

Beyond ADA or FMLA

... dealing with the “Medicated Worker”



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Scope of the Problem

- One in ten Americans, ages 12 and older are using prescription antidepressants
- Most frequent users are females, ages 40-59
- Figures are up 400% since 1980s
- 16% of all weekend and nighttime drivers are under the influence of:
 - Unlawful drugs
 - Prescription drugs that restrict driving
 - OTC medications causing drowsiness
- Same drugs present in 18% of all fatalities

Why is it a Problem?

- Potential for injury to self or others
- Most employer policies address only “unlawful” drugs
- Many psychotropic drugs do not show up on a standard drug screen
- Use of even lawful mood altering drugs on duty can affect the credibility of the worker as a witness; and even trigger Brady v. Maryland, 373 U.S. 87

Why aren't Employers doing anything?

- Employers fear collateral issues, such as HIPAA, ADA, and employee privacy rights
- Employers fear accidentally creating a “public record”
- “Doc Feelgood” has released them to work (provided they don't do anything)
- A lot of horror stories out there, where employers make mistakes

Understand the Game ...

- Employees have rights
- Employees in “safety sensitive” jobs are subject to greater scrutiny
- Inquire about an employee’s ability to perform “essential functions” safely; is “job related and consistent with business necessity” ...

Prepare to be Proactive ...

- Job analysis/research to determine whether a job is “safety sensitive”
- Don’t rely on physical standards that have not been adopted

(Rorrer v. City of Stow, 743 F.3d 1025)

- Don’t “declare” EVERY job to be “safety sensitive”

(AFSCME v. Scott, 717 F.3d 851)

- Rely on outside medical opinion of “MRO”

(“honest belief” cuts off “regarded as,” when based upon an outside medical opinion)

Questions???



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