

H.B. 223: WORKERS' COMPENSATION SUBSTANCE ABUSE TESTING LAW

by

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Under House Bill 223, which amends O.R.C. 4123.54 and goes into affect on October 14, 2004, says if an employee is involved in a workplace accident, and the employer has reasonable suspicion to believe that the employee is intoxicated or under the influence of a controlled substance **not prescribed by a physician**, then the intoxication or the influence of the controlled substance will be viewed as the proximate cause of the injury. Therefore, the employee will not be eligible to receive Workers' Compensation benefits for this accident unless the employee rebuts this presumption.

The employer must post a written notice explaining this aspect of its Substance Abuse Policy. This posting **MUST** include a statement explaining that a positive result on a substance abuse test, or the employee's refusal to submit to such a test, will create a rebuttable presumption that the employee's substance abuse caused the accident. This written notice to employees must be the same size or larger than the certificate of premium payment notice furnished by the Bureau of Workers' Compensation. This notice must be posted by the employer in the same location as the certificate of premium payment notice or the certificate of self-insurance.

The employee must undergo a qualifying chemical test administered within eight hours of the injury and/or a qualifying chemical test administered within thirty-two hours of the injury.

"Reasonable cause" means, but is not limited to, evidence that an employee is or was using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training of the person making the observation.

These facts and inferences may be based on, but are not limited to, any of the following:

1. **Observable phenomena, such as direct observation of use, possession, or distribution of alcohol or a controlled substance, or of the physical symptoms of being under the influence of alcohol or a controlled substance, such as but not limited to slurred speech, dilated pupils, odor of alcohol or a controlled substance, changes in affect, or dynamic mood swings;**
2. **A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance such as frequent absenteeism, excessive tardiness, or recurrent 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 an employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;**
4. **A report of use of alcohol or a controlled substance provided by a reliable and credible source;**
5. **Repeated or flagrant violations of the safety or work rules of the employee's employer, 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 attributable to other factors.**

This new law in no way affects the rights of an employer to test employees for alcohol or controlled substance abuse for the purpose of administering discipline. House Bill 223 **ONLY** affects the ability of the employee to obtain Workers' Compensation benefits.

Also, under House Bill 223, only laboratories certified by the United States Department of Health and Human Services or laboratories that meet or exceed the standards of that department for laboratory certification shall be used for processing the test results of a qualifying chemical test.

WORKPLACE FACTS

Most drug users are employed. Of the 13.4 million illicit drug users age 18 or older in the U.S. in 2001, 10.2 million (76.4 percent) were employed either full or part time.

Employed drug abusers cost their employers about twice as much in medical and Workers' Compensation claims as their drug-free coworkers.

Source: U.S. Department of Health and Human Services. Substance Abuse and Mental Health Services Administration. (2002, September 4). Results from the 2001 National Household Survey on Drug Abuse: Volume I. Summary of National Findings (Office of Applied Studies, NHSDA.)

<http://www.samhsa.gov/oas/nhsda/2k1nhsda/vol1/chapter2.htm#2.empl>

Also, The International Labour Organization's "InFocus Programme on Safety and Health at Work" reports:

- **Absenteeism is 2-3 times higher for drug and alcohol users than for other employees,**
- **Employees with chemical dependence problems may claim 3 times as many sick days and file 5 times as many workers' compensation claims,**
- **In many workplaces, 20 to 25 per cent of accidents at work involve intoxicated people injuring themselves and innocent victims and**
- **On-the-job use of drugs/alcohol account for 15%-30% of ALL accidents at work.**

Is It An Employer's Business What An Employee Does On His/Her Own Time?

Yes. Studies show that off the job drug use affects on the job performance and safety. The residual affect of various drugs can impair one's ability to reason and function for days after ingesting the substance. Marijuana, for instance, affects one's depth perception, which explains why marijuana users tend to "rear end" others when driving and why they get their fingers caught in machines at work. As a result, drug and alcohol users are:

- **3.6 times more likely to injure themselves *or another person* in a workplace accident,**
- **5 times more likely to be injured in an accident *off the job* which, affects their attendance and/or performance *on the job*,**
- **One-third less productive than non-drug using employees and**
- **Incur 300% higher medical costs than non-drug using employees.**

Unfortunately, these "users" also spread other problems in the workplace:

- 44% sell drugs to other employees and 18% steal from co-workers to support their habits.

~~ Source: OHS Safety and Health Services

WHAT TESTING SHOULD I PUT INTO PLACE?

NEVER put a Substance Abuse Testing Program into place unless you intend to follow through with it. However, most employers should at a minimum have the following testing policies in place:

Reasonable Suspicion Testing & Post-Accident Testing

It is rare to find an employer that does not want to control its safety, productivity and attendance record. Also, most employers want to have the ability to test their employees if they suspect alcohol or drug abuse is occurring in their workplaces. Reasonable Suspicion and Post Accident Substance Abuse Testing can be a great asset in attaining these goals.

Too many employers adopt Pre-Employment Testing or Random Testing, but then never want to do anything about an employee's substance abuse problem if "they like" that employee. If you are not going to take action when substance abuse is discovered, then it is better if you do not test at all. (Of course, by "taking action" I am referring to terminating the employee or sending the employee to be assessed for possible drug/alcohol rehabilitation.)

Other types of testing available to employers are the following: Safety Sensitive Position Testing, Transfer/Promotion Testing, Customer Required Testing, Follow-Up Testing Department of Transportation Testing Requirements, and the Bureau of Workers' Compensation Rate Reduction Testing.

A proper policy will also address the odor of alcohol, the use of prescription drugs, tampering with a specimen or the test itself, which includes diluting the specimen by drinking a gallon of water before taking the test, and voluntary self-disclosure by an employee. The policy should also define a workplace accident as also involving damage to property in addition to individuals. (i.e., Apparent damage to property of \$250 or more.) Employers should also seriously consider requiring employees who test positive on a test and go through rehabilitation to sign a "Conditional Return To Work Agreement" before being allowed to return. These Agreements allow the employer to test the employee whenever the employer wants for the next 2-3 years, they require the employee to continue with his/her treatment for an elongated period of time, etc.