

# Opioid Abuses in the Workplace— *Reducing Risk as an Employer*



**T**here is no doubt that the U.S. is in the midst of an opioid epidemic. According to the U.S. Centers for Disease Control and Prevention, sales of prescription opioids have nearly quadrupled since 1999, more than 1,000 people per day receive emergency treatment for misuse of prescription opioids, and 80 percent of all new heroin users started out by abusing prescription painkillers. Professionals and employees in the healthcare industry are not immune to the epidemic.

Studies show that 10 to 15 percent of healthcare professionals will misuse substances at some point in their career. Users, and abusers, of opioids are quite possibly your friends, colleagues, and co-workers. It is important that everyone within an organization, even those not within an organization's management or personnel department, be aware of the signs of opioid abuse.

Signs of opioid abuse can include excessive time off (including absenteeism, arriving late or leaving early), decreased productivity, sleeping on the job, deteriorating personal hygiene, and workplace accidents.

Not only can opioid abuse in the workplace be dangerous to the user and those around them, but decreased productivity can have a profound impact on the financial health of an organization.

Even when taken as prescribed, prescription medicines can result in life-threatening situations and create hazardous work conditions. When an employee exceeds the recommended dosage of their prescription, he/she will

also expose the employer to an increase of liability with the company's patients, clients, and customers.

To address those and other concerns, employers should consider adopting policies for pre-hiring decisions and for-cause drug testing programs. Testing for opioid use can be complicated, because opioids are legal substances, and employers and drug screens are generally looking for illegal substances. This, however, should not deter an employer from adopting a reasonable drug testing policy.

The Americans with Disabilities Act (ADA) addresses drug use, abuse and recovery or rehabilitation from addiction. Under the ADA, a *current* drug user is not protected from adverse action arising from use or addiction. ("Current" is determined on a case-by-case basis, not by a specific period of time.) A recovering or rehabilitated addict is protected under the ADA, as well as an employee using an opioid for a medically approved therapeutic reason, in accordance with his/her physician's instructions.

However, whether the use falls within the ADA's protection from discrimination or not, employers do not have to tolerate poor performance, absences, tardiness, and other negative effects, whether they are caused by addiction, medically authorized use that causes impairment, or any job-related reason for termination.

There are several issues employers need to consider before adopting policies, evaluating existing policies, or having conversations with employees about suspected or confirmed opioid abuse.

## Blanket Prohibitions Under ADA Not Allowed

The ADA requires employers to make reasonable accommodations for employees who are not currently abusing drugs (e.g., implementing a flexible work schedule to attend support group meetings, allowing for unpaid leave, or reassignment to a lower-stress position in the company). A blanket prohibition against on-the-job use of prescription medications, however, violates the ADA. It is possible for employers to demonstrate a job-related requirement that obligates employees to report when they are taking prescribed medications, but those exceptions are limited to situations involving direct threats to the safety and well-being of the employee and others.

As an example of an improper policy, in 2012, a Michigan-based automotive parts company was forced to pay \$750,000 and furnish other relief to settle a lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) under the ADA. The lawsuit alleged that Dura Automotive Systems, Inc. tested all of its employees at a Tennessee plant for 12 substances, including certain legally prescribed drugs, in violation of the ADA. Five of the drugs tested for were illegal controlled substances, the EEOC said, but the other seven were legal medications that were lawfully prescribed for the individuals taking them.

According to the EEOC, Dura required those employees who tested positive for legally prescribed medications to disclose the medical conditions for which they were taking prescription medications. The company further made it a condition of employment that the employees cease taking their prescription medications, without any evidence that the medications were affecting the employees' job performances. The EEOC also alleged that Dura then suspended employees until they stopped taking their prescription medications and fired those who were unable to perform their job duties without their medications. Also problematic was Dura's conducting the drug tests in such a manner as to disclose to its entire workforce the identities of those who tested positive. These actions were deemed to violate federal law.

This case shows that employers cannot adopt policies that create a blanket limitation on the use of prescription medicines while performing job functions that do not pose a direct threat to the employee or others. A policy should be adopted that allows for opioid use in accordance with medically prescribed dosages and encourages disclosure so that the employer can make reasonable accommodations for the employee.

## Drug Testing

Drug testing programs can include legally prescribed drugs and could be required for pre-hiring decisions as well as post-hiring workplace incidents. Post-hiring tests are usually limited to circumstances involving reasonable suspicion or following a workplace accident. As set forth above, a positive test for prescribed medications should

normally not result in an automatic termination, but consultation should occur between the employer and employee regarding the reasons for the positive test result. The extent and frequency of the drug testing program may vary between employers and depend in large part upon the scope and nature of the services being rendered by the employer.

A drug testing policy is also important to reduce the risks to employers for employees who operate vehicles during their employment. Opioid use can, and most frequently will, result in at least some impairment to the user. Opioid users who drive for a company should be viewed the same as employees who may consume alcohol

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and attempt to drive during regular employment hours—it's not to be allowed. Opioid use can subject the driver to penalties for driving impaired, just like alcohol. Moreover, a licensed healthcare professional could also be subject to disciplinary action for a DUI conviction, whether it's alcohol or opioids.

## Drug-free Workplace Policies

The first step in addressing opioid use in the workplace is to have a policy addressing its use so that all employees understand what is, and what is not, permitted. Employee manuals and drug-free workplace policies should be designed to require an employee to disclose the use of any prescription drugs that could adversely affect the employee's job performance and, further, limit any use to legally prescribed dosages. Forbidding the use of illegal drugs should also be a required component of any policy.

The bottom line for legal drugs? A company policy should be all about engaging in conversations, avoiding assumptions, and making reasonable accommodations. Taking reasonable precautions within the workplace will reduce an employer's risks and provide a foundation for successful employees. ■

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