MEMORANDUM OF LAW

DATE: January 9, 1998

TO: Charles E. Mueller, Jr., Deputy Director, Risk Management Department

FROM: City Attorney

SUBJECT: Long-Term Disability Benefits for Alcohol and Drug-Related Disabilities

QUESTION PRESENTED

Would excluding long-term disability benefits for disabilities attributable to alcoholism or drug addiction violate the Americans with Disabilities Act?

SHORT ANSWER

Yes. Both alcoholism and drug addiction are considered disabilities under the ADA. An exclusion of either of these disabilities would violate the ADA, unless such an exclusion is based on established actuarial principles, or actual or reasonably anticipated plan experience. The City is not required, however, to provide benefits for a drug addict who is currently engaged in the illegal use of drugs.

DISCUSSION

I. Alcoholism and Drug Addiction are Disabilities under the ADA

A. Alcoholism

Alcoholism is considered a disability under the Americans with Disabilities Act (ADA). Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995); Schmidt v. Safeway, 864 F. Supp. 991, 996 (D. Or. 1994). However, both the ADA and the regulations interpreting the ADA specifically provide that an employer may prohibit the use of alcohol in the workplace, require that employees not be under the influence of alcohol while working, and hold alcoholics to the same performance and conduct standards to which it holds other employees. 42 U.S.C. 12114(c)(1)-(2); 29 C.F.R. 1630.16(b) (1997); see also Gosvener v. Coastal Corp., 51 Cal. App. 4th 805 (1996) (termination of alcoholic under FEHA).

B. Drug Addiction

Drug addiction is also considered a disability under the ADA. 28 C.F.R. 41.31(b)(1) (1997); Hartman v. Petaluma, 841 F. Supp. 946, 949 (N.D. Cal. 1994). Casual drug use, without some indicia of dependence or addiction sufficient to substantially limit a major life activity, does not fit within this category and is not protected by the ADA. Hartman, 841 F. Supp. at 949.

Although drug addiction is considered a disability, an individual currently engaged in the illegal use of drugs is *not* protected under the ADA. 42 U.S.C. 12210(a); 29 C.F.R. 1630.3(a). Once an individual is rehabilitated, or participating in a supervised rehabilitation program and not using drugs, the individual gains protection under the ADA. McDaniel v. Mississippi Baptist Medical Center, 869 F. Supp. 445, 450 (S.D. Miss. 1994) aff'd, 74 F.3d 1238 (5th Cir. 1995); 29 C.F.R. 1630.3(b). Accordingly, as long as the addict continues to use drugs, he or she can be excluded from a long-term disability plan without violating the ADA. It follows, then, that in determining the eligibility for receipt of benefits, the Plan Administrator can require that persons with drug-related disabilities submit to drug testing.[1] 29 C.F.R. 1630.3(c).

As with alcohol, an employer may prohibit the use of illegal drugs in the workplace, may require that employees not be under the influence of drugs, and may hold drug addicts to the same performance and conduct standards to which it holds other employees.[2] 42 U.S.C. 12114(c)(3); 29 C.F.R. 1630.16(b)(3). However, the ADA protects the supervised use of prescription drugs. 42 U.S.C. 12210(a); 29 C.F.R. 1630.3.

II. The City May Limit or Exclude Disabilities From Its Long Term Disability Plan Provided Those Limitations or Exclusions are Supported by Actuarial Studies and/or Plan Experience.

Title II of the ADA prohibits public entities (e.g., the City) from discriminating in providing any of their programs, including employee fringe benefits like the City's long term disability plan. 42 U.S.C. 12132. The ADA contains a safe-harbor provision for insurance and benefit plan providers, however, that creates an exception to this rule. Under the safe-harbor provision, benefit plan providers may still underwrite, classify, and administer risks so long as they do so in a manner consistent with state law, and not as a subterfuge to evade the ADA. 42 U.S.C. 12201(c).

"Subterfuge" is defined in the Equal Employment Opportunity Commission's (EEOC) regulations to mean "disability based treatment that is not justified by the risks or costs associated with the disability."[3] The courts have interpreted this to mean that the classifications used by the plan provider must be based on sound actuarial principles, or related to actual or reasonably anticipated experience. World Insurance Co. v. Branch, 966 F. Supp. 1203, 1208 (N.D. Ga. 1997); Doukas v. Metropolitan Life Insurance Co., 950 F. Supp. 422, 432 (D. N.H. 1996); Cloutier v. Prudential Insurance Co. of America, 964 F. Supp. 299, 304 (N.D. Cal. 1997). Thus, a disability-based limitation (such as a disability attributable to alcohol or drug abuse) is exempt from the ADA only if the benefit provider can show that the limitation is justified, using accepted actuarial practices or plan experience, by the risks or costs associated with that disability. Some courts have opined that certain limitations on certain disabilities may be acceptable but outright exclusions will be difficult if not impossible to justify. See, e.g., Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 780 (E.D. Tex. 1996) (Exclusion of employee with AIDS from health insurance may be "a *per se* violation of the ADA's mandate that

employers provide individuals with disabilities equal access to group health insurance").

For example, the Plan Administrator may be able to cite studies or statistics based on Plan experience to show that the rate of recovery from certain drug addictions is extremely low unless the individual participates in a long-term in-patient recovery program. Were that the case, the Plan Administrator may then be able to justify a condition on receipt of benefits for those persons, dependent upon their participation in such a program. Likewise, based on actuarial studies or Plan experience, the Administrator may be able to place limitations on benefits for alcoholics who either refuse to participate in or drop out of a recovery program. However, because both drug addiction and alcoholism are treated as disabilities under the ADA, it would be difficult to justify a total exclusion of benefits for either disability.

CONCLUSION

Both alcoholism and drug addiction are considered disabilities under the ADA. In order to limit or exclude long-term disability benefits for conditions related to these disabilities, the Plan Administrator must rely on accepted actuarial principles and/or Plan experience that justifies the exclusion or limitation based on the risks and costs associated with these disabilities.

The ADA does not, however, protect drug addicts who are currently engaged in the illegal use of drugs. To protect against providing benefits to such persons, the Plan may require drug testing for claims related to drug addiction.

Currently, the City's Long-Term Disability Plan does not exclude disabilities caused by drug or alcohol abuse. To consider limiting benefits for these disabilities, the Plan Administrator should review both past and anticipated Plan experience for claims related to drug addiction and alcoholism, and determine what limitations are justified by the actual risks and costs associated with these disabilities, as compared to other disabilities covered by the Plan.

CASEY GWINN, City Attorney

By
Carrie L. Gleeson
Deputy City Attorney

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Attachments
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