THE OPIOID CRISIS IN THE WORKPLACE: WHAT EMPLOYERS MUST DO TO ENSURE ANTI-DISCRIMINATION COMPLIANCE AND TO SUPPORT THEIR EMPLOYEES

Jamie Campisi[*]

I. INTRODUCTION

The United States is facing a severe opioid[1] crisis with widespread consequences affecting every segment of the population. According to the Centers for Disease Control and Prevention, from 1999 to 2016, more than 350,000 people died in the United States from an opioid overdose.[2] More specifically, over 200,000 people died from prescription opioid overdoses between 1999 and 2017.[3] According to the 2016 National Survey on Drug Use and Health, 11.5 million Americans misused prescription opioids in 2016 alone.[4] These statistics reflect just some of the reasons why President Trump and the United States Department of Health and Human Services declared the opioid crisis a nationwide public health emergency on October 26, 2017.[5]

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[*] J.D. Candidate, Seton Hall University School of Law, 2020; B.A., Lehigh University, *summa cum laude*, 2017. I would like to thank Professor Tara Ragone for her guidance in the writing of this Comment. I would also like to thank my family, fiancé, and friends for their unwavering love and support throughout my entire law school career.

[1] "Opioids are a class of drugs that act in the nervous system to produce feelings of pleasure and pain relief." Common examples are heroin and legally prescribed narcotic medications to manage severe and chronic pain conditions. *Opioid Addiction*, GENETICS HOME REFERENCE – U.S. NAT'L LIBRARY OF MED. (Nov. 2017), https://ghr.nlm.nih.gov/condition/opioid-addiction.

[2] *See Understanding the Epidemic*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 30, 2017), https://www.cdc.gov/drugoverdose/epidemic/index.html.

[3] *Prescription Opioid Data - Overview*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 30, 2017), https://www.cdc.gov/drugoverdose/data/prescribing/overview.html [hereinafter *Prescription Opioid Data*].

[4] Rebecca Ahrnsbrak, Jonaki Bose, Sarra L. Hedden, Rachel N. Lipari, & Eunice Park-Lee, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2016 National Survey on Drug Use and Health* fig.27, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (2017), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.htm#opioid.

[5] *The Opioid Crisis*, THE WHITE HOUSE, https://www.whitehouse.gov/opioids/ (last visited Oct. 23, 2019).

While the effects of this opioid epidemic on individuals and their families are the predominant focus of media attention,[6] the effects of the opioid crisis on the local workplace and the national economy are also significant.[7] In fact, a 2017 report by the Council of Economic Advisers (the "CEA")[8] estimated that the opioid crisis reduced workforce productivity by over $20 billion in 2015.[9] Thus, employers are undoubtedly feeling the impacts of the opioid crisis, and this Comment urges employers to exercise caution in the policies they adopt in confronting the crisis.

In the midst of the current opioid epidemic, employers could be tempted to engage in rigid, inflexible, and even knee-jerk reactions when they discover that a job applicant or employee is either taking opioid medication or has a history of opioid misuse or abuse. Given the declaration of the opioid epidemic as a national public health emergency and the heightened media attention surrounding opioid use, employers might wish to immediately take adverse action against such an employee to insulate themselves from any potential problems arising from the opioid use. Such short-sighted conduct would actually expose the employer to considerable legal liability. This Comment aims to help employers navigate through potential legal pitfalls while attempting to minimize the effects of the opioid crisis in their own workplace. It also recommends positive solutions that can aid employers in realizing that goal. This Comment therefore asserts that employers must be wary of the potential minefield of taking adverse actions against employees for their past or present opioid use—barring current illicit use—without legal justification, and instead, encourages employers to become part of the solution to combatting this crisis.

Part II of this Comment describes the opioid epidemic's specific effects on both the workplace and the U.S. economy, demonstrating its grave effects in the employment context. Part III discusses how the

[6] *See, e.g.*, Erin Schumaker, *Here's How the New Opioid Deal Could Help Kids and Families*, HUFFINGTON POST (Oct. 24, 2018), https://www.huffingtonpost.com/entry/new-opioid-deal-kids-families_us_5bbcc11ae4b0876edaa26021.

[7] *See* Dan Mangan, *Economic Cost of the Opioid Crisis: $1 Trillion and Growing Faster*, CNBC (Feb. 13, 2018), https://www.cnbc.com/2018/02/12/economic-cost-of-the-opioid-crisis-1-trillion-and-growing-faster.html.

[8] The CEA is a United States agency within the Executive Office of the President charged with offering the President objective economic advice on the formulation of both domestic and international economic policy. *Council of Economic Advisers*, THE WHITE HOUSE, https://www.whitehouse.gov/cea/(last visited Sept. 29, 2019).

[9] *The Underestimated Cost of the Opioid Crisis*, THE COUNCIL OF ECON. ADVISERS 1 (Nov. 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf [hereinafter 2017 CEA Report].

Americans with Disabilities Act (the "ADA") and state anti-discrimination laws provide substantial protections to employees who are either past (illicit or otherwise) or present legal opiate users. It is therefore crucial for employers to understand which actual or potential employees are covered under the ADA and their own state's anti-discrimination laws regarding opioid use and the legal protections afforded to their employees. Part IV recommends that employers exercise caution in drafting new drug policies or confirm that their existing policies are ADA compliant. Part IV also explains how employers often use their drug policies as justification for adverse employment actions against employees and how such drug policies might be significant sources of litigation and legal exposure if not drafted correctly. For instance, employers must be particularly wary of the "drug-free workplace" label and the drug testing procedures contained in their policies. Part V encourages employers to take a proactive approach and recognize the substantial impact they can have in confronting the opioid epidemic. It makes recommendations to employers regarding possible support systems to implement, thereby cultivating good will with their employees and reducing the likelihood that the epidemic's negative effects will seep into their workplace. Finally, Part VI provides a brief conclusion of the Comment's analysis.

II. EVALUATING THE EFFECTS OF THE OPIOID CRISIS IN THE EMPLOYMENT CONTEXT

On October 24, 2018, President Trump signed the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act—also known as the SUPPORT for Patients and Communities Act (the "Act")—into law.[10] Recognizing the magnitude of the opioid crisis affecting the country, the final version of this legislation passed in the Senate with a remarkably bipartisan, 98 to 1, vote on October 3, 2018.[11] Apart from "[t]he most high-profile aspects of the bipartisan bill deal[ing] directly with the [opioids],"[12] the Act also includes provisions discussing the opioid epidemic's effect on children and families.[13] For example, the Act includes provisions supporting residential treatment facilities where children can stay with their parents receiving substance use

[10] Marianna Sotomayor, *Trump Signs Sweeping Opioid Bill with Vow to End 'Scourge' of Drug Addiction*, NBC NEWS (Oct. 24, 2018), https://www.nbcnews.com/politics/congress/trump-signs-sweeping-opioid-bill-vow-end-scourge-drug-addiction-n923976.

[11] Colby Itkowitz, *Senate Easily Passes Sweeping Opioid Legislation, Sending to President Trump*, WASH. POST (Oct. 3, 2018), https://www.washingtonpost.com/politics/2018/10/03/senate-is-poised-send-sweeping-opioids-legislation-president-trump/?utm_term=.06b83d99b5a5.

[12] Schumaker, *supra* note 6.

[13] *Id.*

disorder treatment instead of going into the foster care system and adopts plans outlining care for infants with neonatal opioid exposure.[14] The Act also includes a section "addressing economic and workforce impacts of the opioid crisis."[15] Section 8401 outlines a pilot program that authorizes the Secretary of Labor to make $100 million in grants per fiscal year to state workforce agencies, which can in turn make subgrants to local workforce development boards to address the economic and workplace effects of the opioid crisis.[16] Section 8401, however, is just one relatively short section in an immense piece of legislation and was not included in the mainstream media's coverage of the bill's signing.[17] Finding ways to assist individuals and families struggling with substance use disorder is deservedly at the forefront of conversations surrounding the opioid epidemic, so it is no surprise that the epidemic's effect in the employment arena is not as frequently considered. The opioid crisis, however, is also having severe negative impacts on the U.S. economy and the employment sector as a whole.

According to a report issued by Altarum, a "nonprofit health research and consulting institute,"[18] the opioid epidemic's economic cost in the U.S. from 2001 to 2017 exceeded $1 trillion.[19] The report also projected that the opioid crisis would cost the U.S. economy an additional $500 billion by 2020.[20] As the CEA described in its November 2017 report, the "nonfatal costs" of the opioid epidemic, such as healthcare, criminal justice, and employment costs, are significant.[21] For example, in 2013 alone, prescription opioid abuse resulted in approximately $28 billion in

[14] *Id.*

[15] SUPPORT for Patients and Communities Act, H.R. 6, 115th Cong. § 8041 (2018).

[16] *Id.*

[17] *See, e.g.*, John Fritze & David Jackson, *What's Included in the Opioids Bill Signed by President Trump*, USA TODAY (Oct. 24, 2018), https://www.usatoday.com/story/news/politics/2018/10/24/donald-trump-opioids-bill-includes-changes-trafficking-treatment/1752329002/; Sarah Owermohle, *Trump to Sign Sweeping Bill*, POLITICO (Oct. 24, 2018), https://www.politico.com/newsletters/politico-pulse/2018/10/24/trump-to-sign-sweeping-opioid-bill-386557; Itkowitz, *supra* note 11; Sotomayor, *supra* note 10.

[18] *Economic Toll of Opioid Crisis in U.S. Exceeded $1 Trillion Since 2001*, ALTARUM (Feb. 13, 2018), https://altarum.org/news/economic-toll-opioid-crisis-us-exceeded-1-trillion-2001.

[19] *Id. See also* Greg Allen, *Cost of U.S. Opioid Epidemic Since 2001 is $1 Trillion and Climbing*, NPR (Feb. 13, 2018), https://www.npr.org/sections/health-shots/2018/02/13/585199746/cost-of-u-s-opioid-epidemic-since-2001-is-1-trillion-and-climbing; Tom Valentino, *Opioid Crisis Now $1 Trillion Problem*, BEHAV. HEALTHCARE EXECUTIVE EXEC. (Feb. 13, 2018), https://www.behavioral.net/article/prescription-drug-abuse/opioid-crisis-now-1-trillion-problem.

[20] ALTARAM, *supra* note 18.

[21] *See* 2017 CEA Report, *supra* note 9, at 8.

healthcare and substance use disorder treatment costs,[22] $7.5 billion in criminal justice costs,[23] and over $20 billion in reduced productivity costs.[24] Critical to note in assessing the opioid epidemic's costs to economic productivity is the fact that most deaths resulting from opioid overdoses in the U.S. in 2015 occurred among individuals ranging between twenty-five and fifty-five years old—prime working age.[25] Given the unfortunate fact that most of the opioid epidemic fatalities are resulting in the loss of prime-working-age individuals, it comes as no surprise that the American labor-force participation rate, which calculates the percentage of Americans either employed or actively seeking work, hovered between 62.7% and 63.1% in both 2017[26] and 2018[27]—low by historical standards.[28] For example, between 1986 and 2009, the labor force participation rate consistently fell between 65% and 67%.[29] Alan Krueger, a Princeton economist, has conducted a study showing "a striking relationship between these missing workers and increasing opioid addiction"[30] and has concluded that "over the past fifteen years, labor-force participation among prime-age workers has declined the most in U.S. counties where opioid prescriptions are the most plentiful."[31] While it is difficult to establish whether the increased rate in opioid prescriptions is causing the lower labor force numbers or whether the lower labor force numbers are resulting in increased opioid prescriptions, Krueger explains that "[r]egardless of the direction of causality, the opioid crisis and depressed labor force

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[22] Curtis Florence, Feijun Luo, Likang Xu, & Chao Zhou, *The Economic Burden of Prescription Opioid Overdose, Abuse and Dependence in the United States, 2013*, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, CTR. FOR DISEASE CONTROL AND PREVENTION 1, 13 (Oct. 2016), https://stacks.cdc.gov/view/cdc/55377.

[23] *Id.*

[24] *Id.*

[25] *See* 2017 CEA Report, *supra* note 9, at 5.

[26] Gillian B. White, *The Opioid Crisis Comes to the Workplace*, THE ATLANTIC (Dec. 21, 2017), https://www.theatlantic.com/business/archive/2017/12/workers-dying-overdoses/549008/.

[27] *United States Labor Force Participation Rate*, TRADING ECONOMICS, https://tradingeconomics.com/united-states/labor-force-participation-rate (click calendar visual beneath the chart and insert "2018-01-01" and "2018-12-31" to view 2018 labor force participation rate data) (last visited Sept. 29, 2019).

[28] *See* White, *supra* note 26; *see* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CIVILIAN LABOR FORCE PARTICIPATION RATE, https://www.bls.gov/charts/employment-situation/civilian-labor-force-participation-rate.htm (last visited Sept. 10, 2019).

[29] *Id.*

[30] *See* White, *supra* note 26.

[31] *Id. See also* Alan B. Krueger, *Where Have All the Workers Gone? An Inquiry Into the Decline of the U.S. Labor Force Participation Rate*, BROOKINGS 48–49 (Sept. 7, 2017) https://www.brookings.edu/bpea-articles/where-have-all-the-workers-gone-an-inquiry-into-the-decline-of-the-u-s-labor-force-participation-rate/ (analyzing the growth of opiod prescription use as a factor in the decrease of labor force participation).

participation are now intertwined in many parts of the United States."[32]

Additionally, employers not only face a reduced labor force, but face opiate-related issues with their existing employees as well. According to a 2017 National Safety Council survey, 70% of employers with fifty or more employees have experienced workplace incidents due to prescription drug use.[33] More specifically, 39% of those employers cited that they have dealt with employee absenteeism and 29% claimed to have experienced employees' impaired or decreased job performance because of prescription drug use.[34] Succinctly stated, employers are dealing with real challenges to the national workforce and economy, in addition to direct effects within their own workplaces, because of the current opioid crisis.

III. ANTI-DISCRIMINATION PROTECTIONS OFFERED BY THE AMERICAN WITH DISABILITIES ACT

Employers experiencing the direct effects of the current opioid epidemic must be aware of how to properly treat opioid-using employees and how to recognize, evaluate, or characterize misuse and abuse. Employers unsure of how to deal with the opioid epidemic might be tempted to draft blanket policies forbidding *all* opiate use, thereby failing to distinguish between an employee's legal use and abuse. Part IV describes some cases in which employers have utilized and attempted to enforce such blanket policies, ultimately exposing themselves to litigation that could have been avoided had they remained ADA-compliant. It is true that "[h]istorically, an employee's drug use in violation of a 'drug free workplace' policy almost surely meant termination,"[35] but that no longer remains the case today. Ultimately, employers considering taking adverse employment action against an opioid-using employee must be careful to ensure that they are not punishing *legal* opiate use (such as employees taking opioid medications to treat "moderate-to-severe pain, after surgery or injury, or pain from health conditions like cancer")[36] and that the employee is not a member of a protected class under the ADA and/or their own state's anti-discrimination laws. It is therefore critical for employers to have a firm grasp on the employee protections afforded to opioid users under both the ADA and existing state law. This section will explain who

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[32] *See* Krueger, *supra* note 31, at 55.

[33] *How the Prescription Drug Crisis is Impacting American Employers*, NAT'L SAFETY COUNCIL 1, 6, 8 (2017), https://www.nsc.org/Portals/0/Documents/NewsDocuments/2017/Media-Briefing-National-Employer-Drug-Survey-Results.pdf [hereinafter 2017 NSC Report].

[34] *Id.* at 8.

[35] Benjamin E. Widener, *Opioid Accommodation: Overview, Case Study and Recommendations*, N.J.L.J. (Aug. 10, 2018, 10:00 AM), https://www.law.com/njlawjournal/2018/08/10/opioid-accommodation-overview-case-study-and-recommendations/.

[36] *See Prescription Opioid Data*, *supra* note 3.

qualifies as a disabled individual entitled to ADA protections and what protections the ADA offers to those individuals. It will then apply both of those concepts more narrowly to the opioid use context.

A. An Introduction to the American with Disabilities Act in the Employment Context

The ADA was passed by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[37] The ADA defines "employers" as persons engaged in commercial industries with fifteen or more employees.[38] It further mandates that employers "shall [not] discriminate against a qualified individual on the basis of disability in regard to job application procedures [or] the hiring, advancement, or discharge of employees . . . ."[39] In order to fully understand which employees are protected by this ADA mandate in the opioid context, it is first necessary to further define "disability" and "qualified individual[s]."

1. Defining Covered Disabilities

The ADA defines "disability . . . with respect to an individual" as "(i) [a] physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) [a] record of such impairment; or (iii) [b]eing regarded as having such impairment."[40] Thus, employees can qualify as disabled under the ADA through any of the preceding three definitions—the "actual disability" prong, the "record of" prong, or the "regarded as" prong.

In the opioid context, the "actual disability" prong could, for example, include an employee who is suffering from opioid addiction as the result of taking legally prescribed opiate medications.[41] The addiction could be either the physical and/or mental impairment that substantially limits one or more of the employee's major life activities, such as caring for oneself, communicating, interacting with others, and working.[42] A non-addicted employee taking legally-prescribed opiates could also qualify under the "actual disability prong" because the underlying medical condition (such as

[37] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(1)–(2).
[38] 42 U.S.C. § 12111(2), (5)(A) (1990).
[39] *Id.* at § 12112(a).
[40] 29 C.F.R. § 1630.2(g)(1)(i)–(iii) (2019).
[41] *Id.* at § 1630.2(h)(1)–(2).
[42] *Id.* at § 1630.2(i)(i).

cancer)[43] requiring the use of those opiates will typically qualify as the physical or mental impairment impeding an individual's major life activities required to satisfy the ADA's definition of a disability.[44] Moreover, the ADA Amendments Act of 2008 mandates that the definition of disability is meant to be read broadly[45] and instructs that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[46] Employers should be aware, therefore, that it will not be difficult for an employee taking opioid medications to successfully argue that he or she has an "actual disability."

The "record of" prong in the opioid context could include an employee with a record of past drug addiction and/or drug treatment and rehabilitation programs.[47] Assuming the employee has overcome their addiction and no longer has an "actual disability," the employee would still have a record of a physical or mental impairment—the prior addiction—that substantially limited one or more of their major life activities.[48]

The ADA deems an employee disabled under the "regarded as" prong, even if they do not have, or never have had, a physical or mental impairment that substantially limits one or more of their major life activities, if the employer perceives them as having such impairment.[49] Thus, an employee could be deemed disabled under the ADA if an employer regards an employee as being addicted to opioids, regardless of whether that perception is correct, and regardless of whether that employee actually uses opiates or not.[50]

2. Defining Qualified Individuals and Their Rights Under the ADA

The ADA does not permit employers to discriminate against "a qualified individual" on the basis of any of the three preceding definitions of disability. Importantly, a "qualified individual" is someone who can perform the essential functions of their job, with or without reasonable accommodation.[51] In the opioid context, it is important to note that an employee or job applicant who is currently engaging in the illegal use of

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43 *See Prescription Opioid Data*, *supra* note 3.

44 29 C.F.R. § 1630.2(g)(1)(i).

45 Elisa Y. Lee, Note, *An American Way of Life: Prescription Drug Use in the American Workplace*, 45 COLUM. J.L. & SOC. PROBS. 303, 321 (2011).

46 ADA Amendments Act of 2008, 110 P.L. 325, 122 Stat. 3553, § 2(b)(5).

47 29 C.F.R. § 1630.2(k)(1).

48 *Id.* at §1630.2(k)(2).

49 *Id.* at § 1630(l)(1).

50 *Id.*

51 42 U.S.C. § 12111(8) (2018).

drugs is not considered a qualified individual.[52] As a result, employers are free to take adverse employment actions without fear of consequences stemming from employee's *current illegal* drug use.[53]

Notably, the Equal Employment Opportunity Commission (EEOC) has defined "current illegal drug" use as having "occurred recently enough to justify an employer's reasonable belief that involvement with drugs is an ongoing problem."[54] Furthermore, an employee who tests positive on a drug test will also be considered a current illegal drug user.[55]

On the other hand, the ADA specifies that employees who have completed a drug rehabilitation program and are no longer using illegal drugs,[56] employees who are currently enrolled in a drug rehabilitation program but are no longer using illegal drugs,[57] and those who are erroneously regarded as using illegal drugs[58] are qualified individuals entitled to ADA protection. Moreover, qualified individuals include those taking opioid medications legally prescribed by a healthcare professional.[59] If an individual were to become addicted to that opiate prescription medication while under the doctor's care, they would still be protected under the ADA because the use of the prescription drugs as directed is not illegal.[60] Individuals who utilize prescription medications in ways other than prescribed, however, would be considered engaged in the aforementioned current illegal use of drugs.[61]

These definitions of legal and illegal drug use notably leave a lapse in ADA protection for employees who relapse while receiving treatment. While "[t]he chronic nature of addiction means that for some people relapse . . . can be part of the process . . . and relapse doesn't mean treatment has failed,"[62] the ADA is clear that only those "who have

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[52] *Id.* at § 12114(a).

[53] *Id.*

[54] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-M1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 8.3 (1992) [hereinafter EEOC MANUAL].

[55] *Id.*

[56] 42 U.S.C. § 12114(b)(1).

[57] *Id.* at § 12114(b)(2).

[58] *Id.* at § 12114(b)(3). *See also* 29 CFR § 1630.2(g)(1)(iii).

[59] 42 U.S.C. § 12111(6)(A).

[60] LEGAL ACTION CENTER, *Questions and Answers from Webinar: Know Your Rights: Employment Discrimination Against People with Alcohol/Drug Histories*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. 2, https://www.samhsa.gov/sites/default/files/partnersforrecovery/docs/QA_Employment_Discrimination.pdf (last visited September 29, 2019).

[61] *Id.*

[62] *Drugs, Brains, and Behavior: The Science of Addiction, Treatment and Recovery*, NAT'L INST. ON DRUG ABUSE (July 2018), https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery [hereinafter *Drugs, Brains, and*

completed a drug rehabilitation program *and are no longer using illegal drugs*"[63] or those "who are currently enrolled in a drug rehabilitation program *but are no longer using illegal drugs*"[64] are entitled to protection. Thus, even an employee who is actively participating in treatment will be deemed to have engaged in current illegal drug use if they have a positive drug test.[65] A similarly-situated employee could also be deemed to have engaged in current illegal drug use if they suffer a relapse that could justify an employer's reasonable belief that involvement with drugs is an ongoing problem.[66] Such employer determinations are made on a case-by-case basis.[67]

Despite this somewhat expansive definition of "current illegal drug use," it should be noted that individuals currently participating in medication-assisted treatments (MAT) are also qualified individuals subject to the protections of the ADA.[68] MAT utilizes controlled substances such as methadone and buprenorphine to treat opioid addiction both to short-acting opioids, such as heroin, and synthetic opioids, such as prescription opiate drugs.[69] MAT "normalize[s] brain chemistry, block[s] the euphoric effects of opioids, relieve[s] psychological cravings, and normalize[s] body functions,"[70] allowing recipients to regain stable physical and psychological functioning. Thus, although methadone and buprenorphine are actually opioids,[71] MAT patients' use of those substances is not considered illegal drug use; rather, it is considered part of a prescribed course of rehabilitative treatment. By their very participation in MAT, employees will have a "record of" a disability—their opioid addiction—and be "regarded as" having that disability.[72] As a result, employees participating in MAT programs are qualified individuals entitled to ADA protection, as long as they are not also engaging in any current illegal drug use.

Employers will be considered to have wrongfully discriminated against a qualified individual employee if they fail to make reasonable

Behavior].

[63] 42 U.S.C. § 12114(b)(1) (emphasis added).

[64] *Id.* at § 12114(b)(2) (emphasis added).

[65] *See* EEOC MANUAL, *supra* note 54.

[66] *Id.*

[67] *Id.*

[68] U.S. DEP'T OF HEALTH AND HUMAN SERV., SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., authored by LEGAL ACTION CENTER, HHS PUBLICATION NO. (SMA) 09-4449, KNOW YOUR RIGHTS: RIGHTS FOR INDIVIDUALS ON MEDICATION-ASSISTED TREATMENT 6 (2009) [hereinafter KNOW YOUR RIGHTS].

[69] *Id.* at 3.

[70] *Id.*

[71] *See Drugs, Brains, and Behavior*, *supra* note 62.

[72] *See* KNOW YOUR RIGHTS, *supra* note 68, at 6–7.

accommodations for that employee[73] or "deny employment opportunities to a job applicant or an advancement to a current employee based on the knowledge that they would have to make a reasonable accommodation for that employee."[74] Reasonable accommodations can consist of a variety of measures, such as restructuring some of the employee's job responsibilities, permitting flexible work schedules or part-time work, or reassigning the employee to another vacant position.[75] For example, adjusting work hours to allow an employee no longer engaging in current illegal drug use to seek treatment and rehabilitative services could constitute a reasonable accommodation.

3. Concluding Anti-Discrimination Protections

Before taking any adverse employment action against an employee on the basis of their drug use, employers must protect themselves from liability by ensuring that the employee is not a qualified individual with a qualifying disability under the ADA, or, if the employee is a qualified individual, that the employee could not be afforded a reasonable accommodation.

Employers should also be aware of the anti-discrimination laws adopted by their own states. With the exception of Alabama,[76] every state has a general anti-discrimination statute that protects employees from discrimination on the basis of disability or handicap.[77] The majority of these state laws against discrimination in employment include categories of employers that are not regulated by the ADA, such as state or public employers and employers with fewer than fifteen employees.[78]

B. Options for Employers Wanting to Take Adverse Employment Action Against a Disabled Employee

While employers must ensure compliance with the ADA and its state equivalents, they are not without recourse if they wish to take adverse employment action against an employee with an ADA-recognized

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[73] 42 U.S.C. § 12112(b)(5)(A) (2018).

[74] *Id.* at § 12112(b)(5)(B).

[75] *Id.* at. § 12111(9)(B).

[76] Alabama does not have a general anti-discrimination statute but does require state and state-funded employers to employ "the blind, the visually handicapped and the otherwise physically disabled . . . on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved." ALA. CODE § 21-7-8; *State Employment-Related Discrimination Statutes*, NAT'L CONF. OF STATE LEGISLATURES 1 (July 2015), http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf.

[77] *State Employment-Related Discrimination Statutes*, *supra* note 76.

[78] *Id.*

disability. Consider the following scenario: A laborer for a twenty-employee construction company is taking opioid medications for acute chronic back pain. His back pain has led him to request that he only work three days a week, but his employer needs someone for five days and cannot afford to bring on an additional employee. The side effects from his opioid medications inhibit his ability to operate machinery necessary to perform his job. This section will explain what options the ADA affords employers in such situations.

It is first necessary to note that employers do not have to make a reasonable accommodation for a disabled job applicant or employee if they "can demonstrate that the accommodation would impose an undue hardship on the operation of the[ir] business."[79] An undue hardship in this context is defined as an accommodation requiring significant difficulty or expense for the employer.[80] In evaluating whether an accommodation would constitute an undue hardship for the employer, the ADA instructs that the following factors must be considered: (1) the accommodation's nature and cost; (2) the financial resources of the facility providing the accommodation and the accommodation's impact upon facility operations; (3) the employer's overall financial resources; and (4) the type of employer operation.[81] Essentially, employers are not required to make an accommodation for a disabled employee if it is beyond the employer's means, financial or otherwise.[82] Specific to the scenario above, the construction company should attempt to make a reasonable accommodation by allowing the laborer to work only three days a week and attempting to find someone to cover the other two days. If, however, that was not possible (for example, the employer's financial state was such that it could not pay both the new laborer working five days a week and the original laborer working three days a week), paying both employees could impose an undue hardship on the construction company, who would then not be required to honor the original laborer's request. Whether an employer would experience a legitimate undue hardship and truly could not afford to make any reasonable accommodation for a disabled employee is ultimately a fact-sensitive, case-by-case inquiry.[83]

Furthermore, the ADA only protects employees to the extent that their legal opioid use is not negatively affecting their job performance. Recall

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[79] 42 U.S.C. § 12112(b)(5)(A).

[80] 42 U.S.C. § 12111(10)(A).

[81] *Id.* at § 12111(10)(B).

[82] *Id.* at § 12111(10)(A).

[83] *What Is Considered an "Undue Hardship" For a Reasonable Accommodation?*, ADA NAT'L NETWORK, https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation.

that a "qualified individual" for ADA protection is one "who, with or without reasonable accommodation, *can perform the essential functions* of the employment position."[84] What constitutes "essential functions" of a job is a fact-sensitive inquiry, but the ADA provides some deference to the employer's judgment, especially in the presence of a written job description.[85] For example, if an employee was legitimately no longer able to perform the essential functions of their job because of their legally-prescribed opioid medication's side effects, an employer could be within its rights to terminate that employee. It is true that even the use of legally-prescribed opiates is not without risk; common side effects of opioids include dizziness, nausea, vomiting, and physical dependence.[86] These risks could undoubtedly affect job performance in some employees.

Employers are not, however, entitled to complete deference in determining whether a particular function is essential to a job. Aside from an employer's judgment about the essentiality of a job function, "[w]ritten job descriptions prepared before interviewing applicants for the job; the amount of time spent performing the function; consequences of not requiring the incumbent to perform the function; terms of a collective bargaining agreement; work experience of past incumbents; and/or current work experience of incumbents in similar jobs"[87] should also be considered. Furthermore, all determinations of whether a function is essential to a job have to take place on a case-by-case basis.[88] Ultimately, the EEOC explained that courts "are not intended to second guess an employer's business judgment" in the determination of what constitutes a job's essential functions.[89] But to best protect the interests of their qualified individual employee and protect themselves from legal liability, employers still must evaluate the employee's ability to perform the job on an individualized, case-by-case basis, and should consider the other aforementioned factors of what constitutes an essential job function.

Returning to the earlier hypothetical, if operating machinery is a clear essential function of the employee's job, but the employee cannot do so because of the side effects of his legally-prescribed opioid medication, the employer should document the inability of that employee to perform an

[84] 42 U.S.C. § 12111(8) (emphasis added).

[85] *See* Lee, *supra* note 45, at 322–23.

[86] *See* Ramsin Benyamin et al., *Opioid Complications and Side Effects*, PAIN PHYSICIAN 11:S105 (2008), http://www.painphysicianjournal.com/current/pdf?article=OTg1&journal=42.

[87] 29 C.F.R. § 1630.2(n)(3)(ii)–(vii) (2019).

[88] *Procedures for Providing Reasonable Accommodation for Individuals with Disabilities*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm (last visited Feb. 9, 2019).

[89] *See* Lee, *supra* note 45, at 322–23.

essential job function and could potentially fire the employee. Before choosing to ultimately terminate that employee, however, the employer must also consider potential reasonable accommodation alternatives, such as restructuring the employee's job responsibilities or reassigning the employee to another vacant position, in order to maximize its insulation from potential legal liability.[90]

In summary, employers must have a comprehensive understanding of the protections extended to disabled employees under the ADA. Employers are not, however, without recourse if the employee cannot perform the essential functions of their job, even with a reasonable accommodation, or if such reasonable accommodation would cause an undue hardship to the employer.[91]

IV. THE NEED TO EXERCISE CAUTION IN DRAFTING DRUG POLICIES

Now armed with a greater understanding of the ADA as it pertains to employment discrimination in the opioid context, this section emphasizes that employers (and their lawyers) have to exercise caution and flexibility in drafting and revising their workplace drug policies in order to avoid legal exposure arising out of an employee's opioid use. It will first describe how employers must utilize care and precision when labeling themselves as a "drug-free workplace," so as not to punish employees' legal opiate use in violation of the ADA. This section will then utilize case law to demonstrate how failure to use such care has resulted in legal action and subsequent liability against employers. Finally, it will also discuss how drug testing and medical inquiry sections of employer drug policies also need to be drafted with precision in order to avoid violating employees' ADA-protected rights and prevent legal exposure for employers.

A. *An Introduction to the "Drug-Free Workplace" Label*

As Part IV.B. will illustrate, in light of the current opioid epidemic, employers might be inclined to take action against their opiate-using employees, even when the opiates are legally prescribed, to avoid potential workplace problems. One method they might consider employing is a "drug-free workplace" policy. A "drug-free workplace" sounds good in theory, but employers must be wary of it in practice. Employers have been subject to lawsuits and subsequent liability because they have made adverse employment decisions against employees engaged in legal drug use in the name of their "drug-free workplace" policies.

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[90] *See* 42 U.S.C. § 12111(9)(B) (2018).

[91] *Id.* at § 12111(8).

The "drug-free workplace" label is utilized by the federal government in certain contexts[92] and is encouraged by multiple states.[93] The Federal Drug-Free Workplace Act was passed by Congress in 1988 and stipulates that federal contractors and federal grant recipients must provide a drug-free workplace by engaging in various steps, including "publishing a statement notifying employees that the *unlawful* manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of the prohibition."[94] Multiple state legislatures have cited their intent to promote drug-free workplaces so that employers "may be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees."[95] In fact, state legislatures are providing incentives to employers to enact drug-free workplace policies, including offering reductions in employers' worker's compensation premiums[96] or, as in the federal Drug-Free Workplace Act, conditioning state grants and contracts on the grantee employer having a drug-free workplace policy barring illicit drugs from the workplace.[97]

The main issue with drug-free workplace policies is that employers must be wary of the fact that their prohibitions may, inadvertently or otherwise, extend to legally-prescribed drugs. The federal Drug-Free Workplace Act and state analogs specify that they apply only to *unlawful or illegal* drug use or drug-related activity. If not drafted carefully, drug-free workplace policies can lead to unwarranted discrimination against individuals who can still safely and capably perform their jobs while taking legally-prescribed drugs.[98] Moreover, "the use of any particular prescription drug, despite its side-effect warnings, is generally a poor indicator of employee risk" by itself.[99] Essentially, employers should not assume that employees might pose a potential risk of problems arising in

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[92] *See* Drug-Free Workplace Act, 41 U.S.C. § 8101(a)(5) (2018).

[93] U.S. DEP'T OF LABOR, 50 STATE SURVEY: DRUG-FREE WORKPLACE PROGRAMS (Sept. 1, 2009), http://www.lexisnexis.com/documents/pdf/20090930094905_large.pdf. *See, e.g.*, FLA. STAT. ANN. § 112.0455; IOWA CODE § 730.5; OHIO ADMIN. CODE § 4123-17-58.

[94] 41 U.S.C.S. § 8102(a)(1)(A); 41 U.S.C.S. § 8103(a)(1)(A) (emphasis added).

[95] ARK. CODE ANN. § 11-14-101. *See also* GA. CODE ANN. § 34-9-410; TENN. CODE ANN. § 50-9-101.

[96] ALA. CODE § 25-5-332; GA CODE ANN. § 34-9-412; IDAHO CODE § 72-1716.

[97] 30 ILL. COMP. STAT. ANN. 580/3; S.C. CODE. ANN. § 44-107-30; VA. CODE ANN. § 2.2-4312.

[98] *See* Lee, *supra* note 45, at 337–38.

[99] *Id.* at 338.

the workplace on the basis of their legal opiate use.

It is critical that employers realize that they can easily insulate themselves from legal liability and remain compliant with the ADA by prohibiting *only* illegal drug use and activity in their drug-free workplace policies. If employers have concerns about an employee's use of legally-prescribed opiate medications negatively affecting their ability to adequately perform their particular job, employers must take action *after* a legitimate individualized evaluation, rather than relying solely upon a blanket drug-free workplace policy.[100]

B. *Case Law Illustrations of Why Employers Should Not Enact Blanket Drug-Free Workplace Policies*

Case law is instructive in understanding the significance of the liability risks associated with drug-free workplace policies and how to avoid them. The following cases will explain various circumstances in which blind adherence to drug-free workplace policies has led to liability exposure for employers and reinforce the need to ensure that such policies make the legally necessary accommodations for an employee's legal opioid use.

1. *Huffman v. Turner Industries Group, LLC*

Huffman v. Turner Industries Group, LLC outlines a set of circumstances in which an employer took adverse action against an employee taking a legally-prescribed opioid medication because of the employer's blanket drug-free workplace policy. The employer incurred significant legal fees and costs, while exposing itself to potential liability, by blindly enforcing its policy prohibiting all opioids. The employer failed to distinguish between legal and illegal drug use and acted on the blanket premise that even legal prescription drug use prevented the employee from performing his job, instead of conducting an individualized assessment of the employee's ability to capably perform his job. This case serves as a warning to employers taking adverse action against employees in the name of drug-free workplace policies instead of the employee's work product.

In 1986, Henry Huffman, a welder, lost part of his hand in a welding accident, and he took hydrocodone—an opioid pain medication—and Xanax—a benzodiazepine—to manage his persistent chronic pain in the aftermath.[101] Between 2005 and 2011, Huffman had been intermittently hired by Defendant Turner Industries Group (Turner) to work part-time as a

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[100] *Id.* at 338–39.

[101] Huffman v. Turner Indus. Grp., LLC, 2013 U.S. Dist. LEXIS 71842, at *2 (E.D. La. 2013).

welder on various occasions.[102] In September 2011, Huffman was offered a full-time job with Turner, contingent upon his successful completion of a drug screening and a physical examination with Turner's contracted physician's assistant.[103] When Huffman told the physician's assistant that he took hydrocodone—an opiate—three to four times a day, he was informed that such use was a violation of Turner's "Drug, Alcohol, and Contraband Policy," which required that "employees who work in safety-sensitive positions, such as that of a welder, not take narcotic pain medications or benzodiazepines [anxiety medications] during working hours or within eight hours of reporting to work."[104] Although Huffman received a medical release from his physician stating that he required his pain pills three to four times daily, he was told by Turner representatives that he would still need to conform to their narcotic-free policy in order to work as a welder and ultimately was not hired.[105] Subsequently, Huffman brought suit against Turner after receiving a right-to-sue letter from the Equal Employment Opportunity Commission.[106]

Huffman alleged that he was not hired for full-time employment by Turner because he had a record of physical impairment and/or was regarded by Turner as having such impairment stemming from what he told the physician's assistant about his legal opioid use—and thus was discriminated against on the basis of his disability.[107] Huffman contended that the factual record "'unequivocally establishe[d]' that Turner did not base its employment decision on the kind of individualized and fact-intensive assessment envisioned by the ADA, but on a 'blanket "zero-tolerance" policy,' [assuming] that 'any person who takes prescription narcotics, benzodiazepines, or muscle relaxers is too impaired to safely perform jobs at Turner.'"[108] Turner filed a motion for summary judgment[109] and maintained that Huffman could not establish a prima facie case of discrimination because he could not establish that the decision not to hire him was based on a record of disability or because Turner regarded him as disabled.[110] Further, Turner argued that even if Huffman could establish a prima facie case, its drug policy served as an affirmative defense

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at *6.
[106] *Id.* at *5–7.
[107] *Huffman*, 2013 U.S Dist. LEXIS 71842, at *37–38. *See also* 29 C.F.R. § 1630.2(g)(1)(ii)–(iii) (2019).
[108] *Huffman*, 2013 U.S. Dist. LEXIS 71842, at *28.
[109] *Id.* at *2.
[110] *Id.* at *23–24.

because it "was both job-related and justified by business necessity."[111] Turner admitted that although the side effects of opioid medications, such as drowsiness or dizziness, do not present themselves in everyone who takes them, "the possibility of their occurrence is always present and inherently dangerous when an individual performs a safety-sensitive task such as welding."[112] The United States District Court for the Eastern District of Louisiana denied Turner's motion for summary judgment.[113] The court first established that Huffman satisfied the ADA's definition of disability because he had a record of disability and because Turner regarded him as disabled.[114] The court further found that Turner failed to hire Hoffman because of the opioid medication he used to manage his disability, thereby constituting sufficient evidence of a prima facie case of discrimination to defeat summary judgment.[115] The court next denied Turner summary judgment on its affirmative defense of business necessity.[116] The court noted:

> Plaintiff presents ample evidence that he performed the job of Welder for six years between 2005 and 2011 without incident, and, in fact, Turner notes that the 'the <u>only</u> thing that changed between late 2005 when Plaintiff was first hired, and September 16, 2011, when [he] was denied employment,' was Plaintiff's disclosure of his use of hydrocodone and Xanax during work hours.[117]

Moreover, Huffman had produced a doctor's evaluation stating that he did not experience any of the potential side effects of his medications.[118]

Turner's blanket drug policy, for all intents and purposes, made the company a drug-free workplace. Turner understandably wanted to promote a safe environment, especially given the nature of some of the work conducted, such as welding. In fact, Turner argued that the policy was written in response to some of its employees being "involved in industrial accidents at client job sites that were allegedly attributable to work-time use of narcotic pain medication by employees working in safety-sensitive positions."[119]

The side effects of legally-prescribed opiates are certainly real and can justifiably make employers nervous—especially those with employees

[111] *Id.* at *25.
[112] *Id.* at *26.
[113] *Id.* at *23.
[114] *Huffman*, 2013 U.S Dist. LEXIS 71842, at *39.
[115] *Id.* at *39.
[116] *Id.* at *52.
[117] *Id.* at *40 (emphasis in original).
[118] *Id.* at *50.
[119] *Id.* at *2.

working in safety-sensitive positions. Nonetheless, *Huffman* illustrates that blanket drug policies likely are an over-inclusive and unacceptable method of dealing with legal opioid use, and employers must realize that they can reach the same goals by simply conducting individualized assessments. Even from a pure financial standpoint, the extra time, effort, and cost to an employer of conducting individualized assessments is a worthwhile investment to avoid the very real possibility of much larger litigation costs and potential legal liability. That type of legal exposure can lead to severe consequences for employers, as further evidenced in the next section.

2. Stewart v. Snohomish County Public Utilities District No. 1

Stewart v. Snohomish County Public Utilities District No. 1 also outlines the legal risk to employers of having a drug-free workplace policy that bans not only illicit drug use, but categorically prohibits *all* drug use, including the use of legally-prescribed medications. This case also involves an employer who made a decision to terminate an employee for failing to adhere to its drug-free workplace policy without conducting an individualized assessment of the employee's ability to perform her job. The ultimate outcome of this case reveals just how serious and expensive such a practice can be for employers.

In *Stewart*, Plaintiff Stewart was a customer service representative of Defendant Snohomish County Public Utilities, an employer within the meaning of the Washington Law Against Discrimination, for over twenty years.[120] Unfortunately, Stewart suffered from "chronic and debilitating" migraines.[121] While she would attempt to treat her migraines with non-narcotic medications, she also had to go to her doctor for injections of Dilaudid (hydromorphone)—an opiate—when the migraines would not subside.[122] Stewart acquired intermittent medical leave under the Family and Medical Leave Act that allowed her to leave work for a few hours at a time to receive her injections, but her supervisors consistently gave her a difficult time for her absenteeism.[123] Defendant had a "Fitness for Duty" policy prohibiting all employees from working under the influence of drugs and alcohol, but, critically, the policy did not exempt employees taking legally-prescribed medications.[124]

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[120] Stewart v. Snohomish Cty. Pub. Utils. Dist. No. 1, 262 F. Supp. 3d 1089, 1093 (W.D. Wash. 2017).
[121] *Id.* at 1094.
[122] *Id.*
[123] *Id.* at 1095.
[124] *Id.* at 1094.

Stewart became upset after being confronted by a supervisor about her absence upon returning from an injection in October 2014.[125] Her supervisors thought she was showing signs of impairment at work and drove her to be drug tested, informing her that she would be put on administrative leave while they "investigated her."[126] The drug test came back positive and, unsurprisingly, showed the presence of hydromorphone.[127] In order to be permitted to return to work, Stewart signed a "Return to Work Agreement," stating that she would be fired if she came to work while impaired.[128] In April 2015, a few months after returning to work, Stewart had a similar experience to what had transpired in October 2014.[129] After being driven to another drug test in which she, again, tested positive for hydromorphone, Stewart was terminated for violating the Fitness for Duty Policy and Return to Work Agreement by "coming to work while impaired."[130]

While the record made it difficult to ascertain whether Stewart was actually impaired on the days of the October 2014 and April 2015 incidents, or simply upset by the way she was being treated by her employer, the court found that Defendant "ha[d] not shown that any impairment prevented Stewart from properly performing her job [on either] day."[131] As a result, the court determined that Stewart had a disability that could have been reasonably accommodated by Defendant, but Defendant "chose to address Stewart's symptoms through a disciplinary process rather than an interactive one aimed at finding a reasonable accommodation that would allow Stewart to work and seek treatment for her disability."[132] The court further found that reasonable accommodations could have easily been made and that Defendant "could have treated her as an employee with a medical condition, rather than a drug abuser."[133] Because Defendant chose to terminate Plaintiff based upon violations of its blanket drug prohibition policy—which made no exceptions for legal drug use—instead of making reasonable accommodation efforts, the court awarded Plaintiff over $1.8 million in damages.[134]

Stewart is a cautionary tale that warns employers, in drafting their drug policies, against adopting a policy that blindly imposes blanket

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[125] *See id.* at 1096.
[126] *See Stewart*, 262 F. Supp. 3d at 1097.
[127] *See id.*
[128] *See id.* at 1098–99.
[129] *See id.* at 1100–01.
[130] *See id.* at 1101–02.
[131] *Id.* at 1097, 1101.
[132] *See Stewart*, 262 F. Supp. 3d at 1105.
[133] *Id.* at 1106.
[134] *See id.* at 1113.

prohibitions on all drug use.[135] Whether the "drug-free workplace" label is specifically used in the language of the policy or not, employers (and their lawyers) must recognize that it is illegal to create drug-free workplaces that, in effect, do not accommodate the legal use of opiate medications.

C. *Employers Must Carefully Craft the Drug Testing and Medical Inquiry Components of their Drug Policies to Protect Themselves from Liability*

Employers have the right to drug test and make medical inquiries of job applicants and employees, but only at specific times and under specific circumstances.[136] Employers are permitted to require their job applicants and employees to undergo illegal drug testing, as well as make employment decisions as a result of those tests.[137] In order to best protect themselves from liability and to give future or current employees reasonable notice that consequences may follow for certain actions, an employer's drug policy should be explicit in describing when and under what circumstances the employer may require a drug test or conduct a drug-related medical inquiry. As a matter of best practices, the policy should also clearly describe what consequences an employee can expect if they have a positive drug test.

Employers can also make medical inquiries of current or prospective employees in order to ascertain their ability to do the job, but must be wary of the various ADA guidelines in place to ensure that such inquiries are not being used to wrongfully discriminate against employees. These ADA guidelines "reflect Congress's intent to protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs."[138]

Notably, the ADA guidelines distinguish permitted medical inquiries on the basis of whether the qualified individual is a job applicant, has already received an offer of employment, or is a current employee.[139] Prior to making an offer of employment to a job applicant, employers cannot "conduct a medical examination or make inquiries of a job applicant as to

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[135] *See generally Stewart*, 262 F. Supp. 3d at 1089.

[136] *See* 42 U.S.C. § 12114(d) (2018) (explaining that a test for illegal drugs shall not be considered a medical examination); 42 U.S.C. §12112(d) (setting forth the limited circumstances in which employers can make a medical examination or inquiry).

[137] *See* 42 U.S.C. §§ 12114(d)(1)–(2).

[138] *See generally Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_5_.

[139] *See* 42 U.S.C. § 12112(d)(2)–(4).

whether such applicant is an individual with a disability or as to the nature or severity of such disability,"[140] but they can ask about "the ability of an applicant to perform job-related functions."[141] Once an offer of employment has been made, employers can condition that offer on successful completion of a medical examination, as long as that is the standard procedure for all entering employees.[142] Once a person is officially an employee, employers may conduct voluntary medical examinations and inquire into the ability of the employee to perform job-related functions.[143] Employers cannot require a current employee to undergo a medical examination and "shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."[144]

Despite these ADA guidelines, case law demonstrates that sometimes employers' drug policies or medical inquiries are overly broad and intrusive into an employee's legal drug use, thereby leaving that employer susceptible to legal claims.

1. *Harrison v. Benchmark Electrics of Huntsville, Inc.* and Medical Inquiries of Job Applicants

In *Harrison v. Benchmark Elecs. Huntsville, Inc.*, Plaintiff, a temporary worker for the Defendant, applied for a full-time position at the request of his supervisor.[145] After testing positive for barbiturates during the application process, his supervisor called him into his office to speak over the phone with a Medical Review Officer.[146] The supervisor did not leave the room, however, when Plaintiff answered the Medical Review Officer's questions regarding his private medical information, such as the fact that he had suffered from epilepsy since he was an infant, took the barbiturates to control the condition, and revealed his dosage amounts.[147] The supervisor subsequently told the human resources department not to extend a job offer to the Plaintiff.[148] The Eleventh Circuit reversed the District Court's grant of summary judgment to the Defendant, finding that the ADA prohibits medical inquiries "as to whether such applicant is an

140 42 U.S.C. § 12112(d)(2)(A).
141 *Id.* at § 12112(d)(2)(B).
142 *See id.* at § 12112(d)(3)(A).
143 *See id.* at § 12112(d)(4)(B).
144 *See id.* at § 12112 (d)(4)(A).
145 *See* 593 F.3d 1206, 1209 (11th Cir. 2010).
146 *See id.* at 1210.
147 *See id.*
148 *See id.*

individual with a disability or as to the nature or severity of such disability"[149] before an offer of employment is made. The Eleventh Circuit further held that "a reasonable jury could infer that the supervisor's presence in the room was an intentional attempt *likely to elicit* information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries."[150] Thus, if Plaintiff had already been an employee at the time of his positive drug test, the employer could have undertaken a medical inquiry without fear of liability as long as it was job-related and consistent with business necessity. Because the Plaintiff was still only a job applicant, however, the Defendant was not within its legal rights to attempt any inquiry into the Plaintiff's disability status.

2. *Roe v. Cheyenne Mountain Conference Resort* and Medical Inquiries of Current Employees

In *Roe v. Cheyenne Mountain Conference Resort*, Defendant Cheyenne Mountain Conference Resort developed a new Drug and Alcohol Testing Policy which Plaintiff, a current employee, refused to consent to, citing its requirements as unreasonable and intrusive.[151] Plaintiff brought the action to enjoin its implementation.[152] The employer's drug policy at issue read: "[e]mployees must report without qualification, all drugs present within their body system. Further, they must remain free of drugs while on the job . . . . Additionally, prescribed drugs may be used only to the extent that they have been reported and approved by an employee supervisor . . . ."[153] The United States District Court for the District of Colorado held that this prescription drug disclosure provision violated the ADA, a decision that was upheld by the Tenth Circuit Court of Appeals even though other aspects of the case were reversed and remanded.[154] The District Court found that the prescription drug disclosure provision at issue violated section 12112(d)(4)(A) of the ADA,[155] which provides that an employer cannot require medical examinations or make inquiries of an employee's disability "unless such examination or inquiry is shown to be job-related and consistent with business necessity."[156] Since the Defendant failed to make any such showing, the District Court held, and the Tenth Circuit affirmed, that the drug policy violated the "plain language" of the

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149 42 U.S.C. § 12112(d)(2)(A).

150 *Harrison*, 593 F.3d at 1216.

151 *See* Roe v. Cheyenne Mt. Conf. Resort, 124 F.3d 1221, 1226 (10th Cir. 1997).

152 *See id.*

153 *Id.* (emphasis removed).

154 *See id.* at 1231.

155 *See* Roe v. Cheyenne Mt. Conf. Resort, 920 F. Supp. 1153, 1155 (D. Colo. 1996).

156 42 U.S.C. § 12112(d)(4)(A) (2018).

ADA.[157] Thus, the employer left itself open to potential liability by requiring in its policy that employees report *all* drug use without showing that such inquiry was job-related and consistent with business necessity, in direct violation of the ADA's protections for legal drug users.

D. *Conclusions on Drug Policies*

While many employers have existing policies regarding drug use in the workplace, it is imperative that employers understand that they: (1) cannot impose a blanket "drug-free workplace" policy without exposing themselves to significant legal ramifications; and (2) must differentiate between *illegal* drug use, which is not permitted, and legal drug use, which may be permitted. Including prohibitions on legal drug use in drug policies and taking adverse action against an employee or job applicant because of such use leaves the employer open to unnecessary liability. As demonstrated by the $1.8 million award to the plaintiff in *Stewart*,[158] that liability can be quite costly.

Further, employers should ensure that any drug testing and medical inquiry provisions of their drug policies are compliant with the ADA's various guidelines about when such testing and inquiries are permitted. In so doing, employers will protect the rights of their employees, who deserve to be free from worry of disability status discrimination and to be judged on the basis of the merits of their job performance. Simultaneously, employers will be reducing their own legal exposure by ensuring that any adverse action that is taken against an employee in accordance with their drug policies will be compliant with ADA regulations.

V. RECOMMENDATIONS FOR SUPPORTING EMPLOYEES

Part III explained that employers have a legal obligation to remain compliant with federal and state anti-discrimination laws and ensure that they do not wrongfully discriminate against job applicants or employees engaged in legal prescription opiate use.[159] But, as a policy matter, employers' roles can and should expand far beyond simply ensuring their compliance with anti-discrimination employment regulations. In fact, employers can take proactive steps towards combatting the opioid epidemic to achieve a twofold purpose: providing valuable assistance to employees and protecting employers from legal liability by offering their employees support before problems related to opioid use, or even abuse, arise.

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157 *Roe*, 920 F. Supp. at 1155.

158 Stewart v. Snohomish Cty. Pub. Utils. Dist. No. 1, 262 F. Supp. 3d 1089, 1113 (W.D. Wash. 2017).

159 *See* Parts III.A., Part IV.B.

Fortunately, many employers have shown a willingness to take a more active role in providing assistance to their employees during the opioid crisis. According to a National Safety Council survey about the effect of prescription drugs upon employers, 70% percent of employers said they would like to help employees struggling with prescription drug misuse or abuse, and 48% percent responded that they would return the employee to their position after appropriate treatment.[160] Such help is critical, according to Deborah Hersman, the president and CEO of the National Safety Council, because "[r]esearch indicates that those struggling with substance abuse have better sustained recovery rates if their employers help them to receive treatment and monitor their recovery, than if treatment is initiated by family or friends[.]"[161]

A. *Employers May Be Able to Negotiate Alternative Pain Treatment Coverage with Health Insurance Companies*

Opioids are commonly prescribed as pain medications. "In recent years, there has been a dramatic increase in the acceptance and use of prescription opioids for the treatment of chronic, non-cancer pain, such as back pain or osteoarthritis, despite serious risks and the lack of evidence about their long-term effectiveness."[162] In fact, "[t]he amount of opioids prescribed and sold in the United States has quadrupled since 1999, but the overall amount of pain reported by Americans hasn't changed."[163] Since health care providers started prescribing more opioids for pain management in the late 1990s,[164] the risks of these medications have manifested more so than the rewards. Unfortunately, as many as one in four patients receiving legally-prescribed opioid therapy struggle with addiction.[165] Thus, while the availability of opioid pain medications remains an important option for patients—in fact, for some patients, a necessary and indispensable one[166]—

[160] *See* 2017 NSC Report, *supra* note 33, at 16.

[161] Stephen Miller, *As Opioid Epidemic Rages, Worksite Policies Overlook Prescribed Drugs*, SOC'Y FOR HUMAN RES. MGMT. (Mar. 17, 2017), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/workplace-rx-drug-policies.aspx.

[162] *Prescription Opioids*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 29, 2017), https://www.cdc.gov/drugoverdose/opioids/prescribed.html.

[163] *CDC Guideline for Prescribing Opioids for Chronic Pain*, CTR. FOR DISEASE CONTROL AND PREVENTION https://www.cdc.gov/drugoverdose/pdf/guidelines_at-a-glance-a.pdf (last visited Sept. 29, 2019).

[164] *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (Mar. 2008), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis.

[165] *Prescription Opioids - Addiction and Overdose*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 29, 2017), https://www.cdc.gov/drugoverdose/opioids/prescribed.html.

[166] *See, e.g.*, Will Stone, *Patients with Chronic Pain Feel Caught in an Opioid-Prescribing Debate*, KAISER HEALTH NEWS (Aug. 1, 2018), https://khn.org/news/patients-with-chronic-pain-feel-caught-in-an-opioid-prescribing-debate/.

health care providers have also been encouraged to start evaluating alternative pain treatment options.[167] These alternative pain treatment options can include, among others, acupuncture, physical therapy, cognitive behavioral therapy, yoga, and chiropractic treatment.[168]

State Medicaid agencies have already made an effort to cover alternative pain treatments that can be used instead of opioids when appropriate.[169] As of the most recent data from the Henry J. Kaiser Family Foundation, which tracks Medicaid benefits offered by the states, all but six states reimburse providers for at least one category of alternative pain treatment, including physical therapy, occupational therapy, and chiropractic services.[170] In a 2016 survey conducted by the National Academy for State Health Policy, twelve states said that their Medicaid agency "implemented specific policies or programs to encourage or require alternative pain management strategies in lieu of opioids for acute or chronic non-cancer pain."[171]

Similarly, private employers, individually or in conjunction with other private employers, may be able to negotiate with their health insurers for pain management treatments that could serve as an alternative to opioids. Such treatments have shown efficacy in reducing pain[172] without the risk of tolerance or addiction presented by opioids. These treatments provide patients with safer pain management alternatives, thereby reducing the risk of impairment occurring at work and potential conflicts between the employer and employee arising from such impairments. By providing employees with the ability to utilize alternative pain treatments in cases where their conditions are not so severe as to necessitate the use of opioids, employers can play an important role in reducing the number of employees who turn to opioids for pain management (and the corresponding risk of

[167] *See generally* Deborah Dowell, Tamara M. Haegerich, & Roger Chou, *CDC Guideline for Prescribing Opioids for Chronic Pain – United States, 2016*, CTR. FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT 16 (Mar. 18, 2016), https://www.cdc.gov/mmwr/volumes/65/rr/pdfs/rr6501e1.pdf.

[168] Dean Drosnes, *Chronic Pain Management: There Are Alternatives to Opioids*, CARON (Mar. 7, 2018), https://www.caron.org/blog/2018/03/chronic-pain-management-alternatives-to-opioids; Dawn J. Lanouette, *Opioid Addiction Enters the Workplace*, AM. BAR ASS'N SECTION OF LITIG., THE WOMAN ADVOCATE (Mar. 14, 2018), https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2018/opiate-addiction-workplace.html.

[169] Hannah Dorr & Charles Townley, *Chronic Pain Management Therapies in Medicaid: Policy Considerations for Non-Pharmacological Alternatives to Opioids*, NAT'L ACAD. FOR ST. HEALTH POL'Y 1 (Aug. 2016), https://nashp.org/wp-content/uploads/2016/09/Pain-Brief.pdf.

[170] *Id.* at 4.

[171] *Id.*

[172] *See* Drosnes, *supra* note 168.

addiction), thereby limiting the negative impacts of opioid use in the workplace. In doing so, employers would offer a valuable benefit to their employees, and at the same time, lower the risk of a potential liability arising from opioid use in the workplace.

B. *Employers Must Comply with the Family and Medical Leave Act Regulations as They Relate to Substance Use Disorder.*

The Family and Medical Leave Act (the "FMLA") allows eligible employees of a covered employer to take job-protected leave (paid or unpaid depending on the circumstances) for up to twelve weeks per year "because the employee is needed to care for a family member with a serious health condition [or] because the employee's own serious health condition makes the employee unable to perform the functions of his or her job . . . ."[173] Generally, an eligible employee "has been employed for a total of at least [twelve] months by the employer on the date on which any FMLA leave is to commence,"[174] and covered employers are those engaging in commerce who employ fifty or more employees.[175]

Substance use disorder can qualify as a serious health condition, providing that it requires inpatient care or continuing treatment by a healthcare provider.[176] An employee can only take FMLA leave for continuing treatment by a healthcare provider, however, upon health care provider referral.[177] Employers cannot take adverse action against an employee taking FMLA leave to care for a family member receiving substance use disorder treatment.[178] Upon completion of FMLA leave, an employee is entitled to return to either the same position or an equivalent position.[179]

Because employees taking leave to care for a family member suffering from substance use disorder are fully protected against any adverse employment actions by the FMLA,[180] it is prudent for employers to offer their support for their caregiver employees by quickly and amiably granting FMLA leave when it is requested. By displaying understanding and keeping the employee's job or an equivalent position ready for their return, employers can offer comfort to employees during troubling times and

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173 29 C.F.R. § 825.100(a) (2019).

174 *Id.* at § 825.102.

175 *Id.* at § 825.104(a).

176 *Id.* at § 825.119(a). For further explanation of the intricacies of what constitutes "continuing treatment by a healthcare provider," *see* 29 C.F.R. §825.115.

177 *Id.* at § 825.119(a).

178 *Id.* at § 825.119(b).

179 29 C.F.R. § 825.100(c).

180 *Id.* at § 825.119(b).

prevent exposure to future liability at the same time.

Employees can take leave to receive treatment for substance use disorder, but an employee's absence from work resulting from that employee's use of a substance such as opiates is not covered under the FMLA.[181] Put more simply, employers can grant an employee FMLA leave to obtain substance use disorder treatment. But, if an employee does not show up at work one day because of their substance use, the employee cannot then go back and ask for that day they missed to be covered under FMLA leave.

Furthermore, employers cannot take adverse action against an employee for taking FMLA leave to obtain substance use disorder treatment. That does not, however, mean that an employee is protected against all adverse actions stemming from substance use. If an employer has an "established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave."[182] In other terms, if an employer has a clear policy that stipulates that employees may be terminated for substance use disorder under certain circumstances, and this policy applies to and is communicated to all employees, the fact that the employee is now on FMLA leave seeking treatment for substance use disorder does not prevent the employer from taking adverse action. Such a policy would still, however, remain subject to aforementioned ADA requirements. Employers cannot take adverse action against an employee for their legal drug use, so they must ensure that this policy permitting termination of employees for "substance abuse" would only apply to an employee's current, illegal drug use.

C. *Employers May Promote a Work Environment Where Employees Know About and are Not Afraid to Seek Out Their Company's Employee Assistance Program.*

"An employee assistance program is a work-based intervention program designed to assist employees in resolving personal problems that may be adversely affecting the employee's performance."[183] Larger employers will likely have an employee assistance program for employees to utilize. Over 97% of companies with more than 5,000 employees, 80%

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[181] *Id.* at § 825.119(a).

[182] *Id.* at § 825.119(b).

[183] *General: What is an Employee Assistance Program (EAP)?*, SOC'Y FOR HUM. RES. MGMT. https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whatisaneap.aspx (last visited Sept. 29, 2019).

of companies with 1,001 to 5,000 employees, and 75% of companies with 251 to 1,000 employees have employee assistance programs.[184] An employee assistance program can help an employee struggling with opiate misuse or abuse by "offer[ing] counseling and referral services; conduct[ing] substance abuse evaluations[,] connect[ing] an employee to a qualified substance abuse professional . . . [and monitoring an] employee's participat[ing] in, and compliance with treatment as well as return-to-work recommendations."[185]

Employers with employee assistance programs should play a more active role in promoting their services to employees. Despite the large percentage of companies with employee assistance programs, the national average of employees who utilize them is only 3%.[186] Some employees might not even know that employee assistance programs are available to them.[187] Employees have also expressed confidentiality concerns about information getting back to employers.[188] Therefore, employers can create more productive workplaces by proactively encouraging their employees to utilize employee assistance programs when necessary and assuring them that those services are confidential in accordance with Health Insurance Portability and Accountability Act of 1996 (HIPPA) regulations.[189] Such a policy allows employers to help employees nip a potential opioid abuse problem in the bud and/or assist employees in obtaining the appropriate treatment.

VI. CONCLUSION

As the U.S. confronts the opioid national public health emergency, employers might find themselves navigating through some murky waters. Employers should ensure that they have carefully-drafted drug policies that both promote a productive work environment for their employees and shield themselves from potential liability. Drug policies should specify, and enforce, prohibitions on illegal drug use in the workplace. In the context of legal drug use, however, adverse action against an employee

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[184] *Frequently Asked Questions*, INT'L EMP. ASSISTANCE PROF'L ASS'N, http://www.eapassn.org/faqs (last visited Sept. 29, 2019).

[185] *How Employee Assistance Programs Can Address Opioid Painkiller Abuse and Addiction*, NAT'L SAFETY COUNCIL (2014), https://www.nsc.org/Portals/0/Documents/RxDrugOverdoseDocuments/RxKit/EMP-How-Employee-Assistance-Programs-can-Address-Painkiller-Abuse-and-Addiction.pdf [hereinafter 2014 NSC Report].

[186] *Id.*

[187] *See* Alia Hoyt, *Why Hardly Anyone Uses Employee Assistance Programs*, HOW STUFF WORKS (Aug. 22, 2017), https://money.howstuffworks.com/why-hardly-anyone-uses-employee-assistance-programs.htm.

[188] *Id.*

[189] *See* 2014 NSC Report, *supra* note 185.

must only be based on legitimate, objective individual assessments of the employee's inability to competently and safely perform the job (despite any reasonable accommodations made) rather than reliance on rigid "drug-free workplace" labels. Following these guidelines reduces the chances of a lawsuit and minimizes, if not eliminates, legal liability should a disgruntled employee or former employee still choose to bring suit.

Employers must ensure that their policies governing drug testing and medical inquiries are consistent with the different set of rules that apply to job applicants, those who have received a job offer, and current employees. Those policies should not be overly broad or intrusive as applied to an employee's legal drug use. Finally, employers should seek to surpass mere compliance with their drug policies and instead engage in proactive strategies offering supports to their employees. Employers can take the initiative to negotiate for alternative pain management coverage in their offered health insurance plans and promote their employer assistance programs, as well as execute their legal obligation to allow employees to exercise their FMLA right to leave with compassion and understanding. In doing so, employers can help to prevent opioid-related problems in the workplace before they begin, can support and foster goodwill with their employees, and further protect themselves from potential legal liability.