Don’t Let Your Workplace Go Up in Smoke: Drug & Alcohol Issues in the Workplace

Presented by:
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The Opioid Crisis
Why This Topic Matters

• There are now nearly 100 deaths a day from opioids, a swath of destruction that runs from New England to the Appalachian foothills.

• That toll could spike to 250 deaths a day if potent synthetic opioids like fentanyl continue to spread rapidly and the waits for treatment continue to stretch weeks in hard-hit states like West Virginia and New Hampshire.
Why Employers Play an Important Role in This Crisis

- Employees may be prescribed opioids to relieve pain following a workplace injury, which could begin a path to dependency.
- Opioid dependency often leads to drowsiness, shifting moods, anxiety, and depression.
- An employee with an opioid addiction may struggle to maintain regular attendance, achieve quality goals, or pose a safety hazard to him or herself and coworkers.
- Addiction to these drugs usually also causes financial issues because the addict is in constant search for a fix. This could lead to cases of workplace theft or embezzlement.
Why Employers Play an Important Role in This Crisis

• Interact with employees every day and every week

• Employers know if there are issues with an employee’s life (e.g., change in behavior, missing work, etc.)

• The employee’s addiction may have begun at work (e.g., taking pain medication for the first time after an injury/workers’ compensation claim)

• Unfortunately, workplaces are often a marketplace for prescription opioids (originally obtained with a prescription).
MSHA Requirements Related to Drug Testing

30 C.F.R. 56/57.20001 requires that:

Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.
Competing Case Law

• Capitol Aggregates, Inc., 8 FMSHRC 430 (ALJ Koutras Mar. 1986)
  • Citation vacated because operator had no knowledge of drug and alcohol use on the property and therefore did not “permit” it.

• East Tennessee Zinc., Co., LLC, 31 FMSHRC 941 (ALJ Melick Aug. 2009)
  • Citation vacated because operator did not “permit” marijuana on property.

• Weathers Crushing, Inc., 22 FMSHRC 1032 (ALJ Bulluck Aug. 2000)
  • Citation upheld on the basis of strict liability even though operator had no knowledge of employee activities.
Other Questions to Consider

30 C.F.R. 56/57.20001
• What exactly is a “narcotic” for purposes of the statute?
• What constitutes “under the influence”? 

21 C.F.R. 1300.01 (Criminal Schedule)
• Lists opium derivatives, coca leaves, and cocaine as “narcotics”. Not marijuana, etc
• Merriam Webster says “a drug that dulls the senses, relieves pain, and induces sleep…”
DOT and Federal Motor Carrier Administration

• Schedule I Drugs Prohibited

• No driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any drug or substance identified as a Schedule I drug.

49 C.F.R. 382.213
Drug Testing and 105(c)(1) of the Mine Act

- Prohibits retaliation for reporting of dangerous conditions for exercising statutory rights under the Act.

- How does Drug Testing Mesh With the Mine Act’s Anti-Retaliation Provision?
Perry v. Phelps Dodge Morenci, Inc.
19 FMSHRC 1964 (Bulluck 1997)

• Suspicion miner was taking crystal meth – drug test requested.
• Miner refused to sign consent form or provide urine sample
• Placed on 5-day suspension
• Negative test 18 ½ hours later
• Terminated, but reinstated after inter-company appeal process
• HOLDING: not discharged for engaging in protected activity

• TAKEAWAY: Company clearly communicated non-compliance with drug-testing policy would subject employee to discipline; other employees treated consistently; miner would have been discharged for refusing to consent to drug testing irrespective of his complaint that driving trucks posed safety hazard.
• Miners refuse to provide urine sample during random drug testing.

• Employer’s Policy:
  Any employee whose duties, whether by job title or by reason of elected office, involve safety, shall be subject to random drug testing…

• ALJ found drug-testing program discriminatorily applied.

• ALJ held policy targeted safety committeemen, but no other rank and file miners, therefore facially discriminatory.
Review Commission Decision

• Found policy was not facially discriminatory as it applied to all safety-related positions, not just safety committeemen.

• However, Commission affirmed ALJ’s finding that the policy was applied discriminatorily.

• Relied on evidence that the two miners were constant targets of discipline and were belittled when they could not produce urine samples, when other miners who had difficulty urinating were accommodated.
RECREATIONAL & MEDICAL MARIJUANA
Each state law varies regarding employer obligations and worker rights.
Marijuana In The Workplace

• Employers do not need to allow use or possession at work
• But what about offsite use and positive drug tests?
• Employers won decisions in California (2008), Oregon (2010), Washington (2011), Montana (2012), Colorado (2015), and New Mexico (2016) – do not have to accommodate medical marijuana use

Barbuto v. Advantage Sales & Marketing
(Massachusetts July 27, 2017)
• Employees might be entitled to accommodations
• Employers must engage in interactive process
Some States Have Passed Laws Protecting Workers

About a dozen states now have laws prohibiting employers from discriminating against someone because they hold a medical-marijuana card, or because of off-duty use.

Example, West Virginia:
Employers may not discriminate against employees based solely on their status as certified to use medical marijuana. Employers may discipline an employee for falling below normally accepted standard of care while under the influence of medical marijuana. Employers may also prohibit employees from performing any duty that would be life-threatening, or that would pose a public health or safety risk, while under the influence of marijuana. Employers are not required to take any action that would violate federal law.
Recreational Marijuana

- Zero-tolerance policies and practices may still be permitted.
- How to handle inquiries from employees?
- What if you want to have a more relaxed standard?
  - Consider *safety-sensitive positions and federal obligations before acting*
“Good people don’t smoke marijuana...” 4/5/16

“It remains a violation of federal law to distribute marijuana throughout any place in the US, whether a state legalizes it or not” 2/27/17
OSHA’s New-ish Drug Testing Rule
(December 1, 2016)

OSHA has stated that a blanket post-accident drug testing policy may be improper.

Drug testing can be conducted post-accident if:

1) the employer has a reasonable basis for concluding that drug or alcohol use could have contributed to the injury or illness;
2) the test will determine if the impairment existed at the time of the accident/injury (if available); or
3) state law allows such testing.
Other Factors Considered

• Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred);

• Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness (e.g., the injured employee); and

• Whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed when the injury or illness occurred
Common Questions

• What if my workers compensation carrier requires drug testing after every accident?

• What if I get a discount from my workers’ compensation insurer if I drug test after every accident?
Exceptions

1) If your state workers’ compensation insurance program allows or mandates post-accident drug testing:

   The Louisiana Rule: “For purposes of this Section, the employer has the right to administer drug and alcohol testing or demand that the employee submit himself to drug and alcohol testing immediately after the alleged job accident.” La. Stat. Ann. § 23:1081(7)(a).
Exceptions

2) Your state workers’ compensation insurance plan gives you a discount on your insurance premiums if you have a drug free workplace policy in place, and your insurer’s program complies with the state requirements:

The Virginia Rule: “Every insurer providing coverage pursuant to this title shall provide a premium discount of up to five percent to every employer instituting and maintaining a drug-free workplace program satisfying such criteria as each insurer may establish.” Va. Code Ann. § 65.2-813.2.
Drug Testing – Enforcing Rule?

In October 2018, OSHA issued guidance that appears to roll back its December 2016 drug testing rule, or DOES IT? Now, the following types of drug-testing should be permissible:

• Random drug testing.
• Drug testing unrelated to the reporting of a work-related injury or illness.
• Drug testing under a state workers’ compensation law.
• Drug testing under other federal law, such as a U.S. Department of Transportation rule.
• Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees. If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries.
What About a Policy Relating to Property Damage?

• The Company will drug test if there is $250 in property damage.
• The Company will drug test if there is $1,000 in property damage.
• The Company will drug test if there is substantial property damage.
Best Practices
Elements of an Effective Drug Testing Policy

• At a minimum, a good drug and alcohol policy should contain the following provisions:
  • The policy should inform employees about why and when testing may occur, and what may happen if the test is failed.
  • The policy should clearly define what substances are prohibited. The definition of prohibited substances should include illegal drugs and legal drugs that are abused or used without a prescription. Working while under the influence of drugs or alcohol should be prohibited.
  • The policy should prohibit possession, manufacture, distribution, dispensation, transfer, and sale of prohibited substances while on company premises, on company time, or while in company vehicles.
  • The policy should address the failure to cooperate in company investigations of substance abuse.
  • The policy should advise the employees that the employer reserves the right to search lockers, desks, and other company property, and any personal property or personal vehicles on company premises. An employer may want to reserve the right to conduct personal searches, but these searches entail legal risks and should be conducted with caution.
Consider Enhanced Monitoring of Workers’ Compensation Claims

• Many workers’ compensation carriers (and even employers) often seek to minimize the potential impact of workers’ compensation claims by finding the most inexpensive treatment option possible.

• Carriers may be more inclined to pay for opioid prescriptions to “treat” an on-the-job injury versus considering more aggressive treatment options (i.e., steroid injections, surgical intervention, etc.) in the first instance (even when medical providers recommend more aggressive treatment).

• As such, there can be a higher incident of dependency – and increased tolerance levels in the event of a future surgery – simply in the name of reducing the financial impact of a workers’ compensation claim. Employers should monitor these trends, and even their medical providers, and evaluate the care provided to injured workers.
Final Questions?

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Thank You

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