

OSC 12
Ohio Safety Congress & Expo

WELL AT HOME. SAFE AT WORK.

181 Prescription Drugs in the Workplace and the Americans with Disabilities Act (ADA)

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Ohio Bureau of Workers' Compensation

Prescription Drugs in the Workplace and the Americans with Disabilities Act



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Prescription drug use in America

- Nearly 50% of Americans take at least one prescription drug daily
- Over 30% of Americans report taking more than one prescription drug



Source: U.S. Prescription Drug Data for 2007-2008, National Center for Health Statistics, Centers for Disease Control (CDC)

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In 2009, 16 million Americans — age 12 and older — had taken a prescription pain reliever, tranquilizer, stimulant, or sedative for nonmedical purposes.



Source: National Survey on Drug Use and Health (Substance Abuse and Mental Health Administration Web Site)

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In 2009, of the 2.1 million drug abuse visits to emergency rooms, 27.1% involved nonmedical use of pharmaceuticals (i.e., prescription or OTC medications or dietary supplements).



Source: Drug Abuse Warning Network (DAWN), a public health surveillance system managed by the Substance Abuse and Mental Health Services Administration (SAMHSA), U.S. Department of Health and Human Services (HHS).

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In February 2012, former Ohio doctor Paul Volkman was sentenced to four consecutive life sentences by a federal court judge for running a pain clinic that actually was a "pill mill."



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Volkman prescribed millions of powerful pain killers to patients in Scioto County from 2003 to 2006.

12 deaths were associated with his cash-only pill business.

Clients lined up at his clinic from Ohio, West Virginia, and Kentucky.



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In 2011, Ohio Attorney General Mike DeWine launched an aggressive effort to prosecute pill mills in Ohio, especially in Scioto, Gallia, and Ashtabula Counties, and pursue license revocation for doctors who over-prescribed prescription drugs.



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The Columbus Dispatch

On February 26, 2012, the Columbus Dispatch published an article about felony drug arrests along Rt. 33 between Columbus and southeastern Ohio known as "Heroin Highway."

- Heroin is a cheaper and easier-to-find substitute for prescription painkillers which are increasing in price due to Ohio's crackdown on "pill mills."

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In February 2012, the DEA accused Cardinal Health of selling excessive amounts of oxycodone to four Florida pharmacies, including two CVS pharmacies.

- DEA immediately suspended Cardinal's license to distribute controlled substances from its Lakeland, FL distribution hub, which serves 4 states.
- The pharmacies' customers included groups of young people who were paying cash to have prescriptions for oxycodone filled.

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What is prescription drug abuse?

1. Taking an excess of the prescribed amount.
2. Taking prescription drugs in combination with other substances contrary to instructions.
3. Performing activities while taking the drugs that are expressly prohibited by the prescription (such as driving or operating dangerous machinery).



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Commonly abused prescription drugs:

- **Opioids - for pain:**
 - hydrocodone (Vicodin®)
 - oxycodone (Percocet®)
 - propoxyphene (Darvon®)
 - hydromorphone (Dilaudid®)
 - meperidine (Demerol®)
 - diphenoxylate (Lomotil®)
 - Fentanyl patches



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Commonly abused prescription drugs:

- **Central nervous system depressants - for anxiety and sleep disorders:**
 - barbiturates such as pentobarbital sodium (Nembutal®)
 - benzodiazepines such as diazepam (Valium®) and alprazolam (Xanax®)



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Commonly abused prescription drugs:

- **Stimulants - for ADHD and narcolepsy:**
 - dextroamphetamine (Dexedrine®)
 - methylphenidate (Ritalin® and Concerta®)
 - amphetamines (Adderall®)



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Nonprescription over-the-counter drugs are also abused, such as Dextromethorphan (DXM) or cough syrup.

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The Americans with Disabilities Act (ADA)

- The ADA is now known as the ADA Amendments Act of 2008 (ADAAA).
- The ADAAA expanded the definition of a “disability,” effective January 1, 2009.



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ADAAA generally limits an employer’s ability to make disability-related inquiries or require medical examinations at three stages:

- 1. Pre-offer:**
No disability-related inquiries even if they are related to the job.



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- 2. Post-offer (after an employee has been given a conditional job offer but before beginning work):**
Potential employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as the employer does so for all entering employees in the same job category.



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3. During employment (after an employee begins working):

Employer may make disability-related inquiries and require medical examinations only if they are:

1. "Job-related" and
2. "Consistent with business necessity."
 - Ensuring a safe and secure workplace satisfies this requirement.



Is it a disability-related inquiry to ask what prescription drugs an employee is taking?

1. Yes, it is a disability-related inquiry to:
 - a. Ask an employee whether s/he currently is taking any prescription drugs or medications.
 - b. Ask an employee whether s/he has taken any such drugs or medications in the past.
 - c. Monitor an employee's taking of such drugs or medications.



This is distinguished from asking about illegal drug use or whether an employee is under the influence of alcohol while at work, which is not a disability-related inquiry.



What are permissible disability-related inquiries of current employees that are "job related and consistent with business necessity"?



Employer has a "reasonable belief" that:

- a. An employee's ability to perform essential job functions is impaired by a medical condition.
- b. An employee will pose a direct threat to health or safety due to a medical condition that cannot be eliminated or reduced by a reasonable accommodation.



When does an employer have a "reasonable belief" that the prescription drug use will impair the employee's ability to perform the essential functions of his/her job or pose a direct threat to others?

- a. Following an employee's request for a reasonable accommodation for the medical condition related to the prescription drug
- b. After an employer observes symptoms that impair an employee's ability to perform his/her job duties safely
- c. After receiving reliable information that an employee has a medical condition or takes a prescription drug that would pose a direct threat or impair his/her ability to perform his job duties

May an employer ask all employees what prescription drugs they are taking?

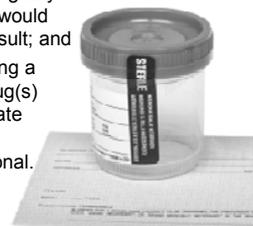
- a. Generally no, because it is not job related or consistent with business necessity.
- b. In very limited circumstances, yes. Jobs affecting public safety—e.g. transportation workers.
- c. An employer may, however, ask whether an employee is engaged in the unlawful use (as distinguished from lawful use) of prescription drugs.



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Drug Testing

- 1. An employer may test for prescription drugs as part of a drug testing policy.
- 2. After a positive test, an employer may ask:
 - If the employee is taking any prescription drug that would explain the positive result; and
 - If the employee is taking a prescription for the drug(s) detected per a legitimate prescription written by a medical professional.



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An employer's drug policy violates the ADAAA if it prohibits the use of all legally prescribed controlled substances without a determination that such prohibition is job-related and consistent with business necessity.



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Unionized workplaces

- Employers should always review the relevant collective bargaining agreements to determine what they can/cannot do with regard to inquiries about prescription drug use and drug testing.



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Prescription drug use policies:

- 1. Often prescription drug use policies are part of a larger Drug Free Workplace Policy.
- 2. Many policies require employees who take prescription drugs — that may adversely affect judgment, coordination, or the ability to perform assigned job duties — to notify their supervisors or a designated human resources official.
 - The inquiry must be limited to drugs that raise legitimate safety concerns, not all prescription or over-the-counter drugs.



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After a disclosure of prescription drug use, supervisors or human resources can either allow the employee to remain at work or make other arrangements.

- These determinations must be made on an *individualized* basis, looking at the employee's essential job functions and the particular prescription drug at issue.



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Blanket prohibitions on particular drugs are not permissible.

- Categorical exclusions violate the requirement that the direct threat to health or safety be examined on an *individualized* case-by-case basis.



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What should an employer do after an employee discloses prescription drug use that may — or may not — affect the employee's job performance?

- Request that the employee provide a medical certification from his/her doctor regarding the effect of the medication on his/her ability to perform his/her essential job functions safely.
- The doctor should be provided with a list of the essential job functions.



If there are side-effects, the employer can have a medical examination performed by a doctor of its choice to make an assessment regarding how the employee's prescription drug use will affect the employee's ability to function effectively and safely in his or her job.



How should an employer conduct the required individualized assessment of the threat to safety?

1. Generalizations based on generic listed side effects of the medication cannot be drawn. Side effects can affect different individuals differently—in both severity and effect.
 - The employer must carefully assess what side effects occur; to what extent; what symptoms are presented; and in what situations they arise.



The risk must be “significant”—more than the safety risk posed by an employee who is not taking a prescription drug.

- The risk analysis should be focused on the probability that the safety risk will occur—and not the mere remote possibility of harm.



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Interesting cases and factual scenarios

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Federal transportation agencies recently adjusted the policy to permit exceptions to their once blanket prohibition on medical certifications for insulin-dependent diabetics who are commercial drivers.

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***Kosmicki v. Burlington Northern & Santa Fe Railway Co.*, 545 F.3d 649 (8th Cir. 2008).**

- Employee who worked as a train conductor failed a simulator test given to him to test his performance.
- To explain the test result, the employee disclosed that he took three drugs that caused sleepiness and dizziness.
- The employer's policy stated that an employee could not take prescription drugs that affected cognitive abilities.

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- The employee also failed to disclose these prescription drugs on a medical screening questionnaire — he initially answered "yes" and then crossed it out.
- Employee was terminated and sued under the ADA.
- The employer prevailed because there was no evidence that the termination was for any reason other than the two violations of the employer's policy.

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***Bates v. Dura Automotive Systems, Inc.*, 650 F. Supp. 2d 754 (M.D. Tenn. 2009).**

- The employer fired employees who tested positive for pain and anxiety drugs, including Xanax, Oxycodone, and Lortab, even though the employees were taking the drugs pursuant to a valid prescription and under doctors' supervision.
- The employees worked in a manufacturing environment assembling glass windows for cars and often operated machinery. The employer instituted the policy in response to an increase in OSHA recordable incidents.

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- Employer's drug testing policy included some substances found in prescription drugs, which it believed posed a safety risk because of operating heavy machinery or impaired mental alertness.
- Employees testing positive for the substances who had a valid prescription were given 30 days to transition to drugs without the same safety risks or to stop taking the medication altogether.
- After 30 days, if the employees failed to test negative on a follow up drug test, they were placed on indefinite layoff and terminated after 6 months.



The employer alleged that the drugs were an automatic safety risk in the workplace because of the side effect of drowsiness. Even if the employees submitted doctor's notes stating that the prescription drug did not cause any adverse side effects that would affect their work, they were still prohibited from taking the drug based on the *stated* side effects and warnings.



The trial court refused to dismiss the case, holding that the policy possibly overreached because it did not provide for *individualized* review of the safety risks posed by each employee's use of the prescription drug.



- Ultimately, the Sixth Circuit held that the individual employees were not "disabled" under the ADA, declining to offer an opinion on the validity of the policy.
- It is important to note that under the ADAAA's expanded the definition of "disabled," this case may have been decided differently.



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