EEOC Issues New Workplace Guidance On Opioid Use And Reasonable Accommodation Considerations

Insights
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The Equal Employment Opportunity Commission recently released two new technical assistance documents that address issues concerning the employment provisions of the Americans with Disabilities Act in relation to the use of opioids by employees. The August 5 guidance documents are presented in a question and answer format and, although not legally binding on the public, provide valuable insight into how the EEOC expects the reasonable accommodation process to operate as it relates to opioid-related disabilities. What do employers need to know about each document?

Guidance For Employees: Use And Misuse Of Codeine, Oxycodone, And Other Opioids
The first new guidance document provides practical guidance suggestions for employers when it comes to the use and misuse of opioids.

Job Disqualification Considerations
Preliminarily, the EEOC reminds employees that individuals who lawfully use opioid medication, are in treatment for opioid addiction, or have recovered from addiction are protected from disability discrimination by their employer. Nevertheless, illegal drug use is not a covered disability under the ADA, and employers can fire and take other adverse employment actions against individuals based on illegal use of opioids, even if the individual does not have performance or safety problems.

In addition, employers are allowed to disqualify individuals for opioid use if required by another federal law. However, in situations where an employee's opioid use is legal and the individual is not disqualified by federal law, an employer is prohibited from automatically disqualifying an employee because of opioid use.

The EEOC defines "opioids" as prescription drugs such as codeine, morphine, oxycodone, hydrocodone, meperidine, and illegal drugs like heroin. This definition also includes buprenorphine and methadone, which can be prescribed to treat opioid addiction in a Medication Assisted Treatment (MAT) program. However, an employee cannot be denied a job or fired from a job because the employee is in a MAT program unless the individual cannot do the job safely and effectively or is disqualified under another federal law.

The EEOC also instructs that employers should allow individuals with a positive drug test resulting from lawful opioid use an opportunity to provide information about their lawful drug use. For

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example, an employer can satisfy this requirement by asking for an explanation from all individuals who test positive.

The Reasonable Accommodation Process And Opioids

If an individual is using opioids legally and isn't disqualified for the job by federal law, an employer may be required to provide a reasonable accommodation before firing the individual or rejecting a job application based on opioid use. The EEOC defines a reasonable accommodation as "some type of change in the way things are normally done at work, such as a different break or work schedule (e.g., scheduling work around treatment), a change in shift assignment, or a temporary transfer to another position."

The guidance makes clear that employees may ask for, and employers may suggest, other modifications or changes. An example of an accommodation is an altered schedule to attend a support group meeting or therapy session. However, an employer never has to lower production or performance standards, eliminate essential functions (fundamental duties) of a job, pay for work that is not performed, or excuse illegal drug use on the job as a reasonable accommodation.

The EEOC advises that an employee who needs a reasonable accommodation for opioid related issues should ask for one. While an employee should check whether the employer has procedures for requesting a reasonable accommodation, employers cannot deny a reasonable accommodation based solely on an employee's failure to follow specific procedures.

In addition, the employer may ask the employee for a written request, to complete a form, and generally describe how the employee's work is affected by the disability. An employer is also permitted to ask the employee to submit a letter from the employee's healthcare provider identifying the disability and explaining why the employee needs a reasonable accommodation.

Employees are reminded in the guidance that they are allowed to submit a request at any time and do not need to have a particular accommodation in mind when submitting the request. The EEOC suggests that employees should try to ask for a reasonable accommodation before problems at work occur or become worse. An employer does not have to excuse poor job performance, even if it was caused by a medical condition or treatment for a medical condition. The guidance reiterates the ADA's requirement that an employer must provide a reasonable accommodation if the accommodation would allow the individual to perform the job safely and effectively and does not involve significant difficulty or expense.

To remove an employee from a job for safety reasons, the employer must have objective evidence that the employee poses a significant risk of substantial harm. An employer is permitted to request that an employee undergo a medical evaluation to assess the employee's ability to perform the essential functions of the job.

Finally, the guidance provides that an employer may be required to hold the job while the employee takes leave for treatment or recovery. If an employee is permanently unable to perform the job, the

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takes leave for treatment or recovery. If an employee is permanently unable to perform the job, the employee may ask the employer to reassign them to a job that can be performed with a reasonable accommodation, if one is available.

How Healthcare Providers Can Help Current And Former Patients Who Have Used Opioids Stay Employed

In the second guidance, the EEOC provides recommendations to assist medical professionals in providing the medical documentation necessary for employers to evaluate whether the employee is a safety risk.

Helpful Information To Include In Accommodation Request Documentation

The documentation most likely to support an individual's request for a reasonable accommodation should contain the following:

- the provider's professional qualifications and the nature and length of the provider's relationship with the patient;
- the nature of the patient's medical condition;
- the patient's functional limitations in the absence of treatment, such has how the condition would limit a "major life activity" such as walking, sleeping, lifting, concentrating, or caring for oneself, in the absence of treatment;
- the need for a reasonable accommodation, including an explanation of how the patient's medical condition makes changes at work necessary;
- how the patient's symptoms, as they are, with treatment, make performing the function more difficult; and
- suggested accommodations.

The EEOC also explains that the employer may contact the healthcare provider for clarification about what has been written concerning the employee's disability or provide the healthcare provider with additional information to consider, such as if the accommodation would be too difficult or costly to provide.

Safety Concerns

The guidance also discusses the importance of the safety assessment performed by the healthcare provider in determining whether an employee's disability poses a safety risk. The EEOC explains that safety concerns can justify a suspension of duties or other adverse employment action if the risk level rises to a "direct threat," which means a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced to an acceptable level with a reasonable accommodation.

The EEOC advises that when determining whether an employee poses a "direct threat," employers need information that will help them evaluate the level of risk presented by a disability, taking into consideration the following factors:

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- probability that harm will occur;
- imminence of the potential harm;
- duration of the risk; and
- severity of the potential harm.

Finally, the EEOC recommends that healthcare providers should describe medical events or behaviors that could occur on the job, such as loss of consciousness or nausea, and state the probability of occurrence. Additionally, where relevant, healthcare providers should assess the following:

- risks the employee's condition may present in light of the type of work being performed by the employee on a day-to-day basis;
- the type of equipment being used by the employee;
- the employee's access to harmful objects or substances;
- safeguards in place at the worksite;
- the type of injury or other harm that may result if one of the identified medical events or behaviors occurs; and
- the likelihood that injury or other harm would occur as a result of the event or behavior.

Conclusion

Although these technical assistance documents are not legally binding and do not make any changes to existing law, the information provided by the EEOC is valuable to employers as they provide a detailed explanation of issues employers should be prepared to evaluate when addressing opioid related accommodations.

Fisher Phillips will continue to monitor the situation and provide updates as appropriate. Make sure you subscribe to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact the authors, your Fisher Phillips attorney, any attorney in our Workplace Safety and Catastrophe Management Practice Group.

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