



Drug Tests, Medical Marijuana, Misbehaving and Careless Employees: The Impact These Can Have on Your Workers' Compensation Costs

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Drug Testing in Workers' Compensation Context: Using a positive drug test to defend against the allowance of a workers' compensation claim

- An employee is not entitled to receive workers' compensation benefits if the injury or occupational disease is caused by the employee being intoxicated or under the influence of a controlled substance not prescribed by a physician
- The intoxication must be the proximate cause of the injury
 - Ohio Revised Code Section 4123.54(A)(2)



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Drug Testing in Workers' Compensation Context: To determine if an employee is intoxicated

- The drug test must be a qualifying chemical test within 8 hours of the injury for potential alcohol intoxication. For amphetamine, cannabinoids, cocaine, opiates or phencyclidine, the drug test must be a qualifying chemical test administered within 32 hours of an injury or a gas chromatography mass spectrometry test.
 - Ohio Revised Code Section 4123.54(B)(1)(a-d)
- Exceeding the levels set forth in the statute, there is a rebuttable presumption the employee is intoxicated.
- If the employee refuses to take a qualifying drug test, there is a rebuttable presumption of intoxication
 - Ohio Revised Code Section 4123.54(B)(2)

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Drug Testing in Workers' Compensation Context

- Laboratories certified by the U.S. Department of Health and Human Services that meet or exceed the standards of that department must be used for drug testing
 - Ohio Revised Code Section 4123.54(E)
- The employer must post written notice to employees that the results of a positive test or an employee's refusal to take a drug test may affect the employee's eligibility for workers' compensation or benefits
 - Ohio Revised Code Section 4123.54(F)

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Whether to Test

- A chemical test is a qualifying test if:
 - Administered after the injury; and
 - Employer has a reasonable suspicion employee may be intoxicated; or
 - Test administered at request of a police officer; or
 - At the request of a licensed physician not in the employ of the employer



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Whether to Test

- Reasonable suspicion must be from objective facts and reasonable inferences drawn from these facts in light of experience and training
 - This includes:
 - Observable phenomenon such as direct observation of use, possession or distribution of the controlled substance
 - Physical symptoms of being under the controlled substance such as slurred speech, dilated pupils, odor of alcohol, “dynamic mood swings”, change in affect
 - Pattern of abnormal conduct, erratic or aberrant behavior
 - For example: frequent absence, excessive tardiness, recurrent accidents not attributable to other factors
 - Employee being subject of a criminal investigation
 - Reliable and credible report of use

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Remember

- Nothing in the Ohio Workers' Compensation Act prevents the employer from drug testing employees randomly or after any industrial accident
- To be used as a defense to a workers' compensation claim, the test must be based on reasonable suspicion as set forth in the statute
 - Ohio Revised Code Section 4123.54(D)



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Remember

- Termination of employment for positive drug test may be used to prevent payment of temporary total benefits where there is written notice that a positive drug test will result in termination of employment
 - See *Louisiana-Pacific Corp. v. Indus. Comm.*, 72 Ohio St.3d 401, 650 N.E.2d 469, 1995-Ohio-153



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Remember

- In Kentucky, voluntary intoxication through any substance bars workers' compensation benefits
 - Ky Rev. Stat. § 342.610(3)
- The intoxication must be shown to have a causal connection to the injury
- The employer must plead and prove the intoxication and its causal relationship to the injury



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Ohio Medical Marijuana Law

- HB 523 effective September 8, 2016
- Legalizes medical marijuana in Ohio for certain medical conditions including pain that is either chronic and severe or intractable as well as PTSD and traumatic brain injuries



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Ohio Medical Marijuana Law

- Only legal forms of marijuana will be oils, edibles, patches, plant material and tincture
- Vaporization is permitted
- Cannot be smoked
- Growth is prohibited

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Ohio Medical Marijuana Law

- Ohio Department of Commerce is charged with regulating the licensure of medical marijuana cultivated and processed
- Ohio Board of Pharmacy will license retail dispensaries and register patients
- State Medical Board of Ohio regulates physician requirements and procedures, including:
 - Applying for and maintaining certificates to recommend medical marijuana
 - Maintaining the list of conditions for which medical marijuana can be recommended

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Impact on BWC & Employers



- No impact on Drug Free Safety Program
- No requirement that BWC pay for patient access to marijuana
- The law expressly states that an employee under the influence of marijuana is not covered by workers' compensation

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Impact on BWC & Employers

- The law does not require an employer to accommodate an employee's use of medical marijuana
- The law does not prohibit an employer from refusing to hire, discharge, or taking adverse employment actions because of a person's use of medical marijuana
- The law specifies that marijuana is covered under "rebuttable presumption", even if the marijuana use is recommended by a physician

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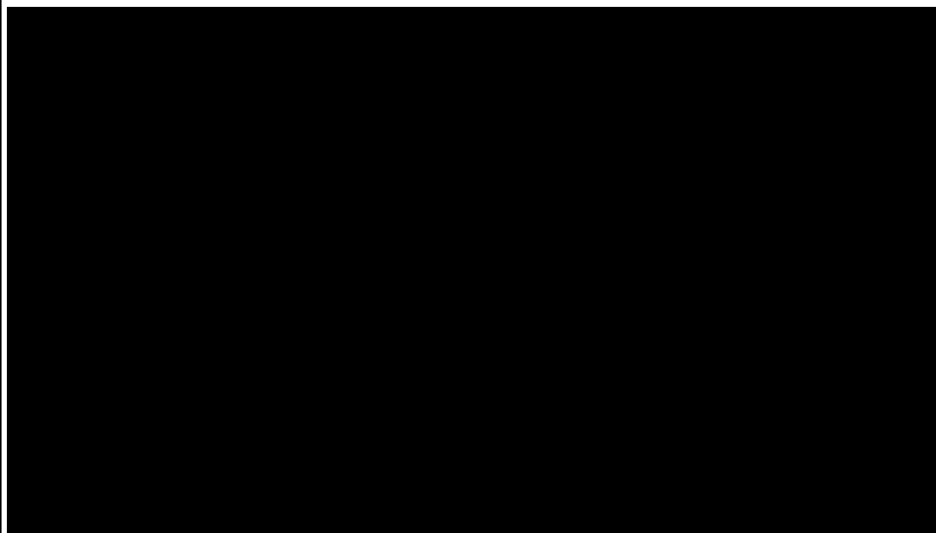
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Impact on BWC & Employers

- The law does not address reimbursement for medical marijuana by BWC for injured workers
- BWC relying upon existing OAC regulations concerning medication:
 - OAC limits reimbursement by BWC to only those drugs approved by FDA
 - BWC funded prescriptions must be dispensed by a registered pharmacist from enrolled provider
 - BWC only reimburses for drugs on its pharmaceutical formulary

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