MAINTAINING A DRUG FREE WORKPLACE

What does it mean given employee use of quasi-legal and prescribed substances?

–Jim Macy and Jonathan Eiden, von Briesen & Roper, s.c.

Policing employee drug use in the workplace used to be a straightforward issue dictated by the legality of the substance. The issue of legality, however, is becoming more complex as states continue to legalize substances such as marijuana and cannabidiol (CBD), even though those substances remain illegal at the federal level. Further complicating the issue is the growing number of individuals misusing and abusing legal prescription medication. Almost 70% of Americans take at least one prescription medication, and more than half take at least two, according to a study by researchers at the Mayo Clinic. The most common prescriptions are for antibiotics, antidepressants, and opioid painkillers. The same study found 13% of the population has a prescription for opioids. Because of the increase in prescription drug misuse and abuse, it is critical that county employers focus their "drug-free workplace" efforts away from a simple characterization of "legal" or "illegal" substances, and instead pay closer attention to conduct and performance standards.

POLICING PRESCRIPTION DRUG USE THROUGH EMPLOYMENT POLICY AND TESTING CAN BE DIFFICULT.

Most employers have a drug and alcohol policy that prohibits the use, sale, or possession of alcohol or illegal drugs on the premises. The definition of "illegal drugs" under the policy typically includes prescription drugs obtained by an employee without a prescription. Given the current social environment, it is recommended that county employers update their drug policy to also address the misuse and abuse of prescription medication. The following is model policy language put forth by the U.S. Department of Labor relating to prescription and over-the-counter drug use.

> *Prescription and over-the-counter drugs are not prohibited when taken in standard dosage and/or according to a physician's prescription. Any employee taking prescribed or over-the-counter medications will be responsible for consulting the prescribing physician and/or pharmacist to ascertain whether the medication may interfere with safe performance of his/her job. If the use of a medication could compromise the safety of the employee, fellow employees or the public, it is the employee's responsibility to use appropriate personnel procedures (e.g., call in sick, use leave, request change of duty, notify supervisor, notify company doctor) to avoid unsafe workplace practices.*
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> *The illegal or unauthorized use of prescription drugs is prohibited. It is a violation of our drug-free workplace policy to intentionally misuse and/or abuse prescription medications. Appropriate disciplinary action will be taken if job performance deterioration and/or other accidents occur.*

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In order to properly enforce a drug and alcohol policy, the employer must be permitted to test its employees. However, employers may only test for prescription medication in limited circumstances. Generally, asking employees about prescription medications or testing employees for prescription medication is prohibited under the Americans with Disability Act (ADA). The exception to this rule is where the employer can show the inquiry is job related and consistent with business necessity. The employer has to demonstrate that an employee's inability or impaired ability to perform the essential functions of his or her job will result in a direct threat to him/herself or others. Employees in positions affecting public safety, such as police officer, deputy sheriff, highway patrol or fire fighter, are more likely to meet this threshold. If and when to test an employee for prescription medication is a fact-specific analysis based on the nature of the position, and most jobs will not rise to the level of "direct threat" required to allow testing. As a result, counties looking to implement a testing regimen should consult with corporation counsel and, if necessary, labor and employment counsel prior to implementation.

ENFORCEMENT SHOULD BE FOCUSED ON EMPLOYEE PERFORMANCE.

An employer who suspects that prescription drug use is causing a performance or safety problem should focus on the performance issue without assuming or guessing about potential causes. But it is important to remember that focusing on performance brings its own set of challenges under the ADA. When looking at potential disciplinary action based upon performance that is believed to be the result of misuse of prescription medication, a county employer should outline its concern to the employee and ask if there is anything preventing the employee from meeting performance expectations or performing the job safely. If the employee indicates that a heath condition and/or prescription medication is the cause of the problem, then the employer will need to evaluate whether a reasonable accommodation can be made to allow the employee to perform the essential functions of the job.

The laws governing drug testing in the workplace are still operating under the presumption that prescription medication is authorized by a doctor and therefore off limits for employer testing. The reality is that prescription drugs are having as much of an impact on productivity and safety in the workplace as

illegal drugs. The law will eventually need to evolve in order to permit testing for prescription medication, along with illicit drugs, if the employer has a reasonable suspicion based on objective evidence that the employee is impaired at work. Until then, employers should focus on monitoring and disciplining employees for performance and safety issues rather than their misuse or abuse of prescription medication.

If you have any questions about your current policies or would like additional information, please do not hesitate to contact the authors at *jmacy@vonbriesen.com* and *jeiden@vonbriesen.com*.

AMICUS CURIE BRIEF IN SUPPORT OF POLK COUNTY

Success at court of appeals involving county maintenance operation litigation.

–Andrew T. Phillips & Rebecca J. Roeker, von Briesen & Roper, s.c.

On July 3, 2018, the Wisconsin Court of Appeals District III (Court of Appeals) issued its opinion in the *Lakeland Communications Group, LLC vs. Polk County* case (Wisconsin Court of Appeals District III, Appeal No. 2017-AP-001262). The Wisconsin Counties Association (WCA) was granted permission to file an Amicus Curiae (or "friend of the court") brief in the *Lakeland* case. WCA sought permission to participate in the *Lakeland* case because the facts raised significant concerns for all counties across the state given the potential implications on the way counties complete routine maintenance activities in rights-of-way. Fortunately, the Court of Appeals agreed with Polk County and WCA by upholding the circuit court's decision dismissing Lakeland's claims against Polk County, and held that Polk County was not liable for property damage incurred while it was mowing in the right-of-way.

FACTUAL BACKGROUND

Lakeland owns telecommunications facilities that are located in highway right-of-way and claimed that Polk County was liable for damages to a Lakeland's pedestals after two separate incidents. In the first incident, a Polk County Highway Department employee was mowing vegetation in the right-of-way of County Trunk Highway (CTH) I in Polk County. While mowing, the employee struck one of Lakeland's cable television pedestals located in the right-of-way. Lakeland claimed $682.00 in damages for the CTH I incident. In the second incident, a Polk County Highway Department employee was again mowing vegetation in the highway right-of-way along WIS 35 (under its obligations under a Routine Maintenance Agreement with the Wisconsin Department of Transportation) and struck one of Lakeland's pedestals, which was also located in the right-of-way. Lakeland claimed $1,108.71 in damages for the WIS 35 incident.

LEGAL ARGUMENT NO. 1 REJECTED

Polk County was "Negligent Per Se" Because It Failed to Call Diggers Hotline Prior to Mowing:

Lakeland based its claim for damages on Polk County's alleged "negligence per se" for failing to call Diggers Hotline prior to mowing in the right-of-way. To justify its argument, Lakeland argued that mowing qualified as "excavation" in Wis. Stat. § 182.0175, thereby triggering Polk's County's obligation to call Diggers Hotline prior to the commencement of mowing. Polk County argued that "excavation" does not include routine maintenance as defined by Wis. Stat. § 84.07(1), and that the Wisconsin Legislature did not intend to include mowing or removal of vegetation (defined as any tree, shrub, hedge, woody plant, or grass) within the activities that require a call to the Diggers Hotline pursuant to Wis. Stat. § 182.0175. Polk County bolstered its position by pointing out that Wis. Stat. § 66.1037 requires an overseeing authority to "remove, cut or trim…any tree, shrub or vegetation in order to provide safety of the highway." Any conditions on those maintenance obligations, such as having to call Diggers Hotline before commencing the maintenance, should be set forth in Wis. Stat. § 66.1037.

The Court of Appeals agreed with Polk County and WCA. It held that the plain meaning of "excavation" does not include mowing grass and other surface vegetation, particularly in light of the other terms used to describe "excavation" in Wis. Stat. § 182.0175(2), such as grading, trenching, and digging. In referencing those other terms, the Court of Appeals stated "we cannot discern any reason why the list of digging-related items in the statute would permit inference that the mowing of vegetation is an 'excavation operation' pursuant to Wis. Stat. § 182.0175(1)(b). WCA agrees with the Court of Appeals that "excavation" should not include mowing, and therefore a county should not be required to call Diggers Hotline prior to mowing.

LEGAL ARGUMENT NO. 2 REJECTED

Polk County Should Be Held Liable on Public Policy Grounds

Lakeland also argued that Polk County should be liable in its performance of the mowing, and therefore not be entitled to immunity, based on public policy grounds. While a county may incur liability for failure to adhere to its maintenance obligations in limited circumstances, the Wisconsin Court of Appeals ruled in *Estate of Wagoner v. City of Milwaukee*, 2001 WI App 249, Wis.2d 306, 249 N.W.2d 382, that a municipality's failure to adhere to its obligations in Wis. Stat. § 66.1037 does not give rise to a private cause of action against the municipality. To put it simply, a county's failure to properly maintain vegetation is generally not enough to abrogate the county's immunity.

The Court of Appeals agreed with Polk County and WCA in recognizing the "virtually unworkable task" placed on counties if each county was required to "scour miles of roadsides for objects lurking in vegetation" prior to mowing operations. The Court of Appeals acknowledged the "unreasonable burden on counties" if Lakeland was allowed to recover damages in this case.

If you have any questions about the *Lakeland Communications Group, LLC v. Polk County* case, a county's maintenance obligations, potential liability for performing maintenance, or any other governmental law needs, please contact WCA or any member of the von Briesen & Roper Government Law Group.