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by Nancy N. Delogu, Esq.

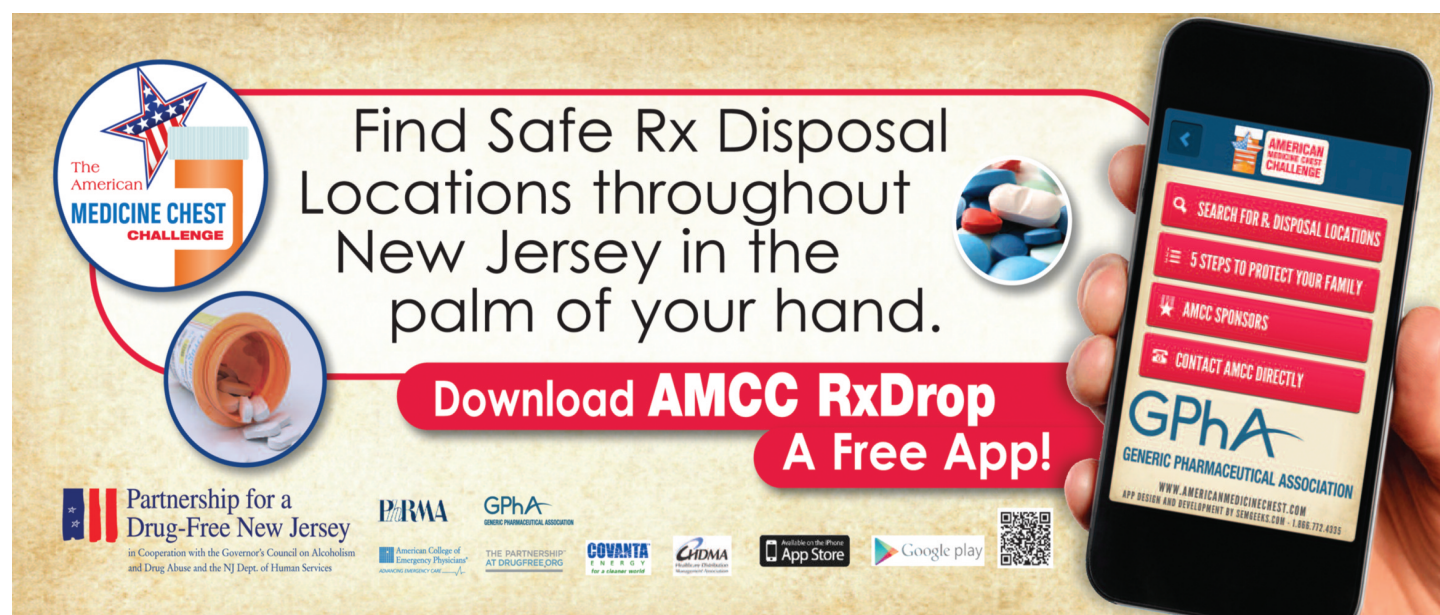
How Prescription Drug Abuse Became a Workplace Problem... and what Employers Can Do About It

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How Prescription Drug Abuse Became a Workplace Problem... and what Employers Can Do About It

by Nancy N. Delogu, Esq.

According to the White House's Office of National Drug Control Policy, the abuse of prescription drugs has soared in recent years, coming in second only to marijuana use as the nation's most commonly abused illegal drug.¹ Nearly one in three individuals who reported they started abusing drugs in 2009 said they began by misusing a prescription drug. In 2010, physicians in the United States wrote more than 257 million prescriptions for potentially addicting opiate pain medications, a huge increase over the numbers prescribed 10 years ago.² How this came to be apparently can be attributed to a complex group of disparate factors, including America's willingness to believe that if a doctor prescribed the drug, it must be "safe" and unlikely to lead to abuse or dependence.

The increased abuse of prescription painkillers has led to dramatic and negative outcomes. Startlingly, since 2008 more Americans have died because of drugs than have been killed in traffic accidents.³ Deaths caused by pain medications alone have increased by 400 percent, and currently cause more deaths than overdoses of cocaine and heroin combined. Moreover, visits to hospitals related to prescription medication adverse effects have increased 500 percent in a decade.⁴

Of course, no one wants people who suffer pain to go without relief, and this may explain some of the increase in prescriptions for pain medications. Intriguingly, however, data being evaluated by some workers' compensation insurers suggests that prescription pain medications may actually slow the rate of healing. For that reason, the medical community and especially the insurance industry is taking a closer look at the uses of pain medications in treating medical conditions. If the use of narcotic medications in fact has



the effect of slowing recovery and the individual's return to employment, and moreover carries the risk of physical and psychological dependence, medical professionals may back away from prescribing these medications as readily, or may monitor their use for signs of dependence more carefully.

The *New York Times* reported in June 2012 that workplace insurers (i.e., workers' compensation program underwriters) spend an estimated \$1.4 billion on narcotic painkillers (opiates or opioids) annually.⁵ Insofar as those medications help the individuals they are treating, well and good. But these insurers, who track patient diagnoses and their outcomes, have also found that workers who received high doses of these pain medicines often take far longer to recover than those who did not receive those medications. For example, a 2008 report by the California Workers Compensation Institute found that workers who took more medicine took three times longer to return to work than those with similar injuries who were prescribed lower doses.⁶ The Times also reported that Accident Fund Holdings, a multi-

(Continued on next page)



state insurer, concluded that the overall cost to treat a workplace injury is nine times higher than the cost to treat a similar injury when a strong narcotic like OxyContin is prescribed. According to the Office of National Drug Control Policy, parents, youth, patients, and healthcare providers need to be educated about the dangers of prescription drug abuse, including the possibility that even anticipated short-term prescriptions can lead to dependence.⁷

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Very recently, a panel of experts recommended that the U.S. Food and Drug Administration adopt stricter controls on prescriptions containing the painkiller hydrocodone (for example, Vicodin), restrictions similar to those currently in place for medication containing oxycodone, another narcotic pain reliever. The medical community is, by all accounts, divided in its concerns that access to these drugs be limited, while ensuring that individuals who experience chronic pain can obtain some relief.

In the meantime, employers are struggling to identify and respond to the use and abuse of pain medications in their workplaces while workers prescribed those medications object to having to defend their use of prescribed medications to their employers. Setting aside the use of pain medications prescribed to relieve workplace injuries, it is impossible to ignore the fact that vast numbers of Americans presently abuse controlled substances that they may have once obtained legally. What can an employer do to minimize the substance abuse that is occurring in their own workplaces?

Simply barring the use of controlled substances (which include nearly all medications available only by prescription in the United States) overreaches and is surely counterproductive, since many prescribed medications can be used safely

and can improve an individual's health without compromising safety. The latest numbers on prescription drug abuse make it clear, however, that failing to address the possibility of such abuse means ignoring a significant and growing proportion of workplace drug problems. There are steps a workplace may take to reduce the risk of this harm.

First, if an employer is testing only for the five classes of drugs targeted by the federal government for testing (marijuana, amphetamines, opiates, cocaine, and PCP), commonly called a "5-panel test," an employer could choose to expand its testing program to include commonly abused prescription medications. Although employees may legally obtain prescriptions for drugs that will cause a positive test on all but one of the 5 types of tests described above, those tests are quite limited. For the most part, the tests are useful in detecting the abuse of both methamphetamine and the most commonly abused amphetamine drugs. They are not, however, particularly good at identifying narcotic painkiller abuse, as the federal standards admittedly are focused on identifying users of heroin and other "street drugs."

Employers that do not test for the abuse of prescribed medications as part of their workplace testing programs may wish to consider expanding their testing regimen. The use of a prescription medication by a person other than for whom it was prescribed is illegal, as may be the misuse of prescribed medication, and therefore, policies against such abuses are a legitimate focus of workplace policies. Changes to the testing process may make the abuse of opiate-based painkillers easier to identify. A five-panel test that includes opiates is unlikely to be useful in identifying individuals who abuse prescription painkillers, if focused on identifying only heroin abuse. Five-panel tests also do not test at all for individuals who abuse benzodiazepines (the prescription drugs Valium and Xanax are well-known benzodiazepines. Nor do such tests seek information about the use of barbiturates (these may be used to treat pain or as prescription sleep aids).

Employers also should educate themselves on the risks of prescription drug abuse, which may be even less "visible" and difficult to identify than the abuse of other "illegal" drugs like marijuana and PCP. Stories of employees "sharing" prescription drugs at work and purchasing "leftover" prescriptions from their co-workers are not hard to find. Internet "chat groups" offer advice to drug abusers on how to get high even using reformulated versions of popular drugs of abuse like Oxycontin. More importantly, an employer can commu-



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nicate to workers its concern about their use of medications that may impair their ability to work safely, and allow them time away from work when necessary to ensure that they do not come to work impaired. For workplaces where safety is a priority, safety education programs that educate workers on the risks of prescription medication abuse and policies addressing the abuse of these drugs should be part of the safety culture.

To be sure, most employees using prescription medications will have obtained those drugs lawfully, pursuant to a valid prescription. Some of those employees may be impaired while using those prescriptions. This impairment poses a different challenge for employers. In general, laws like the Americans with Disabilities Act and the New Jersey Law Against Discrimination protect employee medical privacy by limiting when employers can inquire about an individual's lawful use of prescribed medication or prohibiting the individual's use of that medication while working. Employers are, however, permitted to ensure that individuals who use prescription medications are able to work safely, without posing a direct threat to themselves or co-workers.

Employers can require employees to consult with their own physicians and to report any work restrictions that should be observed while the employee uses the medication.

An employee's use of a medication that may impair workplace safety should trigger an individualized assessment of how that individual's job duties and risks, medical condition, and treatment plan intersect to determine whether that individual should be barred from working in a safety-sensitive role while using the medication. If an employee doesn't pose a safety risk while using a medication, but appears impaired or otherwise unable to work, the employer must approach the situation from both a performance perspective and with an eye to offering reasonable accommodations of health conditions. Understanding the interrelation between employee health and safety and the laws protecting employees from discrimination on the basis of their health

¹ Epidemic: Responding to America's Prescription Drug Abuse Crisis, Office of National Drug Control Policy 2011

² Id.

³ "F.D.A. Likely to Add Limits on Painkillers," by Sabrina Tavernise, *The New York Times*, January 26, 2013.

⁴ "Prescription Painkiller Overdoses in the U.S.," CDC Vital Signs, U.S. Centers for Disease Control, November 2011.

⁵ "Pain Pills Add Costs and Delays to Job Injuries," by Barry Meier, *The New York Times*, June 2, 2012.

⁶ Id.

⁷ Id. at 1

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About the Author

Nancy Delogu is the managing shareholder in Littler Mendelson, P.C.'s Washington, D.C. office. In addition to counseling employers on substance abuse prevention and disability discrimination laws, she helps them with strategic counsel and defense of employment law disputes.

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