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Labor & Employment Law Special Briefing

Highlights

- ✓ Workplace challenges caused by use/abuse of drugs
- ✓ Identifying and dealing with drug abusers
- ✓ The ADA or FMLA may come into play
- ✓ Proactive steps and best practices

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Workplace primer: Navigating the opioid-marijuana quagmire

By all accounts the opioid crisis sweeping the nation over the past several years is still in full swing. At the same time, there is a growing movement among many states to provide protections for the medical use of marijuana, and in some instances, for its recreational use as well. These trends have left employers with a morass of state and federal compliance issues that can be very challenging to manage—especially for companies with locations in multiple states.

To understand the scope of the problem and identify the most important compliance issues, *Employment Law Daily* reached out to a panel of seasoned attorneys familiar with the many challenges that employers may face when navigating issues related to opioid and marijuana use in the workplace: [John Doran](#), Member, Sherman & Howard LLC; [Eric B. Meyer](#), Partner, FisherBroyles LLP; and [Kathryn J. Russo](#), Principal, Jackson Lewis P.C.

How big is the problem?

“Illicit” drug use

The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), [reported](#) that in 2017, 30.5 million people (aged 12 or older) had used an illicit drug in the past 30 days—about one in nine Americans or 11.2 percent of the population. Regardless of age, the estimates of current illicit drug use for 2017 were driven primarily by marijuana use and the misuse of prescription pain relievers: Among that 30.5 million, 26.0 million were current marijuana users, and 3.2 million were current misusers of prescription pain relievers.

“Misuse”

That same year (2017), an estimated 11.4 million people misused opioids, including 11.1 million pain reliever misusers and 886,000 heroin users. Among people aged 12 or older who misused pain relievers in the past year, about 6 out of 10 people indicated that the main reason they misused pain relievers the last time they misused them was to *relieve physical pain* (62.6 percent), and about half (53.1 percent) obtained the last pain reliever they misused from a friend or relative.

Substance use disorders

SAMHSA also reported that in 2017, about 19.7 million people (aged 12 or older) had a substance use disorder related to their use of alcohol or illicit drugs in the past year. Breaking it down, 14.5 million people had an alcohol

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use disorder and 7.5 million had an illicit drug use disorder. The most common illicit drug use disorder was for marijuana, at 4.1 million people. About 2.1 million individuals had an opioid use disorder, including 1.7 million people with a prescription pain reliever use disorder and 0.7 million with a heroin use disorder.

And let's not forget that these are the statistics for 2017. Anecdotally, and through media reporting, it's clear that the numbers are still rising.

A word about workers comp

According to the CDC, data from workers' compensation systems has assisted in the initial identification and response to the opioid epidemic. For one thing, injured employees may first be exposed to an opioid prescription due to an on-the-job injury.

As opposed to the opioid crisis overall, it is a clear trend that the number of workers' comp claims with prescriptions that include opioids is dropping. In 2016, 44 percent of all workers' compensation claims with prescriptions had at least one prescription for opioids based on data from 40 states. This figure has declined from 55 percent since 2012, the CDC says.

The amount of opioids prescribed is also dropping to some extent, but it can vary dramatically among the states. The CDC notes that three times as much opioid medication was prescribed in the highest states compared to the lowest states.

Many states have taken steps to address opioid use in their workers' compensation systems by limiting opioid availability, educating health care providers on responsible opioid prescribing, and increasing awareness among injured workers.

A [recent NIOSH-funded study](#) by the Workers' Compensation Research Institute (WCRI) found significantly different opioid dispensing rates within the workers' compensation system based on several factors, including:

- Industry in which the injured worker is employed (Mining, including oil and gas, and Construction had the highest opioid dispensing rates)
- Company size (smaller companies had higher opioid dispensing rates than larger companies)
- Injured worker age (older workers had higher opioid dispensing rates than younger workers)
- Rural areas had higher opioid dispensing rates than urban areas
- Areas with low rates of health insurance had higher rates for opioids prescribing than areas with high rates of health insurance
- Fractures and carpal tunnel syndrome had the highest opioid dispensing rates, followed by neurologic spine pain

In the workplace

"There's simply no way to completely quantify the breadth of abuse in the workplace," according to John Doran. "However, in the face of the American opioid crisis, it would be naïve to assume that the crisis does not present with equal force in the workplace. And, with the expanding legalization of marijuana throughout the country, it is safe to assume that marijuana impairment in the workplace poses a substantial problem."

In what the [CDC characterizes](#) as "an opioid overdose epidemic," it is not surprising that the epidemic will impact the working age population. Opioids (including prescription opioids, heroin, and fentanyl) killed more than 47,600 people in 2017, more than any year on record; 37 percent of all opioid overdose deaths involve a prescription opioid.

Overdose deaths

In 2017, 95 percent of the 70,067 U.S. drug overdose deaths occurred among the working aged population, persons aged 15-64 years. It is unknown how many were employed at the time of their death, the CDC says.

Majority of illicit opioid users are employed

According to the [National Survey of Drug Use and Health](#) (NSDUH), an estimated 4.3 percent of respondents aged 18 years or older reported illicit opioid use in the past year, and an estimated 66.7 percent of these self-reported illicit opioid users were employed full- or part-time.

Workplace deaths

The Bureau of Labor Statistics (BLS) [reported](#) that overdose deaths at work from non-medical use of drugs or alcohol increased by at least 25 percent *annually* between 2013 and 2017. The 272 workplace overdose deaths reported in 2017 accounted for 5.3 percent of occupational injury deaths that year, as compared to 1.8 percent in 2013. It is unknown how many of these deaths were caused by opioids specifically, however.

Costs to employers

In 2017, the Council of Economic Advisers released a [report](#) estimating that the economic cost of the opioid crisis was \$504 billion in 2015, or 2.8 percent of the GDP that year. For employers, there is a significant impact with regard to lost workplace

productivity and the costs associated with healthcare spending. According to a 2018 [analysis](#) from the Kaiser Family Foundation, which tracked the impact of the opioid epidemic on those with employer-based health coverage, the annual cost of treating addiction and overdose increased by more than eight-fold between 2004 and 2016.

Growing concern

There is growing concern among employers about the issue of opioid misuse and abuse in the workplace. The National Business Group on Health's Large Employers' 2019 Health Care Strategy and Plan Design [Survey](#) found that a majority of employers (55%) are very concerned over the impact of prescription opioid abuse on the workforce.

State marijuana laws

The movement to legalize the use of marijuana continues to trend, with 10 states and District of Columbia permitting possession and use of marijuana recreationally for personal use, as of November 2018, [according to Ballotpedia](#). Those states are Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington.

Ballotpedia also notes that as of March 2019, 33 states and the District of Columbia have passed laws legalizing or decriminalizing medical marijuana. Further, 13 states have legalized the use of cannabis oil, or cannabidiol (CBD), one of the non-psychoactive ingredients found in marijuana, for medical purposes.

The National Conference of State Legislators [also provides a map](#) identifying the states and U.S. territories in which medical marijuana use is permitted and by program type.

As a result of these varied approaches, employers are left scrambling to make sure that workplace policies and compliance efforts take all of them into account.

Workplace use and abuse

Employees' use or abuse of opioids or marijuana in the workplace can pose many challenges for employers; among them are safety risks and absenteeism, tardiness, and employee leave issues.

"The challenges are manifold," Doran said. "They range from detection to discipline, from accommodation to catastrophic injury.

Charting the legal landscape in each jurisdiction in which a company does business is mind-boggling, particularly given the conflicts between federal versus state and local laws."

Safety

As to safety issues, "The concern is that an employee's use of any of these drugs may reasonably result in the individual harming himself/herself or others," Eric Meyer explained. "Often, this involves individuals who operate heavy machinery or operate vehicles."

"An individual might be completely functional while following a prescribed course of opiate treatment or marijuana use. Another individual might be completely incapacitated or at least impaired by the same course of treatment."

- Sherman & Howard attorney John Doran

Doran said the safety concerns depend on each unique circumstance and must be evaluated on a case-by-case basis. "Mere opioid or marijuana use, standing alone, may or may not pose safety risks," he observed. "An individual might be completely functional while following a prescribed course of opiate treatment or marijuana use. Another individual might be completely incapacitated or at least impaired by the same course of treatment."

That being said, Doran observed that "at the very least opioids and marijuana can lead to significant drowsiness, militating strongly against work in safety-sensitive positions during the course of treatment."

Absenteeism, tardiness, and employee leave

Workers with substance use disorders miss almost 50 percent more work days than do their peers, up to six weeks annually, [according to the National](#)

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Safety Council (NSC). And absenteeism leads to productivity losses.

According to CDC [data](#), workers with a current substance use disorder miss an average of 14.8 days per year, while the subset with a pain medication use disorder (often opioids) miss an average of 29 days per year—approximately twice as many days annually. This is in contrast to an average of 10.5 days for most employees, and an average of 9.5 days for workers in recovery from a substance use disorder, the CDC reports.

Echoing similar observations, Doran said that abuse of opiates and marijuana certainly correlates with attendance challenges. “Drug abuse generally impacts an individual’s reliability, drive and more,” he explained. “Opiate abuse, in particular, can result in an extremely debilitated state, leading to potential death.”

Responsible use

But when absenteeism, tardiness, and employee leave issues do arise from opioid and/or marijuana use, “it’s more likely due to the underlying disability or condition for which the employee was prescribed the drugs,” according to Meyer. “Anecdotally, *responsible* use of opioids and marijuana will not create significantly more absenteeism, tardiness, and employee leave issues,” he said.

Similarly, like the CDC, the NSC found that workers who are in recovery have lower turnover rates. They are also less likely to miss work days, less likely to be hospitalized, and have fewer doctor visits.

Other issues

Russo pointed to other challenges that workplace opioid and marijuana use can prompt, including employee turnover, having a smaller pool of qualified applicants, and insurance costs.

NSC data echo these concerns, with 95 percent of employers reporting they were most concerned about the costs of benefits, 93 percent reporting concerns about their ability to hire qualified workers, and 84 percent citing concerns about the costs of workers’ compensation. Employers were less concerned over drug misuse (67 percent) and illegal drug sale or use (61 percent).

Lawful vs. unlawful use

Employers face different challenges when the opioid or marijuana are lawfully prescribed, as opposed to unlawfully used. Meyer said this is especially true for those employers that do business in several states “because state law generally dictates whether an employer has a duty to accommodate employee use of medical marijuana, for example.” He also observed that “legal use of opioids generally invokes issues under the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA)” —both federal statutes that apply in addition to any state laws that may apply.

As Doran sees it, the primary differences between lawful and unlawful use “lie in the duty to accommodate and discerning when legal use morphs into abuse or on-the-job impairment.” He also noted that “with possible differences among the states, no employee is entitled to legal protection for the use of illegal drugs or misuse of properly prescribed drugs.”

Russo, too, cited differences between drugs lawfully prescribed and unlawful use, “because medical use means the employee or applicant is disabled, and the employer must be careful not to discriminate based on a disability.” She also noted that employers “may take disciplinary action for unlawful use.”

Substance abuse by sector

According to the NSC, the construction, entertainment, recreation, and food service sectors have twice the national average of employees with substance use disorders. Industries dominated by women or older adults had a two-thirds lower rate of substance abuse. Industries with greater numbers of workers with alcohol use disorders also had more illicit drug, pain medication, and marijuana use disorders.

Opioid abuse

Some industries have evidenced a higher rate of opioid abuse than others. Meyer said that construction, extraction (e.g., mining, oil and gas extraction), food preparation and serving, health care practitioners, and technical, health care support, and personal care and service occupations are more vulnerable to opioid abuse. He pointed to a [study](#) in an August 2018 *Morbidity and Weekly*

report by the Centers for Disease Control and Prevention, for more detailed information.

“For obvious reasons, health care, transportation, construction, and manufacturing pose the greatest risks and vulnerabilities because the stakes are so high,” according to Doran. “Some research suggests that abuse is likely to be more prevalent as a general proposition in fields with significant physical demands or in which significant stress is part and parcel of the workplace.”

Russo noted increased opioid abuse vulnerability in the healthcare—due to access to opioids—and the construction industries—likely due to injuries.

Identifying opioid abusers

Russo said that some employers are proactively trying to identify employees who may be abusing opioids. As to those that do not, Russo noted that “drugs are a safety issue, so drug abuse has a bigger impact on employers operating dangerous or safety-sensitive work environments.”

Proactive identification

Are employers proactively trying to identify employees who may be abusing opioids? Doran said it’s hard to generalize. “While a very large percentage of employers recognize that workplace drug abuse poses a very serious safety risk, not to mention other substantial collateral costs, surveys indicate that a substantially smaller population of employers are proactively tackling the issue.”

“Employers that have addressed the problem proactively are often reacting to a specific business challenge in the form of increased health plan costs, workers’ compensation costs, or the like,” according to Doran. “Employers that have not addressed the issue tend to be those that haven’t faced an actual instance of abuse.”

Use vs. abuse

Should employers be trying to spot opioid use? “I’m not convinced that employers should be trying to ‘identify’ opioid users,” Doran said. “For one thing, there’s no easy way to do that. For another thing, it is fraught with potential liability for ‘perceived as’ discrimination, among other things. The reality is that an individual

who is ‘using opioids’ consistent with medical directives and without posing any meaningful workplace risks doesn’t need to be identified. An employer’s quixotic quest to spot and label these individuals will only be used against it down the road.”

But spotting opioid *abuse* is a different matter. As Meyer sees it, there is no downside to trying to identify workers with opioid abuse issues “if done legally.” The upside includes helping these employees get better, lowering turnover and other business costs. I can’t think of any cons if done legally.”

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More about the costs to employers

What are the costs to employers of substance abuse in the workplace? According to the NSC, the annual cost of untreated substance use disorder can run from \$2,600 per employee in agriculture, to more than \$13,000 per employee in information and communications.

When it comes to opioid abuses, Meyer said that employers can face higher prescription drug costs and high medical expenses generally.

Doran observed that costs to employers come in several forms. “Of course, attendance issues stand out as an obvious cost,” he said. “However, health care plan costs, workers’ compensation costs, third-party personal injury claims, increased policing costs, product defect costs, recruiting and staffing costs, and more present as significant costs for employers.”

Russo cited advantages of accident prevention and addressing issues related to employee turnover, smaller qualified applicant pools, and insurance costs.

How to know?

How can employers identify employees who may be abusing opioids? Meyer said that employers may train managers to know the signs of addiction.

Employers can also rely on drug testing, direct observation, and self-identification to spot opioid users, according to Russo.

Other clues

In addition to spotting signs of addiction, Meyer noted that employers may learn of opioid abuse

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or addiction from coworkers or the employee's family member, or seeing the drugs at work.

Awareness of the problem may also come through drug test results, employee self-identification, or employee conduct at work, Russo observed.

"The most common ways employers learn are from a workplace accident or a coworker's report that the individual is acting strangely," according to Doran. "Sometimes an employee will self-report, often in response to threatened discipline."

Signs and symptoms of drug abuse and addiction

HelpGuide has published a [comprehensive guide](#) detailing the signs and symptoms of drug use and addiction.

Physical warning signs of drug abuse or addiction

- Bloodshot eyes, pupils larger or smaller than usual
- Changes in appetite or sleep patterns
- Sudden weight loss or weight gain
- Deterioration of physical appearance, personal grooming habits
- Unusual smells on breath, body, or clothing
- Tremors, slurred speech, or impaired coordination

Behavioral warning signs of drug abuse or addiction

- Drop in attendance and performance at work
- Unexplained financial problems; borrowing or stealing
- Engaging in secretive or suspicious behaviors
- Sudden change in friends, favorite hangouts, and hobbies
- Frequently getting into trouble (fights, accidents, illegal activities)

Psychological warning signs of drug abuse or addiction

- Unexplained change in personality or attitude
- Sudden mood swings, irritability, or angry outbursts
- Periods of unusual hyperactivity, agitation, or giddiness
- Lack of motivation; appears lethargic or "spaced out"
- Appears fearful, anxious, or paranoid

Warning signs of commonly abused drugs: marijuana or opioids

Marijuana: Glassy, red eyes; loud talking, inappropriate laughter followed by sleepiness; loss of interest, motivation; weight gain or loss.

Opioid painkillers (including OxyContin, Vicodin, Norco): Drooping eyes, constricted pupils even in dim light, sudden itching or flushing, slurred speech; drowsiness, lack of energy; inability to concentrate, lack of motivation, decline in performance at work or school; neglecting friendships and social activities.

Dealing with drug problems

What are employers doing when they become aware that an employee has an opioid or marijuana abuse issue? "For the smaller percentage of employers who have faced this issue head-on, the responses take any number of iterations," Doran observed. "Approaches include formulation of formal drug/alcohol testing programs, supervisor and employee education, health plan programs including employee assistance programs, and more."

Doran added that "employee assistance programs are particularly favored, because they help the employer help the employee without necessarily exposing the employer to privacy or disability liability."

Similarly, Meyer said that employers should consider employee benefits that permit opioid abusers to get help, such as EAPs; counseling and other addiction recovery benefits; and pharmacy benefits to facilitate the transition from opioids.

"Employers need to focus on employee education and supervisor training to root out and address addiction and abuse in the workplace," Doran suggested.

Russo, too, suggested that employers can provide employee education and drug testing to help combat or mitigate opioid and/or marijuana abuse.

Opioid issues

Disability?

When it comes to opioid abuse, employers need to be aware that state and federal disability and leave laws may come into play. "As a matter of law, if the employee has a valid prescription, the employer may need to treat the situation as one arising under the ADA/FMLA," according to Meyer. "If the employee is using opioids illegally, then the employer can apply its workplace drug policy as it would in a situation involving any other illegal drug."

Misconduct?

Whether the employee has engaged in misconduct or merely disclosed opioid use or abuse also matters. How the employer addresses the abuse "depends on whether the employee engaged in misconduct or violated a policy, or whether he/she disclosed the information

voluntarily,” Russo explained. “Misconduct and policy violations can be addressed with drug testing and/or disciplinary action (depending on the factual circumstances), while voluntary disclosures of addiction must be treated like *any other illnesses*.”

Marijuana use

Doran, Meyer, and Russo agreed that an employee’s marijuana use may come to an employer’s attention through the same channels through which opioid abuse becomes apparent.

Doran added that marijuana odor is another, more distinct way that an employer may become aware. “In states where medical marijuana is legal and protected, applicants/employees may self-identify to ‘trick’ the employer into a misstep or to obtain another level of protection from discipline or discharge,” he observed.

What to do about it

The more critical question is what employers should do when they become aware that an employee is using marijuana in the workplace, or still experiencing its effects even though it was ingested outside the workplace. “As a matter of law, the employer should apply its workplace drug policy as it would in a situation involving any other illegal drug,” according to Meyer.

Similarly, Russo said that employers may consider drug testing and/or disciplinary action (depending on the factual circumstances). “But with medical marijuana, the employer may have to consider potential accommodation as well as the safety risk (again depending on the factual circumstances),” she cautioned.

Employee assistance programs

Many employers try to address opioid abuse and unlawful marijuana use through employee assistance programs. As [NIDA notes](#), many employers have EAPs that offer short-term counseling and/or assistance to link employees with drug or alcohol problems to local treatment resources, including peer support/recovery groups.

“Therapeutic work environments that provide employment for drug-abusing individuals who can demonstrate abstinence have been shown not only to promote a continued drug-free lifestyle

but also to improve job skills, punctuality, and other behaviors necessary for active employment throughout life,” according to NIDA.

Referring instead of firing

Russo noted that employers can use these types of programs to refer employees for evaluation and treatment, rather than terminating them after a positive drug test result. EAPs can also be used for employees who voluntarily self-identify a substance abuse problem, she added.

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– Jackson Lewis attorney Kathryn Russo

Naloxone in the workplace

As to other health and benefit programs that employers have implemented to help combat opioid and marijuana abuse in the workplace, Russo pointed to Naloxone programs.

Naloxone is a medication approved by the Food and Drug Administration to prevent overdose by opioids such as heroin, morphine, and oxycodone. The CDC notes that Naloxone is an effective drug for reversing opioid overdoses. Naloxone hydrochloride (also known as naloxone, NARCAN® or EVZIO®) can temporarily stop many of the life-threatening effects of overdoses from opioids. Naloxone can help restore breathing and reverse the sedation and unconsciousness that are common during an opioid overdose.

Workplaces may consider implementing a program to make naloxone available in the event of an overdose. It may not be feasible to implement in all workplaces; however, it

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is worth consideration for making naloxone available as part of a comprehensive workplace safety and health program. A [new NIOSH factsheet](#) provides additional detail about workplace-specific programs.

Interaction with other laws

When dealing with opioid and marijuana use and abuse in the workplace, employers need to tread cautiously because laws other than those related to unlawful controlled substances, may apply at either the state or federal level.

Doran cautioned: “Employers need to understand that *current* illegal drug use/abuse is not protected under federal law, but it could conceivably be protected in a particular state or local jurisdiction disability law. To complicate things further, leave for a current drug abuser can be protected leave under the FMLA under certain circumstances.”

FMLA and ADA

Leave for treatment

“If the employee is using either drug illegally or unrelated to any medical conditions, neither the FMLA nor the ADA protect the employee,” Meyer explained. “The caveat is that the employer may

not take action against the employee because the employee has exercised his or her right to take FMLA leave for substance abuse *treatment*. (The ADA, however, does not consider current drug use to be a disability.) Additionally, if there is an underlying disability or serious health condition, the employer may have a duty to accommodate or provide job-protected leave.”

Recovering and recovered users

As to opioid abuse or addiction, Russo said: “The ADA and comparable state laws protect recovering and recovered substance abusers as ‘disabled,’ and a leave of absence for treatment may be a reasonable accommodation. FMLA leave may be used for substance abuse treatment.”

The ADA and comparable state laws, and the FMLA do not come into play when employees use marijuana in the workplace, according to Russo. “Most medical marijuana laws do not permit marijuana use in the workplace,” she explained. “However, a medical marijuana user likely has a medical condition that makes him or her ‘disabled’ for purposes of the ADA and comparable state laws.”

Opioids

Turning to state or federal laws pertaining to opioid use in the workplace, Meyer said that this would depend on whether the employee is using the opioid legally. “As a matter of law, if the employee has a valid prescription, the employer may need to treat the situation as one arising under the ADA/FMLA,” he said.

Likewise, Russo noted that there are some opioids that are illegal, such as heroin, and others that are legal (prescription painkillers).

Aiding and abetting liability

Doran added a warning for employers who may turn a blind eye to drug use: “Those laws criminalizing marijuana use and/or opioid abuse can expose an employer to aiding and abetting liability to the extent an employer permits and facilitates use or abuse in the workplace,” the cautioned.

About drug testing

Drug testing can be an important tool for employers, especially for workers in safety-sensitive

Marijuana drug laws

As to state or federal drug laws that may apply to marijuana use in the workplace, FisherBroyles attorney Eric Meyer said: “There is no legal protection for use of marijuana at work. Rather, employers may apply their drug and alcohol policies, subject to any state law restrictions on their application. However, some states do require an employer to accommodate an employee’s use of medical marijuana outside of work.”

“Marijuana still is illegal under federal law and most state medical marijuana laws provide that employers do not have to permit marijuana use in the workplace,” according to Jackson Lewis attorney Kathryn Russo.

Similarly, Sherman and Howard attorney John Doran said that he is not aware of any federal or state law that permits an employee to use marijuana or non-prescription opioids during the workday.

positions. What do employers need to know about drug testing?

Keep the ADA in mind

“Under the ADA, an employer is entitled to test applicants and employees for ‘illegal’ drug use,” Doran advised. “Drug tests will, however, find positives for individuals who are properly using opioids per a valid prescription, which then poses the risk of unlawful discrimination.”

With respect to drug testing job applicants, “In order to be completely safe, an employer is wise to make a conditional job offer first, then administer a drug test, and should the individual test positive for opioids, allow the individual to explain the positive test result confidentially to an independent medical review officer,” Doran suggested. “In many instances this is more than the law requires, but it is ordinarily the safest course to avoid expensive litigation.”

When the results are positive

What do employers need to know about what actions they may take when drug test results are positive for marijuana or opioids? The actions employers are permitted to take depends on whether it is legal or illegal opioid or marijuana use, and the law under which the employer is drug testing, according to Russo.

Marijuana

When it comes to a positive result for marijuana, Doran had this to say: “As long as marijuana remains a federally controlled substance, an employee is *not* protected by the ADA with respect to marijuana use, even when prescribed.” However, an employee may be protected under state law.

Opioids

When the drug test is positive for opioids, Meyer suggested: “Under the ADA, the employer should inquire whether the employee has a valid prescription for the opioids. Absent a valid prescription the employer may terminate the employee’s employment.”

Where the employee has a valid prescription, the employer may be required consider the situation under as falling under ADA/FMLA, but if the employee is using the opioid *illegally*, then the workplace drug policy pertaining to illegal drugs may be applied, Meyer reiterated.

State laws may apply

Meyer noted that employers are permitted to test employees for marijuana and opioid use, but the testing may be “subject to any state-law restrictions on timing and circumstance.”

As to what actions employers may take in response to positive drug tests, Meyer said it depends on the state. “Generally, the employer can terminate the employee’s employment,” he said. “In some states, the employer may have a duty to accommodate the employee’s use of medical marijuana provided that the employee is not under the influence of marijuana at work.”

But that is difficult to demonstrate, Meyer added. “For example, a urine test for marijuana will only reveal the presence of THC, but not active THC, which would evince that someone is actually high.”

Being proactive

What proactive measures can employers take to head off opioid and/or marijuana abuse in the workplace? Russo suggested that employers have strong written drug policies, drug testing, employee education, and supervisor training.

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Best practices

FisherBroyles attorney Eric Meyer offered these best practices for identifying and dealing with opioid and/or marijuana abuse in the workplace:

- Communicate
- Train managers to identify the signs of abuse and how to respond
- Prepare for emergencies
- Promote wellness
- Make help accessible to employees dealing with drug abuse

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Provide training

“First, TRAIN, TRAIN, TRAIN—supervisors, managers, and above must have meaningful training with respect to recognizing signs of impairment,” Doran stressed. “For example, some state marijuana laws set a higher hurdle for determining if and when to test an employee for impairment in the workplace,” he explained. “Allowing your supervisors and managers to merely guess or use an ‘I know it when I see it’ standard of reasonable suspicion can get you in hot water.”

Drug testing programs

Doran also suggested that if employers do not currently have a comprehensive drug testing program in place, they should do so—even if their program includes a decision not to test at all. “You don’t want to be scrambling around trying to figure out policy and practices in the face of a serious workplace incident,” he said.

Know the law

Doran also stressed that employers should understand the law everywhere that they do business—including local laws. “For example, New York City now prohibits employers from pre-employment marijuana testing, even though it is legal in other parts of New York State,” he said.

Specific measures

Meyer suggested that employers put these proactive measures in place:

- Policies
- Training
- Employee benefits that allow drug abusers to get help, such as EAPs, counseling, and other addiction recovery benefits
- Pharmacy benefits to facilitate the transition from opioids

More about what employers can do

The National Safety Council has [offered several suggestions](#) as to what employers can do to effectively deal with the prescription drug crisis:

- Recognize prescription drugs have a big impact on your workplace
- Put strong policies in place
- Expand drug testing panels to include opioids
- Train supervisors and employees on how to spot signs of misuse
- Treat substance use problems as a disease
- Leverage Employee Assistance Programs to help employees return to work

About the Author

Pamela Wolf is an attorney and legal analyst who tracks and analyzes labor and employment law issues, court decisions, legislation and trends for *Employment Law Daily*. As a practicing attorney for 12 years, Wolf’s experience includes litigation of employment and civil rights matters.

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