

Don't Let Your Company Go Up In Smoke: Testing For Opioids and Cannabis in the Workplace



Presented by:

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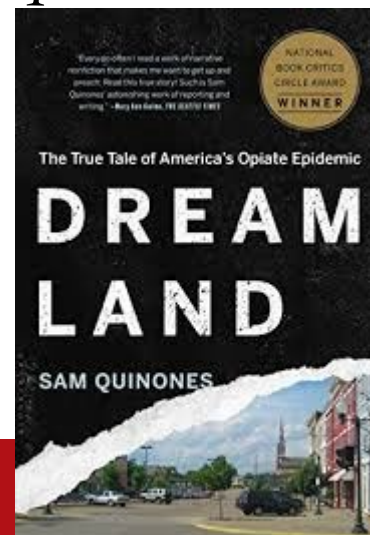
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The Opioid Crisis



Why This Topic Matters

- As many as 50,000 Americans may have died last year alone of opioid-related overdose.
- A recent study showed 2 million Americans had a substance abuse disorder involving prescription pain relievers, while drug overdose is now the leading cause of death of Americans under the age of 50.
- Abuse of the drug has had tragic consequences across the nation, ravaging communities and tearing apart families.
- Sam Quinones, Dreamland



The Future Doesn't Look Good

- 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 the Crisis Occurred

- Opioids may be found in any medicine cabinet.
- This group of drugs includes the regularly-prescribed painkillers oxycodone, hydrocodone, morphine, and fentanyl.
- These drugs interact with opioid receptors on nerve centers in the brain to create a pleasurable experience and relieve pain.
- Due to the relief they experience, consumers of these drugs often become dependent upon them.
- Once addicted, individuals may turn to heroin, which, although illegal, is often a cheaper and more accessible opioid. In fact, approximately four in five heroin addicts developed their addiction after taking prescription painkillers.

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

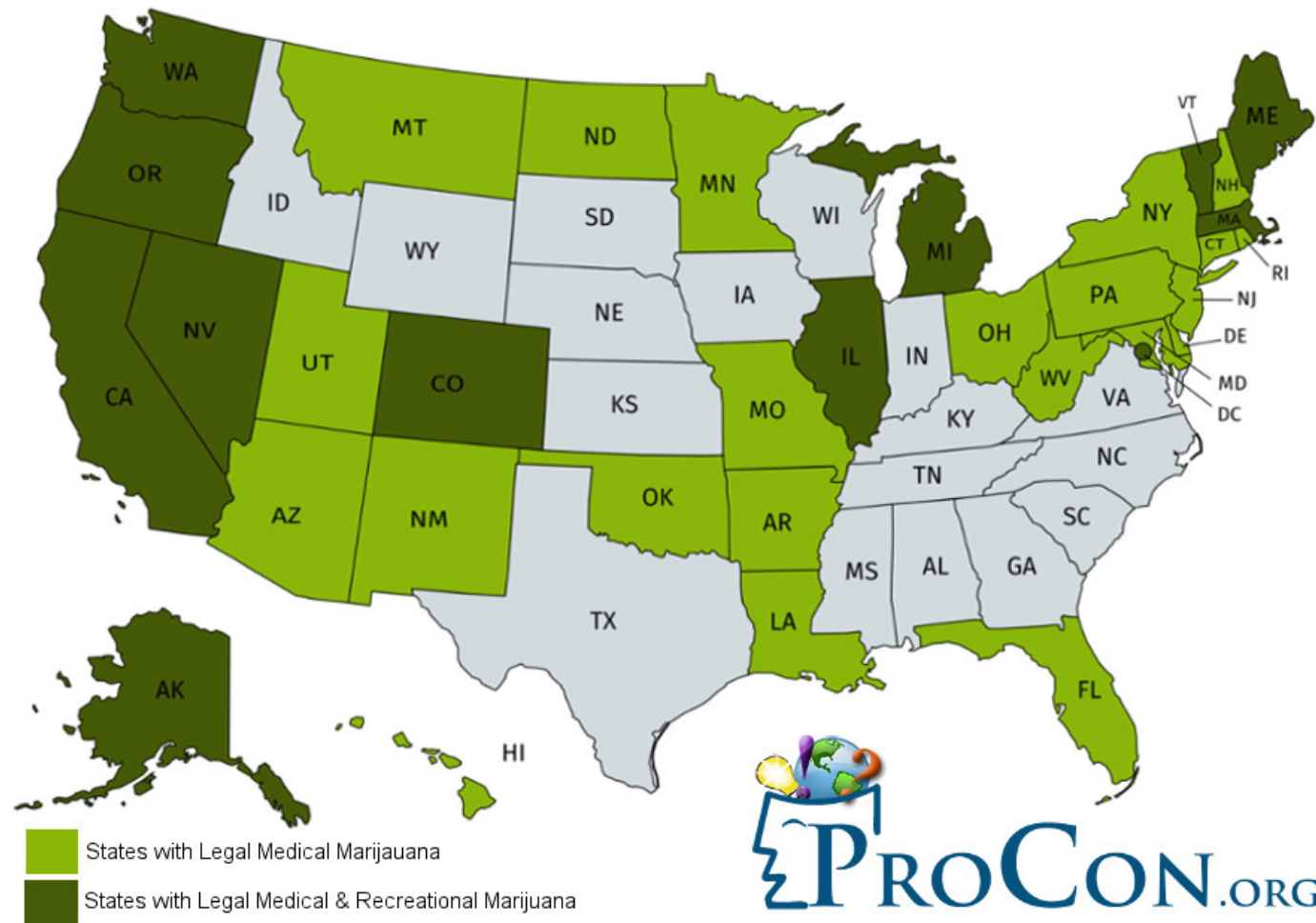


- Interact with employees every day and every week
- Employers know if there are issues with an employee's life (e.g., change in behavior, missing work, etc.)
- The employee's addiction may have begun at work (e.g., taking pain medication for the first time after an injury/workers' compensation claim)
- Unfortunately, workplaces are often a marketplace for prescription opioids (originally obtained with a prescription).



RECREATIONAL & MEDICAL MARIJUANA

33 Legal Medical Marijuana States & DC
11 Legal Recreational Marijuana States & DC



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***



Recreational Marijuana

- Eleven states and D.C. now permit recreational marijuana (Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington).
- 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*

Sessions
Memo
1/4/18



Drug Testing: A Case Study

- In February of 2019, an employee came back from lay off and was not the same person he was six weeks earlier.
- Other employees began reporting unusual behavior in March. Sleeping at breaks or at lunch. Getting angry over nothing. Acting paranoid. Really excited and talking fast one minute and really slow the next. Late for work.
- Coworkers suspected he was potentially using drugs on the job. The Marina does not have a “Drug Testing Policy”.

Drug Testing: A Case Study

- Manager confronted the employee in early April for the first time. Employee denied using any substances of any kind. He claimed to be having relationship issues with his wife and no sleep due to a baby less than a year old.
- The other employees continued to report unusual behavior. Continue to mention he was “Tweaking”, meaning using drugs. Manager desired to help the long time employee and continued to speak with him almost daily and offered him treatment. Manager assured him his job would be waiting for him if he decided to get help. Employee continued to deny any substance use of any kind.

Drug Testing: A Case Study

- In May 2019, manager called an all employee meeting. At this point the other employees are not speaking with him. They are not including him in any non-work related activity, like going out to lunch. He begins taking breaks and lunch a different times
- Before the meeting, manager tells the employee the purpose of the meeting. Manager explained that he needs to let the other coworkers know what he is going through so they will understand his problem is not drug related, but personal in nature.
- At the meeting, Manager asked the employee to face the group. He broke down. He asked for forgiveness and understanding. He never admitted any substance abuse. All of the employees were behind him. They all wanted him to succeed. They have all been together for a long time.

Drug Testing: A Case Study

- Things got better for awhile.
- In September 2019, the other employees are reporting “Tweaking” behavior again.
- Manager confronted the employee again. He still denied any substance abuse. Manager offered him the option of seeking treatment or counseling again. He declines.
- Managers calls another all employee meeting. The employee broke down again, but this time, the other employees are not as forgiving. They do not believe him when he says he is not using drugs.

Drug Testing: A Case Study

- In Mid September, the employee was terminated. Manager did not reference any drug use as reason for letting him go. Manager found employee was falsely documenting his “Portable Pump Out Tips”. This employee was responsible for the portable pump out service each week and was paid \$2.25 for each boat he pumped out. The system was designed for him to cross off boats on his list that he pumped out and circle boats that did not need to be pumped out. We leave a note on each boat each week and ask the boater to remove the note on arrival. If the note is still there, that boat does not get pumped out. He claimed he pumped out every boat every week. Manager documented the boats that did not need to be pumped out each week due to suspicion of employee behavior.

Drug Testing: A Case Study

- Marina did not press any charges for theft and did not challenge the unemployment claim.
- The following day, Manager told the other employees about the termination. Manager watched as a collective weight lifted off all their shoulders. It was at this point that the manager realized an attempt to save one employee had been really hurting the rest of the team.

Case Study (Cont'd)

1. What did the manger do correctly?
2. What did the manager do incorrectly?
3. How would a substance abuse policy benefit the manager?

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.

Create an Environment Where Employees Are More Likely to Disclose Opioid-Related Issues

- Consider encouraging employees to tell you when they have a problem or suspect that another employee may have an issue with prescription painkillers.
- This starts by creating a workplace environment conducive to the free exchange of information.
- This is an evolving area of human resources and business management; you must balance the concern of being viewed as an employer who attempts to invade employees' private home life versus later dealing with an employee who quits, overdoses, or creates a safety concern due to an addiction you may have ignored.
- Also helps with workplace violence issues (e.g., restraining order)

Create an Environment Where Employees Are More Likely to Disclose Opioid-Related Issues

- The key to preventing opioid addiction is educating employees on the potential harmful impacts of abusing painkillers.
- If you become aware of an employee's potential abuse of opioids, attempt to approach the employee in a cordial, non-confrontational manner to offer assistance with this condition.
- Pay special attention to employees returning to work after an injury.
- Consult your counsel on navigating any potential ADA or HIPAA issues. Addressing these issues early may help prevent a larger issue later.

Reconsider Zero Tolerance Drug Testing Failure Policies

- An employee who loses his or her job because they fail a drug test may fall further into the depression often caused by opioid use.
- Unemployment may lead to more drastic outcomes for the employee, including intentional or accidental overdose.
- In order to avoid such a tragedy, employers should revisit their zero tolerance drug testing policy.

Reconsider Zero Tolerance Drug Testing Failure Policies

- When modifying their drug testing policy, and in light of the opioid epidemic, employers should think seriously about *removing any provision requiring the automatic termination of the employee after the first positive drug test.*
- Instead, employers can amend the policy to include required counseling for employees who fail drug tests. This not only gives the employee a second chance to become “clean” and attempt to end their dependency, it also provides the employee with an opportunity to obtain much needed education and counseling on their condition. The permitted use of prescription drug use while working at the worksite must also be clearly explained in the policy.

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.

Revisit and Enhance Drug Counseling Programs

- Now is the time for employers to evaluate and enhance their drug counseling programs.
- Does your insurance provider offer drug counseling to employees? Is there an extra cost for this service? Are employees aware of this amenity?
- Providing employees robust counseling on opioid use and addiction may prevent further use from occurring.

Final Questions?



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Thank You



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