

Combating the Opioid Crisis from Within

Labor & Employment Law Update

By Suzannah Wilson Overholt on December 27, 2019

The average life expectancy in the U.S. has declined for three consecutive years. The Centers for Disease Control and Prevention (CDC) links that decline to three factors: the rise in drug overdoses, an increase in liver disease, and a rise in suicide rates. More than 2 million Americans from all walks of life suffer from an opioid use disorder (OUD), and about two-thirds of those people are in the workforce. This has a tremendous financial impact on employers: In 2016, U.S. large employers covered \$2.6 billion on treatment for OUD and overdose, up from \$0.3 billion in 2004.

OUD and substance use disorder (SUD) more generally have a negative impact on the workplace through increased absenteeism, impaired job performance, and a decrease in the eligible workforce either due to candidates failing pre-employment drug screenings or fewer candidates applying as a result of their dependency. Employers can combat these issues by increasing accessibility to various treatments through their health plans and adopting policies allowing time for necessary treatment.

Studies indicate that the majority of employees would not seek help for a prescription opioid problem due to perceived stigma in the workplace. Educating employees about the risks and signs of opioid use disorder and taking steps to minimize stigma surrounding OUD/SUD can help address – and reduce – the problem before it starts. This can be accomplished by discussing the prevalence of OUD/SUD in America across all races, genders and socio-economic groups and recognizing individuals who have overcome the disease.

If an employee does come forward to seek help with OUD or SUD, understanding the interplay of leave policies is important. As usual, the FMLA and ADA play the leading role here. Under both, there is a distinction between an employee's ongoing substance use (not protected) and seeking treatment for that use (protected).

Under the FMLA, the employee has to be in treatment or scheduled to start treatment for such time to qualify as FMLA covered leave. The addiction to be treated must constitute a serious health condition. The employee has to be referred for rehabilitation by a health care provider and the rehabilitation needs to be provided by a health care provider or by a provider of health care services, as those terms are defined by the FMLA.

The ADA provides that a person who has successfully completed a supervised drug or alcohol rehabilitation program or is participating in a supervised rehabilitation program and who is no longer engaging in substance use may be deemed a qualified individual with a disability.

Employers may also want to evaluate their zero tolerance policies related to drug tests and drug and alcohol related conduct. Rather than require dismissal for a failed drug test or inappropriate behavior linked to OUD/SUD, a revised policy could refer the employee for treatment.

Any crisis requires a response plan to overcome and move beyond it. The opioid crisis is no different and, like most other issues, is best addressed through education and the consistent implementation of appropriate policies and procedures.

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