

OPIOIDS IN THE WORKPLACE - FAQs

The following information has been adapted from: Zinober, Peter. Greenberg Traurig, P.A. Opioid-Related Questions; Florida Nursery, Growers & Landscape Association. April 17, 2018.

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Q. Are there any available templates which specifically address workplace policies regarding opioid use? Or do most drug and alcohol policies in Employee Handbooks also cover opioids?

A. At this juncture, most standard drug policies already address the use of opioids in the workplace. The employer should follow the standard process for testing and, if desired, include opioid testing as part of its standard protocol.

The workplace policy should explicitly state if an employee (or applicant) tests positive for opioid use, the employee has the opportunity to present to the Medical Review Officer (MRO) a valid physician's prescription for the particular medication. The MRO can then communicate this information to the employer who is then in a position to further evaluate - based on the individual circumstances of the employee and the specific job - whether the employee's use of the medication presents a danger to workplace safety and prohibition is necessary.

There are significant Americans with Disabilities Act (ADA) concerns here and there is no bright line rule for prohibition. While impairment based on lawful opioid use may not present a disciplinary issue, safety considerations may nonetheless warrant adjustment to an employee's status. The employer should contact legal counsel before making any decisions.

Q. If an employee is suspected of being under the influence of opioids, can the employer require the employee to show a prescription? Or does this trigger a federal violation of medical record confidentiality?

A. The proper process to follow is to direct the employee to submit for testing under the "reasonable suspicion" standard provided in most workplace drug and alcohol

testing policies. The employer should ensure the examination panel includes testing for opioids and its byproducts.

If the employee tests positive for opioids, the MRO will then give the employee an opportunity to provide certification from his/her physician showing the employee is prescribed this particular drug and is able to operate safely in the employee's particular workplace environment despite taking the medication.

If the job is a "safety-sensitive" position (such as those which require the operation of large machinery or vehicles and the unsafe operation of which may pose a greater risk to the employee, his co-workers and the public), the employer will be in a better position to restrict employment due to opioid use.

The ADA provides for circumstances where an employee may be prohibited from working in a particular position where: (1) the employee's ability to perform essential job functions will be impaired by a medical condition; or, (2) the employee poses a direct threat to himself or others due to the employee's medical condition. The inquiry here is limited to whether the medical condition prohibits the employee from safely performing his job functions with or without a reasonable accommodation.

Again, there is no bright line test on which an employer can rely and legal counsel should be contacted whenever this situation arises. The fact is: If an employee is impaired, it does not matter whether the cause of the impairment is lawfully obtained or prescribed.

Q. What are reasonable causes for testing for opioids? Is 'suspicion' a plausible threshold or must there be other factors?

A. The standard is still "reasonable suspicion" for employees already working for the company. There is no separate provision for the testing of opioids. Evaluation of job applicants should follow the same standards provided in most generally accepted "Drug Free Workplace Act" policies.

Q. What happens when an employee has a prescription, does not have any known dependency or addiction, yet may still be impaired places co-workers and the workplace itself at risk?

A. The answer to this question presents challenges. The main pitfall the employer needs to avoid is violation of the ADA which may occur if an employee is taking the medication due to suffering from a disability. If the employer wishes to prohibit employment of a disabled employee in a particular position because the employee takes the medication, then there must be a strong business necessity for doing so.

The ADA permits the prohibition of an individual from performing in a position if: (1) the employee's ability to perform essential job functions will be impaired by a medical condition; or, (2) the employee will pose a direct threat to himself or others due to a medical condition or the treatment of it.

Again, there is no bright line test for determining whether a prohibition will violate the ADA, and employers should contact counsel whenever this situation arises. Without contacting legal counsel, blanket prohibitions of certain medications or medical conditions are not recommended. Individualized evaluations of specific situations are strongly advised and interactive discussions with an adversely affected employee are required by Equal Employment Opportunity Commission.

See Bates v. Dura Auto. Sys., Inc., 650 F. Supp. 2d 754, 771-72 (M.D. Tenn. 2009), rev'd in part, 625 F.3d 283 (6th Cir. 2010), and on reconsideration, No. 1:08-0029, 2010 WL 5184793 (M.D. Tenn. Dec. 15, 2010) (Held a violation of ADA could occur when a drug screening program excludes an employee who takes particular medications from working in any capacity without analysis of the individual circumstances).

Q. If the employer offers to help get the employee treatment (or enrollment in an employee assistance program) and the employee declines or refuses such offers, does the employer have the right to fire the employee?

A. An employer should not assume the taking of a legal prescription drug will warrant enrollment in an employee assistance program. If the drug is being taken without a prescription, then the standard employee assistance programs should be offered. And, in such situations, the employee should be moved to a non-safety sensitive position during enrollment (or be asked to take leave during enrollment).

The Drug Free Workplace Act prohibits an employer from discharging an employee who voluntarily seeks treatment for a drug-related problem during their employment if: (1) the employee has not previously tested positive for drug use; and, (2) the employee has not previously entered an employee assistance program for drug-related problems.

If an employee cannot present a prescription for the opioid (the use of which must be confirmed through a confirmation test) and refuses to enter the employee assistance program, then the employer likely has the right to terminate the employee. However, if this situation arises, it is always recommended to contact legal counsel so all of the circumstances can be properly evaluated before a decision is made.