Overview
Opioid addiction continues to be a serious problem in the United States. As with many other prescription medications, opioids present significant challenges to employers, who must address issues relating to both the lawful use of the medication as well as the impact of its abuse.

The Equal Employment Opportunity Commission (EEOC) recently issued a Guidance document entitled “Use of Codeine, Oxycodone, and Other Opioids: Information for Employees.” While not breaking any new legal ground, the Guidance is a powerful reminder to employers that opioid addiction often constitutes a disability that entitles the individual to the rights and protections of the Americans with Disabilities Act (ADA), including the right to reasonable accommodation.

Legal Background
The ADA considers a person addicted to alcohol or drugs to be disabled and therefore entitled to legal protection if that person:

1. Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

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.

Significantly, the ADA explicitly provides that “individuals currently engaging in the illegal use of drugs” are not protected under the ADA. The withholding of protections for current illegal drug users was intended to balance the desire to help those afflicted with a disease with the urge to condemn illegal behavior. This would create a bright line for employers seeking to understand their obligations toward chemically dependent employees.

When considering the new EEOC Guidance and the overall issue of the impact of opioids on the workplace, employers should remember that all of this applies only to persons actually suffering from chemical dependency – the causal and/or voluntary use of opioids (or any other substance) is not protected.

Possible Termination
According to the EEOC Guidance, if an employee is lawfully using opioids and is not otherwise disqualified under a specific federal law, an employer may not take adverse action against an employee without first “considering if there is a way for [the employee] to do the job safely and effectively.” In other words, the employer must offer reasonable accommodation.
Thus, as with other disabilities, the EEOC Guidance reminds employers that employee addiction to opioids, either past or present, is not a basis for employment decisions. Instead, it is the starting point for evaluation of whether and to what extent such addiction affects performance and/or safety, and if so, whether a reasonable accommodation can be identified to overcome the performance or safety concern.

In evaluating whether the employee’s addiction poses a performance or safety issue, there must be objective evidence and not merely remote or speculative concerns. Especially in the case of safety risks, employers should consult medical and occupational experts, and may request medical evaluations, although under some state laws, such evaluations may be required only with the consent of the employee, and, of course, the employer must pay for this exam.

**Accommodations**
The Guidance recognizes that employees may be entitled to accommodation either because they are using opioids to treat pain arising from a current disability or the addiction itself has become a disability. In either case, however, the accommodation must facilitate the employee’s ability to perform the essential functions effectively and without safety risks. As such, merely ignoring the performance or behavioral deficiencies caused by opioid abuse is not within the range of required considerations.

Employees may also be entitled to accommodation if they have recovered from opioid addiction and need to attend a support group meeting or therapy session in order to avoid a relapse. While it is permissible to ask the employee to try to schedule such sessions outside of working hours, declining to allow the employee to miss work to attend them poses a significant risk of being considered a failure to accommodate.

Lastly, remember that the need to be off work for opioid addiction treatment likely would qualify for leave under the Family and Medical Leave Act (FMLA). Remember, the FMLA applies only to employers with 50 or more employees. Therefore, the first 12 weeks that an employee needs to be off would be job protected. If additional time off is needed, leave could be provided as an accommodation. The employee’s job would still be held open for the employee’s return unless and until the employer determines that doing so is an undue hardship.

**Bottom Line**
The EEOC’s Guidance really does not offer new answers or perspectives on the issue of dealing with employees suffering from opioid addiction. Remember too, that state laws may hold employers to a stricter standard than what the ADA imposes.

Nevertheless, the EEOC Guidance is a good reminder of best practices and provides solid recommendations on accommodation issues for such employees.