

Workers' Comp & Safety News



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Litigating the Opioid Epidemic

“Opioids could kill nearly half a million people across America over the next decade as the crisis of addiction and overdose accelerates.”

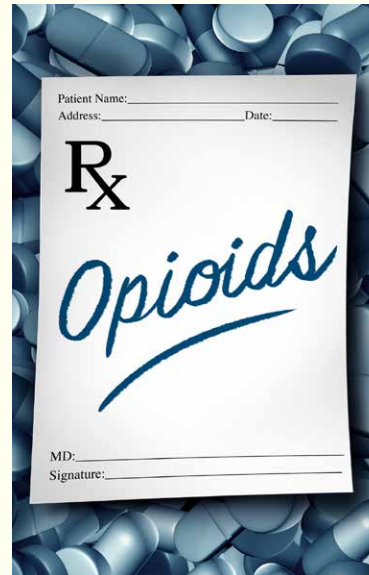
That was the consensus of public health experts from 10 universities surveyed last summer by STAT, a public health news service.

Unlike most drug epidemics, the majority of opioid dependencies result from legitimate prescription treatment, including for workers' compensation injuries such as lower back pain.

Employers, workers' comp professionals, physicians and patients themselves need to be mindful of the lethal effects of opioid pain relievers. We'll review some of the guidelines recommended by the Centers for Disease Control (CDC) for use of opioids in workers' compensation claims. But first, we want to get you up to date on the latest attempts to hold drug makers accountable for their role in the epidemic.

More than 100 Lawsuits

Lawsuits against drug companies manufacturing opioids have now been filed by over 100 states, cities, counties and Na-



This Just In...

With unemployment around 4% and marijuana legal in many states, some employers are now less picky about requiring preemployment drug tests.

A survey of 609 Colorado employers by the Mountain States Employers Council in 2017 found that employer testing for marijuana use fell to 66 percent, down from 77 percent the prior year. Colorado legalized the recreational use of marijuana in 2014.

Surveys by The Federal Reserve last year revealed that many employers have stopped administering drug tests because too many employees were failing them. And some employers fear maintaining tough drug standards means losing prospec-

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tive American tribes, and new suits are filed almost weekly. In March, South Dakota brought suit against Purdue Pharma L.P., a unit of Endo International P.L.C. and Johnson & Johnson's Janssen for deceptive marketing practices and contributing to the nationwide drug epidemic. South Dakota was just the latest in a long list of states and other government entities suing drug makers for problems caused by opioids, which now result in nearly 100 deaths a day.

The latest round of lawsuits by public entities represents a different strategy from a few years ago, when private individuals were suing drug companies for personal injury from opioid addiction. Those claims alleged that opioid products were defectively designed, lacked sufficient warnings about addiction, and were misrepresented as safer than alternatives.

The hurdle for these plaintiffs was that most of their allegations were preempted by the fact that the drugs had FDA approval and that the duty to warn patients about risk rests with the doctors who prescribe them. Still, manufacturers settled many of these cases without admission of guilt.

Now though, there is a movement building to create a class action against opioid manufacturers, similar to the judgment that led to more than \$200 billion in court-ordered payouts by the tobacco industry in 2000.

Similarities to Tobacco Settlement

Using a tactic that was successful against tobacco, government entities, like South Dakota and other states, are claiming that drug

makers and distributors have disrupted their social systems by oversaturating the market and failing to control against misuse. To repair this public nuisance, states, counties, cities and Native American tribes need restitution, they say. This is the approach that worked against the tobacco industry.

In addition, they are alleging that drug companies falsely misrepresented the addictiveness of their products and made false representations about effectiveness. While there is no whistle-blower testimony that drug makers deliberately sought to deceive, as there was against the tobacco industry, admission of liability in settlements and documents obtained by government entities, investigative reporting and litigation are available to support the opioid claimants' arguments.

Counties Would Get Money This Time, Too

These lawsuits differ from the tobacco litigation in that counties and cities are filing suits this time, too. When the states won their lawsuit against the tobacco companies, they kept the money. "None of it flowed down to the counties," according to Paul Hanly, a partner with Simmons Hanly Conroy, which represents more than a dozen counties in opioid lawsuits, as reported in *Governing* magazine. The cities, counties and Native American tribes end up providing and paying for the health care and services opioid addicts need.

Pulling off a win like the states did against tobacco in 2000 might be a long shot. But win or lose, the current deluge of litigation "very publicly paints the opioid industry as contrib-

utive employees to competitors. "Employers are really strapped and saying 'We're going to forgive certain things,'" said James Reidy, a lawyer who works with employers on their human resources policies, to *Bloomberg News*.

But not all companies are willing to change their drug policies. Especially those in manufacturing, or where driving vehicles or operating heavy machinery are involved, and even in industries like food services. Restaurant Brands International Inc., for example, which owns Burger King, still treats pot as an illegal substance. The federal government has increased its opposition to the legalization of marijuana under the Trump administration. In January, Attorney General Jeff Sessions rescinded the Obama administration's hands-off policy toward prosecuting marijuana-related crimes, which allowed free rein to cannabis industries in states where it's legalized. Even where safety is not a concern, the cloud of uncertainty created by that change in policy will discourage many employers from taking a more tolerant drug policy.

uting to the worst drug crisis in American history [and puts] wind in the sails of agencies and legislatures seeking stronger oversight. Together, litigation and its spillover effects hold real hope for arresting the opioid epidemic," said Rebecca L. Haffajee, J.D., Ph.D., M.P.H., and Michelle M. Mello, J.D., Ph.D., writing in the *New England Journal of Medicine*,

Guidelines for Mitigating Opioid Addiction

To ensure workers' compensation claimants receive treatment for pain without overuse of opioids, the CDC and other experts recommend:

- ✳ Encouraging treating physicians to follow current prescribing guidelines.
- ✳ Setting up prescription claims review programs to identify and address improper prescribing and use of painkillers.
- ✳ Increasing insurance coverage for other treatments to reduce pain, such as physical therapy, and for substance abuse treatment.
- ✳ Counseling patients on the benefits and risks of opioid use.
- ✳ Using psychological screening for individuals using opioids on a long-term basis.
- ✳ Requiring drug testing of individuals using opioids on a long-term basis.
- ✳ Referring individuals whose productivity or behavior changes to an employee assistance program (EAP) for evaluation and referrals if drug abuse is suspected.

For more information on using an EAP to prevent or address addiction issues in your workplace, please contact us. ■

The Cost of Bullying in the Workplace

Approximately one out of five workers reported being bullied in the workplace in a recent survey by the Workplace Bullying Institute of Bellingham, Washington.

The survey noted that 61% of workers who reported being bullied said that the perpetrator was a “boss” or “supervisor.” 65 percent also said they had lost their jobs because of their encounters with bullies in the workplace.

What Is Bullying?

The Workplace Bullying Institute defines workplace bullying as “repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that is:

- ✳ Threatening, humiliating, or intimidating, or
- ✳ Work interference — sabotage — which prevents work from getting done, or
- ✳ Verbal abuse.”

Bullying Can Cause Lost Productivity and Litigation

One of the biggest problems with workplace bullying is that it leads to so many other problems, such as lost productivity and even litigation.

“It occurred to me that many of the cases that I have defended over the years regarding stress in the workplace, psychiatric injury, sexual harassment, as well as other issues, really in a way have their genesis in the bullying behavior of someone in the workplace,” said Jeffrey M. Adelson, Santa Ana, California-based general counsel and manag-



ing partner at Adelson, Testan, Brundo, Novell & Jimenez, when he attended the 2018 CLM & *Business Insurance* Retail, Restaurant & Hospitality Conference in Dallas.

Some of the productivity issues related to bullying are worker fatigue, absenteeism and other stress factors. Bullying can also lead to allegations of discrimination based on age, disability, gender, race and other protected classes.

Can Bullying Lead to Workers' Comp Claims?

“Whether workplace bullying could result in a successful workers' compensation claim would depend upon several factors. If the workplace bullying were deemed to be so pervasive that it constituted a fact of employment, then injuries arising from workplace bullying could be deemed

to arise out of and in the course of employment, and be compensable under workers' compensation statutes," according to Charles Tenser, an attorney specializing in workers' compensation cases.

One of the telltale signs of bullying in the workplace, according to Kendra Schropp, Irving, Texas-based director of risk management and safety at On the Border Mexican Grill & Cantina, is "when you have a company with a steady amount of comp claims happening... and then suddenly within the same set of circumstances, same type of work, same groups of employees, they have a low amount of workers' comp reported." If you can't attribute the lower claims to some kind of change in safety or work procedure, look to the effect of management on employee morale; it could be bullying.

Bullying and Violence in the Workplace

Bullying can make an unstable person "snap". "Employees that become aggressive see it as a way of getting even for something," said Tom Tripp, a professor of management and operations at Washington State University in Vancouver and co-author of "Getting Even: The Truth About Workplace Revenge—And How to Stop It," in an interview with *Business Insurance* magazine. "They [bullied employees] feel they've been unjustly treated by the organization and they want to find a way to make it right."

To prevent bullying in your workplace, adopt a zero-tolerance policy and address bullying behavior appropriately. Here are some guidelines:

- 1 Notify employees and supervisors alike that the company will not tolerate bullying.
- 2 Encourage reporting of bullying or threatening behavior.
- 3 Encourage management to have an "open door" policy to stay involved with day-to-day interactions.
- 4 Appoint someone (ideally, someone from human resources with experience in dealing with interpersonal conflicts) to immediately investigate all reports of bullying.
- 5 Take appropriate action, from soliciting apologies to reassigning positions to termination, if warranted.
- 6 Educate employees on what constitutes inappropriate or harassing behavior.
- 7 Ensure management takes a "top down" approach to modeling appropriate behavior.
- 8 If your company has an employee assistance program, utilize the expertise of your EAP provider in investigating, intervening and providing education on bullying.
- 9 Create a written no-bullying policy; include your policy in employee handbooks and post it in prominent locations throughout the workplace.
- 10 Make your workplace safer by taking all complaints of bullying seriously and taking appropriate steps to remedy it.

A zero-tolerance policy toward bullying can improve workplace morale and safety. For more suggestions on improving safety, please contact us. ■

How Drug Formularies Are Reducing Costs and Mitigating the Opioid Crisis

Texas was the first state to experience a decrease in opioid prescriptions and significant savings in overall drug costs.

One result of the opioid crisis is the growing popularity of workers' compensation drug formularies. Workers' compensation drug formularies are already in place in Arizona, Ohio, Oklahoma, Tennessee, Texas, and Washington. And they are currently working their way toward approval in the legislatures of Indiana, Kentucky, New York, California and Montana.

Drug formularies are commonly used in Medicare and health insurance to regulate dosage, cost and types of drugs covered by an insurance plan. Just because a drug isn't on the formulary doesn't mean it won't be covered; approval just requires taking additional steps.

Big Impact on Opioid Use in Texas

Texas was the first state to adopt a workers' compensation drug formulary in 2011. Since then, employers and insurers in Texas have experienced significant savings in prescription drug costs and a decrease in opioid prescriptions.

"The number of open claims in Texas where nonpreferred strong opioids were being received and utilized by injured workers decreased from almost 15,000 injured workers in 2009 to less than 500 injured workers in 2015," according to Trey Gillespie, Austin, Texas-based assistant vice president of workers' compensation with the Property Casualty Insurers Association of America, in an interview with *Business Insurance* magazine.

Each state puts together its own workers' compensation drug formulary, which has some flexibility. "It evolves over time either based upon guidelines or pharmacy and therapy committees or whatever mechanism each state chooses that dictates 'here are the medications that are acceptable for treatment of injured worker conditions.' If you need something that is not within that drug list or formulary, it requires preauthorization, depending on which state, or requires another form of heightened review," said Don Lipsy, Memphis, Tennessee-based managed care specialty products manager with Sedgwick Claims Management Services Inc., in an interview with *Business Insurance* magazine.

Though the number of states with formularies is increasing, not all states are on board. In Pennsylvania, the state Senate passed a drug formulary bill, but in March it failed in



the House. Similar legislation also failed in Georgia and Louisiana in 2017.

Opposition and Misinformation

"I think there has been a significant amount of misinformation about drug formularies," said Joe Paduda on his blog, *Managed Care Matters*. "There has been a lack of understanding that formularies enhance patient safety and promote return-to-work and healing... Instead, some people in the industry purport that formularies are a way to prevent patients from getting the treatment they

need. I think there has also been fear on the parts of some people in the community who are injured-worker advocates that this would somehow be harmful to patients."

In Pennsylvania, the drug formulary bill was opposed by trial lawyers, who said it is an attempt to curb utilization review organizations.

For more information on workers' compensation drug formularies and how they affect your workers' compensation claims, please contact us. ■

The Benefits of Structured Settlements

Once a worker suffers an occupational injury while working for you, he or she becomes your responsibility for life.

If the injury recurs or flares up, the employer remains responsible for providing the necessary medical treatment. This holds true even years after a relatively minor accident.

Some workers' compensation claims remain open for years, or even decades. Using a structured settlement can help both your organization and the injured employee move forward.

Under a structured settlement, proceeds of the court settlement go to the plaintiff in the form of periodic payments, including scheduled lump sum payments. Payments can last for a year, for the claimant's lifetime, or somewhere in between.

When an organization and employee agree to a structured settlement, they will generally use a structured settlement broker. An experienced broker can help you negotiate the terms of the agreement and arrange funding. Structured settlements generally are funded by a single-premium annuity contract held by the employer.

Structured settlements offer the following advantages:

- ✦ They release employers from future obligations. Both the employer and employee can move on.
- ✦ They provide a continuing stream of income to injury victims.



This minimizes the risk that injured workers will spend away their claims proceeds and run out of money.

- ✦ They can provide injured workers a tax-free source of income.
- ✦ They typically prohibit the claimant from assigning or transferring his/her rights to receive future payments. This helps prevent fraud, embezzlement and running out of funds.

For more information on using structured settlements, please contact us. ■

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