

**COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

THE OPIOIDS EPIDEMIC: IMPLICATIONS FOR AMERICA'S WORKPLACES

February 15, 2018

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Good morning, my name is Kathryn Russo and I am an attorney at Jackson Lewis, where I manage the Drug Testing and Substance Abuse Management Practice Group. Jackson Lewis is one of the largest law firms dedicated to representing employers in workplace law. My practice consists of providing advice to employers on drug and alcohol issues that arise in the workplace, including drug testing and disability management issues. I am privileged to work with employers in many different industries and in all fifty states.

I am pleased to offer my perspective on how the opioid crisis impacts employers. Many employers I work with are struggling with the workplace impacts of opioid addiction, including issues such as increased work-related accidents and injuries, increased employee turnover, decreased productivity and increased workers' compensation costs and health insurance costs. For employers who operate dangerous workplaces, ensuring the safety of employees and others is critical.

The opioid crisis affects employers in many different ways. Consider the following examples of situations that employers are faced with routinely:

- An employee is out of work for some time on a medical leave of absence. In conjunction with medical treatment, he begins taking a prescription painkiller. After returning to work, the employee admits to his employer that he has become addicted to painkillers and requests another leave of absence to treat the addiction.
- An employee is involved in a work-related accident and is required to submit to a post-accident drug test. The employee tests positive for prescription painkillers.
- An employer learns that one of its employees is selling OxyContin to his co-workers.
- An employee reports for work appearing drowsy, incoherent, and apparently unable to perform his job duties. The employer has a "reasonable suspicion" testing policy and decides to send the employee for a drug test. When the employer meets with the employee to escort him for testing, he admits that he took too many painkillers.
- An employee who previously completed drug rehabilitation for painkiller addiction becomes addicted to heroin and overdoses at work.

These scenarios are just a few of the situations that employers are grappling with. The way that an employer responds to each of these situations depends on whether the employee can be characterized as “disabled” for purposes of federal and state discrimination laws.

Employees who use opioid medications pursuant to lawful prescriptions, as well as recovering and recovered substance abusers are considered “disabled” for purposes of the federal Americans with Disabilities Act of 1990, 42 U.S.C. §12101 *et seq.*, (“ADA”), and comparable state laws. However, “current users” of illegal drugs (including those who use prescription drugs without a lawful prescription) are not protected under federal and state discrimination laws.

This is why an employer can take disciplinary action against an employee who uses illegal drugs at work or tests positive for illegal drugs on a workplace drug test. But when an employee is using prescription medication, or is recovering or recovered from a substance abuse problem, the employer must analyze its legal obligations under applicable laws including the ADA, the Family and Medical Leave Act, and comparable state and local laws.

A. Who Is Protected Under The Americans With Disabilities Act?

The ADA provides that no employer “shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.” 42 U.S.C. § 12112(a). A “qualified individual with a disability” is defined as an “individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). The ADA defines a “disability” as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(1).

1. Current Illegal Drug Users Are Not Protected by the ADA

An individual who is currently engaged in the illegal use of drugs is not considered a “qualified individual with a disability” for purposes of the ADA. 42 U.S.C. § 12114(a). This includes any individual who tests positive for illegal drug use, which is defined to mean the use, possession or distribution of any drugs considered unlawful under the federal Controlled Substances Act (21 U.S.C. § 801 *et seq.*). The “illegal use of drugs” does not include the use of any drugs taken under the supervision of a licensed healthcare professional or other lawful uses authorized by the Controlled Substances Act or other provisions of federal law. 42 U.S.C. § 12111(6)(a).

2. Recovering and Recovered Drug Abusers Are Protected Under the ADA.

The ADA provides that a “qualified individual with a disability” may include the following:

- An individual who 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 engaged in such use;

- An individual who is participating in a supervised rehabilitation program and is no longer engaging in such use; or,
- An individual who is erroneously regarded as engaging in such use, but is not engaging in such use.

42 U.S.C. § 12114(b)(1), (2) and (3).

B. Permissible Employer Actions Under the ADA.

The ADA expressly permits employers to:

- Prohibit the use of alcohol and the use of illegal drugs in the workplace;
- Prohibit employees from being under the influence of alcohol or illegal drugs in the workplace;
- Comply with the Drug-Free Workplace Act of 1988 (which requires certain federal contractors and grantees to create policies prohibiting illegal drug use at work, among other things);
- Require employees to comply with any applicable drug and alcohol testing regulations of the U.S. Department of Transportation, Department of Defense or Nuclear Regulatory Commission;
- Hold employees who engage in illegal drug use to the same qualification, performance and behavior standards to which it holds all other employees, even if the unsatisfactory performance or behavior is related to the drug use.

42 U.S.C. § 12114(c).

In addition, the ADA expressly provides that drug tests to determine current illegal drug use are not medical examinations. 42 U.S.C. § 12114(d)(1).

C. What Must Employers Do If An Employee Volunteers a Substance Abuse Problem and Requests Help?

The ADA prohibits employers from "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer.]" 42 U.S.C. § 12112(b)(5)(A). When an employee volunteers that he or she has a substance abuse problem and wishes to seek help for that problem, or is already seeking help for that problem, an employer

must consider whether it can make a "reasonable accommodation" for the employee. Such "reasonable accommodation" could include a leave of absence, or a modified work schedule, among other things. The employer must make an "individualized assessment" of the situation through an "interactive dialogue" with the employee.

In addition, under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, substance dependence is considered a "serious health condition" and therefore, if the employee is FMLA-eligible, he or she may take FMLA leave for substance abuse treatment. See 29 C.F.R. § 825.119.

However, if the employee discloses a substance abuse problem and requests help merely to avoid disciplinary action for misconduct that he/she already has engaged in, the employer is not required to offer an accommodation and may instead enforce its disciplinary policy. See U.S. Equal Employment Opportunity Commission's *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities* No. 28 (Dec. 20, 2017).

D. Must An Employer Permit Employees To Use Opioids At Work If They Are Taken Pursuant To A Lawful Prescription?

In general, employers should avoid making medical inquiries about employees' use of prescription medications. Under the ADA, medical inquiries are required to be "job-related and consistent with business necessity," which means, as a practical matter, that the employer must have a safety reason for the inquiry. An employer with employees in dangerous or "safety-sensitive" jobs, however, should consider a policy provision requiring those "safety-sensitive" employees to disclose the use of medications that may impact the employee's ability to do the job safely. The employer then must consider whether the employee's use of the medication poses a "direct threat" of harm to himself or others. 29 C.F.R. § 1630.2(r). These issues must be addressed on an individualized, case-by-case basis.

Employers should not assume that an employee using prescription opioids cannot do the job, and more importantly, employers should not have policies containing blanket prohibitions on the use of certain drugs – such as opioids – at work. Such blanket policies, without any individualized analysis, may result in legal claims under the ADA and comparable state laws.

E. May Employers Drug Test Employees For Opioids, Including Prescription Opioids, And Take Disciplinary Action For Positive Test Results?

Many employers conduct drug testing to ensure that workers are not impaired by drugs while performing their jobs. There are many laws that regulate workplace drug testing, including federal regulations (such as the drug and alcohol testing regulations of the U.S. Department of Transportation's operating agencies, and other federal agencies); state laws (including mandatory laws that apply to all employers and voluntary laws permitting employers to obtain workers' compensation premium discounts); and, local laws (some cities have their own drug testing laws).

Employers who conduct drug testing commonly use a “five-panel” drug test, indicating that five categories of drugs will be tested, *i.e.*, amphetamines, cocaine, marijuana, opioids and phencyclidine (PCP). In a typical five-panel drug test, however, the only “opioids” tested for are heroin, morphine and codeine. Because of the prescription painkiller epidemic, many employers have concluded that a five-panel test is insufficient, and so employers increasingly are utilizing larger drug testing panels that include synthetic and semi-synthetic opioids.

Semi-synthetic opioids include oxycodone, oxymorphone, hydrocodone, hydromorphone, and buprenorphine. Synthetic opioids include fentanyl, methadone, and tramadol.

Last October, the U.S. Department of Health and Human Services’ Mandatory Guidelines for Federal Workplace Drug Testing Programs Using Urine (which affect all federal employees in testing designated positions) were revised to add four semi-synthetic opioids to the drug testing panel. The U.S. Department of Transportation followed suit and revised its drug and alcohol testing regulations for certain transportation workers to add the same four semi-synthetic opioids to its drug testing panel. Those semi-synthetic opioids are oxycodone, oxymorphone, hydrocodone and hydromorphone, more commonly known as Vicodin, OxyContin, Opana, Percocet and Dilaudid, among others. DOT’s revised regulations took effect on January 1, 2018, and now all DOT-regulated employers are required to test for those four additional opioids. 49 C.F.R. § 40.87. DOT-regulated employers include those in the trucking, aviation, railroad, transit, pipeline and marine industries.

If an employer is not regulated by federal drug testing regulations, may it lawfully test for semi-synthetic opioids? The answer is yes, as long as it is permitted by applicable state law (there are a few states that limit the drugs that employers may test for), and, there is a mechanism to distinguish between unlawful use of drugs and lawful use of drugs. It is critical that employers who conduct drug testing utilize a Medical Review Officer (“MRO”) to make this distinction for them. A MRO is a licensed physician with expertise in analyzing drug test results. The MRO contacts an applicant or employee who has tested positive to discuss whether there is any legitimate medical reason that could have caused the positive test result, such as the use of prescription medications. If the MRO accepts the tested individual’s explanation, the test result is reported to the employer as negative. If the MRO does not accept the tested individual’s explanation, the test result is reported to the employer as positive. This process ensures that employers do not take adverse employment actions against individuals who are using lawful medications as opposed to illegal drugs.

With regard to disciplinary consequences for positive drug test results, employers generally may choose whether they wish to terminate employees who test positive for illegal drugs or whether they will offer the employee an opportunity for evaluation and rehabilitation, if necessary. (There are some exceptions: a few states do not permit employers to terminate employees for a first-time positive drug or alcohol test result). If, however, the employee is using prescription opioids lawfully, no disciplinary action should be taken, although the employer may need to assess the safety risk, if applicable, as mentioned above.

F. Are Employers Conducting More Drug Testing to Combat the Opioid Epidemic, Such as Post-Accident Testing and Random Testing?

Employers increasingly are using post-accident drug testing and random drug testing to promote drug-free workplaces, assuming that these types of tests are permitted under applicable federal, state and local laws.

Random drug testing is a particularly useful tool for employers because it is unannounced and unexpected. Post-accident testing also is a very useful tool for employers to help rule out whether an employee had drugs or alcohol in his system at the time of the accident. However, the U.S. Department of Labor's Occupational Safety and Health Administration's recent statements concerning post-accident drug testing have been a source of confusion and frustration for employers. In May 2016, OSHA published a final rule on electronic recordkeeping that contained a prohibition on retaliating against employees for reporting work-related injuries or illnesses. 29 C.F.R. § 1904.35. In the preamble to that rule, OSHA stated that "blanket post-injury drug testing policies deter proper reporting" and that the final rule prohibits employers from using drug testing (or the threat of drug testing) as a form of adverse action against employers who report injuries or illnesses. These statements raised many questions from employers, particularly because there are no OSHA regulations addressing post-accident drug testing.

OSHA published a memorandum in October 2016 that explained its preamble comments further. It stated that post-accident drug testing may be permissible where there is a "reasonable basis" or "reasonable possibility" that drugs or alcohol could have contributed to the injury or illness. This standard has created much confusion. Many employers believe that it means that individualized "reasonable suspicion" is required in order to conduct post-accident drug testing. Other employers have stated that they don't know what it means, and, because of that uncertainty, they will not conduct any post-accident drug testing at all, out of concern that they risk a potential OSHA citation.

OSHA also clarified that it will not issue citations to employers who conduct post-accident drug testing under federal or state laws. While this sounds reasonable, it will adversely impact employers in states with no drug testing laws (and who are not subject to any federal regulations). For example, the state of Minnesota has a drug testing law that applies to all employers which permits broad post-accident drug testing. It is therefore reasonable to expect that citations will not be issued to Minnesota employers for post-accident drug tests. However, in many other states, post-accident drug testing is not regulated at all, which means that employers in those states must comply with OSHA's rule or face a potential OSHA citation.

Employers also have complained that this post-accident testing standard first appeared in the preamble to an electronic recordkeeping rule, and that there is no formal OSHA regulation addressing drug testing that employers were permitted to comment on prior to the rule taking effect. Many employers believe that drug testing is an issue that already is regulated by many other federal, state and local laws, and that OSHA's position on this topic unnecessarily complicates the already-complicated arena of workplace drug testing.

G. What Are Employers Doing To Address the Opioid Epidemic?

There are a number of steps that employers can take to address the effects of the opioid epidemic in the workplace, such as:

1. Enact strong company drug policies. Consider implementing a drug testing program if the Company does not already have one;
2. Expand the drug testing panel to include semi-synthetic opioids;
3. Consider whether the Company will terminate employees for positive drug test results, or whether the Company will offer an opportunity for evaluation and treatment;
4. Train supervisors how to spot the signs of drug misuse, and to take appropriate steps under the employer's policy;
5. Train all employees on the dangers posed by prescription painkillers (because many people do not fully understand how addictive they are), including:
 - a. The risks of opioid pain medication use, especially for workers with sleep apnea, COPD and other respiratory problems;
 - b. The dangers of using alcohol and sleep aids with opioid pain medications;
 - c. The risks of addiction and drug overdose.
6. Do not stigmatize those who are struggling to recover from substance abuse problems; and,
7. Make employee assistance programs available to assist employees when they need help but may be afraid to tell anyone at work.

I appreciate the opportunity to share my thoughts with the Committee.