When Does "Currently" Using No Longer Apply? The Americans with Disabilities Act, the Opioid Crisis, and the Search for a Solution

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Introduction

By the time you have finished reading this Comment, at least two people in the United States will likely have died from an opioid overdose.[1] In fact, a person in the United States is now more likely to die from an opioid overdose than a motor vehicle crash.[2] Such statistics are stark and daunting, leading many to fixate their policy efforts solely on prevention. But a focus on only the most painful aspects of the opioid crisis can hinder discussions about recovery and the return to normalcy after addiction.[3] Discussing recovery in the workforce is especially important because over sixty percent of those with opioid use disorder ("OUD") were employed within the past year.[4] While identifying and preventing OUD should remain a top health priority, there needs to be a renewed focus on recovery,

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1 *See What is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH & HUM. SERVS., http://perma.cc/4XP5-XGKC (estimating that over 130 people died every day from opioid-related drug overdoses in 2018 and 2019).

2 *See* Patricia Mazzei, *Opioids, Car Crashes and Falling: The Odds of Dying in the U.S.*, N.Y. TIMES (Jan. 14, 2019), http://perma.cc/A46M-WXV9; *Preventable Deaths: Odds of Dying*, NAT'L SAFETY COUNCIL, http://perma.cc/X8MT-W4DE.

3 *See generally* Nora D. Volkow, *What Does It Mean When We Call Addiction a Brain Disorder?*, SCI. AM. (Mar. 23, 2018), http://perma.cc/6T57-A724.

4 *See* Carlos Blanco et al., *Probability and Predictors of Remission from Life-Time Prescription Drug Use Disorders: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 47 J. PSYCHIATRIC RES. 42, 47–48 (2013).

and particularly on accommodating a workforce with millions of individuals in the recovery process.[5]

Picture the typical portrait of an American who has struggled with past addiction to opioids. He has gone to rehabilitation, and during that time, began Medication Assisted Treatment ("MAT"). He was prescribed methadone, buprenorphine, or another opioid agonist or antagonist prescription to assist with the numerous side effects of opioid withdrawal.[6] Now, he wants to take the next step in the recovery process and reenter the workforce. Or, maybe he has remained employed while struggling with addiction and has just finished a part-time rehabilitation program, while continuing the MAT program or outpatient treatment.

In each of the scenarios above, if this person is otherwise qualified for a particular job, the Americans with Disabilities Act ("ADA")[7] should provide protection against discrimination in that job by a potential or current employer.[8] But in reality, neither the regulations nor courts' interpretation of this law have conformed to the purposes of the statute as it was written. The lack of any standard for ADA employment protections of those in recovery do a disservice to those who have struggled with addiction. In recognition of current medical knowledge surrounding addiction and employment, federal courts need guidance in their interpretation of this portion of the ADA.

The ADA provides a useful approach for employers and employees concerned with OUD and recovery. The ADA states: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[9] The ADA protects those with real or perceived physical disabilities or mental impairments that substantially limit major life activities.[10]

Although the ADA does not protect a person "who is currently engaging in the illegal use of drugs," it does provide protection for those in the

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[5] This author acknowledges that opioid addiction is a complex epidemic comprised of cultural, economic, and physiological factors. The origin of addiction is a task for another work; this Comment will focus on strategies to accommodate recovering addicts in socially just, legal, and productive ways.

[6] *See How Do Medications to Treat Opioid Use Disorder Work?*, NAT'L INST. ON DRUG ABUSE, http://perma.cc/RHR5-HM3N (stating that agonists and partial agonists "act[] on opioid receptors in the brain—the same receptors that other opioids such as heroin, morphine, and opioid pain medications activate," while antagonists "work[] by blocking the activation of opioid receptors").

[7] *See generally* 42 U.S.C. §§ 12101–12213 (2012).

[8] *See id.* § 12112(a).

[9] *Id.*

[10] *See generally id.* § 12102.

rehabilitation process and those who have recovered from addiction.[11] However, neither the statute nor the regulation interpreting this statutory provision provide a definition of the term "currently engaging."[12] Instead, the regulations and interpretive guidance on this statutory provision state only that "currently engaging" is "intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct."[13] Thus, neither employers nor employees have firm guidance on when *current* use of illegal drugs becomes *past* use of illegal drugs. This distinction is critical because once *current* becomes *past*, a person in addiction recovery may receive protection under the ADA.[14]

As a result of this lack of guidance and because the courts have refused to clearly define when current illegal drug use becomes past drug use, the landscape of employment discrimination caselaw on this issue is disjointed and conflicting.[15] Although employment discrimination lawsuits under the ADA are not uncommon, courts have more recently begun to grapple specifically with employees in the process of OUD recovery.[16]

Furthermore, individuals in recovery from OUD may face additional hurdles because of the prevalence of drug testing in the American workplace. Many individuals in recovery use methadone or buprenorphine as part of an integrated treatment program.[17] Although these substances are legal and often necessary for recovery, they are detected by many drug tests because, technically, they are opioid derivatives.[18] Thus, applicants or employees may feel obligated to disclose their medical status, even though this disclosure may not protect them from the stigma and discrimination that often accompanies addiction.

The trend toward legal pharmaceutical treatments for OUD—and the employment issues associated with these treatments—will likely continue

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11 *Id.* § 12114(a).

12 *See generally* 29 C.F.R. app. § 1630 (2018).

13 *Id.* § 1630.3(a)-(c).

14 *See* 42 U.S.C. § 12114(b).

15 *See, e.g.*, Mauerhan v. Wagner Corp., 649 F.3d 1180, 1186 (10th Cir. 2011) (detailing various cases that illustrate the lack of a bright-line rule).

16 *See* TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 222989, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–2006, at 2 (2008), http://perma.cc/W38B-DVD8 (noting that "[e]mployment discrimination accounted for about half of all civil rights filings in U.S. district courts from 1990–2006"); *see also* Williams v. FedEx Corp. Servs., 849 F.3d 889, 894 (10th Cir. 2017); Breaux v. Bollinger Shipyards, LLC, No. 16-2331, 2018 WL 3329059 (E.D. La. July 5, 2018).

17 *See Methadone and Buprenorphine: Opioid Agonist Substitution Tapers*, PROVIDERS CLINICAL SUPPORT SYS. (Dec. 6, 2017), http://perma.cc/PHE9-M75P.

18 *See generally* DailyMed, *Suboxone*, U.S. NAT'L LIBR. MED., http://perma.cc/BS87-52CN.

and increase in the near future. While rates of prescription opioid addiction have leveled off since 2011,[19] heroin use disorder (heroin is classified as an opioid) has nearly tripled between 2002 and 2016.[20] Additionally, ADA protection for those with OUD covers an interesting cross section of populations, since "[i]ntroduction to opioid narcotics frequently starts with legitimate prescriptions for acute pain,"[21] and "opioids are essential for the treatment of many forms of acute and chronic pain."[22] Hence, many with OUD may be otherwise disabled due to chronic pain.[23] This means that they may have more than one disabling condition, and therefore may face additional barriers to employment apart from OUD.

This Comment analyzes current caselaw on claims of employment discrimination involving the safe harbor provision of the ADA. Part I considers the federal government's 2017 declaration of the opioid crisis as a "public health emergency," and how the opioid crisis may be affecting employment in the United States. Part II summarizes the Rehabilitation Act ("RA"), the employment provisions of the ADA, and how the ADA protects persons in OUD recovery.

Part III analyzes employment discrimination caselaw under the ADA, focusing on cases with plaintiffs who have a current or past history of drug or alcohol addiction. Part III emphasizes decisions that center on judicial construction of the ADA language that excludes persons who are "currently engaging in the illegal use of drugs," as well as the safe harbor provision for those in recovery.

Part IV argues that most judicial constructions have allowed employment discrimination claims to rest on outdated misconceptions about drug addiction and recovery and do not conform with the letter or the intent of the ADA. Part IV further proposes that the Equal Employment Opportunity Commission ("EEOC") promulgate new regulations to evaluate whether someone is "currently engaging" in the use of illegal drugs. Specifically, the EEOC should adopt the twelve-week framework used by the Family & Medical Leave Act ("FMLA")[24] as a baseline to trigger ADA employment protections for people in recovery from substance use. Finally, Part IV considers policy arguments in favor of and against this

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19 Gery P. Guy, Jr. et al., *Vital Signs: Changes in Opioid Prescribing in the United States, 2006–2015*, 66 MORBIDITY & MORALITY WKLY. REP. 697, 698 (2017), http://perma.cc/YBK5-7AH3.

20 *See What is the Scope of Heroin Use in the United States?*, NAT'L INST. ON DRUG ABUSE (2018), http://perma.cc/8QKV-U4J7.

21 Alan Gordon & Alexandra Gordon, *Does It Fit? A Look at Addiction, Buprenorphine, and the Legislation Trying to Make It Work*, 12 J. HEALTH & BIOMEDICAL L. 1, 5 (2016).

22 Andrew Rosenblum et al., *Opioids and the Treatment of Chronic Pain: Controversies, Current Status, and Future Directions*, 16 EXPERIENTIAL CLINICAL PSYCHOPHARMACOLOGY 405, 406 (2008).

23 *See id.*

24 *See generally* 29 U.S.C. §§ 2612(a)(1).

proposal and considers hypothetical test cases using the proposed framework.

I. Background: The Opioid Crisis as a Public Health Emergency

This Part provides historical context for the current opioid crisis in the United States and its connection with employment issues in the private sector. The current opioid crisis is affecting all parts of the economy, but this Comment focuses on the intersection between the opioid crisis and employment drug testing, since the majority of private employers are drug testing applicants and current employees in the regular course of business.[25]

A. *History Behind the 2017 Declaration of Public Health Emergency*

Opioids[26] are a class of drugs that interact with certain receptors in the brain and are most commonly used to treat pain.[27] The term "opioids" includes several different drug types, including (but not limited to): (1) prescribed opioids, such as morphine, fentanyl, oxycodone, and hydrocodone;[28] (2) illegal opioids, such as heroin;[29] and (3) long-acting opioids used to combat opioid addiction, such as methadone and buprenorphine.[30] Because opioids powerfully affect brain chemistry and produce both euphoria and pain relief, many people who take opioids become dependent on them; this dependence may develop into addiction to opioids or OUD.[31]

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[25] *See infra* note 41.

[26] For clarity purposes, the term "opioid" will be used throughout this Comment to refer to both "opioids" and "opiates." But there is a slight distinction between "opiates" and "opioids." *See* Rosenblum et al., *supra* note 22, at 406 ("The term *opioid* refers to all compounds that bind to opiate receptors. Conventionally, the term *opiate* can be used to describe those opioids that are alkaloids, derived from the opium poppy; these include morphine and codeine. Opioids include semisynthetic opiates, that is, drugs that are synthesized from naturally occurring opiates (such as heroin from morphine and oxycodone from thebaine), as well as synthetic opioids such as methadone, fentanyl, and propoxyphene.").

[27] *See Opioids*, NAT'L INST. ON DRUG ABUSE, http://perma.cc/C4VD-RK2U.

[28] *See Prescription Opioids*, NAT'L INST. ON DRUG ABUSE, http://perma.cc/WED4-8UF3.

[29] *See Heroin*, NAT'L INST. ON DRUG ABUSE, http://perma.cc/9ZAB-BSNA.

[30] *See* Substance Abuse & Mental Health Admin., *Medication and Counseling Treatment*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://perma.cc/8W8P-3AU5.

[31] *See* Genetics Home Reference, *Opioid Addiction*, U.S. NAT'L LIBR. MED. (March 31, 2020), http://perma.cc/DB7R-WU7R.

Opioid addiction in the United States has a long history, dating back to opium use the nineteenth century.[32] Starting in the late 1990s, however, prescriptions for legal opioids proliferated, making opioids more accessible.[33] As prescriptions increased, so did addiction and overdose deaths. From 1999 to 2011, "the annual number of overdose deaths from prescription opioids tripled" before leveling off in 2012.[34] After the Food and Drug Administration ("FDA") Amendments Act[35] became law in 2007, the FDA promulgated safety restrictions on many prescription opioids as part of an ongoing effort to combat their misuse.[36] Subsequently, as prescription opioids became more difficult to obtain, use of illicit opioids rose.[37] Just as prescription opioid deaths leveled off in 2012, overdose rates from heroin and illegal fentanyl derivatives followed an accelerated trajectory, with opioid deaths in those categories tripling between 2012 and 2015.[38] In 2016, about two-thirds of the sixty-three thousand drug overdose deaths in the United States involved opioids.[39] In 2017, the projected number of

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[32] *See* Clinton Lawson, *America's 150-Year Opioid Epidemic*, N.Y. TIMES (May 19, 2018), http://perma.cc/LZU6-C42Z.

[33] *See* COMM. ON PAIN MGMT. & REGULATORY STRATEGIES TO ADDRESS PRESCRIPTION OPIOID ABUSE, PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE 188 (Richard J. Bonnie et al. eds., 2017), http://perma.cc/R7D9-QN5G [hereinafter COMM. ON PAIN]; *see also* Jack Hubbard et al., *Opioid Abuse: The Fall of a Prince*, 21 QUINNIPIAC HEALTH L.J. 159, 167–69 (2018) (asserting that the prescription proliferation was caused by several key factors, including: (1) a 1980 medical research paper claiming opioids carried low risk of addiction, a conclusion seized by pharmaceutical companies "to allay physicians' fears regarding addiction"; (2) a 2001 requirement of the Joint Commission classifying pain as a medical vital sign and requiring doctors to ask patients about pain levels; and (3) the patient satisfaction survey that incentivizes doctors "to issue unnecessary opioid prescriptions for pain relief in order to achieve better patient satisfaction scores").

[34] COMM. ON PAIN, *supra* note 33, at 2–3.

[35] Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823.

[36] *See Timeline of Selected FDA Activities and Significant Events Addressing Opioid Misuse and Abuse*, U.S. FOOD & DRUG ADMIN., http://perma.cc/ABE2-FAU8.

[37] *See* Theodore J. Cicero et al., *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years*, 71 JAMA PSYCHIATRY 7, 821, 824–25 (2014).

[38] *See* COMM. ON PAIN, *supra* note 33, at 2.

[39] *See* CDC NAT'L CTR. FOR INJURY PREVENTION & CONTROL, 2018 ANNUAL SURVEILLANCE REPORT OF DRUG-RELATED RISKS AND OUTCOMES: UNITED STATES 7 (2018), http://perma.cc/F7WD-M2U2. The report notes:

> [P]rescription and/or illicit opioids were involved in 66.4% (42,249) of these drug overdose fatalities. Among opioid-involved deaths, the most commonly involved drugs were synthetic opioids other than methadone (a category that is primarily illicitly manufactured fentanyl, based on epidemiologic evidence) (19,413 deaths), followed by prescription opioids (17,087 deaths), and heroin (15,469 deaths). Prescription opioids included deaths involving natural and semisynthetic opioids (14,487 deaths) and methadone (3,373 deaths).

drug overdose deaths involving opioids is expected to reach nearly fifty thousand fatalities.[40]

B. *Key Employment Issues in the Opioid Crisis*

In recognition of an ongoing national crisis, the federal government declared a public health emergency in 2017, acknowledging the need for a comprehensive strategy to tackle opioids on multiple fronts and within multiple federal agencies.[41] As a result, the Department of Health and Human Services released a five-point opioid strategy, emphasizing the need for both "recovery support services" and better pain management practices.[42] The Department of Labor recently introduced a pilot program, funding over $20 million in grants "to help provide new skills to workers . . . who have been or are being impacted by the opioid crisis" and encouraging "workforce development . . . [to] address or prevent problems related to opioids in American communities."[43]

Divisions and offices within federal agencies have also taken steps to combat the opioid crisis. For example, the Civil Rights Division of the Department of Justice "is working to remove discriminatory barriers to recovery and treatment confronted by people with Opioid Use Disorders."[44] Barriers to recovery are particularly acute in employment because employers in the private and public sectors often drug test prospective and current employees, and these tests can be problematic for individuals currently receiving MAT.[45]

Drug tests before and during employment became more common during the 1980s.[46] After peaking at about eighty percent of private

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Id.

[40] *See Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE, http://perma.cc/X99K-JURP; *see also* F.B. Ahmad et al., *Provisional Drug Overdose Death Counts*, NAT'L CTR. HEALTH STATS. (2020), http://perma.cc/8NCZ-BJYL.

[41] *See* Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis A Public Health Emergency*, NAT'L PUB. RADIO (Oct. 26, 2017), http://perma.cc/M66L-MMNJ.

[42] Press Release, U.S. Dep't of Health & Human Servs., HHS Acting Secretary Declares Public Health Emergency to Address National Opioid Crisis (Oct. 26, 2017), http://perma.cc/HAZ9-LVCY.

[43] Press Release, U.S. Dep't of Labor, U.S. Secretary of Labor Acosta Announces New Dislocated Worker Grants to Help Fight Opioid Public Health Emergency (Mar. 20, 2018), http://perma.cc/37FN-EEJR.

[44] *28 Years of the Americans with Disabilities Act*, U.S. DEP'T JUST. C.R. DIVISION, http://perma.cc/S8BZ-L6SV.

[45] *See* Stacy Hickox, *It's Time to Rein in Employer Drug Testing*, 11 HARV. L. & POL'Y REV. 419, 421 (2017).

[46] *See* Pauline T. Kim, *Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing*, 66 LA. L. REV. 1009, 1011–12 (2006) (stating that the War on

employers in the mid-1990s,[47] employment drug testing has declined and stabilized, hovering between fifty and sixty percent of employers.[48] Additionally, roughly thirty to thirty-six percent of current employees undergo ongoing drug testing during employment.[49] Although the rate of drug testing has declined due to doubts about its efficacy,[50] it is still quite prevalent and remains an important aspect of hiring and continued employment for the majority of Americans.[51]

Drug testing appeals to employers as a risk mitigation effort because "substance use in the workplace may impose high costs to firms in the form of lower productivity, increased absenteeism, and more workplace accidents."[52] Of course, these drug tests are not targeted toward those in recovery from OUD; any employee who currently engages or has engaged in substance use regularly or even recreationally is at risk of losing his job as a result of a positive drug test. However, individuals with OUD may "report significantly higher rates of job loss within the previous year" in comparison to those without a history of OUD.[53] Further, for employees in recovery from OUD, drug testing in employment presents a myriad of complications beyond the struggle to find or maintain steady employment.[54] When a person in recovery from OUD seeks employment, he may choose not to apply for fear of failing a drug test due to MAT use, or he may be rejected for a "positive" result, even though MAT is part of a legal medical regimen. Thus, a vicious cycle may ensue: OUD may lead to

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Drugs initiated by the Reagan Administration fueled the rise of private-sector employment drug testing).

47 *See* Daniel Engber, *Why Do Employers Routinely Drug-Test Workers?*, SLATE (Dec. 27, 2015), http://perma.cc/7YFS-B9HT.

48 *See Drug Testing Efficacy SHRM Poll*, *SOC'Y FOR HUM. RESOURCE MGMT.* 3 (Sept. 7, 2011), http://perma.cc/6HRU-BRMY (noting fifty-seven percent of employers drug test all candidates).

49 *See id.* at 9; *see also* SHARON L. LARSON ET AL., WORKER SUBSTANCE USE AND WORKPLACE POLICIES AND PROGRAMS, U.S. DEP'T HEALTH AND HUM. SERVS. 3 (2007), http://perma.cc/E4WX-Z96W (reporting that 29.6% of full-time employees "reported random drug testing in their current employment setting").

50 *See, e.g.*, Lydia DePillis, *Companies Drug Test a Lot Less Than They Used to – Because it Doesn't Really Work*, WASH. POST (Mar. 10, 2015), https://perma.cc/8DH8-C4ZU (arguing that fewer employers are drug testing "because there's very little evidence that testing does much to improve safety or productivity").

51 *See* Rebecca Greenfield & Jennifer Kaplan, *The Coming Decline of the Employment Drug Test*, BLOOMBERG L. NEWS (Mar. 5, 2018), http://perma.cc/9PDE-FRM5.

52 Chris S. Carpenter, *Workplace Drug Testing and Worker Drug Use*, 42 HEALTH SERVS. RES. 795, 795 (2007).

53 Marjorie L. Baldwin, Steven C. Marcus & Jeffrey De Simone, *Job Loss Discrimination and Former Substance Use Disorders*, 110 DRUG & ALCOHOL DEPENDENCE 1, 4–5 (2010).

54 *See id.* at 2–7; *see also* Greg Marotta, *Addiction Crisis in the Workforce: How Employers are Combating the Opioid Epidemic*, CLEANSLATE (June 11, 2018), http://perma.cc/6ZSY-MK7W.

employment issues and job loss, which then means less access to needed treatment and recovery.[55] Without access to employer-based insurance, many with OUD lose access to the benefits of treatment programs.

Imagine, again, a typical person in recovery from OUD. He needs to find work, and although he attended inpatient rehabilitation, he recognizes the importance of stability in recovery and how a steady job can contribute to that stability.[56] He is also aware of the link between ongoing unemployment and addiction relapse.[57] Because of his past history of drug abuse, however, he is justifiably worried about disclosing his recovery status to an employer. He is also unsure whether his MAT prescription—a key component of his treatment—could show up on any drug test that a potential employer gives.[58]

The realities of modern workplace drug testing and the ongoing opioid crisis mean that more employees may face discipline, termination, and long-term job loss due to OUD, recovery, and use of MAT. However, employees who are in the recovery process may be entitled to certain protections under federal law.

II. Background: The Rehabilitation Act and the ADA

The opioid crisis and its related employment issues have led to employment discrimination lawsuits under the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA"). This Part provides a brief overview of the RA followed by an in-depth analysis of the relevant ADA provisions governing these lawsuits, including the obligations of covered employers, the individuals who are protected under the ADA, and the safe harbor provision that protects individuals who are in recovery from drug addiction.

A. *The Rehabilitation Act*

Although statutory protection for employees with OUD falls more squarely within the language of the ADA, the RA historically precedes the

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[55] *See* Marotta, *supra* note 54.

[56] *See* Alexandre B. Laudet, *Rate and Predictors of Employment Among Formerly Polysubstance Dependent Urban Individuals in Recovery*, 31 J. ADDICTIVE DISEASES 288, 288–89 (2012).

[57] *See* Dieter Henkel, *Unemployment and Substance Use: A Review of the Literature (1990-2010)*, 4 CURRENT DRUG ABUSE REVS. 4, 17–18 (2011).

[58] *See* Scott E. Hadland & Sharon Levy, *Objective Testing – Urine and Other Drug Tests*, 25 CHILD ADOLESCENT PSYCHIATRIC CLINICS N. AM. 549, 550 (2016).

ADA and provides a nearly identical legal framework for analysis.[59] Employees often bring claims under both statutes.[60] Furthermore, the RA's stated purpose speaks directly to employment, aiming "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society."[61]

Originally enacted in 1973, the RA recognizes that "individuals with disabilities continually encounter various forms of discrimination" in multiple areas, including employment.[62] To further its goal of empowerment through employment, the statute (1) authorizes funds for state vocational rehabilitation services;[63] (2) establishes a committee (now known as the National Council on Disability) to research disability employment and make "recommendations for legislative and administrative changes";[64] and (3) requires affirmative action plans of federal agencies "for the hiring, placement, and advancement of individuals with disabilities."[65]

More broadly, the RA prohibits discrimination against those with disabilities in "any program or activity receiving Federal financial assistance" and "any program or activity conducted by any Executive agency."[66] This provision encompasses most state and local public entities as "[m]ost programs and activities of State and local governments are recipients of Federal financial assistance from one or more Federal funding agencies."[67]

Although congressional passage of the RA represents an important first step in the elimination of discrimination based on disability, the RA's text encompasses only federal employees and federally assisted state and local entities.[68] Recognizing the need to fully eradicate discrimination against persons with disabilities, Congress drafted a more expansive statute to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," including those in the private sector.[69] Congress eventually passed this new law: the Americans with Disabilities Act.[70]

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59 *See* Amy L. Hennen, *Protecting Addicts in the Employment Arena: Charting a Course Toward Tolerance*, 15 LAW & INEQ. 157, 161, 175 (1997).

60 *See id.*

61 29 U.S.C. § 701(b)(1) (2012).

62 *Id.* § 701(a)(5).

63 *See id.* §§ 721, 723.

64 *Id.* § 791(a).

65 *Id.* § 791(b).

66 *Id.* § 794(a).

67 28 C.F.R. § 35 (2019).

68 *See* 29 U.S.C. § 794; *see also* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., A GUIDE TO DISABILITY RIGHTS LAWS (2009), http://perma.cc/X3R3-S2WM.

69 42 U.S.C. § 12101(b)(1) (2012).

70 *See id.* §§ 12101–12213.

B. *The Americans with Disabilities Act*

Enacted in 1990, the ADA seeks "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for all Americans with disabilities.[71] Title I of the ADA addresses employment, Title II addresses state and local government activities, and Title III addresses public accommodations.[72] Under Title I, the ADA expands the non-discrimination provisions of the RA to all employers with "15 or more employees."[73] This analysis focuses on employment under Title I.[74]

1. Employment Protections—Who Is Covered and Who Is Excluded Under Title I?

Under the ADA, "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[75] Title I of the ADA defines: (1) covered entities (employers); (2) who is a person with a disability; (3) the "otherwise qualified" standard; (4) reasonable accommodations; and (5) undue hardship to the employer, which the employer may use as an affirmative defense.[76] This Section discusses each element in turn.

a. *Employers and Employees Defined*

Title I of the ADA currently defines employers as anyone "engaged in an industry affecting commerce" with "15 or more employees" for "each working day in each of 20 or more calendar weeks in the current or preceding calendar year."[77] The ADA also provides several explicit exceptions

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71 *Id.* § 12101(7).

72 *See id.* §§ 12101–12181.

73 *Id.* § 12111(5) (excluding "the United States, a corporation wholly owned by the government of the United States, or an Indian tribe" or "a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986"). The United States as an employer already had a non-discrimination and affirmative action plan for federal employees with disabilities. *See* 29 U.S.C. § 791(b) (2012).

74 Although the ADA covers federal employees, the issuance of Executive Order 12564 in 1986 brought workplace drug testing for federal employees under what is now the Substance Abuse and Mental Health Services Administration (SAMHSA). *See* 5 U.S.C. § 7301 (2012).

75 42 U.S.C. § 12112.

76 *See generally id.* §§ 12111–12117.

77 *Id.* § 12111(5)(A). For the first two years after the ADA was enacted, employers were covered if they had twenty-five or more employees in the same timeframe of the previous calendar year. *See id.*

from the definition of employer.[78] Because the RA covers federal employment nondiscrimination, the ADA excludes the United States from its definition of employer.[79] This analysis therefore focuses on the ADA and employment discrimination claims in the private sector. Under the "15 or more" employees definition, the ADA protects about eighty percent of all private sector employees in the United States.[80] Because the majority of people with OUD were employed within the past year,[81] the ADA has implications for millions of employees or applicants in recovery and thousands of employers who are covered entities under the ADA.

b. *Persons with Disabilities Defined*

The ADA also defines who is a person with a disability under the law.[82] First, an individual with a disability is one with "a physical or mental impairment that substantially limits one or more major life activities."[83] The ADA's definition of "major life activities" includes activities such as "performing manual tasks," "sleeping," "concentrating," and "working."[84] Second, the ADA protects individuals who have "a record of" a substantially limiting impairment, meaning that people who have recovered from debilitating illnesses may be included within the ADA's definition of disabled.[85] Third, an individual meets the legal definition of disabled when that person is "regarded as having" a substantially limiting impairment,

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[78] *Id.* § 12111(5)(B) (exempting the "United States," a "corporation wholly owned by the government of the United States," "an Indian tribe," and 501(c) "bona fide private membership club" from the definition of employer).

[79] *See* 29 U.S.C. § 791(b) (2012); 42 U.S.C. § 12111(5)(B); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that sovereign immunity under the Eleventh Amendment bars state employees from recovering monetary damages from state employers in federal court). *But see* 28 C.F.R. § 35.140(b) (2019) (noting that "requirements of title I of [the ADA] . . . apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I").

[80] *See Table F: Distribution of Private Sector Employment by Firm Size Class 1992-2017*, U.S. BUREAU LAB. STATS., http://perma.cc/GJ42-4UM5; *see also* U.S. SMALL BUS. ADMIN. OFFICE OF ADVOCACY, UNITED STATES SMALL BUSINESS PROFILE 1 (2016), http://perma.cc/NBC6-QDMX (illustrating that employers with 1–19 employees make up 17.3% of US employment). *Cf.* Andy Kiersz, *The Impact of Small Business on the US Economy in 2 Extreme Charts*, BUS. INSIDER (June 16, 2016), http://perma.cc/DPK4-87UM.

[81] *See* Blanco et al., *supra* note 4, at 44.

[82] *See* 42 U.S.C. § 12102(1) (2012).

[83] *Id.* § 12102(1)(A). Although this definition encompasses many disabilities, ADA regulations emphasize that the definition of disability "shall be construed broadly in favor of expansive coverage." 28 C.F.R. § 36.105(a)(2)(i) (2019).

[84] 42 U.S.C. § 12102(2)(A).

[85] *Id.* § 12102(1)(B).

even if the person does not actually have a medically diagnosable impairment.[86] The second and third definitions, in particular, "indicate that disability can be socially constructed."[87] Congress, recognizing the possibility of stigma associated with disability,[88] afforded protection "based on society's previous observations and perceptions," even when those perceptions are inaccurate.[89] Thus, if an employer or other covered entity wrongly perceives an individual as a person with a disability when that individual does not have a disability, the ADA still protects the person from discrimination.[90]

All three definitions of statutory disability may apply to individuals in recovery from OUD. Importantly, the regulations promulgated in connection with the ADA include "drug addiction" within the term "[p]hysical or mental impairment."[91] More specifically, a person with a history of OUD may struggle with certain cognitive functions during initial abstinence from opioids.[92] In the initial stages of recovery, many individuals with OUD report symptoms of withdrawal, including anxiety, depression, and sleep disturbances.[93] Furthermore, because many individuals with OUD began their use through a legitimate prescription, OUD often correlates with discrete disabilities, such as Post-Traumatic Stress Disorder or chronic pain.[94]

Additionally, the ADA still considers an impairment as a disability when that impairment is "episodic" or "in remission" so long as the impairment "substantially limit[s] a major life activity when active."[95] The

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[86] *Id.* §§ 12102(1)(C).

[87] Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405, 1432 (1999).

[88] *See* Carol J. Gill, *Questioning Continuum*, *in* THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE FIRST FIFTEEN YEARS OF *THE DISABILITY RAG* 42, 44 (Barrett Shaw ed., 1994) (noting that "disability is a marginalized status that society assigns to people who are different enough from majority cultural standards to be judged abnormal or defective in mind or body").

[89] Eichhorn, *supra* note 87, at 1432; *see also* Johnson v. Am. Chamber of Commerce Publishers, Inc., 108 F.3d 818, 819 (7th Cir. 1997) (holding that the ADA forbids discrimination against a person with a record of impairment, "[but who] may at present have no actual incapacity at all").

[90] *See* 42 U.S.C. §§ 12102(1)(B)–(C).

[91] 28 C.F.R. § 36.105(b)(2) (2019).

[92] *See generally* Pekka Rapeli et al., *Cognitive Function During Early Abstinence from Opioid Dependence: A Comparison to Age, Gender, and Verbal Intelligence Matched Controls*, 6 BMC PSYCHIATRY 9 (2006).

[93] *See* Center for Substance Abuse Treatment, *Protracted Withdrawal*, 9 SUBSTANCE ABUSE TREATMENT ADVISORY 1, 3 (2010), http://perma.cc/A82N-P32L.

[94] *See* Elena Bilevicius et al., *Posttraumatic Stress Disorder and Chronic Pain Are Associated with Opioid Use Disorder: Results from a 2012–2013 American Nationally Represented Survey*, 188 DRUG & ALCOHOL DEPENDENCE 119, 119–20 (2018).

[95] 42 U.S.C. § 12102(4)(D).

"episodic" and "in remission" terms mean that individuals who have a record of a past disability may also be covered under the statute.[96] Thus, a person who has a record of OUD that substantially limited a major life activity, but has been in recovery for several years, may still meet the statutory definition of person with "disability" under the ADA. Such individuals would meet the definition because the medical and legal communities characterize substance use disorders as "episodic" and "in remission" depending on the frequency and severity of use.[97]

c. *Protections for Employees with Disabilities Defined*

The ADA further defines how it provides protections to employees with disabilities. The ADA protects a "qualified individual," or a person who "with or without reasonable accommodation, can perform the essential functions of the employment position."[98] A person must be a "qualified individual" for the job in question to receive ADA protection.[99] To define "essential functions," the ADA defers to an employer's definitions, particularly when the employer prepares "a written description before advertising or interviewing applicants."[100] Therefore, an individual who is recovering from OUD must be able to perform the essential functions of the job he has or the job he has applied for, with or without a reasonable accommodation. If he is not able to perform these functions, though he may meet the statutory criteria for a person with a "disability," he is not a "qualified individual" for the purposes of employment protection for that job.[101]

If a "qualified individual" works for a covered employer, that employer may be required to provide "reasonable accommodation" for the individual's disability.[102] The ADA provides a broad definition for "reasonable accommodation," including both physical access accommodations and job-

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96 *See, e.g.*, Oehmke v. Medtronics, Inc., 844 F.3d 748, 756 (8th Cir. 2016) (stating that an employee's cancer, "even while in remission, is clearly a covered disability under the ADA"); Gogos v. AMS Mech. Syss., Inc., 737 F.3d 1170, 1172–73 (7th Cir. 2013) (holding that an employee's occasional blood pressure spike and subsequent intermittent vision loss are "episodic" and covered by the ADA).

97 *See* AM. PSYCHIATRIC ASSOC., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 17 (3d ed. 1980). ADA employment discrimination cases illustrate acceptance of diagnoses of addiction to include "in remission." *See, e.g.*, Vedernikov v. W. Va. Univ., 55 F. Supp. 2d 518, 523 (N.D. W. Va. 1999) (characterizing a plaintiff seeking coverage under the ADA as "in early full remission" from addiction to fentanyl).

98 42 U.S.C. § 12111(8) (2012).

99 *See id.* § 12111.

100 *Id.* § 12111(8).

101 *See id.*

102 *See id.* § 12111(9).

specific accommodations.[103] For example, an individual recovering from OUD may request a job-specific accommodation such as a "modified work schedule" to accommodate medical appointments or therapy sessions.[104]

In sum, under the statutory and regulatory definitions, many individuals in recovery from OUD—including those who have a MAT prescription—clearly fall within the statutory protections of the ADA. Furthermore, due to the intended use of opioids to treat acute and chronic pain, many individuals with OUD may qualify as persons with disabilities regardless of their OUD status.[105]

d. *Illegal Use of Drugs and ADA Protection Defined*

The ADA does not extend employment protection to individuals who are "currently engaging in the illegal use of drugs."[106] But the ADA does provide what has come to be called the "safe harbor provision" for individuals in recovery.[107] The safe harbor provision extends ADA protections to a former illegal drug user who:

> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise successfully completed a rehabilitation program and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use.[108]

Under the statutory definitions, many individuals in recovery from OUD, including those who have a MAT prescription, should be able to access the safe harbor provision of the ADA.

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103 *See id.* Physical access accommodations, likely not applicable to the OUD context, may entail "making existing facilities used by employees readily accessible to and usable by individuals with disabilities." *Id.*

104 42 U.S.C. § 12111(9); *see also* U.S. Equal Emp. Opportunity Comm'n, EEOC915.002, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), http://perma.cc/VJA5-H5KY (stating as an example of accommodation: "to give an employee a break in order that s/he may take medication, or to grant leave so that an employee may obtain treatment").

105 *See* Gordon & Gordon, *supra* note 21, at 5.

106 42 U.S.C. § 12114.

107 *See, e.g.*, McDaniel v. Miss. Baptist Med. Ctr., 877 F. Supp. 321, 326 (S.D. Miss. 1995) (stating that the ADA creates a "'safe harbor' for chemically dependent persons" who are no longer illegally using drugs).

108 42 U.S.C. § 12114(b).

2. Employment Discrimination—Medical Examinations, Drug Testing, and Lawsuits Under Title I

Drug testing may occur pre-hire, during the course of employment, or during both of these phases.[109] The ADA does not prohibit drug testing as a precondition to employment, including testing conducted prior to a formal job offer.[110] The ADA also allows general medical examinations "after an offer of employment has been made" as long as it is required of all offerees and the employer follows certain confidentiality safeguards.[111] Employers may also administer drug tests under the ADA during the course of employment. These drug tests often occur in two settings: (1) ongoing random or periodic testing (often framed as testing for safety or business necessity); and (2) for-cause testing due to a workplace accident or employee behavior.[112]

In the context of OUD, the ADA's safe harbor provision should theoretically protect individuals in recovery from OUD who are no longer illegally using opioids.[113] As Part III will demonstrate, however, employer use of drug testing can cause complications for individuals in recovery, making it more difficult to obtain or maintain employment. Before heading to court, employees who believe they have been subject to adverse employment action must resolve their claims at the administrative level.[114] If they do file a lawsuit, employment discrimination plaintiffs may establish

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109 *See Drug Testing*, NAT'L INST. ON DRUG ABUSE, http://perma.cc/GH6P-9G9X.

110 *See* 42 U.S.C. § 12114(d). Although general medical inquiries are restricted, the ADA specifically excludes drug tests from the term "medical examination" allowing drug tests to fall outside prohibited pre-offer practices. *Id.* However, this section does not condone drug testing: "Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results." *Id.*

111 *Id.* § 12112(d)(3). Employers can even conduct medical examinations and medical inquiries before employment begins, if the employer is trying to assess "the ability of an applicant to perform job-related functions." *Id.* § 12112(d)(2)(B).

112 *See* 1 KEVIN B. ZEESE, DRUG TESTING LEGAL MANUAL § 1:3 (2d ed. 2018).

113 *See* 42 U.S.C. § 12114(b).

114 *See id.* § 12117. This sub-section adopts the "powers, remedies, and procedures" under Title VII claims for employment discrimination, which many federal courts interpret as requiring exhaustion of administrative remedies prior to filing a lawsuit. *See, e.g.*, Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275, 278 (1st Cir. 1999) (ruling that a plaintiff with ADA Title I claim who did not file administrative claim with EEOC had failed to exhaust administrative remedies). The EEOC is charged with enforcing Title I. *See* 42 U.S.C. § 12117(a). The EEOC resolves many employment disability discrimination claims through mediation before resorting to federal courts. *See, e.g.*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 2018 PERFORMANCE AND ACCOUNTABILITY REPORT 13, 32 (2018), http://perma.cc/9CUD-MSN3.

a discriminatory hiring decision through direct or indirect evidence.[115] Because employment discrimination cases rarely involve direct evidence,[116] most plaintiffs follow procedures for indirect evidence, following the *McDonnell Douglas Corp. v. Green*[117] standard for Civil Rights Act claims.[118]

Under the *McDonnell Douglas* standard, an employee who sues and claims disability discrimination must establish a prima facie case of direct discrimination by proving: (1) the complainant is a member of a protected class (here, a person with a disability); (2) the complainant is a qualified individual for the job in question; and (3) due to their protected class, the complainant was the subject of adverse employment action.[119] In disability law, an adverse employment action can include "failure to accommodate" in addition to firing, harassing, and other more generalized charges of employment discrimination.[120] If the complainant successfully establishes a prima facie case, the burden then shifts to the employer, who is given the opportunity to provide a non-discriminatory basis for the adverse employment action.[121]

The ADA also provides specific defenses to the employer: undue hardship and direct threat. For "undue hardship," if a requested accommodation results in "action requiring significant difficulty or expense," the employer may claim that the expense or action constitutes too high of a burden to accommodate the employee with a disability.[122] Similarly, the ADA does not protect an employee who poses a "direct threat to the health or safety" of the workplace.[123] Thus, employers can fire or refuse to hire an employee who poses such a threat. There are obvious benefits to such defenses, such as cost containment[124] and prevention of the spread of

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115 *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121–22 (1985) (noting that the *McDonnell Douglas Corp. v. Green* framework was formulated in the average discrimination case, where direct evidence is unavailable).

116 *See* William L. Corbett, *Proving and Defending Discrimination Claims*, 47 MONT. L. REV. 217, 219 (1986) ("Seldom can a plaintiff point to direct evidence of discrimination . . . .").

117 411 U.S. 792 (1973).

118 *See id.* at 802 (setting out the prima facie discrimination standard for Title VII of the Civil Rights Act of 1964).

119 *See id.* The original test also included a fourth prong: after the adverse employment action, the "employer continued to seek applicants with complainant's qualifications." *Id.*

120 *See Notice of Rights Under ADA Amendments Act of 2008 (ADAAA)*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://perma.cc/U5C7-VX7B.

121 *See McDonnell Douglas*, 411 U.S. at 802.

122 42 U.S.C. § 12111(10)(A) (2012).

123 *Id.* § 12113(b).

124 *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (noting that, in considering whether an employer faces an undue hardship, an "employee must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs").

communicable diseases.[125] These defenses also mean that not all applicants or employees who have a disability must be hired or accommodated, even when they are otherwise qualified for the job.

Whether an employer can successfully raise the "undue hardship" defense depends on several statutory factors, including the "nature and cost" of the accommodation, the "overall financial resources" involved, how the accommodation may broadly affect the employer, and the "type of operation" of the covered entity.[126] EEOC regulations define an "undue hardship" as any accommodation that is "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[127]

Similarly, an employer who raises a "direct threat" defense must prove that the employee poses "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[128] The assessment must be individualized, and the employer must use "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" to determine if an individual can safely perform on the job.[129]

In sum, the ADA protects people with a disability from employment discrimination if they are otherwise qualified for their job and the employer is a covered entity. If that disability involves recovery from an addiction such as OUD, the ADA provides a "safe harbor" provision to protect these individuals, as long as they are no longer using illegal drugs. If an employer fires an applicant or employee due to drug test results, the individual may seek relief through the EEOC or the courts. The next section analyzes cases in which employees have sought such relief.

III. Analysis of Title I in Federal Caselaw

Under the ADA, individual employees, classes of employees, or the EEOC may file charges against private employers for workplace discrimination.[130] Title I lawsuits involving legal or illegal drug use typically result

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125 *See* Bragdon v. Abbott, 524 U.S. 624, 649 (1998) ("The ADA's direct threat provision stems from the recognition . . . of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks . . . ." (citing *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 (1987))).

126 42 U.S.C. § 12111(10)(B).

127 29 C.F.R. app. § 1630.2(p) (2019).

128 29 C.F.R. § 1630.2(r) (2019).

129 *Id.*

130 *See* Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Releases Fiscal Year 2017 Enforcement And Litigation Data (Jan. 25, 2018), http://perma.cc/NT9Z-L6R2 (noting that

from two types of employer action: (1) drug testing during the hiring process; and (2) drug testing during employment.[131]

This Part analyzes the current federal caselaw on ADA employment discrimination claims involving addiction. Specifically, it considers cases involving both types of employment drug testing: hiring process drug testing and drug testing during employment. Taken together, these court decisions reflect a disjointed, rather than comprehensive, interpretation of the ADA. Arguably, this disjointedness occurs because courts lack guidance on defining what "currently engaging in the illegal use of drugs" means for an employee.[132] Without better guidance for this statutory language, the courts may be relying on stigmatized social perceptions of individuals in recovery,[133] which is exactly the type of discrimination the ADA is meant to eradicate.[134] As American society works to address various aspects of the opioid crisis, these decisions require closer scrutiny and reconsideration.

A. *Drug Tests During Hiring*

The ADA allows drug testing as a precondition to employment because the statute excludes drug tests from the term "medical examination"—which are generally prohibited at this stage.[135] The allowance for illicit drug testing, however, does not give an employer license to discriminate, particularly when the employee has disclosed use of *legal* drugs.[136]

For example, the court in *Connolly v. First Personal Bank*[137] considered post-offer, pre-employment testing, which is permissible under the

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employment lawsuits under federal law are not uncommon—in 2017, the EEOC filed over 80 thousand charges of workplace discrimination, and over thirty percent of those charges involved disabilities); *see also* Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FASTCOMPANY (July 31, 2017), http://perma.cc/2SUP-6FQS (noting that although employment discrimination charges are not uncommon, these charges rarely result in a trial).

131 *See Drug Testing*, *supra* note 109 (noting that drug tests during employment may be broadly classified as: (1) random testing; (2) reasonable suspicion/cause testing; (3) post-accident testing; (4) return-to-duty testing; (5) follow-up testing).

132 *See e.g.*, Mauerhan v. Wagner Corp., 649 F.3d 1180, 1186 (10th Cir. 2011) (observing that "[n]one of our sister circuits have articulated a bright-line rule for when an individual is no longer 'currently' using drugs, as defined by the ADA").

133 *See* Hennen, *supra* note 59, at 158 ("Further, courts are split over the degree of protection to be afforded an addict. Without clear guidance, courts have drifted farther and farther away from the purpose of both the ADA and the Rehabilitation Act . . . .").

134 *See* 42 U.S.C. § 12101 (2012).

135 *Id.* § 12114(d)(1).

136 *See id.* § 12112(d).

137 623 F. Supp. 2d 928 (N.D. Ill. 2008).

ADA.[138] In *Connolly*, an applicant received an offer of employment that was "contingent upon her satisfactory completion of a pre-employment drug test."[139] After the applicant disclosed a recent medical procedure that could impact the results of this drug test, she tested positive for that very drug.[140] The employer rescinded the employment offer after receiving the test results.[141] Upon review, the court in *Connolly* stated that a preemployment drug test cannot be conducted "under the guise of testing for *illicit* drug use when . . . used to make employment decisions based on *both legal and illegal* drug use alike."[142]

The *Connolly* ruling underscores the rationale for one section of the safe harbor provision, which protects someone who is "erroneously regarded as" using illegal drugs.[143] The applicant in *Connolly* tested positive for a legally prescribed barbiturate from her physician and notified the employer that this substance would likely appear on any drug test.[144] The court rejected the employer's choice to rescind the offer without further inquiry or investigation, noting that the employer acted "without regard to whether such medication would impair [the applicant's] ability to effectively perform her job."[145] Thus, post-offer drug tests are permissible because an employer cannot easily rescind an offer when the only new information the employer acquires are drug test results. The employer has already determined that the applicant is otherwise qualified by extending the applicant an offer.

On the other hand, the court's final decision in *EEOC v. Grane Healthcare*[146] illustrates the key statutory distinction between drug testing for illegal and legal drugs, and how this distinction disadvantages individuals recovering from OUD. In *Grane Healthcare,* the employer rejected several applicants due to opioid or methadone use as revealed by preemployment drug tests.[147] The EEOC sued, in part because it claimed that some applicants were legally prescribed these drugs.[148] In its initial summary judgment denial,[149] the court concluded that the pre-offer drug tests were pre-offer "medical examinations" and "inquiries," which are

138 *See id.* at 931–32.

139 *Id* at 929.

140 *See id.*

141 *See id.*

142 *Id.* at 931 (emphasis added).

143 42 U.S.C. § 12114(b)(3) (2012).

144 *See Connolly*, 623 F. Supp. 2d at 929.

145 *Id.* at 932.

146 No. 3:10-250, 2015 WL 5439052, at *39–40 (W.D. Pa. Sept. 15, 2015).

147 *See id.* at *40.

148 *See id.* at *1, *25, *33.

149 EEOC. v. Grane Healthcare, 2 F. Supp. 3d 667 (W.D. Pa. 2014).

forbidden because they "elicit medical information extending far beyond evidence of illegal drug use."[150] At first glance, then, the initial *Grane Healthcare* decision tracked with *Connolly*'s insistence that "[t]he exemption for drug testing was not meant to provide a free peek into a prospective employee's medical history."[151]

After a trial, however, the court reversed course, concluding that the employer's trial testimony established that the drug test was not actually "a medical examination" under the ADA.[152] In particular, the court noted that some of the applicants who tested positive for opiates possessed lawful prescriptions, but failed to disclose these prescriptions to the employer.[153] This failure to disclose allowed the employer to infer that the applicants' drug use was illegal.[154]

The court's reversal in *Grane Healthcare* exemplifies the quandary facing individuals in recovery from OUD. Although *Connolly* states that employers cannot base employment decisions off *legal* drug use,[155] opioids and other prescription medications may be considered illegal drug use whenever the applicant does not disclose a valid prescription.[156] Fearing stigma, some applicants in *Grane Healthcare* did not disclose their prescriptions.[157] Ironically, this allowed the employer to refuse to hire them. On the other hand, if the applicants had disclosed their prescriptions, the employer might have been in a similar position as the employer in *Connolly*: Without further inquiry or investigation, the employer would not have had a valid reason to withhold an offer of employment so long as the applicant provided prescription information for a positive test result.[158]

In the context of OUD recovery and preemployment drug tests, the ADA safe harbor provision should protect a person who is "erroneously regarded as" illegally using drugs.[159] For example, an individual with OUD may be using legally prescribed methadone or buprenorphine as part of a MAT program. Although applicants should receive ADA protection when using legally prescribed drugs, the final result in *Grane Healthcare*

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150 *Id.* at 704.

151 *See* Connolly v. First Personal Bank, 623 F. Supp. 2d 928, 931 (N.D. Ill. 2008).

152 *See Grane Healthcare*, No. 3:10-250, 2015 WL 5439052, at *106.

153 *See id.* at *53–*56.

154 *See id.* at *40.

155 *See Connolly*, 623 F. Supp. 2d at 931.

156 *See Grane Healthcare*, No. 3:10-250, 2015 WL 5439052, at *1, *25, *33.

157 *See id.* at *40.

158 *See Connolly*, 623 F. Supp. 2d at 931–32.

159 *Id.* at 932. *But see* Lopez v. Pac. Mar. Ass'n, 657 F.3d 762, 768 (9th Cir. 2011) (holding that it is not an ADA violation when employers use a "one-strike" policy against applicants who fail a drug test and refuse to ever hire a person due to the single failed test).

illustrates the barriers that individuals in recovery may face when they seek employment.[160]

Therefore, when applying for employment, applicants using MAT need to disclose MAT use to employers. Upfront disclosure is key because, as *Grane Healthcare* makes clear, employers can legally reject applicants who fail to disclose a legal prescription.[161] After the employer extends an offer, individuals with OUD are also best protected by disclosing all medications, regardless of fear of stigma. Disclosure is always the best option because, as held in *Connolly*, the ADA's "erroneously regarded as" provision prevents employers from making decisions based on medical stereotypes.[162] As the United States continues to confront the opioid crisis, applicants who test positive for opioids may become more commonplace, and both employers and employees lack adequate guidelines to readily comply with the law.

B. *Rehab, Relapse, and Drug Tests During Employment*

Disclosure of MAT may be important during the hiring process, but because the majority of those with OUD were employed within the past year, recovery for those already in the workforce is also an important consideration.[163] Again, the EEOC regulation on current use states that use may be current if it "has occurred recently enough to indicate that the individual is actively engaged in such conduct."[164] The caselaw in this area often renders persons with OUD exposed to adverse employment actions and provides little recourse in the event of termination.

For example, an early ADA Title I case involved an employee who voluntarily disclosed his addiction status to his employer and checked into rehabilitation.[165] His employer terminated him due to his violation of company policy requiring one year of sobriety; he subsequently sued under the ADA.[166] While the court acknowledged that a "strict reading of the statute would be in the [employee's] favor," it nonetheless determined that the employee did not qualify for the safe harbor provision for an addict in

160 *See Grane Healthcare*, No. 3:10-250, 2015 WL 5439052, at *40.

161 *See id.* at *40.

162 *See Connolly*, 623 F. Supp. 2d at 932.

163 *See* Blanco et al., *supra* note 4, at 47–49.

164 29 C.F.R. app. § 1630.3 (2019).

165 *See* McDaniel v. Miss. Baptist Med. Ctr., 877 F. Supp. 321, 323–24 (S.D. Miss. 1995).

166 *See id.* at 324.

rehabilitation.[167] The court therefore held that the employee was not protected under the ADA.[168]

In reaching this conclusion, the court opined on the ADA's legislative history, concluding that a person seeking the safe harbor provision should have discontinued drug use "[for] some considerable length [of time]" and that his recovery should be "long enough to have become stable."[169] In drawing these conclusions, the court did not cite any particular medical knowledge or any specific guidance for the ADA.[170] Rather, it concluded that the employee in this case was "on the non-exception side of the line" without specifying where that line might be, only that it is "some longer period than Plaintiff has presented here [three-and-a-half weeks]."[171]

More recently, the Tenth Circuit in *Mauerhan v. Wagner Corporation*[172] considered the length of time necessary for an employee to qualify for the safe harbor provision of the ADA.[173] In *Mauerhan*, an employee failed a drug test while attending outpatient rehabilitation for drug abuse.[174] The employer offered to rehire him if he passed a drug test, but at a lower pay rate; the employee refused and sued under the ADA.[175] The court held that the employee was not protected under the ADA since he reapplied for his job immediately after a thirty-day rehabilitation program, and the program provided a "guarded" prognosis about his recovery.[176]

In its ruling, the *Mauerhan* court also recounted the holdings of several other circuits that have ruled on the time requirement surrounding the safe harbor provision.[177] For example, the *Mauerhan* court adopted the reasoning of the Fifth Circuit, which concluded that an employee does not qualify for the safe harbor provision when the "drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse

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167 *Id.* at 327–28.

168 *See id.* at 329–30.

169 *Id.* at 327–28; *see also* Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997) ("[T]he ordinary or natural meaning of the phrase 'currently using drugs' does not require that a drug user have a heroin syringe in his arm or a marijuana bong to his mouth at the exact moment contemplated. Instead, in this context, the plain meaning of 'currently' is broader. Here, 'currently' means a periodic or ongoing activity in which a person engages (even if doing something else at the precise moment) that has not yet permanently ended.").

170 *See generally McDaniel*, 877 F. Supp. at 323–30.

171 *Id.* at 327–28.

172 649 F.3d 1180 (10th Cir. 2011).

173 *See id.* at 1185–88.

174 *See id.* at 1183.

175 *See id.*

176 *Id.* at 1189.

177 *See id.* at 1185–86.

remained an ongoing problem."[178] The *Mauerhan* court also noted that the Second Circuit considers whether the use was "severe and recent enough so that the employer is justified in believing that the employee is unable to perform the essential duties of his job."[179] Further, the *Mauerhan* court noted that the Fourth Circuit defines "currently" under the safe harbor provision to mean "periodic or ongoing activity . . . that has not yet permanently ended," including use that is "in periodic fashion during the weeks and months prior to discharge."[180] Finally, the *Mauerhan* court noted that the Ninth Circuit found that the safe harbor provision applies "only to employees who have refrained from using drugs for a significant period of time."[181]

In sum, the courts have resorted to ad hoc decisions because the Title I regulation lacks useful guidelines on the definition of "currently" using. These decisions most often favor an employer's subjective definition of recent or ongoing drug use that may or may not be supported by concrete evidence. Moreover, the courts' vague language, including "significant period of time," "recent enough," and "periodic fashion," deprives employees and employers of any meaningful guidance on their rights and obligations under this provision of the ADA. The disjointed caselaw and lack of regulatory guidance is not sustainable, particularly in light of the magnitude of the opioid crisis and its effects on employers and employees throughout the country.

IV. Moving Forward: Reevaluating Employee Rights Under Title I

Not one of the federal court decisions in Part III violates the letter of the ADA. Indeed, the regulations promulgated under the ADA note that employers may take adverse action when they believe that an employee has illegally used drugs "recently enough to indicate that the individual is actively engaged in such conduct."[182] The problem with this flexible standard, however, is that it allows the courts evaluating employment discrimination claims to fall back on outdated and incorrect stereotypes about individuals in recovery. Furthermore, this nonstandard fails to inform employees and employers of their rights and obligations under the law.

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178 *Mauerhan*, 649 F.3d at 1187 (quoting Zenor v. El Paso Healthcare Sys., Ltd., 176 F.3d 847, 856 (5th Cir. 1999)).

179 *Id.* (quoting Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 520 (2d Cir. 1991)).

180 *Id.* (quoting Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997)).

181 *Id.* at 1188 (quoting Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1186 (9th Cir. 2001)).

182 29 C.F.R. app. § 1630.3 (2019).

For example, the Fourth Circuit's definition of illegal drug use includes any use that "has not yet permanently ended."[183] This definition does not comport with the medical definition of addiction, which characterizes addiction as an ongoing disease.[184] Even if a person has stopped illegally using drugs, he does not lose his status as an addicted individual.[185] Using the Fourth Circuit definition, a "permanently ended" drug habit can really only be proven once a person has died. The other circuits similarly suffer from vague and nonspecific language about the length of abstinence needed to receive protections under the safe harbor provision. This is an absurd and unworkable approach to a law that is intended to eradicate stigma and discrimination against persons with disabilities.[186]

This Part proposes that the EEOC promulgate a regulation to reflect and enforce the original intent of the ADA. Specifically, the EEOC should adopt a twelve-week period of abstinence as a baseline to trigger employment protections for people in recovery from substance use. This twelve-week period would mirror the maximum leave allowed under the FMLA.[187]

This Part considers both statutory and policy reasons for reevaluating the safe harbor provision. It argues that, to better approach the ongoing problem of drug addiction and to better assist those in the recovery process, courts and affected parties would be well served by receiving more specific guidance that reflects the statutory purpose of the ADA. Most of the rulings described above do not adhere to the explicit intent of the ADA, and the EEOC bears responsibility to provide better guidance for when "currently engaged in" becomes "no longer engaged in" the use of illegal drugs.

A. *The Safe Harbor Provision in 2018 and Beyond: The Breaux and Steel Painters Cases*

As the opioid crisis worsens, employment discrimination cases involving OUD are becoming more commonplace. *Breaux v. Bollinger*

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183 Shafer v. Preston Mem'l Hosp. Corp., 107 F.3d 274, 278 (4th Cir. 1997).

184 *See* Am. Med. Ass'n, *Drug Abuse in the United States: A Policy Report*, *in* PROCEEDING OF THE HOUSE OF DELEGATES, 137TH ANNUAL MEETING OF THE BOARD OF TRUSTEES OF THE AMERICAN MEDICAL ASSOCIATION 241 (1988) (stating that drug addiction "is the product of complex hereditary and environmental factors . . . [and] properly viewed as a disease, and one that physicians can help many individuals control and overcome").

185 *See Shafer*, 107 F.3d at 278.

186 *See* 42 U.S.C. § 12101 (2012).

187 *See* 29 U.S.C. § 2612(a)(1) (2012).

Shipyards[188] and *EEOC v. Steel Painters*[189] are two recent cases that both illustrate some complications of the safe harbor provision and OUD recovery.

Breaux involved an employee who worked as a welder for four years while using MAT, and he was taking legally prescribed buprenorphine to treat OUD.[190] The employee had not previously disclosed his use of the medication, but his healthcare provider inadvertently disclosed his OUD status to the employer after the employee injured his hand outside the workplace.[191] The employer refused to allow the employee to return to work while taking buprenorphine, citing safety concerns, and the employee eventually sued.[192] In July 2018, the court denied the employer's motion for summary judgment regarding the employee's ADA claims.[193] A week later, the case was dismissed after the parties reached an out-of-court settlement.[194]

In June 2018, the EEOC filed suit against a Texas company for firing a new employee after he tested positive for methadone.[195] After a shoulder injury and opioid prescription several years prior, the employee had developed OUD.[196] At the time of his application, however, the employee had been abstinent and in treatment for over a year; he was taking methadone as part of a MAT program.[197] Although he promptly disclosed his methadone prescription and medical documentation for a drug test, the company refused to retain him as a journeyman painter when it received the positive results.[198] In February 2020, the company entered into a consent decree with the EEOC.[199] Steel Painters agreed to review and revise its workplace discrimination policy and institute a more flexible prescription verification policy for employees.[200] The company also agreed to implement workplace discrimination training, and post notices for its

188 No. 16-2331, 2018 WL 3329059 (E.D. La. July 5, 2018).

189 No. 1:18-CV-303, 2020 WL 525126 (E.D. Tex. Jan. 14, 2020) (denying summary judgment).

190 *See Breaux*, 2018 WL 3329059, at *1–2.

191 *See id.*

192 *See id.*; *see also* Skinner v. City of Amsterdam, 824 F. Supp. 2d 317, 322 (N.D.N.Y. 2010).

193 *Breaux*, 2018 WL 3329059, at *16.

194 *See* Order Dismissing Case, Breaux v. Bollinger Shipyards, No. 16-2331 (E.D. La. July 12, 2018).

195 *See* EEOC v. Steel Painters, No. 1:18-cv-00303, 2020 WL 525126, at *1–2 (E.D. Tex. Jan. 14, 2020) (denying motion for summary judgment).

196 *See id.*

197 *See id.*

198 *See id.*

199 *See* Consent Decree, EEOC v. Steel Painters, No. 1:18-cv-00303 (E.D. Tex. Feb. 24, 2020).

200 *See id.* at 4–5.

employees to advise them of their rights.[201] Finally, it agreed to pay $25,000 in compensatory damages to the journeyman painter.[202]

As the *Breaux* and *Steel Painters* cases illustrate, OUD employment discrimination is becoming a common reality, yet the courts still do not have clear guidance on how to interpret the safe harbor provision of the ADA. While substance use is not a new phenomenon, the magnitude of the OUD crisis calls for reevaluation of this area of the law. As outlined in Part III, the caselaw in this area has largely legitimized stereotypes about individuals with a history of addiction, rather than granting flexibility for rehabilitation, recovery, and a return to employment. In reevaluating the ADA's safe harbor provision, courts need guidance that focuses on the ADA's purpose and text, its 2009 amendments, and developments in medical treatment for addiction, particularly treatment for OUD. By reconsidering and better defining the time requirement for the safe harbor provision—like the twelve-week timeframe proposed below—courts can further the ADA's stated purposes of "assur[ing] equality of opportunity" and "economic self-sufficiency" for people living with disabilities.[203]

B. *Why a Reevaluation Is Sensible*

Under ADA caselaw, federal courts have eschewed offering any rule or guideline for when "currently" using becomes "no longer" using for the purposes of employment.[204] This refusal leaves both employees and employers without guidance about their rights and obligations under the ADA. The ongoing opioid crisis creates an additional layer of confusion. Many people with OUD probably began to use opioids because of a legal prescription.[205] If they are in recovery they are also increasingly likely to use MAT, thus integrating buprenorphine or other prescriptions into the recovery process.[206] Furthermore, many who develop OUD may have additional disabilities due to chronic pain, meaning they already face barriers to employment.[207] But because drug tests are often overinclusive, they detect the presence of legal opioids.[208] Furthermore, because drug tests simply detect the use of drugs, they cannot differentiate medical use from

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201 *See id.* at 5–6.

202 *See id.* at 7.

203 42 U.S.C. § 12101(a)(7) (2012).

204 *Id.* § 12114(a)–(b).

205 *See* Gordon & Gordon, *supra* note 21, at 3.

206 *See* Cathie E. Alderks, *Trends in the Use of Methadone, Buprenorphine, and Extended-Release Naltrexone at Substance Abuse Treatment Facilities: 2003–2015 (Update)*, CBHSQ REP. (Aug. 22, 2017), http://perma.cc/B63H-342M.

207 *See* Bilevicius et al., *supra* note 94, at 123.

208 *See* Hadland & Levy, *supra* note 58, at 559.

illegal use.[209] Thus, both applicants and employees who are in OUD recovery may suffer adverse employment actions because of MAT. These and other complications demand a reevaluation of the "currently engaging in the illegal use" language of the ADA.

1. Statutory and Regulatory Reasoning for a Reevaluation of the Safe Harbor Provision

Both the statutory purpose and the legislative history of the ADA provide support for a more nuanced and employee-centric focus in employment discrimination claims. For example, the first finding of the ADA states that "disabilities in no way diminish a person's right to fully participate in all aspects of society."[210] The ADA's first stated purpose is a "mandate for the elimination of discrimination against individuals with disabilities."[211]

Furthermore, the ADA's statutory findings acknowledge that "discrimination against individuals with disabilities persists," particularly in employment.[212] The findings also note that discrimination "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars."[213] These findings make clear that Congress recognized the following: (1) discrimination against individuals with disabilities is pervasive; (2) that such discrimination is unfair, unnecessary, and costly; (3) the ADA seeks to eradicate this discrimination and stigma; and (4) the employment sector is a critical area where equal treatment is vital to this eradication.

Congress's findings easily apply to people who are in recovery from OUD. People with disabilities have long faced stigma and discrimination. As the Commission on Civil Rights noted: "To the fact that a handicapped person differs from the norm physically or mentally, people often add a value judgment that such a difference is a big and very negative one."[214] Due to a widespread "perception that addicts are morally deficient or self-indulgent," this value judgment becomes amplified in the context of drug addiction.[215] In the ADA context, a vigorous dissent in a Ninth Circuit ADA

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209 *See id.*

210 42 U.S.C. § 12101(a)(1) (2012).

211 *Id.* § 12101(b)(1).

212 *Id.* § 12101(a)(3).

213 *Id.* § 12101(a)(8).

214 U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 26 (1983).

215 Marc Lewis, *Addiction and the Brain: Development, Not Disease*, 10 NEUROETHICS 7, 7 (2017).

employment case acknowledges that a "primary limitation[] suffered by individuals recovering from addiction is the *continuing stigma* associated with their prior drug and alcohol use."[216]

Moreover, the statutory text specific to drug use explicitly notes that "currently" should become "no longer" using after a reasonable period of time.[217] The employment subchapter notes that an employee does not receive protection while "currently engaging in the illegal use of drugs" and when the employer "acts on the basis of such use."[218] The provision's ending phrase "such use" refers only to an employee's or applicant's "current" illegal use of drugs, not to past use. This means that Congress carved out a narrow exception for current illegal drug users from the broad ADA protections guaranteed to all qualified employees with a disability.

Indeed, the very next subsection of the chapter defines the safe harbor provision, under the "Rules of construction" subtitle, emphasizing that "[n]othing in [the illegal drug use exception] shall be construed to exclude" individuals who have completed rehabilitation, who are in rehabilitation, or who are wrongly perceived to be illegally using drugs.[219] Congress thus constructed the ADA protections to apply with a broad scope, and its exception for illegal drug use to apply only in a limited context.

Legislative history from the ADA's debate and passage clarifies the narrow construction of the drug exception. As a statement from Senator Tom Harkin notes: "The last phrase of the subsection was added to make it clear that if the covered entity discriminated against a person on the basis of a disability covered under this act, not on the basis of *current* use of illegal drugs, that action was still prohibited."[220] Furthermore, an early 1990s case brought under the Fair Housing Act[221] and the RA also considered the ADA's safe harbor provision, concluding that the provision ensures that individuals who are now rehabilitated from drug use are protected.[222] There, the Fourth Circuit noted that the ADA's "explicit focus on successful rehabilitation and supervised programs assures us that Congress accepts the concept of a rehabilitated addict."[223]

In addition to the ADA, as passed in 1990, the ADA Amendments Act of 2008 ("ADAAA") adds further support for broadly construed protections and narrowly construed exceptions to the ADA. The title description

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216 Lopez v. Pac. Mar. Ass'n, 657 F.3d 762, 769 (9th Cir. 2011) (Pregerson, C.J., concurring in part and dissenting in part) (emphasis added).

217 *See* 42 U.S.C. § 12114(b)(1).

218 *Id.* § 12114(a).

219 *Id.* § 12114(a)–(b).

220 135 CONG. REC. 20,637–38 (1989) (statement of Sen. Harkin) (emphasis added).

221 42 U.S.C. §§ 3601–31.

222 *See* United States v. S. Mgmt. Corp., 955 F.2d 914, 922–23 (4th Cir. 1992).

223 *Id.* at 922.

of the Act when passed by Congress states: "To restore the intent and protections of the Americans with Disabilities Act of 1990."[224] Congress's principal finding under the ADAAA responds to several court cases that "narrowed the broad scope of protection intended to be afforded by the ADA."[225] This finding also notes that the ADAAA seeks to correct this injustice through "reinstating a broad scope of protection to be available under the ADA."[226] More specifically, the ADAAA broadens the definition of disability, stating that disability should be defined "in favor of broad coverage" and "to the maximum extent permitted" under the statute.[227] Therefore, both the ADA as originally enacted and the more recent ADAAA were passed with the explicit intention of broad coverage.

Finally, in 2011, the EEOC promulgated regulations in connection with the ADAAA.[228] After a ninety-day comment period, the EEOC finalized regulations, including a rule of construction that echoed the findings and purpose of the ADAAA.[229] As the Supreme Court has made clear, "properly promulgated, substantive agency regulations have the 'force and effect of law.'"[230] The EEOC regulations thus reinforce Congress's intent to provide broad ADA protections for employees. In particular, the regulations contain a rule of construction, stating:

> The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA .... [T]he definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.[231]

The rule of construction is important because it appears to shift some of the burden from employees to employers in discrimination cases. Although an employee must establish statutory qualification as a person with a disability, the regulations indicate that this question "should not demand extensive analysis" and instead shifts the focus to "whether covered entities have complied with their obligations and whether discrimination has occurred."[232]

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224 ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 (2008).

225 *Id.* §§ 2(a)(4)–(5).

226 *Id.* § 2(b)(1).

227 *Id.* § 3(4)(A).

228 *See* 29 C.F.R. §§ 1630.1 (2019).

229 *Id.*

230 Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979).

231 29 C.F.R. § 1630.1(c)(4).

232 *Id.*

As the foregoing analysis makes clear, both the ADA as originally enacted and the 2008 ADAAA impart a Congressional desire for broad construction of the term "disability" and a narrow construction for exceptions to that term. Thus, the "currently" using exception to ADA protection merits reevaluation informed by the Congress's explicit intent. The EEOC's lack of specific guidance on the safe harbor provision and the courts' refusal to adopt any guidelines for the provision leave employees vulnerable to discrimination and leaves employers uninformed about their obligations.

2. Policy and Economic Reasoning for a Reevaluation of This Provision

Apart from statutory reasoning, policy arguments also favor a reevaluation of "currently" using under the ADA. Both economic policy arguments and legal policy arguments support a narrow construction of the "currently" using exception.

Under current EEOC regulations, employers may define currently using as use that "occurred recently enough to indicate that the individual is actively engaged in such conduct."[233] This vague guideline invites uninformed judgments about an applicant or employee. Generally, the rationale for drug testing assumes that testing acts as a proxy for illegal conduct. However, drug testing can also inadvertently reveal medical status because it can detect the presence of legal *and* illegal drugs. For a person in recovery from OUD who uses MAT, drug tests may disclose the presence of opioid agonists approved for MAT treatment.[234] Thus, when an employer receives drug test results indicating the presence of opioids, this only invites further inquiry about the medical status and medical history of an applicant or employee. The medical status and medical history of an applicant or employee will likely have no bearing on whether that individual is qualified for the job or even whether the individual is currently using illegal drugs.

Economically, the ongoing costs from the opioid crisis are staggering. A 2016 estimate placed the cost at over $75 billion annually.[235] Incredibly, a more recent approximation indicates that "previous estimates of the economic cost of the opioid crisis greatly understate[s]" its costs, assessing the total cost at over $500 billion in 2015.[236] In the employment context,

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233 29 C.F.R. app. §§ 1630.3 (2019).

234 *See* Hadland & Levy, *supra* note 58, at 559.

235 *See* Curtis Florence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse and Dependence in the United States, 2013*, 54 MED. CARE 901, 901 (2016).

236 COUNCIL OF ECON. ADVISERS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 1 (2017).

both healthcare costs and productivity losses drive up costs for employers.[237] Employers, employees, and the federal government should see treatment for addiction as a worthy goal since "addiction treatment has been shown to reduce associated health and social costs by far more than the cost of the treatment itself."[238] Furthermore, employment and successful addiction treatment become self-reinforcing. Initially, individuals who report employment as they begin treatment for OUD are more than twice as likely to complete a treatment program.[239] Subsequently, individuals who successfully complete a substance abuse treatment program report higher levels of income in the following year.[240] Clearly, employment plays a key role in both treatment completion and a return to the workforce.

In addition to statutory and policy support, medical research specific to opioid addiction and recovery also reinforces the idea that better guidance is needed on how to define "currently" using under the ADA. Medically, the science on addiction recovery confirms that addiction is a treatable disease. Thus, it should be treated no differently than other illnesses with a potential risk of recurrence or relapse.[241]

Although addiction is accepted as a disease within the medical community, stereotypes and stigma surrounding drug addiction have not disappeared.[242] Many people do not want to work with or hire individuals

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[237] *See* J. Bradford Rice et al., *Estimating the Costs of Opioid Abuse and Dependence from an Employer Perspective: A Retrospective Analysis Using Administrative Claims Data*, 12 APPLIED HEALTH ECON. HEALTH POL'Y 435, 444 (2014) ("[I]t may be beneficial for employers, for whom the full burden of opioid abuse is potentially hidden, to take proactive steps to address the issue through educational programmes [sic] on the warning signs of opioid abuse and coverage of broad options for treatment.").

[238] NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 13 (3d ed. 2012) ("According to several conservative estimates, every dollar invested in addiction treatment programs yields a return of between $4 and $7 in reduced drug-related crime, criminal justice costs, and theft. When savings related to healthcare are included, total savings can exceed costs by a ratio of 12 to 1. Major savings to the individual and to society also stem from fewer interpersonal conflicts; greater workplace productivity; and fewer drug-related accidents, including overdoses and deaths.").

[239] *See* Joshua Drago, Buprenorphine Treatment for Opioid Addiction in the Primary Care Setting: Predictors of Treatment Success and Failure 17 (2015) (unpublished doctoral dissertation, Harvard Medical School), http://perma.cc/Y8LC-2K9H.

[240] *See* Amelia M. Arria et al., *Drug Treatment Completion and Post-Discharge Employment in the TOPPS-II Interstate Cooperative Study*, 25 J. SUBSTANCE ABUSE TREATMENT 9, 10 (2003).

[241] *See* Am. Med. Ass'n, *supra* note 184, at 241 (stating that drug addiction is "properly viewed as a disease, and one that physicians can help many individuals control and overcome"); *see also* NAT'L INSTS. OF HEALTH, FACTS SHEET: DRUG ABUSE & ADDICTION 1 ("Recent scientific advances have revolutionized our understanding of addiction as a chronic, relapsing disease and not a moral failure."), http://perma.cc/JG3N-NLQP.

[242] *See* NAT'L INSTS. OF HEALTH, *supra* note 241, at 1 ("Addiction was considered a moral failing, a lack of will over one's actions."). If you as the reader are currently questioning the societal consequences of narrowing the construction of "currently using," ask yourself: if the individual in question

with a history of substance abuse.[243] Although relapse rates for substance abuse may be comparable to some cancers and other illnesses, studies illustrate that substance use confers a particular stigma that is not associated with these other medical diseases.[244] As detailed above, however, eradicating the discrimination that results from stereotypes and stigma surrounding disabilities is the core function of the ADA.

Multiple federal agencies have already committed to battling the opioid crisis, and the courts and affected parties need clearer guidance for battling the discrimination associated with OUD. By promulgating a regulation that creates incentives for individuals with OUD to work toward recovery, the EEOC can clarify the application of the ADA in this area and, in doing so, help stop the opioid crisis. A narrowed construction of "currently" using, along with a liberal construction of "disability" would represent tangible progress in this area.

C. *Proposed Solution—Twelve-Week Baseline Mirroring the FMLA*

On statutory, economic, and policy bases, the judicial framework for "currently" using is not sustainable and instead undermines the purposes of the ADA. Although courts have eschewed any guidelines for when "currently" using becomes "no longer" using, a twelve-week baseline would give both employees and employers a better understanding of their rights and obligations under federal law.

1. The FMLA and Its Application to ADA Protections

A twelve-week baseline for the ADA's safe harbor provision is sensible because it follows a closely related federal statute covering medical conditions: the Family & Medical Leave Act of 1993 ("FMLA").[245] Broadly, the FMLA mandates that eligible employees are entitled to "a total of twelve workweeks of leave" per year for personal or familial medical reasons.[246] Eligible employees must have worked for the employer at least twelve months, and must have worked at least 1,250 hours in the past twelve-

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was not "recovering from OUD" with "50% possibility of relapse" and, instead, was "recovering from breast cancer" with "50% possibility of relapse," would that person be more deserving of protections under the ADA; if so, why?

243 *See* Colleen Barry et al., *Stigma, Discrimination, Treatment Effectiveness and Policy: Public Views About Drug Addiction with Mental Illness*, 65 PSYCHIATRIC SERVS. 1269, 1270 (2014).

244 *See id.* at 1270–72.

245 *See* Family & Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

246 29 U.S.C. § 2612(a)(1) (2012).

month period.[247] Covered employers include those with more than fifty employees within a seventy-five mile radius of an employee's worksite.[248]

Employees who take leave under the FMLA must have a "serious health condition" as defined by the statute.[249] A serious health condition includes an "illness, injury, impairment, or physical or mental condition that involves" either "inpatient care" or "continuing treatment by a health care provider."[250] Neither the FMLA as a statute, nor the regulations promulgated under it, forbid employees from using FMLA leave to rehabilitate from addiction. In fact, FMLA regulations explicitly state that "[s]ubstance abuse may be a serious health condition if" it meets the other statutory requirements.[251] However, the regulations also note that, although employers may not terminate employees for taking leave for treatment, employers may still terminate employees for the substance abuse itself.[252]

Under the statute and its regulations, the FMLA provides a ready-made framework for employment protections under the ADA. In passing the FMLA in 1993, Congress explicitly recognized that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods."[253] Furthermore, a key purpose of the FMLA is "to entitle employees to take reasonable leave for medical reasons."[254]

While the FMLA covers a much larger scope than personal medical conditions, its findings and purpose track closely with those in the ADA. Just as the FMLA's findings recognize the risk of job loss when a medical condition requires time away from work, the ADA recognizes the stigma and discrimination many employees face when they live with a disabling medical condition. Just as the FMLA entitles employees to take leave for serious health conditions, the ADA protects employees from discrimination when a disabling health condition meets the ADA's definition of a disability.

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247 *See id.* § 2611(2)(A). Federal employees are covered by a different section of the U.S. Code for family and medical leave. *See* 5 U.S.C. § 6381(1).

248 *See* 29 U.S.C. § 2611(2)(B).

249 *Id.* § 2611(11).

250 *Id.*

251 29 C.F.R. § 825.119(a) (2019).

252 *See id.* § 825.119(b).

253 29 U.S.C. § 2601(a)(4).

254 *Id.* § 2601(b)(2).

2. FMLA Timeline and Current Medical Knowledge on Addiction

Because the ADA and FMLA convey similar policy goals, it's reasonable to adopt similar baselines. The twelve-week FMLA timeline tracks with current medical knowledge on addiction treatment outcomes. Importantly, the medical community considers ninety days (just over twelve weeks) of treatment an important "threshold for effective treatment" for addiction.[255] Multiple studies on addiction have "shown that those who remain in treatment for at least 3 months have more favorable outcomes."[256] Furthermore, the highest rates of attrition (dropout from treatment) occur within the first three months of addiction treatment.[257]

Finally, current medical knowledge indicates that employment and successful recovery may be self-reinforcing. As noted above, employment during treatment for OUD is strongly correlated with successful program completion.[258] Program completion is then correlated with higher levels of income.[259] Because the medical community regards ninety days as a critical turning point in addiction recovery, it is reasonable to adopt a twelve-week timeline of abstinence to trigger ADA protections for addiction recovery.

The medical knowledge surrounding addiction also plays an important role in regulations and caselaw surrounding ADA employment claims. Federal regulations require employers to consider "current medical knowledge" when raising a "direct threat" defense, which is one of the main defenses against an employment discrimination claim.[260] The

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255 DOUGLAS LONGSHORE ET AL., EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT 2002 REPORT 6 (2003), http://perma.cc/53DY-7GYL.

256 CTR. FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., DHHS NO. 05-3992, SUBSTANCE ABUSE TREATMENT FOR PERSONS WITH CO-OCCURRING DISORDERS: A TREATMENT IMPROVEMENT PROTOCOL TIP 42, at 162 (2005).

257 *See* HERBERT D. KLEBER ET AL., PRACTICE GUIDELINE FOR THE TREATMENT OF PATIENTS WITH SUBSTANCE USE DISORDERS 25 (2d ed., 2006), http://perma.cc/4N76-RMP4.

258 *See* Drago, *supra* note 239, at 17.

259 *See* Arria et al., *supra* note 240, at 13–14.

260 29 C.F.R. § 1630.2(r) (2019); *see also* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 85–86 (2002) ("It is true that Congress had paternalism in its sights when it passed the ADA, see [42 U.S.C.] § 12101(a)(5) (recognizing 'overprotective rules and policies' as a form of discrimination). But the EEOC has taken this to mean that Congress was not aiming at an employer's refusal to place disabled workers at a specifically demonstrated risk, but was trying to get at refusals to give an even break to classes of disabled people, while claiming to act for their own good in reliance on untested and pretextual stereotypes. Its regulation disallows just this sort of sham protection, through demands for a particularized enquiry into the harms the employee would probably face.").

Supreme Court has mandated that the risk assessment for a perceived "direct threat" must be "based on medical or other objective evidence."[261]

In the OUD context, this means that employers should not be basing their employment decisions on outdated stereotypes surrounding addiction and recovery. Stereotypes surrounding addiction, however, remain prevalent in American culture. As previously noted, many people dislike the idea of addiction in the workplace.[262] For example, a recent study found that nearly eighty percent of respondents did not want to work closely with someone who had a drug addiction.[263] Nearly two-thirds of these respondents also stated that employers should be allowed to deny employment to an individual with drug addiction.[264] Stigma clings to addiction in a way that is uniquely damaging to the job prospects for those in recovery.

Because the ADA seeks to lessen this stigma through its statutory purpose and the safe harbor provision, it is a reasonable vehicle to combat outdated beliefs about people in recovery from OUD. But to fulfill the purpose of the ADA, courts need guidance from the EEOC to eradicate stigmatized conceptions of addiction that are not based in science. A twelve-week timeline to trigger ADA protections for OUD recovery is sensible because it tracks with both the statutory requirements under the FMLA and with current medical knowledge on optimal treatment lengths for rehabilitation.

3. Test Cases Under the Twelve-Week Timeline

As the *Breaux* settlement and *Steel Painters* consent decree indicate, employment discrimination cases involving OUD recovery will continue to arise.[265] Considering the staggering numbers surrounding the opioid crisis, such claims may increase in frequency as people in recovery return to or continue to be employed in the workforce. A regulation implementing the twelve-week timeline that mirrors the FMLA maximum would provide a concrete and specific approach to this issue.

For example, consider a typical case of opioid dependence: someone receives a prescription for pain after surgery and becomes dependent on opioids long after the need for prescription pain relief has subsided. If he is currently employed, he may be able to use FMLA leave to enter

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261 Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (noting that a "belief that a significant risk existed, even if maintained in good faith, would not relieve [an employer] from liability").

262 Barry et al., *supra* note 243, at 1270.

263 *See id.* at 1270–72.

264 *See id.*

265 *See infra* Section IV.A.

rehabilitation. Because he remains an employee during his approved FMLA leave, he will also be able to access rehabilitation using employer-provided health insurance. After up to twelve weeks of inpatient detoxification and outpatient treatment, he could return to work with documentation on his progress through rehabilitation and support from a medical provider.

Continued employment would then reinforce the progress made during the employee's stay in a rehabilitation facility and would provide the structure and income that is so important to successful recovery. Under this hypothetical, the employer later seeks to retaliate against or terminate the employee because of his status as an addict in recovery. If this happens, the documentation from the employee's rehabilitation stay, coupled with a twelve-week baseline to trigger ADA protections, would incentivize both parties to settle the dispute out of court.

For an applicant who has been out of the workforce, the ADA arguably provides higher levels of protection. As detailed in Part II, the ADA forbids medical inquiries, and applicants are not required to disclose medical status, especially before an employer extends an offer.[266] But because the ADA permits pre- and post-offer drug testing, applicants should be upfront and honest on pre-employment paperwork about any MAT prescription or other legal opioid use.[267] As *Grane Healthcare*, *Connolly*, and *Steel Painters* demonstrate, a positive drug test resulting from legal medication does not disqualify an otherwise qualified applicant from employment under the ADA. Incidentally, encouraging frank discussions about OUD generally may be an important step in lessening the stigma of addiction and recovery.

A twelve-week timeline to trigger ADA protections would not act as a cure-all to the many issues that applicants and employees face when they have a history of OUD. ADA regulations require an "individualized" inquiry into the circumstances of each case.[268] The twelve-week baseline could act as an evidentiary presumption or inference in favor of an

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266 Title I of the ADA does not specifically require disclosure of a disability upfront and requires any applicant's or employee's medical information to be "collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record." *See* 42 U.S.C. § 12112(d)(3)(B) (2012).

267 As a policy matter, applicants who do not disclose medications may face adverse employment action based on failure to disclose that medication, rather than based on the medication itself. *See, e.g.*, EEOC v. Pines of Clarkston, No. 13-CV-14076, 2015 WL 1951945, at *5–6 (E.D. Mich. Apr. 29, 2015) (noting that the employer claimed its termination of an employee with epilepsy was based on her failure to disclose medications for it, rather than the epilepsy or medications alone).

268 *See* 29 C.F.R. § 1630.2(j), (r) (2019); *see also* Keith v. Cty. of Oakland, 703 F.3d 918, 923 (6th Cir. 2013) (reconfirming that "[t]he ADA mandates an individualized inquiry in determining whether an [applicant's] disability or other condition disqualifies him from a particular position" (citing Holiday v. City of Chattanooga, 206 F.3d 637, 643 (6th Cir. 2000))).

employee or applicant who suffers an adverse employment action due to a history of OUD. If the employee or applicant produces sufficient evidence to establish twelve weeks of abstinence prior to the adverse employment action, the burden would then shift to the employer to disprove this assertion or to prove why a twelve-week baseline should not apply in that particular circumstance.[269] Similar to other areas of employment law, the employee or applicant still bears the initial burden of proof. Therefore, a regulation incorporating this baseline would continue to allow an individualized inquiry. At the same time, however, establishing the baseline through EEOC regulation would give courts much-needed guidance to carry out the purpose of the ADA: eradication of stigma and discrimination against individuals with disabilities. It would also provide employees and employers with a more precise understanding of their rights and obligations under the law.

Conclusion

The federal courts have no clear guidance on what constitutes "currently" using illegal drugs under the ADA and have resorted to ad hoc decision-making under the safe harbor provision of this statute. As more people recovering from OUD seek employment and a return to normalcy, the courts need better direction from the EEOC. The EEOC can accomplish this goal by promulgating a regulation establishing twelve weeks of abstinence as a trigger for ADA protection for the applicant or employee, thereby clarifying the definition for "currently" using.

By clarifying the definition for "currently" using, the EEOC has an opportunity to recognize that past opioid abuse is a reality for millions of Americans and that OUD and other addictions should not act as a permanent bar to employment. On the other hand, if the EEOC does not act, a stigmatized conception of OUD may become ingrained in federal caselaw. This will further undermine the ADA's explicit intent to eradicate the stigma associated with disabilities and the discrimination that usually follows. By establishing a reasonable timeline for abstinence, the EEOC and the courts interpreting the ADA can strike a balance between the protection accorded to employees with disabilities and the business needs of employers.

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[269] For example, a complainant who has had multiple past relapses even after being abstinent for twelve weeks.