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# Drug Testing Poses Quandary for Employers

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LAWRENCEBURG, Tenn. — The news, delivered in a phone call, left Sue Bates aghast: she was losing her job of 22 years after testing positive for a legally prescribed drug.

Her employer, Dura Automotive Systems, had changed the policy at its sprawling plant here to test for certain prescription drugs as well as illicit ones. The medication that Mrs. Bates was taking for back pain — hydrocodone, a narcotic prescribed by her doctor — was among many that the company, which makes car parts, had suddenly deemed unsafe.

“I don’t think it should end the way it did,” said Mrs. Bates, an assembly line worker who has sued Dura for discrimination and invasion of privacy. “You tell somebody you lost your job because you’re on prescription medication and they’re like, ‘Yeah, right.’ ”

Two decades after the Supreme Court first upheld the right to test for drugs in the workplace, Dura’s concern — that employees on certain medications posed a safety hazard — is echoing around the country. The growing reliance of Americans on powerful prescription drugs for pain, anxiety and other maladies suggests that many are reporting to work with potent drugs in their systems, and employers are grappling for ways to address that.

What companies consider an effort to maintain a safe work environment is drawing complaints from employees who cite privacy concerns and contend that they should not be fired for taking legal medications, sometimes for injuries sustained on the job.

“This may be the point guard for an important societal issue,” Dr. Robert T. Cochran Jr., a Nashville pain specialist who treats three of the Dura plaintiffs, said of the lawsuit against Dura. “How do we address these drugs as a society?”

There is a dearth of data from independent groups regarding impairment from prescription drugs in the workplace, partly because the issue has not drawn broad scrutiny. But Quest Diagnostics, a prominent provider of workplace drug tests, said that the rate of employees testing positive for prescription opiates rose by more than 40 percent from 2005 to 2009, and by 18 percent last year alone. The data, culled from the results of more than 500,000 drug tests, also indicated that workers who were tested for drugs after accidents were four times more likely to have opiates in their systems than those tested before being hired.

“It’s not nearly on employer radar screens as much as it should be,” said Mark A. de Bernardo, executive director of the Institute for a Drug-Free Workplace, a nonprofit business coalition near Washington, and a senior partner at Jackson Lewis, an employment law firm. “Given the liability for industrial accidents or product defects or workplace injuries involving prescription drug abuse, employers cannot afford not to address this issue.”

Nor is the problem limited to factory floors like the one at Dura’s plant here, where conveyor belts are in constant motion and tow drivers shuttle pieces of glass from station to station, former workers said. In Texas, a prominent prosecutor resigned in 2008 after a scandal for which he blamed impaired judgment because of prescription drugs. And in Missouri, a patient sued alleging that a doctor had torn a hole in his colon during a 2006 colonoscopy while taking the painkiller oxycodone.

Dr. Carl Rollyn Sullivan, director of addictions programs at the West Virginia University School of Medicine in Morgantown, said he had treated “a lot of miners telling me the ridiculous amount of drugs they’re doing underground,” most of them legally prescribed.

### **Challenges for Employers**

Setting rules about prescription drug use in the workplace is tricky, not least because it is difficult to prove impairment. Under Dura’s policy, a prescription drug was considered unsafe if its label included a warning against driving or operating machinery, but doctors say many users function normally despite such warnings.

Also, some employers find it difficult to deal with the problem partly for fear of violating the Americans with Disabilities Act. It prohibits asking employees about prescription drugs unless workers are seen acting in a way that compromises safety or suggests they cannot perform their job for medical reasons, according to lawyers with the Equal Employment Opportunity Commission.

“We’re up against 20 years of training on the A.D.A. that essentially suggests, ‘Don’t ask, don’t tell,’ ” said Steven M. Bernstein, an employment lawyer with Fisher & Phillips in Tampa, Fla.

Christopher J. Kuczynski, assistant legal counsel in the Equal Employment Opportunity Commission’s policy division for the Americans with Disabilities Act, said, “The employer must have reasonable belief the person is unable to do the job or poses a threat based on a medical condition.”

The only exception is for police officers, firefighters and others in public safety jobs, Mr. Kuczynski said. They can be required to self-report the use of prescription medication if their

inability or impaired ability to perform their job functions would result in a direct threat, he added.

Even with bus and truck drivers, nuclear plant workers, and others in jobs that the federal government deems “safety sensitive,” employers are required to test for only six categories of drugs that do not cover synthetic painkillers like OxyContin and Vicodin, anti-anxiety drugs like Xanax, or other controlled prescription drugs. (Because the test looks for codeine and morphine, which experts say are far less abused than the synthetics, many employers wrongly assume it looks for all opiates.)

“That is just a devastating critique of the government’s role in this,” said Dr. Robert L. DuPont, president of the Institute for Behavior and Health near Washington. “It’s a very serious hole in the system.”

Dr. Donna Bush, a senior forensic toxicologist at the Substance Abuse and Mental Health Services Administration, which sets parameters for federal drug testing, said the group was not pushing to add more prescription drugs.

“Which ones do we add?” she asked. “Drug testing for illicit illegal drugs is very easy because presence is an offense.”

Employers can choose to test for more drugs, which is what Dura decided to do at its Lawrenceburg plant in 2007. Citing concerns about drug use and worker safety, Dura hired an independent company to administer random drug tests. Dura chose to screen for 12 types of drugs, including hydrocodone and oxycodone.

“The goal of the plan was to provide a safe environment,” Lindy Boots, the plant’s former human resources manager, said in a deposition.

The concerns were not totally unfounded, some employees who worked at the plant said in interviews. A plaintiff said he knew of workers using illegal drugs on the job, and other former employees said they suspected people were passing around prescription drugs.

“If they had a headache or something was hurting some of them would give them one of their Lortabs,” said Willarene Fisher, a former employee who failed the drug test, of her former co-workers. Ms. Fisher is also suing.

Representatives of Dura declined to comment, citing the continuing lawsuit. It is one of two that have been filed against Dura; the other was brought by the Equal Employment Opportunity Commission. Both cases are currently in court.

Court records show that over a week in May 2007, about 500 employees at the company's Lawrenceburg plant submitted urine samples under the new testing policy. Of those, 44 tested positive for prescription drugs. They were put on a 30-day leave of absence and had to pass a second test to return to their jobs.

Susan Lowery, a former supervisor at the plant who tested positive for oxycodone, said the drug had kept her functioning after three back surgeries and did not affect her job performance.

"My record was clean," said Mrs. Lowery, a plaintiff in one of two lawsuits against Dura. "I was there every day no matter how I felt."

### **National Efforts**

The drug tests coincided with Dura's participation in Tennessee's Drug-Free Workplace Program, which provides incentives that include a premium credit on workers' compensation insurance.

Many states have a drug-free workplace program, a concept that developed after Congress passed the 1988 law requiring companies with federal contracts to adopt drug policies. But the programs have barely changed in the 20 years since they were conceived and focus heavily on illegal drugs.

Meanwhile, the laws on drug testing are complex and vary from state to state. Several, for example, prohibit or greatly restrict random drug testing, while many others give employers broad discretion, even providing incentives for employers to drug test their employees like discounts on workers' compensation premiums.

Employers can ask workers in safety-sensitive jobs to self-report any potentially dangerous prescription medications, but they cannot ensure they do so.

The Substance Abuse and Mental Health Services Administration urges companies to train supervisors to look for signs of drug abuse. But an incorrect assessment can land an employer in court, Dr. DuPont said.

"If somebody puts his head down on a desk, do you test him for drugs or not?" he said. "The first time you get an employee who says you're harassing them, you're not going to test anyone else even if they're passed out."

Many doctors, meanwhile, say that most people can tolerate and function well on pain medication taken under their supervision.

“In general,” said Dr. Seddon R. Savage, a pain specialist at Dartmouth College and president of the American Pain Society, “well-prescribed opioids at a stable dose that are well supervised in most healthy people won’t cause sedation or other cognitive problems.”

Dr. Cochran said that opiate painkillers can help workers do their jobs better if taken appropriately.

“I think they terminated some people who were not in any way compromised,” he said of Dura.

Yet Dr. Cochran also estimated that about 15 percent of his patients misused painkillers and said that he understood why employers would be worried.

At the very least, Dr. DuPont said, the standardized testing that is now mandatory for transportation and nuclear workers should be expanded to include more legal drugs. The Substance Abuse and Mental Health Services Administration recently added a sixth drug, ecstasy, to the panel of five — marijuana; cocaine; amphetamines; phencyclidine, orPCP; and nonsynthetic opiates — that it has long required safety-sensitive workers to be tested for.

That leaves employers in even the most safety-sensitive fields to make their own decisions about whether to test for synthetic opiates and other commonly used legal drugs. And many are skittish, even though anecdotes abound about people misusing or abusing prescription drugs in the workplace.

“I’ve seen people have their fingers cut off because they or somebody they depended on to operate machinery properly was out of it,” said Dr. Neil Capretto, medical director at Gateway Rehabilitation Center in Aliquippa, Pa. “We treat some people in construction who say so many of their co-workers are using, they sometimes have to change careers because it’s too much of a trigger for them to go back to work after rehab.”

### **Finding a Balance**

Dr. Barry Sample, director of science and technology for the Employer Solutions business of Quest Diagnostics, said the smartest thing employers can do is come up with a thorough and consistent policy that spells out which drugs their workers might be tested for and under what circumstances.

Supervisors, he said, should be carefully trained to look for signs of impairment — the “reasonable suspicion” necessary under law to warrant testing.

“They need to understand what constitutes reasonable suspicion,” he said, “and make sure the policy is communicated clearly and very well to the employees who are going to be impacted.”

But some worry that employers wading into the realm of prescription drugs could infringe on privacy and dredge up stereotypes about people who take certain medications.

“People make stereotypical assumptions about certain medications, whether they’re prescription or over-the-counter, and use those prejudices from prohibiting people from maintaining gainful employment,” said Nick Pladson, an Equal Employment Opportunity Commission lawyer in Minneapolis who is suing a manufacturing company on behalf of a man who was required to disclose the prescription drugs he was taking and was later fired.

Although Dura officials said in court documents that the goal of expanded testing was to protect employees, some plaintiffs in the lawsuits claim they were injured on the job and supervisors knew about the medications they were taking. Others say they believe the company wanted to get rid of them because they were costing it thousands of dollars in insurance premiums, a charge the company has denied.

“The reason I was taking the medication was a work-related injury,” said Mark Long, 38, who worked at Dura and was fired for taking hydrocodone. “I really didn’t expect for my job to end.”

Supervisors worried that employees, who manufactured hundreds of thousands of windows for automotive companies including General Motors and Ford within very close proximity of one another, could cause a “domino effect” if one was impaired and had an accident.

Mr. Long said he had stopped taking Lortab after losing his job because the pain subsided when he was not working full-time. With work scarce in Lawrenceburg, a city of 14,000 in south-central Tennessee, Mr. Long drives 70 miles each way to work as a boat mechanic in northern Alabama.

Mrs. Bates, whose job was trimming car window molding, said she had been unable to find another job. She said she understood Dura’s safety concerns but believed the company should have worked with employees who take prescription drugs rather than fire them.

“If the medicine they’re taking is not good for them or the workplace, then there should be some sort of program where they can teach us how that affects you or see if something else can be worked out,” Mrs. Bates said. “But that was not an option for us.”

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