

# Can An Employer Test Employees for the Lawful Use of Prescription Drugs? One Employer Is Fighting For Its Policy

By Nancy N. Delogu

Look Inside for Details



155 Millburn Avenue  
Millburn, New Jersey 07041

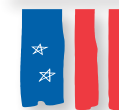
*Thank you...*

*to all of the supporters who  
have and continue to make sure that  
Drugs Don't Work in New Jersey.*

*On behalf of the Partnership for a Drug-Free  
New Jersey Board of Trustees and staff,  
we wish you, your staff, and all of your families  
a happy and healthy holiday season and  
prosperous and peaceful new year.*

# UPDATE

**DRUGS  
DON'T  
WORK  
IN NJ!**



Partnership for a Drug-Free New Jersey

In Cooperation with the Governor's Council on Alcoholism & Drug  
Abuse and the New Jersey Department of Human Services

Update No. 72

Fall 2014

## Can An Employer Test Employees for the Lawful Use of Prescription Drugs? One Employer Is Fighting For Its Policy

By Nancy N. Delogu

Dura Automotive Systems, a design and manufacturing company based in Michigan, implemented an employee drug-testing policy following a number of accidents that appeared to be linked to both illegal drug use and impairment caused by the use of legal medications. Under that policy, described in a lawsuit filed in 2009, if a Dura worker based in its Lawrenceville, Tennessee facility tested positive, the test results were referred to a medical review service as is typical. The medical review service would discuss the results with the tested individual and, if the employee offered a legitimate medical explanation, the employee would be cleared of any suspicion of illegal drug use. The inquiry didn't end there, however. If the medical review agency (provocatively named "Freedom From Self") determined that the employee's use of the prescribed medication could cause a safety problem (based upon warnings that the drugs carried), it would notify Dura that the employee's use of those medications posed a safety concern. Dura then told those employees that they must stop using the medication. Employees were later retested, and if they again tested positive for the prescribed medication, Dura would terminate their employment.

In recent years, the percentage of Americans taking prescription drugs has increased dramatically. During the most recent period, from 2007 to 2010, about 48 percent of people said they were taking a prescription medication, and one in ten are estimated to take five or more prescription medications at the same time, which significantly increases the likelihood of adverse interactions between the medications, according to the Centers for Disease Control report titled "Health, United States, 2013." In 2010, physicians in the United States wrote more than 257 million prescriptions for potentially addicting opiate pain medications. (See also the DDWNJ Winter 2013 update, "How Prescription Drug Abuse Became a Workplace Problem...")

*If the medical review agency (provocatively named "Freedom From Self") determined that the employee's use of the prescribed medication could cause a safety problem (based upon warnings that the drugs carried), it would notify Dura that the employee's use of those medications posed a safety concern. Dura then told those employees that they must stop using the medication.*

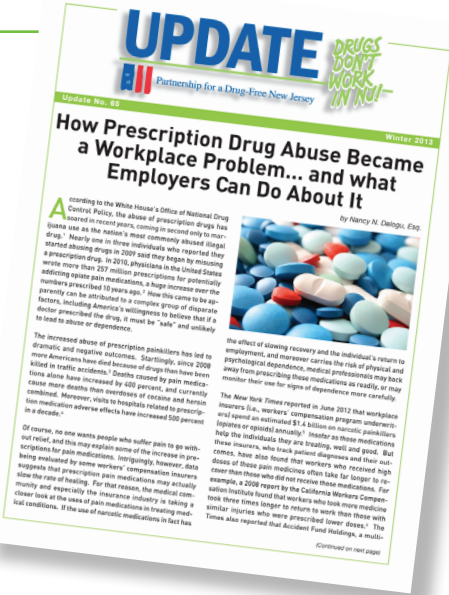


and what Employers Can Do About It,” for additional information on the widespread use of potentially impairing prescribed medications.)

Can employers test employees for prescription drug abuse? Under the Americans with Disabilities Act, the answer is “yes,” as that law specifically states that tests for illegal drug use are not medical examinations and are not evidence of discrimination against recovering drug abusers when used to ensure that the individual has not resumed the illegal drug use. If an employee uses a prescription medication that is not prescribed for her, that is illegal drug use within the meaning of the law and her employer can impose discipline for violating its policy against illegal drug use as a result. The Dura litigation, then, is different because it focuses only on how an employer may gather and use information about an individual’s lawful use of prescribed medications.

*...tests for illegal drug use are not medical examinations and are not evidence of discrimination against recovering drug abusers when used to ensure that the individual has not resumed the illegal drug use.*

The Equal Employment Opportunity Commission, the federal agency charged with interpreting and enforcing federal laws against discrimination, objected to this practice, arguing that Dura’s policy violated the Americans with Disabilities Act (ADA). The ADA protects disabled individuals from discrimination on the basis of disability, but it also limits the type of medical information employers can gather about their employees. (A newer federal law, the Genetic Information Nondiscrimination Act, extends this protection to limit information an employer can gather about an employee’s family medical history). The EEOC argued that Dura’s program amounted to an impermissible medical examination which was neither job-related nor consistent with business necessity, because if Dura learned that an employee was taking a particular medication, the company could determine, in some detail at least, that the employee suffered from a disability. For example, the EEOC suggested, if Dura learned that an employee was using an anti-seizure medication, it might reasonably infer that she suffered from a form of epilepsy. Dura did not need to know whether its employees had impairments as long as they were successfully performing their jobs, the agency argued, and therefore, it claimed that the Dura’s inquiry could not be justified as a



business-related necessity. The EEOC brought suit against Dura, and in 2012 the company entered into a settlement agreement with the EEOC. In addition to paying the agency \$750,000, the settlement agreement prevents Dura from making medical inquires and conducting medical examinations that are prohibited by the ADA; prohibits Dura from conducting

employee drug screens that are not job-related or consistent with business necessity; enjoins Dura from illegally disclosing confidential information obtained through medical inquires of employees, and other similar requirements. The litigation did not end there, however: some of the effected employees continued the litigation in their own names, and over the course of the last two years, the case has been bounced back and forth between the federal district court and the U.S. Court of Appeals for the Sixth Circuit, and the wrangling continues. From a technical legal perspective, the question the Courts are still wrestling with is whether Dura’s program actually involves impermissible medical examinations, as that term is defined by the statute. The business community sees the suit as a test of whether employers can take proactive steps to ensure that employees do not pose a threat to themselves or others --



in this case, by prohibiting them from working while they have medications known to cause impairment in their system – or if the employer must wait until the employee actually demonstrates signs of impairment in the workplace before acting.

Dura has pressed its argument that its drug-testing process was neither a medical examination nor a disability-related inquiry. It claimed that neither its agent nor its management asked employees why they were taking the medications detected and, since everyone affected was subject to the same rule, Dura argued that requiring its employees not use medications warning against the use of machinery was a neutral qualification standard, and not a disability-related inquiry. Dura also has pointed to a record of accidents at the Tennessee facility connected to impairment by both illegal and legal medications as justifying its effort to ensure a safe workplace.



Because tests for illegal drugs are specifically permitted by the ADA, and tests for alcohol, a legal substance, are the trial court ruled that tests for the use of prescribed medications also must be prohibited. After being presented with this instruction, a jury awarded the Dura plaintiff employees roughly \$850,000 in

damages. In August, however, the U.S. Court of Appeals for the Sixth Circuit reviewed the case and reversed, awarding Dura another opportunity to show that its policy complied with the ADA. Noting that before the trial court decided that tests for prescribed medications were prohibited, neither side had argued that the drug tests necessarily revealed employee medical information or even employee impairments, the Sixth Circuit found that testimony was needed regarding exactly what information was gathered in connection with the tests at issue.

If, despite precautions, the testing process did reveal individual medical information or impairments, then presumably the employees could prevail by showing those examinations failed to qualify as both job-related and consistent with business necessity. Similarly, if in practice medical information was actually demanded from employees, despite the policy’s allegedly neutral approach, then presumably Dura would have to show that the inquiries were job-related and consistent with business necessity in order to prevail. If, however, the program gathered and reported only that employees were using medications that bore warnings against operating machinery, then arguably no medical information was shared and the testing program operated within the bounds of the ADA.

As the use of prescribed medications known to significantly impair users has soared in the last decades, business owners and employees have justifiably become concerned about employees who use those medications while working in hazardous employment. By all accounts, the use of prescription opiates and opioids like oxycodone and acetaminophin/codeine combinations has increased by more than 120% in the last decade, and a majority of states now permit the use of marijuana for medical conditions, despite its well-documented negative effects on driving. Would Dura Automotive’s program have been less objectionable if it required every employee working with heavy machinery to undergo a fitness for duty examination with a medical professional who determined whether the employee should not work while using a particular medication? Should Dura have to pay for a detailed medical examination when federal regulations require medications with impairing effects to publish that information so that users are aware of the risks? Is a fitness-for-duty examination preferable because some of the individuals using those medications will also be disabled, and therefore arguably entitled to accommodations rather than termination while they use the prohibited medications?

As of press time, the employees suing Dura have asked the Court of Appeals to reconsider its decision and to reinstate the verdict in their favor. There’s no question that many will be watching closely.

### About the Author

**Nancy N. Delogu** is the managing shareholder in Littler Mendelson, P.C.’s Washington, D.C. office. In addition to counseling employers on substance abuse prevention and disability discrimination laws, she helps them with strategic counsel and defense of employment law disputes.

*Notice: These articles reflect the opinion of the author and does not necessarily reflect the opinion of Partnership for a Drug-Free New Jersey (PDFNJ). This information should not be construed as legal advice from the author or PDFNJ. Please consult your own attorney before making any legal decisions.*