



Session II – The War on Drugs Redux – Addressing the Opioid Epidemic and Current Marijuana Laws

May 3, 2018

9:00 a.m. – 10:00 a.m.

Speakers

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2018 Dorsey & Whitney Annual Construction Symposium

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Who Is Involved?

- “Everyone shares some of the responsibility and no one has done enough to abate it.”

- Judge Dan Polster, N.D. Ohio.

Pharmacists/Pharmacies	Pharmacy Benefit Managers (PBMs)
Hospitals/Prescribers	Pharmaceutical Manufacturers
Health Insurers	Pharmaceutical Distributors
Trade Organizations	State Government
Accrediting Agencies	Congress, Executive Branch, Judicial Branch, FDA, DEA, SAMHSA, OIG, CMS, DOT, OSHA, CDC, NIH, DOL
Shareholders	State Law Enforcement
Employers	Unions



Recent News Developments

- **October 2017- Trump Administration declared the opioid crisis a “public health emergency” for 90 days; extended by HHS until April 2018.**
- **In 2016 Congress passed the 21st Century Cures Act that granted 1 billion dollars to fight the epidemic; the Comprehensive Addiction and Recovery Act of 2016 that granted 1 billion dollars over 2 years to fight the epidemic; and in 2018 the Bipartisan Budget Agreement that included 6 billion dollars to address opioid and mental health crisis.**
- **State Initiatives (PDMP’s, opioid data collections, tasks forces, good samaritan laws, etc.).**
- **Private Industry Initiatives (refill limits, lock-in programs, prior authorizations, data collection/analysis, guide tools, education, advertising limits (Purdue Pharmaceutical)).**
- **Litigation- the Multi-district Litigation in Ohio and various other state lawsuits.**



Recent Litigation/Investigations

• **Summary of Litigation and Investigations:**

Plaintiffs	Defendants	Claims
Federal Agencies/Whistleblowers	Pharmacies	Controlled Substances Act violations: invalid prescriptions; improper recordkeeping
Federal Agencies/Whistleblowers	Manufacturers/Distributors	Controlled Substances Act violations: failure to report suspicious orders; improper recordkeeping
State Boards	Individual Practitioners/Pharmacists	Scope of practice violations; theft; failure to report; Recordkeeping violations
State Government/ Private Individuals	Practitioners	Criminal and civil wrongful death charges/ med-malpractice lawsuits
State/Local Government/Tribal Governments/Labor Unions	Manufactures/Distributors/ Pharmacy Benefit Managers	False marketing; failure to detect; RICO statutes, consumer protection laws, state laws analogous to the Controlled Substance Act, and common law claims such as public nuisance, negligence, negligent misrepresentation, fraud and unjust enrichment
State/Local Government	Private accrediting agencies	Negligence, gross negligence, reckless and willful conduct; unjust enrichment
Hospitals	Manufacturers	False advertising/marketing, RICO claims
Patients/Families	Hospitals/Physicians	Wrongful Death
Health Insurance Companies	Beneficiaries	ERISA violation claims



Opioids and the Construction Industry

- **Statistics**

- In 2015, approximately 1,000 Midwest construction workers died due to opioid related deaths
 - 380 in Ohio, 165 in Illinois, 160 in Michigan, 92 in Wisconsin
- Approximately 15% of construction workers have a substance use disorder.
 - Midwest Economic Policy Institute

- **U.S. Senate Committee on Health, Education, Labor and Pensions**

- Introduced the 2018 Opioid Response Act
 - Addresses economic and workforce impacts of the opioid crisis.

- **Ohio Chamber of Commerce**

- Created an opioid toolkit for employers
 - <http://ohiochamber.com/opioid-toolkit/>

- **Unions**

- Collective Bargaining Agreements have put limits on opioid prescriptions for members;
- Some offer employee assistance programs;
- April 2018: Teamsters of Ohio and West Virginia have filed a lawsuit against opioid drug manufacturers and PBMs.



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Common Suggestions for Employers Faced with Prescription Drug Addiction in Workforce

- Incorporate substance use disorder and mental health treatment into health care coverage.
- Limit opioid dosages in health plan policies.
- Advocate physical therapy and anti-inflammatory medications to remedy chronic wear-and-tear injuries.
- Educate workers on responsible use of prescription opioids.
- Provide employees with paid sick leave.
- Have drug testing in employee policies (immediate termination for first-time offenders may not be the best approach or permitted under state drug testing in the workplace laws).
- Temporarily assign workers using prescription opioids to low-risk duties.
- Provide funding for substance use disorder treatment programs and workforce development initiatives.
- Train supervisors on the use of Naloxone and, if permitted under state law, have available on job site.



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The Pathway to Recovery Is Cyclical

Image omitted

Source: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2797101/>



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Natural History of Opiate Addiction

California Study of 581 Male Heroin Addicts

Image omitted

Source: Unknown



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Bevilacqua Clinical Pharm Therapeutic April 2009

- Genetic contribution to specific addictions
- **Opioid addiction 60% genetic**

Image omitted



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High Mortality Among Patients with Opioid Use Disorder

Image omitted

Source: Journal of Addiction Medicine



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Mortality Risk During and After Opioid Substitution Treatment

Image omitted

Source: <https://www.researchgate.net/publication/316534185> Mortality risk during and after opioid substitution treatment systematic review and meta-analysis of cohort studies



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Cumulative Retention in Treatment

Image omitted

Source: Kakko et al. 2003



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Annals of Internal Medicine

- Cost-Effectiveness of publicly funded treatment of Opioid use disorder in California

Image omitted



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The Societal Cost of Heroin Use Disorder in the U.S.

Image omitted



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Other benefits of methadone and buprenorphine (besides money and death)

- Improved pregnancy outcomes
- Fewer incarcerations
- Less opioid and other drug use
- Fewer injection needle uses
- Less transmission of HIV/Hep C (likely)
- Back with family, back at work
- *Off all opioids? Off all drugs?*



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Receptor Activation

Image omitted



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Indicator Dashboards
Opioid Dashboard

The purpose of the Opioid Dashboard is to be a one-stop shop for all statewide data related to opioid use, misuse, and overdose death prevention. The collection, analysis, and dissemination of data and information is made possible by the Minnesota Department of Health's Data-Driven Prevention Initiative (DDPI), funded by the Centers for Disease Control and Prevention (CDC). For questions or contributions, contact Kate Erickson at kate.erickson@state.mn.us or 651-201-5483.

To learn more about what is happening statewide visit [Opioid Misuse, Substance Use Disorder, and Overdose Prevention](#).

Key

- Improving
- Stable
- Getting Worse
- Not Available

Increased data transparency and availability

Minnesota launched the Opioid Dashboard as a one-stop shop for opioid related data and information. The Opioid Dashboard includes indicators about opioid overdose death, nonfatal overdose, use, misuse, substance use disorder, prescribing practices, supply, diversion, harm reduction, co-occurring conditions, and social determinants of health. The Opioid Dashboard integrates numerous sources of data and makes it more transparent and available to the entire state. The Opioid Dashboard allows for data-driven decision-making and shares information about upstream actions and promising practices

Americans With Disabilities Act

The Americans With Disabilities Act (“ADA”) prohibits intentional discrimination in employment on the basis of a physical or mental disability. The ADA also requires employers to provide “reasonable accommodation” to otherwise qualified disabled employees, unless doing so would impose an undue hardship. The ADA applies to employers with 15 or more employees.

The definition of disability was recently expanded by the Americans With Disabilities Amendments Act (“ADAAA”). If there is a legitimate, serious, health issue implicated, a disability should generally be presumed.

Illegal Drug Use and Treatment

- **ADA protects individuals who are addicted to drugs, but who are:**
 - No longer using drugs illegally; and
 - Are receiving treatment for drug addiction or who have been rehabilitated successfully.
- **ADA does not protect employee who is currently engaging in “illegal drug use.”**



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Disability-Related Inquiries

When can an employer ask a current employee about a mental health condition?

- When the employee requests reasonable accommodation and the need for accommodation is not obvious.
- When the employer reasonably believes, based on objective evidence:
 - that the employee is unable to perform the essential job functions due to a disability; or
 - that the employee will pose a direct threat to self or others.



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Failure to Accommodate Claims

1. Individual was qualified employee with a disability.
2. Employee/applicant informed or otherwise made employer aware of disability and need for accommodation.
3. Employer failed to engage in interactive process in good faith or reasonably accommodate the employee.



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What Qualifies As a Request for Accommodation?

- **Generally the employee must make the employer aware of a need (i.e., request) for accommodation.**
 - Individuals may use “plain English” and need not mention the ADA, Title VII, or “reasonable accommodation.”
- **However, employers may be “on notice” of open and obvious needs for accommodation, even without an explicit request.**
 - Employers should not ask employees if they are disabled.
- **Employers must follow up with employees who self-identify as disabled/requiring accommodation on OFCCP forms.**



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The Interactive Process – The Key Mechanism

- **“Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations.”**
 - Reasonable accommodation must be effective, in enabling the employee to perform the duties of the position.
 - Interactive process requires “communication and good-faith exploration of possible accommodations” between employer and employee; neither side can delay or obstruct the process.
 - Failure to engage in the interactive process in good faith can result in liability if a reasonable accommodation would have been possible.



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Issues Related to Illegal Drug Use – Misconduct

- **The ADA does not obligate employers to ignore an employee’s misconduct, even when it is attributable to a disability.**
 - *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435 (8th Cir. 2007)
- **Threatening other employees, for example, is not protected under the ADA, even if it stems from a mental health issue.**
 - *Mayo v. PCC Structural, Inc.*, 795 F.3d 941 (9th Cir. 2015)
- **Appropriately managing stress and interacting with others is an essential function of almost all jobs.**



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Practical Guidance

1. Carefully Identify Essential Job Functions

- a) While employers generally can identify what functions of the job are “essential,” (e.g., determine whether on-site attendance is “essential”), employers must do so genuinely and in good faith.
 - For example, past history of allowing employees to work from home indicates attendance may not be “essential”
- b) Make sure that designation of job function as “essential” is job-related, uniformly enforced, and consistent with business necessity
- c) Employers are not required to eliminate or reallocate essential functions.



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Practical Guidance

2. Document accommodation requests and the interactive process.

- If an employee requests accommodations, document the dates of the requests and the dates of any accommodations provided.
- If an unreasonable request is made, the employer should provide a thoughtful statement as to why it is not honoring the request.
- Ensure that the people who need to know about the accommodations are informed.



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Practical Guidance

3. Consider all proposed accommodations carefully

- Resist urge to dismiss proposed accommodations out of hand.
- Meet with the employee before decisions are made regarding accommodations.
- Ask questions and look for alternatives.
 - Informal accommodations in the past?
 - Exceptions to work policies made for other employees?



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Practical Guidance

4. Do not inadvertently penalize the employee requesting accommodation.

- Do not place obligations on the employee that would not exist if the employee was not disabled and requesting accommodation
- If you make an exception to a work policy for similarly situated employees, you will likely need to make the same exception when it is requested as an accommodation



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Questions?



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