

# **DRUG TESTING AND THE ADA**

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July 1992

Reviewed May 2002

The final regulations of ADA state that the act does not encourage, prohibit or authorize drug testing (Section 1630.16(c) of Title I). Yet, despite the frequent use of such language, a close review of Title I's final regulations reveals a position far more supportive of drug testing.

Let's begin by addressing directly the definition of those who are protected by the act. You may be concerned that an individual excluded from or denied employment because of a positive drug-test result may seek protection as an individual with a disability. Yet, Section 1630.3(a) specifically excludes from the definition of the term "qualified individual with a disability," persons engaging in the illegal use of drugs when the employer acts on the basis of such use. As we will discuss later, the ADA makes an important distinction between illegal drug users and individuals disabled due to alcoholism.

Although not specifically focused on the drug-testing process, the interpretive guidance to Section 1630.3 (a) through (c), states that "employers may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination."

Illegal drug use is defined in this section as referring to both the use of unlawful drugs and the unlawful use of prescription drugs. In addition, Sections 1630.16(a) and (b) permit employers wide latitude in regulating drug and alcohol use in the workplace.

Section 1630.16(b) allows employers to prohibit alcohol as well as the illegal use of drugs in the workplace. It also allows employees who engage in illegal drug use or who are alcoholics, to be held to the same qualification standards for employment, job performance and behavior as other employees.

Employers with 25 or more employees subject to Department of Defense (DOD) and Department of Transportation (DOT) regulations addressing alcohol and the illegal use of drugs are further allowed to require their employees to comply with these regulations. These regulations permit and, for certain groups of employees, require employers to administer drug tests. They also require covered employers to remove from their positions those employees who test positive for illegal drugs.

Section 1630.16(c), which specifically addresses drug testing, provides additional evidence to support a pro-drug-testing position. Under this section, employers can continue to comply with the DOD and DOT regulations; thus, such employers may feel gratified to know that they may use drug tests as a basis for disciplinary action including the removal of employees from their positions without violating the ADA. Furthermore, this section specifies that a drug test is not considered to be a medical examination and that the administration of drug

tests by employers is not a violation of the ADA's prohibition of medical examinations occurring prior to an employment offer.

To summarize, although Title I's final regulations are carefully drafted to avoid a direct statement of support for drug testing, the language of the regulations and the accompanying interpretive guidance should allow employers currently administering or planning to implement drug-testing programs a large measure of comfort and assurance.

Nevertheless, employers should realize that there is one major issue related to drug testing that remains unresolved in the final regulations.

Within Section 1630.3(b), individuals who have successfully completed or who are participating in a supervised drug-rehabilitation program and who are no longer engaging in the illegal use of drugs, or individuals who are erroneously regarded as engaging in illegal drug use, are not automatically excluded from the definition of the term "qualified individual with a disability." This distinction is an operational issue to explore.

## **OPERATIONAL ISSUES**

Suppose that your company has been administering a pre-employment, drug-testing program that required applicants with positive drug-test results to be rejected for further employment consideration. So far, there is no apparent operational problem in complying with the ADA. However, what if your policy also prohibited such applicants from further consideration for employment with your company for a certain fixed period, for example, six months?

An individual previously rejected for illegal drug use (as confirmed by a positive drug-test result) could return to your office several days or weeks later. This individual could then advise you that he or she is currently participating in (or has already completed) a rehabilitation program and then ask to be considered for any available position for which he or she qualifies.

If you automatically deny this individual such consideration, citing your company's six-month policy, you could find yourself confronting an ADA challenge by an individual who may be found to meet the definition of an individual with a disability. Fortunately, a guideline for this situation can be found by reviewing the interpretation of Title I's final regulations.

The interpretive guidance to Section 1630.3 allows you to obtain reasonable evidence that the illegal drug use is no longer continuing or has not "occurred recently enough so that continuing use is a real and ongoing problem." Such evidence could verify the individual's participation in a rehabilitation program and provide you with some assurance that illegal drug use is no longer occurring. This assurance could then be strengthened by requiring the applicant to undergo another drug test.

Employers will need to demonstrate greater flexibility in evaluating candidates who may have had a prior problem with illegal drugs, even if the problem is a recent one. Inflexible

drug policies with fixed waiting periods for future employment consideration should be reviewed and modified to allow case-by-case consideration of returning applicants, or eliminated entirely.

A second practical issue can be found by reviewing the distinction made between current illegal drug users and individuals disabled by alcoholism. In the interpretive guidance to Section 1630.16(b), current illegal drug users are excluded from the definition of individual with a disability. Yet, individuals disabled by alcoholism are specifically included in the definition.

If you are currently including alcohol along with drugs in your preemployment testing process, you should seriously consider what you intend to do with the knowledge of an applicant's positive test result for alcohol after July.

If your company's current policy is to immediately eliminate an applicant from further employment consideration based on a positive test for alcohol alone, it becomes impossible to complete the analysis required under the ADA. That process requires that you determine whether the applicant, with or without reasonable accommodation, can perform the essential functions of the job. Failure to complete this analysis creates additional exposure for you and your company.

To overcome this problem, employers should re-evaluate the automatic elimination of applicants from further employment consideration solely on the basis of a positive test for alcohol. One approach would be to eliminate the pre-employment alcohol test entirely. As an alternative, if pre-employment alcohol testing is desired, a flexible approach is recommended, with the results of a test for alcohol being used to indicate the need for further scrutiny of the applicant's qualifications before a final selection decision is made.

Currently, many employers administer drug-tests as one element of a pre-employment medical examination. Such practices will need to be closely reviewed under the ADA, which prohibits medical examinations from occurring before an employment offer is made. Post-offer, pre-employment medical examinations are permitted, provided that these examinations are administered to all entering employees in the same job category.

Given that under the final regulations a drug test is not considered a medical examination, employers should consider administering a drug test as a separate and earlier element of the applicant-screening process. Earlier elimination of an applicant, based on positive drug-test results, eliminates the later need for a medical examination and significantly reduces overall employment selection costs.

In its October 1989 statement of policy regarding the issue of drug testing, the Society for Human Resource Management reiterated its support for drug testing as one element of an employer's overall drug-free awareness policy and program. All of us can feel gratified that the Americans with Disabilities Act appears generally supportive of drug-testing programs, provided that prudence and care are exercised by employers in the operational use of drug-test results.

Bresler, Samuel J. & Sommer, Roger D. *“Drug Testing and the ADA.”*

*This article is designed to provide general information and is not a substitute for legal advice.*