

# Blanket Exclusion Policies Continue to Draw EEOC's Ire

## Labor & Employment Law Update

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Last week the EEOC filed suit against an Arizona car dealership for rescinding its offer to an applicant who tested positive for a substance banned by the company's drug policy. The drug screen itself was legal. The ADA specifically allows employers to screen applicants and employees for illegal drug use. It was the employer's policy of excluding anyone who tested positive for certain substances without first inquiring whether the substance was legally prescribed to treat a disability that prompted the EEOC to file suit. Notably, the EEOC filed suit on behalf of this particular applicant as well as all others who are similarly situated.

In a press release the EEOC's Phoenix Regional Attorney explained that drug tests, though legal, "cannot be used to discriminate against qualified people with disabilities." She cautioned employers to "be mindful that they may need to make exceptions to drug use policies as a reasonable accommodation."

The EEOC has taken a similar stance against strict application of maximum leave policies. As is noted in the EEOC's guidance on leave as a reasonable accommodation published earlier this year, reasonable accommodation "can include making modifications to existing leave policies and providing leave when needed for a disability, even where an employer does not offer leave to other employees." In some situations this can mean extending leave beyond that which is protected by the Family and Medical Leave Act. The EEOC's May 2016 guidance on leave as a reasonable accommodation can be found [here](#).

The Arizona case involves prescription medication, not illegal drugs. The plain language of the ADA allows employers to act on the basis of current use of illegal drugs. Employers may also inquire about an individual's ability to safely perform the essential functions of the position. However as prescription drug abuse continues to plague the American workforce, the line between prescription medication and illegal drugs becomes less and less clear.

Bottom line, the ADA requires employers to engage in an interactive process to determine whether reasonable accommodation will allow the individual to perform the job safely. This mandate extends to all phases and facets of the employment relationship. Blanket rules that do not provide for an individualized assessment of whether reasonable accommodation is possible are rarely defensible.