



Fine Print

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NEW WORKERS' COMPENSATION DRUG AND ALCOHOL TESTING LAWS

By James M. Vonau and James D. Viets

By now, most employers have received notice from the Bureau of Workers' Compensation (BWC) that new legislation gives them the right to demand drug and alcohol testing of employees who have been injured on the job. Effective October 12, 2004, Ohio law establishes a "rebuttable presumption" against an employee who makes a workers' compensation claim if he/she either tests positive for alcohol or drugs or refuses to be tested. A rebuttable presumption is a legal conclusion that is thought to be valid until evidence to the contrary is provided. In lay terms, this means that, if an employee tests positive or refuses to be tested for alcohol or drugs following a work-related accident, the employer may be able to prove that drug or alcohol use contributed to or caused the employee's injury. The employer could thereby avoid the costs of such a claim.

In order for employers to take advantage of this new law, a notice of

the rebuttable presumption must be posted in their place of business. The notice must be the same size or larger than the BWC compliance certificate that must be posted, and it must be in the same location as the current BWC postings. A copy of the required notice may be downloaded and printed from the BWC's Web site at www.ohiobwc.com/home/current/articles/2004/062004.asp.

While the new law does not require businesses to implement drug testing, it is a very effective method of reducing an employer's exposure from a costly claim for injuries or death where the employee was under the influence of drugs or alcohol at the time of a workplace accident.

Be advised, however, that the posting of the BWC notice of this new law is only the starting point. The rebuttable presumption is effective after a workplace injury only if specific steps are taken within a certain amount of time after

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EMPLOYERS SHOULD UNDERSTAND LIMITS ON NON-LAWYERS IN WORKERS' COMP CLAIMS

By Cathryn R. Ensign

The Supreme Court of Ohio, in December of 2004, addressed the role of non-lawyers in workers' compensation claim proceedings (Cleveland Bar Association v. Compmanagement, Inc.). The Court held that non-lawyers, typically third party administrators, may assist and represent employers at hearings held before the Industrial Commission of Ohio (ICO) as long as they follow certain rules adopted by the ICO (ICO Resolution No. 04-1-01). It is important for employers to be aware of the limitations imposed on non-lawyers when representing their interests in workers' compensation claim disputes.

Q: According to the Court's decision, what are non-lawyers permitted to do regarding workers' compensation claims?

A: Citing "multiple interests to consider in determining whether a particular legal activity is acceptably performed by non-lawyers," the Court held that non-lawyers could continue to handle workers' compensation claims and it would not be considered the unauthorized practice of law as long as they complied with the ICO's rules.

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the injury occurs. If alcohol is suspected as a cause of the accident, a “qualifying” test must be given within eight hours of the injury. If non-prescribed drugs are suspected, the qualifying test must be given within 32 hours of the injury. If the injured employee refuses to take a test, and assuming the required notice has been posted, the employee’s refusal triggers the rebuttable presumption. Note, however, that in order to trigger the presumption, the test must be offered within the timeframes mentioned above.

Employers must address many other issues and requirements if they wish to take full advantage of this new law. For example, unless a police officer or a doctor requests the drug or alcohol test, an employer must have “reasonable cause” to believe the injured employee was under the influence of alcohol or drugs at the time of the accident. Otherwise, the test may not qualify under the law. Therefore, the employer will need to collect evidence to show that the test was justified. Direct evidence of possession, consumption, or distribution may be available, but employers also will need to train supervisors to collect evidence in the form of their own observations and records, witness statements, and other evidence that can confirm symptoms, behavior, patterns of conduct, attendance, work and safety rules violations, and the like.

For further information regarding these issues, the BWC has a very informative and useful Web site at www.ohiobwc.com.

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According to these rules, a non-lawyer can investigate or assist an employer with a claim; assist an employer with claims administration, including the filing of claims and appeals; attend ICO hearings; complete and submit records and reports to the Bureau of Workers’ Compensation (BWC) or ICO; process settlement of claims; file protests within the BWC and appear at hearings on these protests; pre-

pare reports to an employer regarding claim information; and advise an employer or injured worker to seek legal representation.

Q: What are the limitations on non-lawyers when dealing with workers’ compensation claims?

...Non-lawyers, typically third party administrators, may assist and represent employers at hearings held before the Industrial Commission of Ohio (ICO) as long as they follow certain rules.

A: A non-lawyer may not examine witnesses; make legal arguments; make or give a legal interpretation about evidence submitted or file any pleading; comment on or give opinions about the evidence, credibility of witnesses, or legal significance of a claim; provide legal advice to injured workers or employers; give legal opinions; or provide representation at a hearing for a fee without also providing other services. For these services, an employer must retain a lawyer to protect the employer’s interests that involve significant claim issues.

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IN THE HOPPER

State legislation that could affect small business

The new “omnibus tort reform bill,” Senate Bill 80, affects damages that can be recovered by injured persons, imposes a statute of repose in products liability cases, and adopts governmental standards as a defense to certain proceedings. Additional hearings are created and costs to litigants may increase. The bill becomes law in April, so small businesses may want to consult with their attorneys about how this new law will affect them.

From the OSBA Office of Government Relations.

Web site resource for small businesses:

To learn about programs offered by the U.S. Dept. of Labor’s Office of Small Business, go to: <http://www.dol.gov/osbp>.