

# MONITORING PRESCRIPTION DRUG USE IN THE WORKPLACE: WHAT CAN EMPLOYERS ASK?



*According to the United States Equal Employment Opportunity Commission's (EEOC) Americans with Disabilities Act (ADA), employers are regulated as to what medical questions they can ask of their employees. This includes prescription drug use.*



This fact sheet will provide guidance to employers and employees on when it is appropriate to ask about employees' use of prescription drugs as well as how to properly ask for this information.

## ■ *Scope of the Problem*

In 2011, over 6 million adults had nonmedically used pain relievers, tranquilizers, stimulants, or sedatives in the past month.<sup>1</sup> Nonmedical use of these prescription drugs is defined as use without a prescription of the individual using the drug or using the drug for the experience or feeling the drug caused.

Findings from 2006 indicate that nonmedical use of prescription drugs cost the U.S. \$42 billion that year in lost productivity.<sup>2</sup> With almost 92 percent of U.S. residents having some type of gainful employment<sup>3</sup>, employers can expect that some of their current employees or potential employee candidates will be nonmedical users of prescription drugs.

## ■ *The Americans with Disabilities Act (ADA) in the Workplace*

Given the extent of the nonmedical use of prescription drugs in this country and the money that employers can lose due to this use, employers may be interested in knowing which of their employees or potential new hires use prescription drugs. In 1990, the EEOC enacted the ADA to protect the rights of job 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.<sup>4</sup> The ADA applies to all employees, not just those with disabilities. Medical information such as nonmedical use of prescription drugs is protected under the ADA, so employers must be knowledgeable about ADA regulations before making any inquiries of their employees or potential new hires.

## ■ *Pre-Employment Inquiries*

According to the ADA, employers are not allowed to ask potential new hires about their prescription drug history before they offer a job to the applicant. Speaking in generalities, employers can ask the applicants if they will be able to fulfill all the stated job duties in the job opening description. If this question is asked by the employer, the applicant is required by law to notify the employer of any prescription drugs they may be taking that have side effects which can affect the job duties.

## ■ *After the Job Offer, Before Employment Begins*

Once a potential new hire has completed the interview process and a job offer has been extended, an employer can ask the employee health-related questions, including questions on prescription drug use. This can only be done if all employees at the same job status are required to answer the same questions. These questions can be asked regardless of if they relate to the job's function.

Potential employers can also require potential new employees to get a medical examination and submit their results to the company. Under the ADA, it is illegal for employers to discriminate against potential new hires based on prescription drug use history unless the person could not start the job, even if the employer has made reasonable accommodations for that person's position.



## Employment

In general, employers cannot ask employees about their prescription drug use unless the side effects of the drugs directly affect their job function. Employers can ask health-related questions of employees if they have learned reliable information from a third party that gives them reason to believe that person's job functions will be impaired due to prescription drug use or be a direct threat to safety. To determine if an employee poses a direct threat to safety, employers can require a medical examination. In this case, employers do not have access to employees' full medical records, just the outcome of the medical examination.

## Special Considerations

### • CONFIDENTIALITY

An employer must adhere to strict confidentiality regulations with any employee health-related information. This information is protected by law, which if broken, can lead to serious legal woes for an employer. In terms of prescription drug use, employers can only share an employee's prescription drug use history if there are work-related restrictions for this employee due to the use. In this case, the information can only be shared with the employee's supervisor.

### • EMPLOYEE ASSISTANCE PROGRAMS (EAPs)

EAP counselors may ask employees about their prescription drug use if they do not act for or on behalf of the employer and if they have no power to affect employment decisions. If the employee does reveal prescription drug use, the EAP counselor is obligated to shield any information the employee reveals from decision makers.

### • SAFETY-SENSITIVE TRANSPORTATION POSITIONS

Employees in safety-sensitive transportation positions have different requirements regarding their terms of employment from the Department of Transportation (DOT).<sup>5</sup> Persons employed in the aviation, maritime, pipeline, railroad and transit fields as well as commercial motor carriers are required to have negative drug test results before beginning DOT-covered safety-sensitive duties. These drug tests include opiates, in addition to marijuana, cocaine, amphetamines, and phencyclidine. Employees are also required to be tested following an accident, randomly, and when reasonable suspicion of drug use exists.

## Resources

1. Substance Abuse and Mental Health Services Administration, Results from the 2011 National Survey on Drug Use and Health: Summary of National Findings, NSDUH Series H-44, HHS Publication No. (SMA) 12-4713. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2012.
2. Hansen, R.N., Oster, G., Edelsberg, J., Woody, G.E., & Sullivan, S.D. (2011). Economic cost of nonmedical use of prescription opioids. *Clinical Journal of Pain*, 27 (3). 194-202.
3. Bureau of Labor Statistics, United States Department of Labor. <http://www.bls.gov/ces/#tables>. Accessed on December 4, 2012.
4. United States Equal Employment Opportunity Commission. (1990). Enforcement guidance: Disability-related inquiries and medical examinations of employees under the Americans with Disabilities Act (ADA). <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>. Accessed on December 4, 2012.
5. Goetzl, K. (2012). DOT reiterates that marijuana use by safety-sensitive transportation employees is not authorized, regardless of recent passage of state recreational marijuana use laws. Littler Privacy & Data Protection Group. <http://privacyblog.littler.com/2012/12/articles/drug-testing/dot-reiterates-that-marijuana-use-by-safety-sensitive-transportation-employees-is-not-authorized-regardless-of-recent-passage-of-state-recreational-marijuana-use-laws/>. Accessed on December 14, 2012.

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The Substance Abuse and Mental Health Services Administration supports the Preventing Prescription Abuse in the Workplace Technical Assistance Center. For more information, contact [PAWTArequest@PIRE.org](mailto:PAWTArequest@PIRE.org).

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