



Kentucky's New Workers' Comp Law Encourages Drug Testing

Insights

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House Bill 2 ("HB2") was signed into law by Governor Matt Bevin and became effective in July 2018. Through HB2, the legislature enacted significant changes to multiple provisions of the Workers' Compensation Act. One of the most significant changes in the statute is the portion related to injuries resulting from illegal, non-prescribed substances or prescribed substances in excess of prescribed amounts. Previously, if an employee underwent a drug test after an injury, the employer had to prove that the use of non-prescribed substances (illegal drugs or alcohol) was the proximate cause of the injury. The new workers' compensation law shifts the burden of proof to the injured worker to prove such illegal substances or prescribed substances was not the proximate cause of the injury. This is a significant difference because the illegal or prescribed substance is now presumed to be the cause of the injury until rebutted by the employee.

HB2's Presumption of Causation

Under Kentucky's workers' compensation law, KRS 342.610(3), an employer is not liable for compensation in cases of injury, occupational disease, or death of the employee if the employee willfully intended to injure or kill himself, herself, or another. Section 4 of the statute provides:

If an employee voluntarily introduced an illegal, non-prescribed substance or substances or a prescribed substance or substances in amounts in excess of prescribed amounts into his or her body detected in the blood, as measured by a scientifically reliable test, that could cause a disturbance of mental or physical capacities, it shall be presumed that the illegal, non-prescribed substance or substances or the prescribed substance or substances in amounts in excess of prescribed amounts caused the injury, occupational disease, or death of the employee and liability for compensation shall not apply to the injury, occupational disease, or death to the employee.

Because this is a rebuttable presumption, the burden then shifts to the employee to show that: (1) the substance did not in fact cause an impairment; or, (2) the impairment did not cause the injury. Note, this new rebuttable presumption requires only that the level "could cause" impairment. An expert would presumably need to provide an opinion regarding the levels of the substance in the blood and whether that level could be sufficient to cause a disturbance of mental or physical capacities. While the provision does not appear to apply to alcohol, an employer could still utilize alcohol intoxication as a defense if it can prove that the employee was under the influence of alcohol at the time of a work injury and that such influence was a substantial factor in actually causing the work injury. So, how can an employer benefit from the new law's tightening of the standard for proving intoxication by illegal drugs and prescription medications?

proving intoxication by illegal drugs and prescription medications:

Best Practices to Take Advantage of the New Workers' Compensation Law

One way Kentucky employers can benefit from the new workers' compensation law is to become certified as a Drug Free Workplace by the Kentucky Department of Workers Claims. This allows an employer to receive a 5% discount on its Workers' Compensation Insurance premium. If you are already a certified Drug Free Workplace, review your drug testing policy to be sure it includes "scientifically reliable" drug testing options, such as urine, breath and/or blood tests, since it is required to benefit from HB2's rebuttable presumption.

Keep in mind, under the guidance to the anti-retaliation provisions of OSHA's electronic recordkeeping regulation, blanket post-injury drug tests could be problematic. Although OSHA recently clarified that it does not prohibit workplace safety post-incident drug testing, including drug testing under a state workers' compensation law, this position could change with the next election. For now, employers should strive to implement the following best practices to take advantage of the new workers' compensation law:

- Make sure your drug testing program strikes the appropriate balance pursuant to Kentucky OSHA's anti-retaliation provisions by complying with Kentucky's workers' compensation laws. Drug testing policies should limit post-incident testing to situations in which employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.
- Train supervisors on how to observe and document questionable behavior without "detering or discouraging" an employee from reporting a workplace injury or illness.
- Review your policy to allow for any and all types of drug tests under pre-employment, post-incident (if documented to be appropriate), random, and reasonable suspicion testing. Collection methods should include urine, breath, and/or blood tests.

This article presents an overview of certain legal issues. It is not, and cannot be construed as, legal advice. For more information, contact Fisher Phillips' Louisville, Kentucky office (502-561-3990).

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