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# Navigating the Intersection of Recovery Housing & Employment Law

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## Presentation Overview

Title I of the Americans with Disabilities Act of 1990 (ADA), including guidance from the Equal Employment Opportunity Commission (EEOC):

- What are “employers” under Title I of the ADA?
- Who is protected as an employee?
- What are the rights and obligations of employers and employees?
- When do you have to accommodate, and how do you navigate accommodations?
- What happens if an employer fails to properly navigate Title I of the ADA?
- Best practice considerations.

Ohio law (Revised Code 4112.02) considerations and enforcement guidance.

Real world application of relevant scenarios in recovery housing and related treatment settings.

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## **Big Picture Impact**

The most recent study indicates:

- Approximately 13.6 million members of the workforce currently, actively struggle with substance use disorder.
- Approximately 13.4 million members of the workforce are in recovery from substance use disorder.
- A national survey of the U.S. workforce found that 15.3% of workers reported working under the influence of alcohol, and 2.9% reported being under the influence of illicit drugs on the job.

The COVID-19 pandemic exacerbated these problems. Why?

Why is any of this relevant in the recovery housing space?

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## **Americans with Disabilities Act (ADA) | Overview**

Three main topics with the ADA:

- Disability protections
- Accommodation requirements
- Retaliation protections

Generally, Title I of the ADA makes it illegal to: (1) discriminate against a “qualified” individual with a “disability” in the private sector; (2) fail to provide “reasonable accommodations” absent “undue hardship;” (3) retaliate against the lawful exercise of rights under the ADA.



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## Americans with Disabilities Act (ADA) | Coverage



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**Covered Employers** | The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. Who is not covered?

**Covered Employees** | Employees (and job applicants) who are qualified (*i.e.*, meaning that they have legitimate skill, experience, education, or other requirements of an employment position that they holds or seeks, and who can perform the essential functions of the position with or without reasonable accommodation).

## Americans with Disabilities Act (ADA) | Coverage



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**Covered Disabilities** | A person with a disability is someone who:

- has a physical or mental impairment that substantially limits one or more major life activities,
- has a history or record of such an impairment (*e.g.*, cancer that is in remission), or
- is perceived by others as having such an impairment.

The term “substantially limits” is interpreted broadly and is not meant to be a demanding standard; however, not every condition will meet this standard.

Major life activities are the kind of activities that you do every day, including your body’s own internal processes. Examples?

## Americans with Disabilities Act (ADA) | SUD



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Covered disabilities include, relevantly:

- Recovery from illicit or illegal drug use

The ADA does not protect individuals with active substance use disorder(s).

Considerations:

- What is current/ active versus in recovery?
- What about casual drug use?
- What is “illegal” drug use?

What happens if someone is mistakenly regarded as illegally using drugs?

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## Americans with Disabilities Act (ADA) | SUD



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Can enrolling in a rehabilitation program provide protection under the ADA?

This issue may arise when an employee enrolls in a rehabilitation program following violation of employer policy and prior to any employment-related discipline and then, in turn, claims ADA protection.

Recent case example: *Collings v. Longview Fibre Company*

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## Americans with Disabilities Act (ADA) | AUD

Covered disabilities also include, relevantly:

- Current alcohol use disorder

Distinguishing this from those in recovery from substance use disorder.

Again, an employee would still need to establish the threshold generally required under the ADA (*i.e.*, otherwise qualified and substantial limitation or impairment of one or more major life activities).



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## Americans with Disabilities Act (ADA) | Duties

**Reasonable Accommodation** | The ADA provides that an employer has a “duty to accommodate” a qualified individual with a disability unless the employer can demonstrate “undue hardship.”

How do we figure out that there is a duty to accommodate and get to the point of providing a reasonable accommodation?

Navigating the ADA “interactive process.”



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## **Americans with Disabilities Act (ADA) | Duties**



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Types of accommodations:

- Modifying work schedules;
- Job restructuring;
- Revising job descriptions;
- Making facilities more accessible;
- Acquiring or modifying equipment or devices.

This list is non-exhaustive, and accommodations are determined on a case-by-case basis.

## **Americans with Disabilities Act (ADA) | Undue Hardship**



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What rises to the level of creating an undue burden or hardship on the operation of the employer's business?

The ADA lists many non-exhaustive factors including:

- The nature and cost of the accommodation;
- The overall financial resources of the employer;
- The workforce size and the impact on the personnel and operations;
- The location and type of employer; and
- The employer's operations.

## **Americans with Disabilities Act (ADA) | Retaliation**



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The ADA further protects against retaliation against a protected individual who complained about or opposed discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

What is retaliation?

What does it mean to “oppose” discrimination?

What does it mean to “participate in” an ADA-related process?

## **Americans with Disabilities Act (ADA) | Permissible Actions**



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Employers can do the following:

- Maintain drug- and alcohol-free workplace policies;
- Drug test, in compliance with federal and state laws;
- Discipline an employee for violating policies regarding illegal drug use;
- Prohibit use (or consumption) in the workplace;
- Deny employment to an individual who is currently engaged in the illegal use of drugs; and
- Require employees who use drugs (lawfully) and/or alcohol to meet the standards set for similarly situated employees (*i.e.*, performance and conduct considerations).

## Americans with Disabilities Act (ADA) | Penalties



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Penalties for non-compliance include:

- Fines (an organization can be fined up to \$75,000 for a single violation of the ADA, increasing based on additional violations);
- Risk of litigation (which may result in monetary damages including back pay, lost wages, compensatory damages, punitive damages, and attorneys' fees); and
- Remedial action and enforcement oversight.

## Ohio Law (R.C. 4112.02) Considerations



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In many ways, Ohio law mirrors the ADA.

Primary differences:

- Covers more employers than the ADA.
- Specifies what, without limitation, constitutes a disability.
- Defines what, without limitation, is a “major life activity” impaired by a disability.

It is important to note that penalties under Ohio law can be cumulative.



## **Real Work Applications**

**Scenario No. 1:** You have an employee who, after a sustained period of sobriety, recently relapsed and has come to you to discuss next steps as to their recovery and simultaneously maintaining employment.

**Thoughts?**



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## **Real Work Applications**

**Scenario No. 2:** You have an employee with a history of employment-related concerns arising from their ongoing struggle with alcohol use disorder. They have, on more than one occasion, requested and received extended periods of time off for treatment. They come to you, again, and request an extended period of leave.

**Thoughts?**



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## Real Work Applications

**Scenario No. 3:** You believe that your employee may be struggling with substance use disorder (based on objective criteria). They have not asked for an accommodation. You pull them aside and proactively inquire as to their well-being. They deny any need for an accommodation and deny having any health-related concerns (*i.e.*, including any disabilities).



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### Thoughts?

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## Best Practices and Considerations

1. Make sure you understand the gravity and potential impact of a decision before you make it.
2. Have clear policies governing protections for employees, requests for accommodations, and protocols for reporting harassment or retaliation.
3. Put everything in writing (*e.g.*, employee performance, disciplinary measures, requests for accommodations, the interactive process, discussions with employees, etc.).



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## **Best Practices and Considerations**

4. Provide training to those in leadership, including human resources (HR) personnel.
5. Set clear penalties for violation of policies and procedures.
6. Protect privacy as it relates to navigating these processes.
7. Be consistent in the application of policies and procedures.



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# Questions?



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