

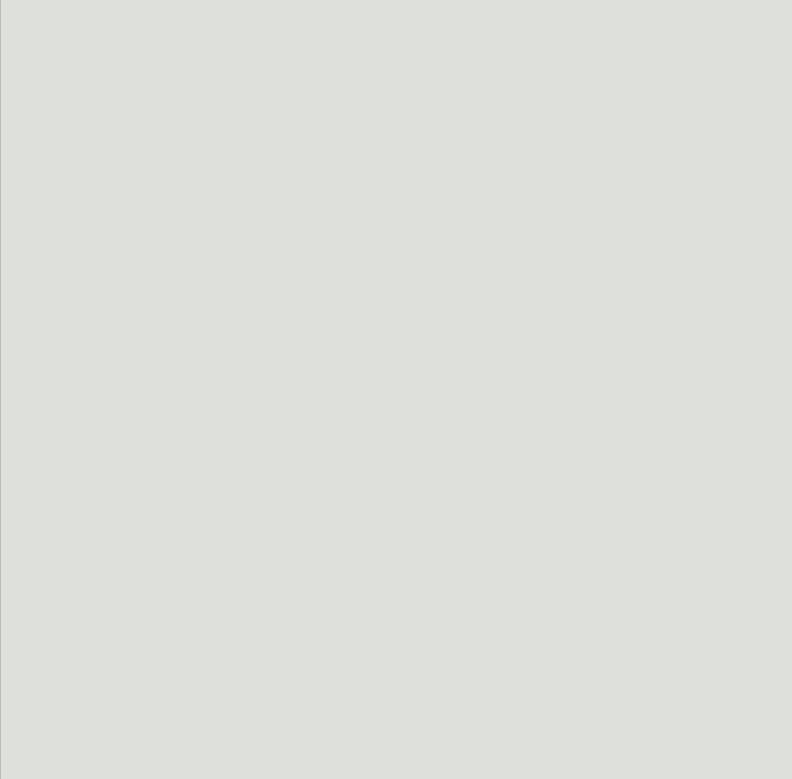
Managing Your Legal Risks in the Workplace during Today's Opioid Epidemic

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Disturbing Numbers: An Epidemic

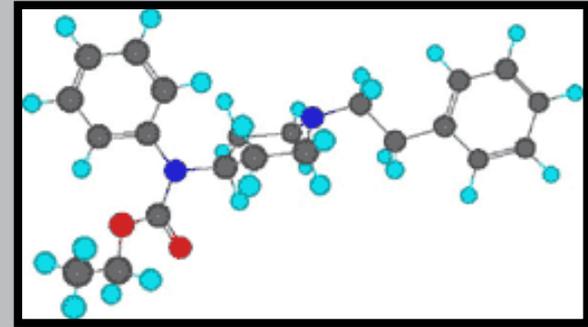
- 130 Americans die every day from overdosing on opioids.¹
 - In 2017, health care providers prescribed opioids at a rate of 66.5 prescriptions for every 100 Americans.²
 - More than 50% of all Americans know someone who suffers from opioid addiction.²
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- October 2017: President Trump declared America's opioid crisis a public health emergency.

What Are Opioids?

Opioids are a class of drugs that include pain relievers available legally by prescription.³

Examples of Rx opioids:

- Codeine
- Morphine
- Oxycodone (OxyContin[®])
- Hydrocodone (Vicodin[®])
- Methadone
- Fentanyl



Disturbing Numbers for Employers

- Employees' use of opioids can lead to absenteeism, decreased productivity, increased errors, and workplace injuries.
 - According to SHRM, more than 70% of employers are impacted by prescription drugs.⁴
 - Rx-painkiller abuse **costs employers almost \$42 billion** due to loss of productivity.⁴
 - 2017 = the 5th consecutive year in which unintentional workplace overdose deaths increased by at least 25%.⁵

Opioids Present Unique Challenges

- These are *legal* drugs prescribed by licensed physicians.
- Difficult to distinguish lawful vs. unlawful use.
- Typically prescribed for pain, sometimes for workplace injuries.
- Powerful & highly addictive. Your employees could be struggling with an emerging addiction.
- Cause impairment and workplace concerns, even when taken as prescribed.
- Drug tests don't always detect—or can result in negative finding of—Rx drugs.
 - **But the employee may still be impaired *and* may be in a safety-sensitive position.**

Legal Challenges for Employers

- Patchwork of state/federal drug testing laws:
 - Post-accident* vs. random vs. reasonable suspicion
 - * In past, OSHA treated post-accident drug testing (or threat of it) as an adverse action.
 - * New OSHA Memos/FAQs (Oct. 11, 2018): Testing to determine root cause is permissible, but testing should be for all employees who may have contributed, not just the injured worker.
 - Types of drugs allowed to be tested varies by state law.
 - State requirements for confirmatory retesting of positive results.
- Many employers use a standard 5-panel test—does not detect all opioids.
 - To detect synthetic opioids (fentanyl) or semisynthetic varieties (oxycodone & hydrocodone), may have to specifically request those tests.
- Possible legal protections for employees using opioids.

Opioids and the ADA

The ADA's protects:

- Someone who is a “qualified individual” with a “disability”
 - Who is a qualified individual? Someone who can perform the essential functions of the job, with or without reasonable accommodation.
 - What is a disability? Physical or mental impairment that substantially limits a major life activity.
- Someone who is “regarded as” disabled
- Someone who has a history of a disability (*i.e.*, recovering from an addiction)

The ADA may also protect:

- Employees who use Rx drugs to treat a disability.
- Employees whose use of Rx drugs results in a disability (addiction).
- Employees who are recovering addicts and participating in a rehabilitation program.

The Impact of Opioids on Employment Litigation

- Employer hit with **\$1.8 million** judgment for failing to accommodate employee's Rx opioid use for migraines and termination after positive drug test result.⁶
- Employer settles with EEOC for **\$750,000.00** after adopting across the board policy prohibiting use of opioids at work.⁷
- Employer hit with **\$563,000.00** judgment for discriminating against employee recovering from addiction to Rx medication.⁸

Navigating Legal Risks in the Workplace

- *Cannot* have a “blanket” policy prohibiting use of Rx drugs.
- *Can* test applicants and employees for illegal drug use (not a “medical exam”)
 - Rx drug *abuse* is considered *illegal* drug use.
 - Use of Rx drugs or controlled substance not prescribed to the individual.
 - Using Rx drugs in a manner inconsistent with prescription.
- EEOC: Employers may ask about or conduct a fitness-for-duty test where it has a reasonable belief based on “objective evidence” that employee’s Rx drug use will interfere with ability to perform essential job functions or will result in a direct safety threat.
- ADA requires interactive, reasonable accommodation process.

Reasonably Accommodating Someone on Rx Opioids

1. Determine the essential functions of the job.
2. Determine whether an individual has a “disability.”
3. Identify abilities and limitations of the individual (individualized assessment).
4. Identify potential accommodations (interactive process).
5. Determine the reasonableness of the accommodations and select options.

Getting Out In Front of the Opioid Epidemic

- Educate employees about the dangers of impairment in their workplace.
- Make job descriptions available to employees to share with their medical providers (safety-specific).
 - Are they updated?
- Offer and remind employees about their Employee Assistance Program (EAP)
- Provide thorough supervisor training to account for ADA.
- Review and updating drug policies.
- Engage use of Medical Review Officer for drug-testing results.
- Cautious disciplinary approaches with employees using Rx drugs.
 - Firing a long-term employee, retraining and hiring a new employee (who could also have a drug problem) may be more costly in the long run.

Train Your Supervisors

- To be current on your workplace drug and safety policies.
- To recognize potential signs of impairment
- To recognize early “red flags”
 - Regular absenteeism on Mon & Fri (or day after payday); tardiness; poor work quality; theft
- To understand legal obligations under ADA



Communication Is Key

Supervisors should:

- Communicate dangers of impairment regularly with employees.
 - But, should be trained on how to communicate these issues *lawfully*
 - What to say & what not to say
- Be coached on how to respond to employee medication issues.
- Understand the importance of notifying HR.
- Know their role in the Reasonable Accommodation Process.
- Know not to contact employee's doctor.

Is Your Drug Testing Policy Legal?

- Is it clear, in writing, and up-to-date?
 - Does it cover how employees should report Rx drug use?
- Focus on Impairment and Safety. No law permits employees to be impaired in the workplace.
- Review Your State's Law. For multi-state companies, try to avoid a “one-size-fits-all” policy.
- Make Employees Aware. Outline the types of testing that may be conducted, the reasoning, procedures, and confidentiality.
- Consequences. Clearly identify the adverse employment actions due to a positive test or refusal to comply.
- DOT considerations. 49 CFR Part 40

Other Recommendations

- Review whether your medical benefits offer:
 - Alternative pain management options (massage, physical therapy, chiropractic care, acupuncture).
 - Counseling, rehabilitation, and/or screening from a professional.
- Communicate with your health plan to determine if the following steps have been considered:
 - Strategies to mitigate risk of addiction before starting, and periodically when continuing, opioid therapy;
 - Limits on opioid Rx's for acute pain to short durations (3 days or less is often sufficient);
 - Use of immediate-release opioids when starting therapy for chronic pain instead of extended release/long-acting opioids;
 - Use of the lowest effective dose when prescribing opioids; and
 - Avoidance of concurrent prescribing of opioids and benzodiazepines whenever possible.

Questions?

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