

Opioids and the Workplace: Legal and Psychological Perspectives



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Woodruff Arts Center
Rich Theatre

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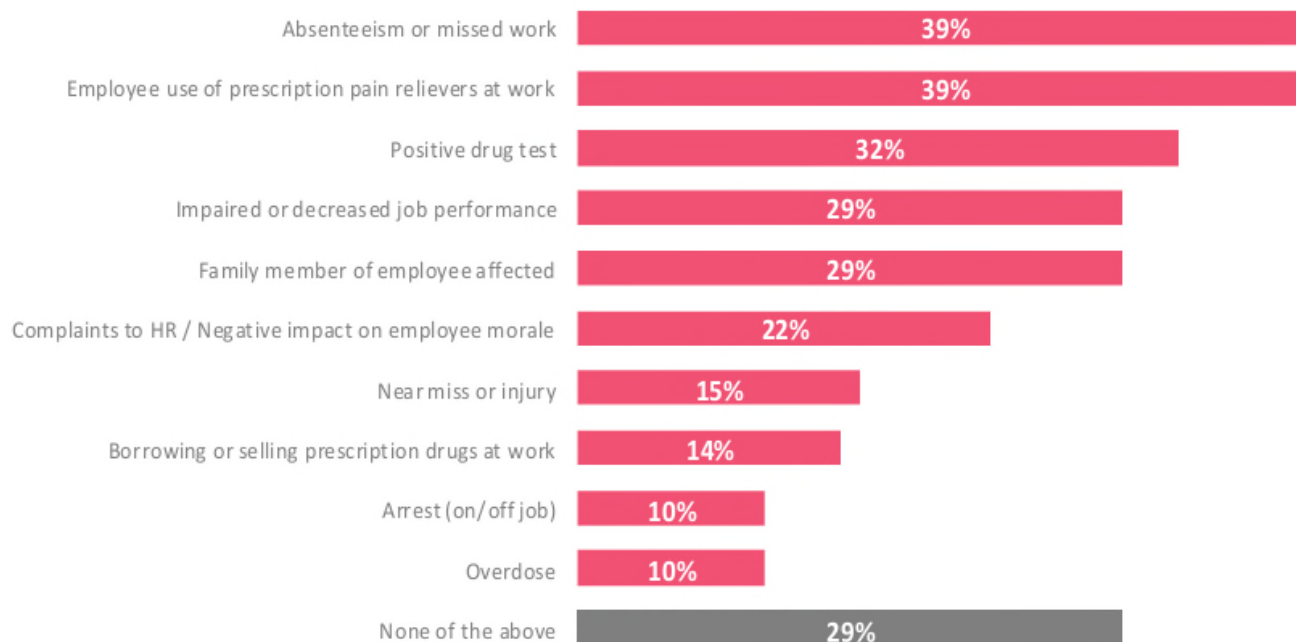
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Topics to Be Covered Today:

- The history of opioid use in treating chronic non-cancer pain and the emergence of the “opioid epidemic”
- The distinction between a bona fide Opioid Use Disorder and physiological dependence
- How to spot the “warning signs” of opioid misuse (i.e., *reasonable suspicion*)
- The legal landscape that applies to opioid users in the workplace
- Drug testing in the workplace—scope and legality
- Development of workplace drug testing policy

7 in 10 Employers Have Felt the Effects of Prescription Drug Use

Incidents Experienced Due To Prescription Drug Usage ...



Large Employers' 2018 Health Care Strategy and Plan Design Survey

(conducted by The National Business Group on Health)

- 80 percent of employers are concerned about inappropriate use of opioids
- 30 percent have restrictions in place for prescription opioids
- 21 percent have programs in place to manage prescription opioid use
 - Working with pharmacy benefit managers to limit quantities, formularies and/or coverage of opioids
 - Allowing coverage for alternative approaches to pain management
 - Workplace training to improve awareness
 - Access to resources such as an Employee Assistance Program (EAP).

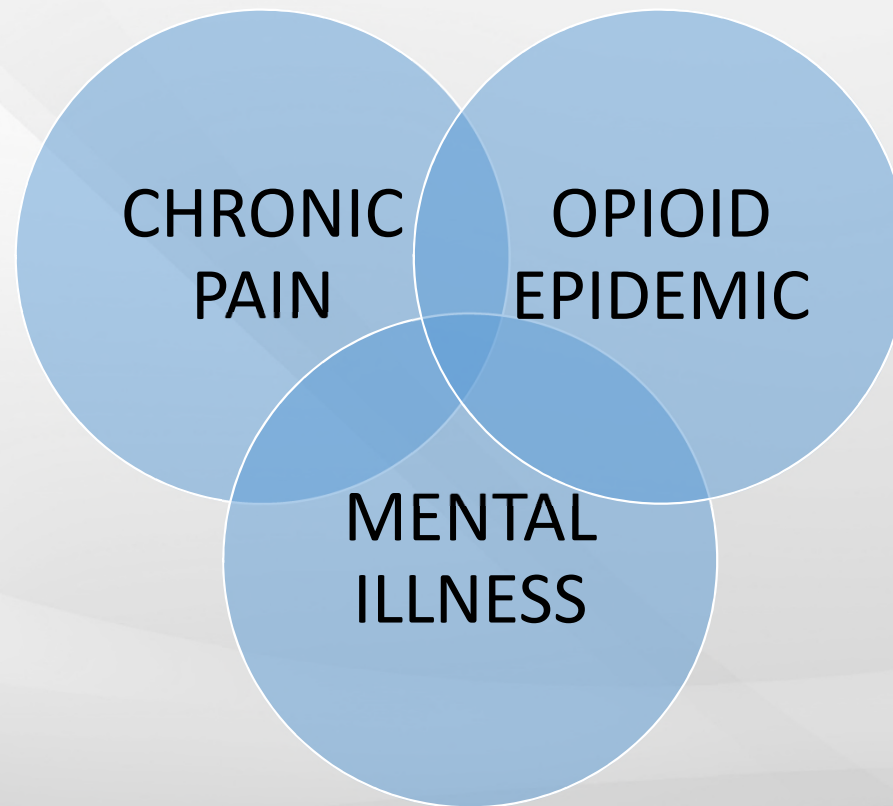
What are Opioids?

- A class of drugs typically prescribed for the **relief of pain**; however, the drugs also have **anxiolytic** qualities.
- *Opiates* refer to the drugs derived from naturally-occurring opium, such as morphine
- *Opioids* refer to synthetically produced drugs, such as oxycodone, hydrocodone, fentanyl, and others.
- Also includes the illegal drug heroin

...and a few other prescription pills of note

- **BENZODIAZEPINES:** a class of drugs used to treat severe anxiety, sleep disorders, and occasionally to relax muscles
 - *Brand names: Xanax, Ativan, Valium, Klonopin, etc.*
- **CARISOPRODOL:** muscle relaxer with sedative properties similar to a barbiturate; considered a controlled substance on account of its potency
 - *Brand name: Soma*
- **“BLACK BOX” WARNINGS OF USING THESE DRUGS IN COMBINATION**

A Collision of Three Issues



Widespread Impact, Mounting Costs

- 137% increase in opioid prescriptions between 1999 and 2017
- Rate of overdose death by opioid was **6 times higher** in 2017 than in 1999, now at 130 deaths per day (nearly 1 million deaths total in that time period)
- 191 million opioid prescriptions dispensed nationwide in 2017, reflecting a decline from highest rates in 2012. Still, rate of dispensing in Georgia is about 71 opioid prescriptions per 100 people.
- Cost of the opioid epidemic has exceeded **\$1 Trillion since 2001**, and projected to cost an additional **\$500 billion by 2020**
- \$15,500 increase in health care expenses for opioid addicted person versus non opioid-addicted
- Of the total economic burden of opioid overdose, abuse, and dependence; **30% is shouldered by employers due to lost productivity and increased healthcare spending** (CDC October 2016)

History of Opioid Prescribing

- Prior to 1980: Opioids rarely prescribed on account of concerns about addiction
- 1980-2000: Small group of physicians began questioning the complete aversion to the use of opioids for chronic non-cancer pain; growing dissent within pain medicine
- 2000--: Explosion of opioid prescriptions with Purdue Pharma's OxyContin campaign
- 2000--: Heroin trafficking boom across small cities in the West, Midwest and Appalachia, due to cheaper production of the drug
- March 2016: CDC publishes Opioid Prescribing Guidelines
 - 90+ MME considered dangerous dosing

The problem continues...

- 116 million chronic pain patients in the United States
- 40 million adults struggling with anxiety disorders
- Current dosing of opioids in the United States = **50 MME** per capita
- 4,000 adults/day in the U.S. initiating opioid use for recreational purposes
- Pharmaceutical companies continue to manufacture astounding quantities of opioids--58.4 million grams of hydrocodone/year and 108.5 million grams of oxycodone/year
- Third-party payers continue to reimburse traditional opioids at more favorable rates than safer medications (e.g., opioids with abuse-deterrent properties)
- NO incentive at present for multi-disciplinary treatment, with fewer than 200,000 patients accessing this type of care

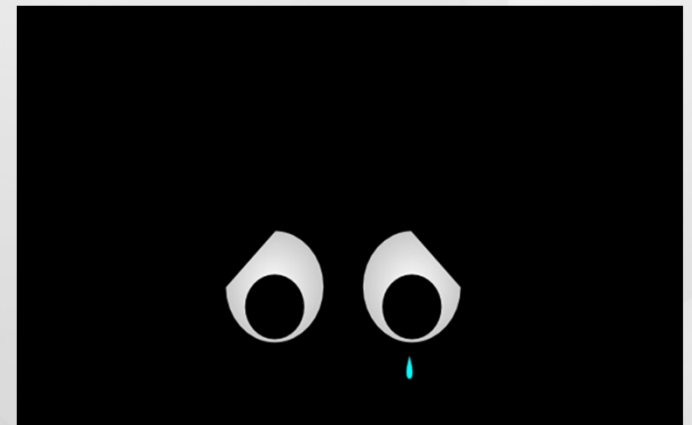
Why are opioids such a problem?

- Blocks pain
- Calming
- Anti-anxiety effect
- Feelings of intense joy and comfort
- Similar to feelings of great accomplishment or achievement of a goal; more than what might be obtained naturally



However...

- The body stops producing enough endogenous (“home grown”) opioids to mitigate severe or chronic pain
- Dysregulation of vital functions, voluntary and non-voluntary
 - Respiration
 - Sleep
 - Movement—voluntary and involuntary
 - Cognition
- Depletion of testosterone = fatigue, depression



Physiological Dependence Defined

- Ubiquitous as consequence of appropriate use
- **Tolerance**
- Loss of analgesic potency
- Development of Opioid **Withdrawal** Syndrome
 - Autonomic and somatic hyperactivity
 - Extremely uncomfortable but NOT life threatening

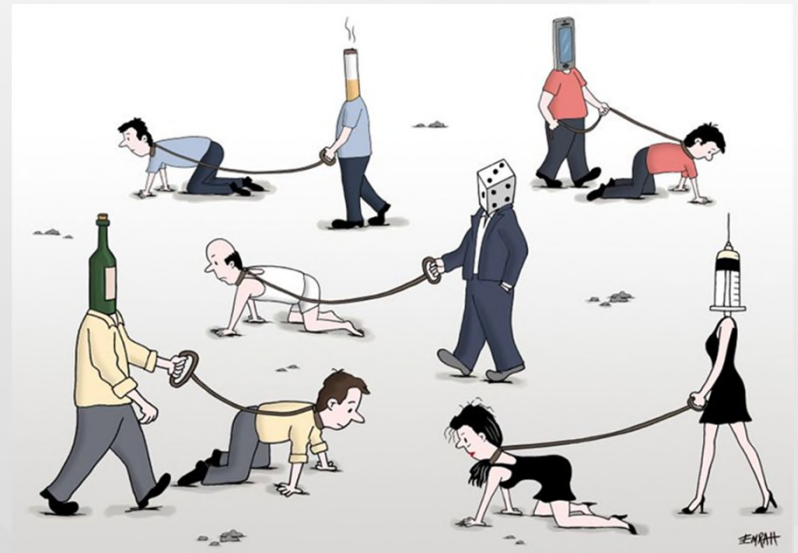
Physiological Dependence is NOT Addiction!

DSM V Criteria: Opioid Use Disorder

1. Opioids are often taken in larger amounts or over a longer period of time than intended.
2. There is a persistent desire or unsuccessful efforts to cut down or control opioid use.
3. A great deal of time is spent in activities necessary to obtain the opioid, use the opioid, or recover from its effects.
4. Craving, or a strong desire to use opioids.
5. Recurrent opioid use resulting in failure to fulfill major role obligations at work school or home.
6. Continued opioid use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of opioids.
7. Important social, occupational, or recreational activities are given up or reduced because of opioid use.
8. Recurrent opioid use in situations in which it is physically hazardous.
9. Continued use despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by opioids.

The Three C's of Addiction

- **C**RAVING
- LOSS OF **C**ONTROL
- NEGATIVE **C**ONSEQUENCES



Addiction/medication overuse in the workplace...what might you see?

- Excessive requests for early dismissal and time off
- Excessive unexcused leave
- Chronically late for work
- Poor hygiene, odd odor
- Unusually high number of workplace accidents
- Erratic behavior and mood swings
- Overly sedate and slurred speech
- Stumbling

Treatment Options

- Inpatient detoxification
- Medication-Assisted Therapy (MAT)
- Cognitive Behavioral Therapy (group and individual)
- 12-step programs
- All of these programs are available in the **residential** setting; however, those programs are either difficult to access, difficult to stay, and/or **EXPENSIVE!** Also, they require **TIME OFF WORK.**



Legal issues with drug policies/testing: FCRA, ADA, FMLA, OSHA

Fair Credit Reporting Act (FCRA)

- Coverage of drug tests:
 - **Not covered** - Test results reported directly by lab.
 - **Covered** – Test results reported by Consumer Reporting Agency (CRA).
- Requirements:
 - Written disclosure by Employer
 - Written authorization of applicant/employee
 - Certification to the Consumer Reporting Agency by Employer
 - Disclosure to applicant/employee before and after adverse action (e.g., no-hire, discipline, termination) if related to report.
- Check state law requirements.

The Americans with Disabilities Act (ADA)

- Drug **addictions** are considered **disabilities** under the ADA.
- A rehabilitated drug or alcohol addict is protected under the ADA.
- Leave of absence for rehabilitation may be considered a reasonable accommodation (before violation of policy).
 - Must engage in “**interactive process**.”
- **Current illegal use of drugs** is **not** protected under the ADA.

ADA Issues – “Current Use”

- The EEOC has stated that “current” means “recently enough” to justify the employer’s reasonable belief that drug use is an ongoing problem.
- Courts have indicated that “currently engaging” is not limited to “the day of” or even within a matter of days or even weeks.
- It is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual **is actively engaged in illegal drug use.**

ADA and Drug/Alcohol Policies

- The ADA specifically permits employers to prohibit the use of alcohol or drugs in the workplace and to discipline employees for such use.
- Alcohol tests v. drug tests:
 - Alcohol test is a medical examination/inquiry.
 - Drug test is not **if used to test for illegal drug use.**
- Post-offer/pre-employment medical examinations/inquiries are permissible.
- After person starts work, medical examinations/inquiries must be job-related and consistent with business necessity.

Family and Medical Leave Act (FMLA)

- The FMLA provides twelve weeks of unpaid leave and reinstatement for an employee with a “serious health condition.”
- In most cases, drug or alcohol addiction will be considered a “serious health condition.”
- An employee’s time off for entering/participating in a substance abuse program will count as FMLA leave.
 - But not to recover from the side effects of substance abuse (such as a hangover or drug-induced incapacity).

Implementing Drug Policies & Testing



Drug-Free Policies

- No one-size-fits-all
- Key components:
 - Written policy
 - *Effective* and accurate drug testing
 - Employee education
 - Supervisor training
 - Employee assistance program



Expectations/Behaviors for the Policy

- State employees are responsible for reviewing warning labels and consulting with their physician about interference with job duties.
- Must disclose potential risks.
 - Employee must not be required to disclose the medical condition to the employer. (ADA violation)
- Prohibit the illegal or unauthorized use of prescription medicine.

Types of Testing

- Most drug and alcohol policies provide for the following types of testing:
 - Post-offer/Pre-employment
 - Reasonable suspicion
 - Random
 - Post-accident
 - Fitness for duty/Return to work
 - Periodic



What Constitutes “Reasonable Suspicion”

- Employer has received reliable information or evidence that an employee has reported to work with drugs or alcohol in his/her system.
- The information may come from a credible report from third parties (co-workers, spouse/child) or may come from observation by management/administration.
- Have multiple observers.
- Record the evidence in writing.



Observations that May Show Reasonable Suspicion

- Bloodshot or watery eyes or very large or very small pupils
- Slurred speech
- Unsteady walking/unusual clumsiness
- Sleeping on the job or lethargy
- Excessive perspiration
- Wearing of sunglasses indoors and in all weather
- The odor of alcohol/marijuana
- Unusual poor, careless, modified, or unacceptable work performance
- Erratic or unusual behavior on the job
- Irritability or unpredictable responses to ordinary requests
- Mood swings or changes, including inappropriate gaiety or lethargic behavior



What is Random Testing?

- Random testing must be purely random.
- Names are generated through a computer system.
- Some people will be tested several times over 5 years; some people will never be tested.



Post-Accident Testing

- Define accident
 - Property damage?
 - Medical treatment?
 - Near miss?
- Specify who decides whether testing is required
- Testing should occur immediately after accident.



OSHA & Post-Accident Testing

- OSHA rule only applies if testing involves work-related injury/illness reporting.
- Employers do not have to specifically suspect drug use by an individual employee to drug test, but there must be a **reasonable basis** to investigate whether drug use may have caused or contributed to an injury or illness.

Examples

- **Impermissible drug testing** – after bee sting.
- **Permissible drug testing** – after forklift accident.
- Federal and state law requirements still trump (*e.g.*, testing pursuant to DOT regulations, Drug Free Workplace requirements, etc.)

What is Periodic Testing?

- Periodic testing is when you test an entire group, department, or identifiable portion of the workforce at the same time.
 - **Note:** be careful that the group you are selecting is not overwhelmingly a particular race, color, gender, etc.
- Periodic testing may be helpful when you have rumors or concerns that a particular group is using drugs but you don't have evidence of any particular person having drugs in his/her system at work.

Methods of Testing - Urine

- Urine testing is very accurate and can evidence whether the substance is in the sample **at the time the sample was given**.
- Most drugs move out of a subject's system, however, within 72 hours, so the timeframe is limited.
- Standard 5-panel test covers cocaine, amphetamines, opiates, PCP and marijuana.



Issues with 5-Panel Test

- Standard 5-panel test:
 - Will test for opiate use but cannot tell employer which drug is responsible for positive result.
 - Employees could mask heroin use with legally prescribed or obtained opiates.
 - Will not detect synthetic and semi-synthetic opioids like methadone, oxycodone, fentanyl or other frequently abused-drugs.
- Should use at least 10-panel & 6-Acetylmorphine (6-AM) tests instead.
 - 10+ Panel – tests for cocaine, marijuana, PCP, amphetamines, Opiates, benzodiazepines, barbiturates, methadone, Quaaludes, propoxyphene, etc.
 - 6-AM (DOT test) – tests for metabolite produced by heroin.
 - Fentanyl requires a separate test.

Methods of Testing – Hair

- Some employers use hair testing. Hair testing cannot tell you whether the individual whose hair was tested had drugs in his/her system **at the time the person was selected to give a sample.**
- The hair shows that the individual used drugs at some point in time over the last few months. Usually up to 90 days for 1.5” of hair cut close to the scalp.

Note: there have been some religious accommodation issues with hair testing.

- Hair testing usually provides analysis for marijuana, opiates, cocaine, methamphetamine, and PCP.



Testing Procedure

- The lab does the first test and then a second test on the same sample to confirm the accuracy of the first test.
- A medical review officer (MRO) reviews the results. If there is a positive result, the MRO communicates with the individual for explanations.
- After this process, the result is sent to the employer.



Last Chance Agreements

- Typically, most companies use last chance agreements only when there is evidence of impairment; not possession.
- The agreement outlines the conditions:
 - Entry into and compliance with a drug program
 - Immediate termination for failure to comply.
 - Drug testing by employer at times determined **in the company's sole discretion** for one or two years.

Thank You



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