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# Confronting The Opioid Emergency In The Workplace

By Joanne Bush, Michael Gray and Lindsay Hedrick

On Oct. 26, 2017, President Donald Trump directed the government to declare America's opioid crisis a nationwide public health emergency. Opioids are a class of pain relievers that includes prescription drugs such as codeine, morphine, oxycodone, hydrocodone, acetaminophen with oxycodone, hydromorphone, methadone, and fentanyl. According to the U.S. Centers for Disease Control, sales of prescription opioids in the U.S. nearly quadrupled from 1999 to 2015.[1] The U.S. now consumes 85 percent of the world's natural and synthetic opiates.[2] According to the CDC, the use of prescription opioids, even when taken as directed, can cause serious risks of addiction, abuse and overdose, as well as other side effects.[3]

Employers are inevitably experiencing the effects of this epidemic in the workplace. Employees' use of opioids can lead to absenteeism, decreased productivity, increased errors and workplace injuries. Opioids taken according to a doctor's prescription are legal, and such lawful use may or may not impair an employee's ability to safely perform essential job functions. Further, unlawful use by employees may be difficult to distinguish from lawful use. As such, and as discussed below, opioid use presents employers with uniquely challenging legal issues.

## Drug Testing for Opioids

Employers have long used drug testing to identify applicants who use illegal drugs, deter employee drug abuse, ensure a safe workplace, protect the public and instill customer confidence. Some states encourage employers to maintain a drug-free workplace program by providing incentives, such as a discount on workers' compensation insurance premiums,[4] while other states require that all employers maintain written drug testing policies.[5] Certain federal government contractors are required to maintain a drug-free workplace program.[6] There are also federal and some state laws that require and regulate drug testing of employees who work in safety-sensitive positions and certain industries, such as transportation.[7] Amid this patchwork of federal and state laws are different requirements and restrictions on various aspects of drug testing programs, such as post-accident drug testing,[8] random drug testing, the types of drugs for which an employer can test, and requirements for confirmatory retesting of a positive result.[9]

In addition to drug testing laws, the Americans with Disabilities Act restricts the circumstances in which employers can test for certain types of drugs. While the ADA does not generally prohibit employers from testing employees for illegal drugs[10] or asking whether the individual is using opioids illegally without a doctor's prescription,[11] the ADA limits the circumstances in which an employer may ask about or monitor an employee's current or former prescription drug use, which is deemed a "medical inquiry" under the law.[12] Under the ADA, an employer may make the following medical inquiries of applicants and employees at various stages:

- **Before Making an Offer of Employment:** An employer may not ask about or test for legal



Joanne Bush



Michael Gray



Lindsay Hedrick

drug use at all. Rather, an employer is limited to inquiries about an applicant's ability to perform the job, which may include any physical job requirements, such as lifting and alertness.[13]

- **After Making an Offer of Employment:** An employer may make disability-related inquiries and require medical examinations, provided that the employer makes such inquiries and conducts such examinations for all new hires in that job category.[14] Employers should exercise caution in acting upon post-offer test results, however, because the U.S. Equal Employment Opportunity Commission has warned that "[i]f the employer rejects the applicant after a disability-related question or medical examination, investigators will closely scrutinize whether the rejection was based on the results of that question or examination." [15] If an applicant tests positive for prescription drugs, employers should determine whether such drug use is legal and conduct an individualized inquiry into whether the applicant can perform the job.[16]
- **After Hiring:** The ADA allows employers to make medical inquiries of employees (rather than applicants) only if such inquiries are job-related and consistent with business necessity.[17] According to the EEOC, employers may ask about or conduct a test to detect a current employee's prescription drug use only where it has a reasonable belief based on objective evidence that the employee's prescription drug use will interfere with his/her ability to perform essential job functions or will pose a direct threat to safety.[18] Some courts have declined to adopt the EEOC's "objective evidence" requirement, however.[19] Therefore, it remains uncertain whether a reviewing court will require such evidence on an ADA claim. The more cautious approach — identifying an articulable basis for a test, such as the employer's observations of the employee's behavior resulting from prescription drug abuse — will best protect the employer in potential litigation. In addition, courts tend to defer to employers' judgments about whether such testing helps protect the safety of employees and others, especially with respect to safety-sensitive jobs.[20]

An additional complication for employers in coping with opioid use in the workplace is that the standard five-panel test that many employers use in drug testing does not detect all opioids. While the five-panel test detects opioids derived from poppy plants — heroin, codeine and morphine — it does not detect synthetic opioids like fentanyl and semisynthetic varieties like oxycodone and hydrocodone. Even the more comprehensive eight-, nine-, or 10-panel tests will only add a check for methadone. Thus, employers that want to test for opioids such as oxycodone and hydrocodone must specifically request those tests from the testing lab.

## **Leave, Accommodation and Job Protection Laws**

Even legal opioid use, with side effects such as dizziness, drowsiness and nausea, may impact an individual's job performance or ability to work safely.[21] Opioids can also cause the body to become dependent, and lawful use can lead to addiction. Employees and applicants may be entitled to certain protections and rights in connection with lawful use of opioids and obtaining treatment for dependency. Accordingly, companies should exercise caution when managing employees who are lawfully using drugs, employees who are obtaining treatment for opioid addiction, or employees who need time off to care for family members who are obtaining treatment for opioid addiction.

### **Americans with Disabilities Act**

The ADA protects employees and applicants who are "qualified individuals with disabilities" from adverse employment actions, including termination.[22] An employee is a qualified individual if he or she can perform the essential functions of the job, with or without a reasonable accommodation that does not cause the employer an undue hardship.[23] The ADA does not protect applicants and employees based on their current illegal use of drugs.[24] And the ADA does not prohibit testing applicants or employees for the illegal use of drugs or making employment decisions based on such test results." [25] The ADA does, however, protect workers who are participating in or who have completed a drug rehabilitation program, provided they are not currently using drugs illegally.[26]

The ADA may protect employees and applicants who lawfully use drugs to treat a covered disability or when the effects of the lawful drug use result in a covered disability. Accordingly, even if an

employee uses a prescription drug that could interfere with his/her ability to perform essential job functions, the employer cannot terminate or rescind the job offer on that basis alone. Instead, the employer must first conduct an individualized inquiry regarding the effects of the medication on the employee's ability to perform essential job functions. If an employee notifies the employer that such prescription drug use may impair job performance or affect the ability to work safely, the employer should engage in the interactive process with the employee to determine whether a reasonable accommodation is available that will not cause the employer undue hardship.[27] An employer can, however, hold an employee accountable for job performance negatively impacted by prescription opioid use before the employee requests an accommodation.[28] A reasonable accommodation could include providing unpaid leave or modifying the employee's job duties.[29] Notably, the ADA does not protect individuals who pose a "direct threat" to the health and safety of others.[30] An employer that fears an employee's use of legal drugs will compromise workplace safety and wishes to rely on the "direct threat" defense must show that, based on an individualized assessment, the employee's drug use poses a significant risk to the safety of the employee, other employees or the public before taking an adverse action.[31]

Employers should ensure their policies address prescription drug use by employees. Such policies may require that employees consult with their physician or pharmacist to determine whether any medication could interfere with the employee's safe performance of their job, and state employees are responsible for using appropriate personnel procedures (e.g., call in sick, use leave, request change of duty, notify supervisor) to avoid unsafe work practices while taking such medication. Further, while workplace policies may state that the illegal or unauthorized use of prescriptions drugs is prohibited, employers should not institute "blanket" policies prohibiting prescription drug use.[32] Courts have held that the requirement that employers conduct an "individual inquiry" renders such blanket prohibits unlawful.[33]

### **Family and Medical Leave Act**

An employee undergoing substance abuse treatment for an opioid addiction that involves inpatient care (such as at a hospital or qualifying detoxification facility) or continuing treatment by a health care provider may be entitled to up to 12 weeks of unpaid leave under the Family and Medical Leave Act.[34] An employee who is caring for a covered family member undergoing such treatment may also be entitled to this leave under the FMLA.[35] Further, absences due to the lawful use of opioids may be covered by the FMLA. For example, an employee undergoing treatment for a serious health condition for which opiates are prescribed may be entitled to FMLA leave if the employee's doctor determines that taking the medication as prescribed will incapacitate the employee for more than three days.[36] Absences caused by an employee's unlawful opioid use, however, are not covered by the FMLA.[37]

When the treatment for an employee's (or a covered family member's) opioid addiction is covered by the FMLA, the employee is entitled to reinstatement in a position that is the same as or equivalent to the position held when the leave commenced.[38] Moreover, an employer may not retaliate against an employee who requests or takes FMLA leave.[39]

### **Recommendations for Employers**

Employers — who have a vested interest in maintaining a safe and productive workplace — can be proactive in helping prevent employees from abusing opioids by taking the following steps:

- Learn which drugs are commonly abused in the geographical area.
- Educate employees about the dangers of impairment from prescription drugs at work. Make job descriptions available to employees to share with their medical providers so they can discuss the impact of opioid medication on their ability to work safely.
- Train supervisors to recognize signs of impairment and abuse and how to respond. Communicate to supervisors what behavior constitutes reasonable cause to test an employee for drug use. Coach managers on how to engage in the interactive process with employees who request an accommodation because their medication may impair their ability to perform their essential jobfunctions.

- Encourage employees to seek help for dependency and abuse. Offer an employee assistance program (EAP) benefit and communicate with employees about how to use it. Ensure supervisors promote EAP services.
- Assess whether employee medical benefits offer alternative pain management options like acupuncture, massage, physical therapy, chiropractic and osteopathic care. Also look to see if the plan provides counseling, rehabilitation and/or screening from a professional provider who can help monitor the employee's drug use and offer resources to help with addiction.
- Ensure your worker's compensation carrier has internal controls to identify misuse and abuse of opioids. A recent study found 88 percent of Arkansas' workers' compensation claims involved opioid prescriptions for injured workers.[40]
- Talk to your prescription benefit manager about what resources it offers such as a "red flag" system to identify abuse, a fraud tip hotline to report drug misuse or a physician practicing poor prescribing habits, and aggregate drug utilization reports. CVS Health, which oversees prescription benefits for 90 million plan members through CVS Caremark, recently announced that it will follow CDC guidelines for prescribing opioids that limit prescription opioid doses and duration.[41]
- Reevaluate drug-free workplace and drug testing policies to ensure that they appropriately address prescription drug use and abuse. The policy should be clear and in writing.

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*Joanne R. Bush is a partner at Jones Day in Houston. Michael J. Gray is a partner at Jones Day in Chicago. Lindsay A. Hedrick is a partner at Jones Day in Dallas.*

*Jones Days associates Brandon L. Dixon, Micah M. Doak, and Stephanie M. Gurgol contributed to this article. Dixon is based in the firm's Chicago office, Doak is based in the firm's Houston office, and Gurgol is based in the firm's Cleveland office.*

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[1] Drug overdose deaths in the United States continue to increase in 2015, Centers for Disease Control and Prevention (Aug. 30, 2017), available at: <https://www.cdc.gov/drugoverdose/epidemic/index.html>.

[2] McLaughlin, Kathleen, Underground Labs in China are Devising Potent New Opiates Faster Than Authorities Can Respond, Science (March 29, 2017), available at: <http://www.sciencemag.org/news/2017/03/underground-labs-china-are-devising-potent-new-opiates-faster-authorities-can-respond>.

[3] Opioid Overdose, Prescription Opioids, Centers for Disease Control and Prevention (Aug. 29, 2017), available at: <https://www.cdc.gov/drugoverdose/opioids/prescribed.html>.

[4] Ala. Code § 25-5-332(a) (2017); Fla. Stat. Ann. § 627.0915 (West 2004).

[5] Minn. Stat. §§ 181.950 to 181.957 (West 1991); N.C. Gen. Stat. Ann. §§ 95-230 to 95-239 (West 2001); 13 N.C. Admin. Code §§ 20.0101 to 20.0602 (2001). \*\*Section 20.0303 has been repealed. \*\*

[6] 41 U.S.C. § 8102.

[7] 49 C.F.R. §§ 40.1 to 40.413, 380.101–380.513; N.Y. Comp. Codes R. & Regs. tit. 17, §§ 720.0 to 720.32 \*\*7 Sections 20.13-720.31 have been repealed\*\*, 721.0 to 721.6; 625 Ill. Comp. Stat. Ann. 5/6-106.1(a)(6) (West 2016).

In early 2017, the U.S. Department of Transportation issued a notice of a proposed rulemaking to revise Part 40 of Title 49 of the Code of Federal Regulations to harmonize its regulations with the newly expanded U.S. Department of Health and Human Services' Mandatory Guidelines for Federal Workplace Drug Testing Programs. The proposed expanded guidelines for both agencies now include drug testing for Schedule II synthetic opioids like oxycodone, oxymorphone, hydrocodone and hydromorphone. See Procedures for Transportation Workplace Drug and Alcohol Testing Programs: Addition of Certain Schedule II Drugs to the Department of Transportation's Drug-Testing Panel and Certain Minor Amendments, 82 Fed. Reg. 7771-82 (Jan. 23, 2017).

[8] The Occupational Safety and Health Administration's final rule that went into effect on Jan. 1, 2017, prohibits employers from using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses. 29 C.F.R. § 1904.35(b)(1)(iv) (2010). The rule does not prohibit employers from post-accident drug testing employees where there is reasonable basis to believe drugs or alcohol contributed to the accident or drug testing conducted pursuant to state or federal law. Moreover, the regulation does not apply to drug testing employees for reasons other than injury reporting. See OSHA Memorandum re: Interpretation of 1904.35(b)(1) (i) and (iv) (Oct. 19, 2016), available at: [https://www.osha.gov/recordkeeping/finalrule/interp\\_recordkeeping\\_101816.html](https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html).

[9] See, e.g., Ariz. Rev. Stat. § 23-493.04; Conn. Gen. Stat. Ann. §§ 31-51t to 31-51aa; Va. Code Ann. § 45.1-161.87(D); Neb. Rev. Stat. §§ 48-1903.

[10] 42 U.S.C. § 12114(a); EEOC No. 915.002, Enforcement Guidance: Disability-Related Inquiries & Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (2000) [hereinafter "Medical Inquiries Guidance"].

[11] EEOC Staff Advisory Letter, ADA: Medical Exams and Inquiries (Sept. 10, 2008), available at: [https://www.eeoc.gov/eeoc/foia/letters/2008/ada\\_medical\\_exams\\_sep10\\_2008.html](https://www.eeoc.gov/eeoc/foia/letters/2008/ada_medical_exams_sep10_2008.html).

[12] Medical Inquiries Guidance, *supra* note 9; see also *Roe v. Cheyenne Mountain Conference Resort Inc.*, 124 F.3d 1221 (10th Cir. 1997) (affirming judgment that employer's policy requiring disclosure of all prescription drugs was unlawful medical inquiry).

[13] See 42 U.S.C. § 12112(d)(2)(A)-(B).

[14] 42 U.S.C. § 12112(d)(3)(A).

[15] EEOC, No. 915.002, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995).

[16] See, e.g., *Connolly v. First Personal Bank*, 623 F. Supp. 2d 928 (N.D. Ill. 2008) (denying summary judgment for an employer where applicant's offer was rescinded after drug test revealed prescription drug use, and suggesting that the employer should have reviewed information from the applicant's physician to determine whether her prescription drug use was legal and could affect her workplace duties).

[17] See Medical Inquiries Guidance, *supra* note 9.

[18] *Id.*

[19] See, e.g., *EEOC v. U.S. Steel Corp.*, Civil Action No. 10-12, 2013 WL 625315 (W.D. Pa. Feb. 20, 2013) (granting summary judgment for employer where employer conducted random alcohol and drug testing and rejecting EEOC requirement that every medical inquiry be based on objective evidence).

[20] See *id.*

[21] Benjamin R, Trescot AM, Datta S, Buenaventura R, Adlaka R, Sehgal N, Glaser SE, Vallejo R., Opioid complications and side effects, *Pain Physician* (March 2008), available at: <https://www.ncbi.nlm.nih.gov/pubmed/18443635>.

[22] See 29 U.S.C. § 12112(a)-(b)(1).

[23] See EEOC No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002) [hereinafter "Reasonable Accommodation Guidance"].

[24] 42 U.S.C. § 12114(a).

[25] 42 U.S.C. § 12114(d)(2).

[26] 42 U.S.C. § 12114(b)(1).

[27] 42 U.S.C. § 12112(5)(a); 29 C.F.R. § 1630.2; see, e.g., *Stewart v. Snohomish Cty.* PUD No. 1, No. C16-0020-JCC, 2017 WL 2665105, at \*12 (W.D. Wash. June 21, 2017) (awarding plaintiff \$1.8 million for failing to accommodate her use of opioids that had been prescribed to treat her migraines).

[28] See Reasonable Accommodation Guidance, *supra* note 22 ("Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability."); see also *Yarberry v. Gregg Appliances, Inc.*, 625 F. App'x 729, 742 (6th Cir. 2015) (agreeing that plaintiff "could not rely on his disability and request an accommodation after engaging in terminable misconduct"); *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 90 (1st Cir. 2012) ("When an employee requests an accommodation for the first time only after it becomes clear that an adverse employment action is imminent, such a request can be 'too little, too late.'").

[29] See 42 U.S.C. § 12111(9).

[30] See 42 U.S.C. § 12113(a)-(b); *Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 296 (5th Cir. 1998). A "direct threat" is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r).

[31] See, e.g., *Huffman v. Turner Indus. Grp. LLC*, No. CIV.A. 12-1061, 2013 WL 2244205, at \*13 (E.D. La. May 21, 2013); see also 29 C.F.R. § 1630.2(r) (defining "direct threat").

[32] See *id.* (holding that employer's blanket policy barring employees in safety-sensitive positions from using narcotics and benzodiazepines (such as Xanax), without more, could not justify preventing employee with a conditional offer from working despite his prescription drug use because individualized information the plaintiff offered showed he did not pose a direct threat and he could perform the essential functions of the job).

[33] *Id.* at \*8.

[34] See 29 C.F.R. §§ 825.100(a), 825.119(a).

[35] See *id.* § 825.119(b).

[36] See *id.* §§ 825.100(a), 825.102.

[37] See *id.* § 825.119(a).

[38] See *id.* § 825.214.

[39] See *id.* § 825.220(c).

[40] Vennela Thumula, Dongchun Wang, & Te-Chun Liu, *Interstate Variations in Use of Opioids*, 4th Ed., Workers Compensation Research Institute 45 (June 2017), <https://www.wcrinet.org/reports/interstate-variations-in-use-of-opioids-4th-edition>.

[41] CVS Health Fighting National Opioid Abuse Epidemic With Enterprise Initiatives, CVS Health

(Sept. 21, 2017), available at: <https://cvshealth.com/newsroom/press-releases/cvs-health-fighting-national-opioid-abuse-epidemic-with-enterprise-initiatives>.