EEOC and directly file a claim themselves. There are several legal aid organizations and resources that are accessible to people who can not afford an attorney. Further, some attorneys have contingency fee arrangements, and only get paid if the case is successful, which is typically determined by the strength of a client's case.

### **Conclusion: Summing it all up**

As the law currently stands, employees with an addiction to alcohol may be protected so long as the use qualifies as a disability and poses no direct threat, whereas employees with an addiction to an illegal drug are not. However, an employee in recovery from an addiction to an illegal drug is protected, if an employer attempts to take action against the employee based on a stereotype or perceived threat. But the law is not clear on what constitutes recovery, and how long the employee must abstain from active use to be considered a past user. With the evolved recovery landscape, which includes harm reductive methods and medication assisted treatment, the law remains unclear. However, so long as an employee is prescribed medication, and taking the prescribed dosage, the employee is protected.

The employer initially determines what action to take against an employee with an addiction, which can put the employee at a serious disadvantage due to loss of employment and income. If a former employee wants to file a claim of unlawful discrimination, the EEOC is the first stop.

## Addiction in the Workplace

A person should seek the advice of an attorney before taking any action. If he/she can not afford an attorney, there are legal aid organizations and clinics, attorneys who offer pro bono services, and attorneys who work on a contingency fee basis.

If a client asks you to apply the law to the specific facts of their case, do not do it. However, you may provide general information on what federal law states about addiction, the general protections offered, without applying the law to the specific facts of a client's case.

The law clearly falls short of protecting employees who can identify that they have a drug problem and want to both take responsibility and seek rehabilitation without losing their jobs. As the law is now, despite an employee wanting to seek help, the employee might be concerned that approaching their employer will result in termination. Therefore, the employee may fail to seek help. However, if this same employee knew that federal law supported an employee's decision to seek treatment for a drug addiction and offered some level of protection to prevent an employer from terminating them, the employee might seek the help they need. While many workplaces have internal programs designed to allow employees to seek help for their drug addictions and have policies that prevent the employer from firing employees on the basis of their drug addictions if they are willing to seek help, such programs are not instituted across the board and are only suggested, not required by law. This is an area of law ripe of improvement and overdue for advancement. We have a long way to go before we strike a fair balance between employer and employee interests, so as to foster a work environment that encourages people to seek the help they need, while at the same time not jeopardizing workplace safety and put others in harm's way or cause an undue hardship to the employer.