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Ohio's Drug Test Defense to Workers' Compensation Claims to Become Effective in October

With the signing by Governor Taft of Sub. H.B. 223, Ohio employers will regain (beginning October 13, 2004) a meaningful opportunity to defend against workers' compensation claims based upon the results of drug and alcohol tests. As most Ohio employers will recall, the prior statute created a rebuttable presumption that an employee's injury was caused by being under the influence of drugs and alcohol when he or she either refused to take a post-accident drug or alcohol test or obtained certain specified results on the test. The Ohio Supreme Court declared this statute unconstitutional largely because the statute created an incentive for employers to require testing even in the absence of any suspicion that the employee had used drugs or alcohol prior to being injured.

The new statute addresses the Supreme Court's concerns by establishing minimum requirements that must be in place before the rebuttable presumption will apply. First, the employer must conspicuously post a notice in the same location as its certificate of workers' compensation coverage. This notice must explain to employees that the results of, or the refusal to submit to, any chemical test described in the statute may affect the employee's ability to receive workers' compensation benefits. The Bureau of Workers' Compensation is expected to produce such a notice and provide it to Ohio employers with their next certificate of coverage.

Second, the rebuttable presumption will apply only if the employee either submitted to a qualifying chemical test demonstrating alcohol or drug levels exceeding the limits set forth in the statute or if the employee refused to take the test after being given proper notice of the implications of such a refusal. In addition, the test must have been offered under one of the following conditions:

- (1) the employer had "reasonable cause" to believe that the employee was intoxicated or under the influence of a controlled substance not prescribed by his or her physician;
- (2) at the request of a police officer pursuant to a traffic stop and not at the request of the employer; or
- (3) at the request of a licensed physician who is not employed by the employer and not at the request of the employer.

Finally, the employer must use a laboratory certified by the United States Department of Health and Human Services or a laboratory that meets or exceeds the Department's certification standards to process the test results.

The statute also provides that an employer has a reasonable suspicion when, but not limited to, situations in which it has evidence that the employee is using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from those facts in light of experience and training. These facts and inferences may be based on, but are not limited to, any of the following:

- (1) observation of the employee, such as direct observation of the employee in possession of alcohol or a controlled substance or physical symptoms such as slurred speech, dilated pupils, an odor of alcohol, etc.;

- (2) a pattern of abnormal conduct, erratic, or aberrant behavior or deteriorating work performance (including attendance problems and recurring accidents) that appears to be related to the use of alcohol or a controlled substance, and does not appear to be attributable to other factors;
- (3) the identification of the employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;
- (4) a report of the use of alcohol or a controlled substance provided by a reliable and credible source; or
- (5) repeated or flagrant violations of the employer's safety or work rules that are determined by the employee's supervisor to pose a substantial risk of physical injury or property damage and that appear to be related to the use of alcohol or a controlled substance and that do not appear to be attributable to other factors.

Although this statute mandates a "reasonable suspicion" standard to create the rebuttable presumption, it must be remembered that this statute is a workers' compensation statute only. Indeed, the statute specifically states that "[n]othing in this section shall be construed to affect the rights of an employer to test employees for alcohol or controlled substance abuse." As a result, this new law should not provide the basis for any claim that a private employer may not have random drug testing programs or conduct post-accident tests after all accidents and take appropriate employment action based upon those test results or the employee's refusal to take the test. This statute only provides that the results of such tests, or the employee's refusal to submit to such tests, may not be used to create the rebuttable presumption in defense of any workers' compensation claim.

As we noted in a Workers' Compensation Law Alert dated January 2003 (*Ohio Supreme Court Strikes Down Workers' Compensation Drug Testing Law as an Unconstitutional Invasion of Privacy*), employers that require drug and/or alcohol testing upon a standard less than reasonable suspicion should continue to insist that all applicants sign an acknowledgment of possible drug testing. The signed acknowledgment should indicate the applicant's understanding that he/she will be subject to such testing and the employment ramifications of refusing to take the test or incurring a positive test result. Unionized employers may need to negotiate with the union in order to make any policy changes. Particularly in the public sector, where policies are scrutinized for constitutional adherence, employers also should consider whether to limit testing policies to accidents involving injuries requiring more than simple first aid or involving property damage in excess of a certain amount. Employers may also want to limit testing to safety or security sensitive positions.

This Workers' Compensation Law Alert is intended to provide general information for clients or interested individuals and should not be relied upon as legal advice. Please consult your attorney for specific advice regarding your particular situation. If you do not have an attorney, you may consult with one of the attorneys below:

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