

# Legal Concerns: Opioids and Marijuana in the Workplace

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Wolters Kluwer

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# Agenda

- How big is the opioid problem?
- The changing marijuana landscape
- Workplace impacts of use and abuse
- Identifying employees at risk
- Drug testing and dealing with abuse problems
- State and federal laws that may apply
- Best practices for employers
- “Real life” scenario



# How big is the opioid problem?



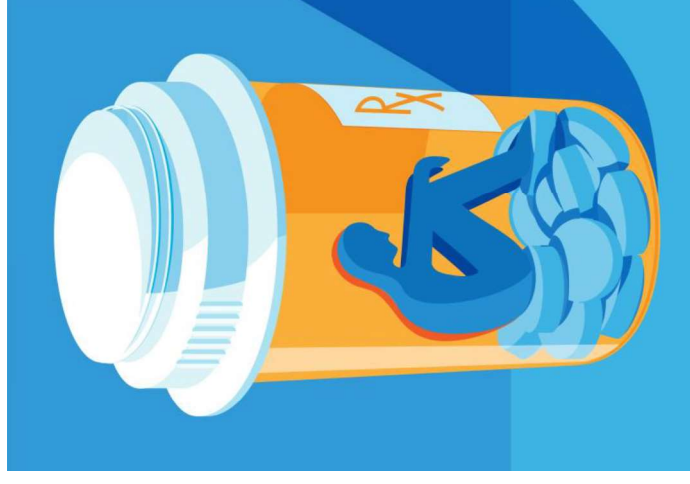
# National data: Opioid overdose deaths

- Opioids (including prescription opioids, heroin, and fentanyl) killed more than 47,600 people in 2017
- More than any year on record at that time
- 37% of all opioid overdose deaths involved a prescription opioid
- Data compiled by the Centers for Disease Control and Prevention



# NYC: Opioid overdoses in 2016

- Overdose death rate from any opioid—12.1 per 100,000 population
- Emergency room visits involving an opioid overdose—33.3 per 100,000 population
- Data compiled by the New York Department of Health; 2016 is the most recent available



# NY State: Opioid overdoses in 2016

- **Excluding NYC:** Overdose death rate from any opioid—18.2 per 100,000 population
- **Including NYC:** Overdose death rate from any opioid—15.5 per 100,000 population
- **Excluding NYC:** Emergency room visits involving an opioid overdose—74.9 per 100,000 population
- **Including NYC:** Emergency room visits involving an opioid overdose—56.9 per 100,000 population



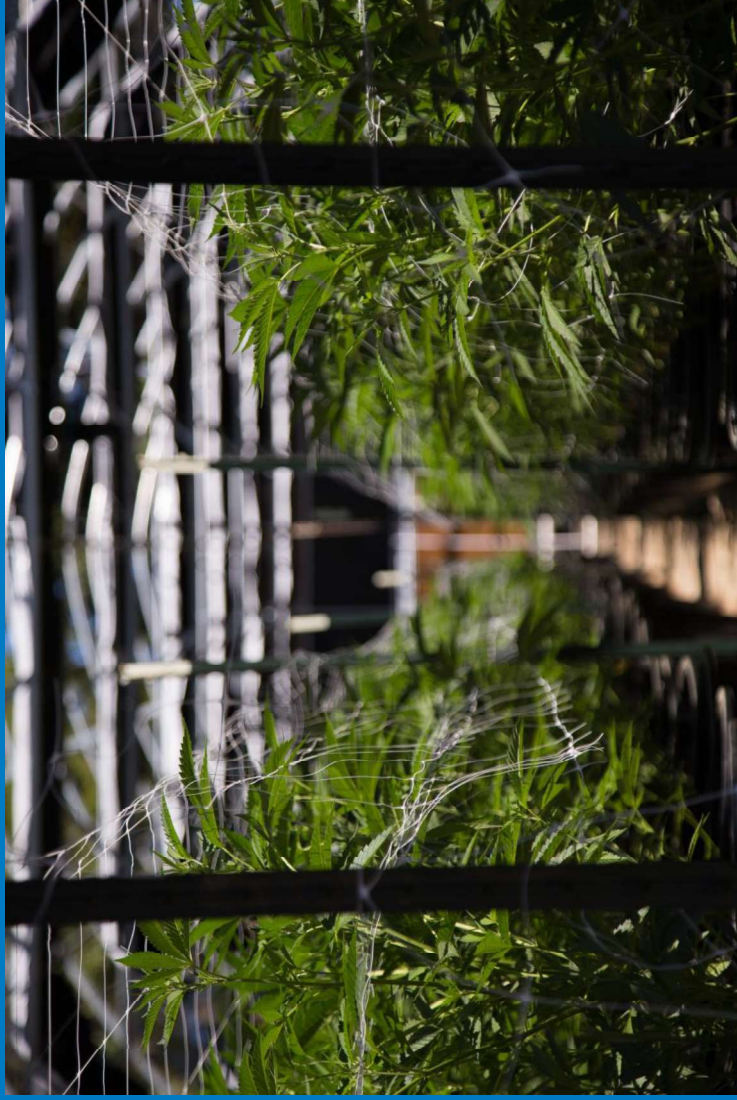
# NY State: 2017 comparative data

- 3,224 overdose deaths involving opioids—16.1 deaths per 100,000 persons
- Average national rate—14.6 deaths per 100,000 persons.
- Deaths involving *prescription* opioids have increased more slowly since 2013 from 859 to 1,044 cases in 2017
- Data compiled by National Institute on Drug Abuse





# The changing marijuana landscape



# State marijuana laws

- **Recreational use:** 11 states and Washington, D.C., have legalized the possession and personal use of marijuana (as of July 2019)
- **Medical use:** 33 states and Washington, D.C., have passed laws legalizing or decriminalizing medical marijuana (as of March 2019).
- **Medical use:** 13 states have legalized the use of cannabis oil, or cannabidiol (CBD)—a non-psychoactive ingredient in marijuana (as of March 2019).
- Ballotpedia data



# Marijuana laws in New York State

- **State Medical Marijuana Program:** Patients can be certified by a health practitioner to receive medical marijuana products for medical use
- **Registry identification card:** Patients must apply to the Department of Health to obtain the card
- **Recreational use:** Not yet legal, but law signed July 26, 2019 (effective 30 days later) “decriminalizes” — only a fine for possession under 2 ounces
- **Expungement:** Of both prior and future convictions



# Big Apple marijuana drug testing law

- Effective May 10, 2020, employers, labor organizations, and employment agencies, cannot require *prospective* employees to be tested for THC or marijuana
- Exceptions for law enforcement, construction site workers, commercial drivers licensees, and supervision/care of children, medical patients, or vulnerable persons, and others
- Int. No. 1445-A, enacted May 10, 2019



# New Jersey medical marijuana law



- Signed into law July 2, 2019 and effective the same day
- Employers are barred from taking adverse actions against employees *solely* based on medical marijuana patient status
- *Applicants* who have tested positive for cannabis must be offered an opportunity to present a legitimate medical explanation or to request a retest



# New Jersey medical marijuana law

- Employers not required to permit medical marijuana consumption during work hours, or anything that might result in the loss of federal funding
- Expressly does not restrict employers' ability to prohibit or take adverse employment action for possession or use of *intoxicating substances* during work hours or on workplace premises outside of work hours



# Nevada: Progressive marijuana laws

- Recreational use is legal for adults age 21 and older
- Under law signed June 5, 2019, effective January 1, 2020, employers will be *barred* from denying employment due to the presence of marijuana in an *applicant's* screening test (with exceptions for firefighters, EMTs, drivers, other laws)
- Where screening test is within the first 30 days of *employment*, the employee will have the right to take another test to rebut the results
- Employers must accept and consider the additional test results



# On the federal scene

- Marijuana use and possession is still illegal under federal law
- Marijuana Opportunity Reinvestment and Expungement Act recently introduced (H.R. 3884; S. 2227)
- Would decriminalize marijuana by taking it off the list of controlled substances—to apply *retroactively*
- Correct historical injustices by requiring resentencing and expungement of prior convictions





# Workplace impacts of use and abuse



# How does opioid and marijuana use and abuse impact the workplace?

- Safety risks
- Absenteeism, tardiness, employee leave issues
- Employee turnover, smaller pool of qualified applicants
- Insurance, medical, and prescription drug costs
- Workers' compensation, third-party personal injury claims, increased policing, product defects, recruiting and staffing costs



# Are some industries more prone to marijuana and opioid abuse problems?



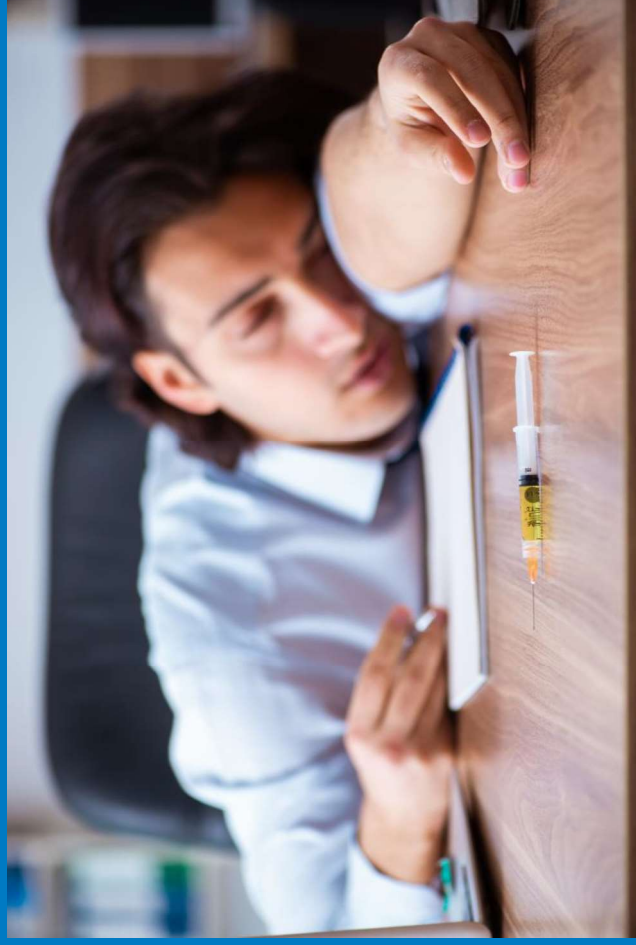
- Construction, extraction, food preparation and serving, health care practitioners, and technical, health care support, and personal care and service occupations more vulnerable to opioid abuse
- Health care, transportation, construction and manufacturing pose the greatest risks and vulnerabilities because the stakes are so high
- Healthcare has increased opioid abuse vulnerability due to opioid access

# Lawful and unlawful use of opioids or marijuana may pose different challenges for employers

- Employers conducting business in multiple states must know state and local laws
- Americans with Disabilities Act and Family and Medical Leave Act may be implicated when opioids or marijuana are lawfully used
- No protection for illegal drugs or misuse of lawfully prescribed drugs
- Marijuana is still unlawful under federal law
- Turning a blind eye may amount to aiding and abetting



# Identifying employees at risk



# How can employers identify opioid abusers and should they proactively try?



- Drug testing, direct observation, self-identification
- Coworker reports, through the family members, seeing the drugs at work
- No downside “if done legally”
- Potential liability for “perceived as” discrimination
- For accident prevention
- To deal with employee turnover, smaller qualified applicant pools, insurance costs

# Drug testing and dealing with abuse problems



# Employers can use several tools to deal with employee drug problems

- Formal drug and alcohol testing programs
- Supervisor and employee education
- Health plan programs such as EAPs; counseling; other addiction recovery benefits
- Pharmacy benefits to facilitate transition from opioids
- Naloxone programs





# What do employers need to know about drug testing?

- Important tool, especially for workers in safety-sensitive positions
- Test applicants after a conditional offer of employment
- Testing can pose a risk of unlawful discrimination for *lawful* use
- Presence of THC, but not *active* THC, may not mean employee is “high”
- Absent a valid opioid prescription, employees may be terminated for testing positive

**DRUG TESTING**

# State and federal laws that may apply



# Family and Medical Leave Act

- Eligible employees may get up to 12 weeks off during a 12-month period
- Because they are unable to work due to their own serious health conditions or to care for a family member with a serious health condition
- The employee must have worked at least 1,250 hours during the 12 months prior to the start of the leave
- The employer must have 50 or more employees within 75 miles of the worksite (surface miles)



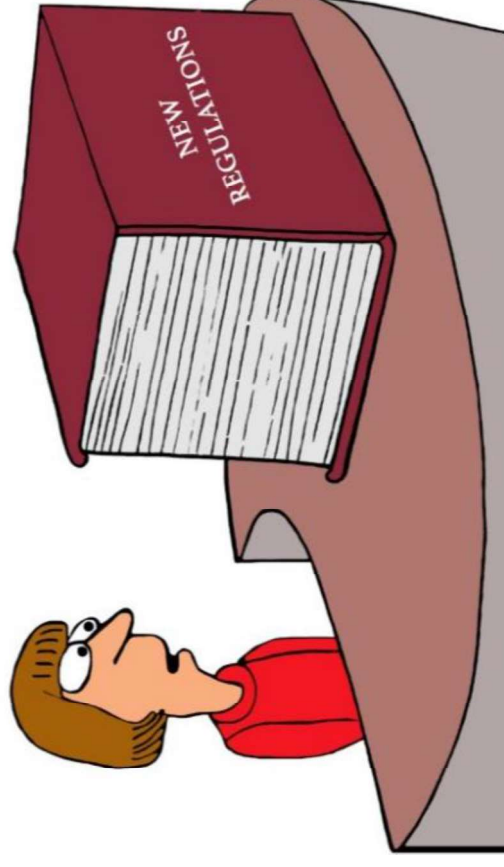
# Americans with Disabilities Act

- Unlawful to treat a qualified individual with a disability unfavorably because she has a disability
- Unlawful to treat an applicant/employee less favorably because she has a *history* of a disability or is *believed to have* a physical or mental impairment that is *not* transitory and minor (lasting 6 months or less)
- Employers must provide reasonable accommodation to an employee/applicant with a disability, *unless* doing so would cause significant difficulty or expense for the employer (undue hardship)



# What state and federal laws may come into play, and when?

- FMLA and ADA protections for legal vs. illegal use
- Recovering and recovered substance abusers may be “disabled”
- Leave of absence for treatment may be a reasonable accommodation
- Employee is *not* protected by the ADA for marijuana use, even when prescribed (but state laws may differ)



# Best practices for employers

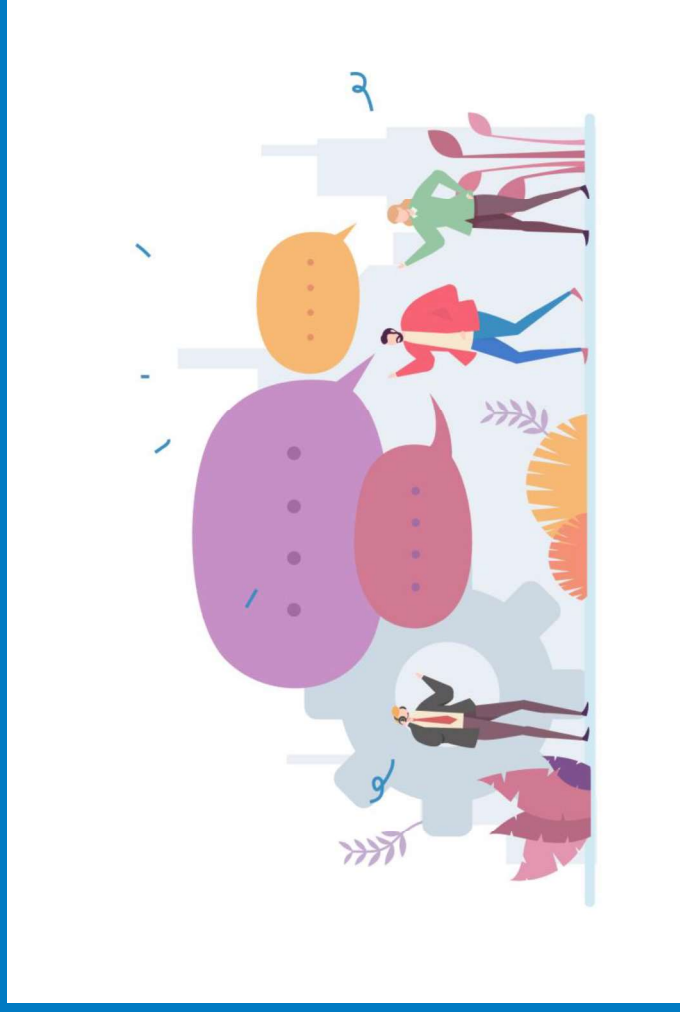


# Best practices for employers to address opioid/marijuana use/abuse in the workplace

- Train supervisors and managers, especially to recognize signs of impairment
- Maintain a comprehensive drug testing program, even if it is *not to test*
- Expand drug testing panels to include opioids
- Understand the law where the employer does business, including local laws
- Maintain employee benefits that allow drug abusers to get help



# “Real life” scenario





# Scenario: Warehouse accident is potentially opioid related

A supervisor learns from an employee's coworker that the well-respected, hard-working employee is currently struggling with abuse of an opioid initially prescribed for pain two years ago when she suffered a severe burn injury. The coworker shared this information with the supervisor five days after the employee was involved in a minor workplace accident, in which she backed her forklift into warehouse shelving and knocked down several crates of product. Nobody was hurt, but some product was damaged.

- ***The supervisor has asked HR what, if anything, should he do now that he suspects the accident may be drug related?***
- ***If the employee admits to the problem, would she be entitled to leave for treatment and under what law?***



# Scenario: Warehouse accident is potentially opioid related

- Drug testing based on “reasonable suspicion” or “cause” might have been an option at the time of accident
- Concerns about an employee harming herself or others, particularly in safety sensitive positions, such as operating heavy machinery or vehicles
- If the employee admits the problem, consider urging the employee to take advantage of an employee assistance program
- The FMLA or ADA may apply if the employee needs time away to seek treatment



Thank You – Questions?

