Employee Benefits & Workers' Comp 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.

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Unknown Future for Wellness Program Incentive Rules

The AARP successfully challenged EEOC rules that allow employers to implement incentives for participating in workplace wellness programs — incentives worth up to 30 percent of the cost of health insurance. Employees who cannot participate must reveal personal health information explaining why they won't participate. AARP's argument is that when employees are required to disclose their protected information, they are not really in a "voluntary" program, which is inconsistent with the "voluntary" requirements of the ADA (Americans with Disabilities Act) and GINA (Genetic Information Nondiscrimination Act).

The U.S. District Court for the District of Columbia ruled that the

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More than 100 Lawsuits

Lawsuits against drug companies manufacturing opioids have now been filed by over 100 states, cities, counties and Native 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 contributing 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*,

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U.S. Equal Employment Opportunity Commission (EEOC) did not properly justify its rules regarding what is a permissible incentive under the ADA and GINA.

However, the court said it would be too disruptive to businesses that currently follow the regulations to immediately create new wellness programs. The court instead gave the EEOC until Jan. 1, 2019 to redraft the rules; after which they must vacate the current regulations.

EEOC representatives said they may take a "wait and see" approach to forming new corporate wellness rules since they don't agree the court had the power to force the agency to comply with any deadline or direct the agency to adopt any new rules.

Employers still can legally follow the rules this year, but some attorneys recommend employers closely examine their programs in light of the decision and prepare to make possible changes.

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.

Kicking it Up a Notch — Retirement Contribution Limits Increased

That's just one of the many changes to retirement plans for 2018.

This year employees can contribute $500 more to their federally legislated retirement funds. The federal government raised contribution limits to $18,500 for 401(k), 403(b), most 457 plans, and the Thrift Savings Plan. The adjustment was made to keep up with the cost of living. Participants age 50 or older, by the end of 2018, may make additional catch-up contributions of $6,000, meaning older savers may defer up to $24,500 into their retirement plan.

This limit does not include any matching contributions made by employers.

To maintain their lifestyle, the average employee will need about 80 percent of their income after they retire. While Social Security will help, employees will need to save the rest. When you encourage employees to contribute the maximum amount to their retirement accounts, not only can they increase their retirement savings, they may qualify for tax breaks, such as the Saver's Tax Credit.

Employees who save the additional $500 and are able to earn a 7 percent annualized return can expect their $500 investment to grow to more than $3,800 over a 30-year period.

Here are some of the other changes that will affect employer sponsored retirement funds in 2018:

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401(k)

A 401(k) plan allows employees to contribute pre-tax dollars from their paycheck to an employer-sponsored retirement plan. The employee doesn't pay taxes until the money is withdrawn.

According to new federal rules, anyone who participates in a 401(k) and earns more than $73,000 ($121,000 for couples) cannot deduct an individual retirement account (IRA) contribution on their tax return. However, if only one member of the married couple has a 401(k), the couple can take the deduction until the couple's income reaches $189,000 and then the tax deduction is phased out when they earn $199,000 or more.

The catch-up contribution limit for employees age 50 and over is still $6,000. Therefore, the maximum elective deferral any employee can choose to make this year is $24,500. The overall limit for 401(k) contributions, which includes money from all sources, including employer matching contributions, increased by $1,000 to $55,000. With the catch-up contribution, a maximum combined contribution of $61,000 is allowed.

Saver's Tax Credit

The Saver's Tax Credit is a non-refundable income tax credit that could reduce federal income tax liability to $0 for employees who have a low to moderate income and are investing for their retirement through an IRA, 403(b), 457(b) and/or 401(k) plan. The Saver's Credit can be claimed along with the tax deduction for participating in a 401(k) or IRA.

Here are some retirement savings plans that also were affected by the contribution limit increase. You may not be familiar with these plans if you do not work in the public sectors:

403(b)

A 403(b) plan is a retirement plan for certain public school employees, ministers and employees working for tax-exempt organizations. These employees can invest in either annuities or mutual funds. They don't pay income tax on allowable contributions until they retire and begin making withdrawals from the plan.

457

A 457 plan is an employer-sponsored, tax favored retirement plan for state and local government employees and some nonprofit executives. Participants don't have to pay a 10 percent penalty if they withdraw funds before age 59 and a half.

Thrift Savings Plan

A Thrift Savings Plan is a retirement savings and investment plan for federal employees and members of the uniformed services.

For more information about helping employees increase their retirement savings, 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

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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.

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Ways to Proactively Combat Mental Health Issues in the Workplace

Do you have employees who are depressed, anxious or addicted to alcohol or drugs? If so, do you know what to do?

In 2015, the American Psychological Association reported that a quarter of surveyed employees felt some level of depression or anxiety. These mental health issues can adversely affect a company through absenteeism, presenteeism (the employee is at work, but not productive), and turnover and training costs for replacement workers.

Many employers offer Employee Assistance Programs (EAP), which help employees who are experiencing stressful situations. Employees and family members can call for advice from a nurse or get basic legal, adoption or elder care assistance and referrals. Unfortunately, employees often do not seek assistance through the program even though their employer usually covers all the costs.

Deloitte Center for Health Solutions suggests that employers must be more proactive and should create a culture to manage mental health wellness proactively.

In 2016, the National Council for Behavioral Health adapted an Australian mental health-training program for American employees and started training managers. The program creates a culture attuned to employee well-being. Managers learn to recognize the signs and symptoms of anxiety, depression and other common mental health disorders. The idea is not to turn the managers into clinicians, but to train them as an early warning system.

In another study, the University of South Wales reported that when managers are trained to communicate regularly with employees who are home because of illness, the employees returned to work more quickly. University representatives found that manager training was cost effective and estimated that employers received $10 for every $1 spent on training by reducing work-related absences.

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