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Kentucky's New Workers' Compensation Intoxication Rebuttable Presumption

The Kentucky Legislature recently enacted Senate Bill 2, which brought sweeping changes to the entire Workers' Compensation system. One of the most significant changes, effective July 14, 2018, is the new rebuttable presumption that may bar benefits to a claimant who was intoxicated at the time of the injury.

The statute, KRS 342.610(3)-(4) states that if an employee voluntarily introduced an illegal, nonprescribed substance or a prescribed substance in excess of prescribed amounts into his or her body *detected in the blood*, in an amount that *could* cause a disturbance of mental or physical capacities, **it shall be presumed that the illegal or nonprescribed substance caused the injury.**

This is a fairly low threshold because it only requires that the amount *could* cause impairment, not that it actually did cause impairment.

Because this is a rebuttable presumption, the burden then shifts to the employee to show that either 1) the substance did not in fact cause an impairment, or 2) the impairment did not cause the injury. For example, if someone else's actions caused harm to the employee, and if that harm would have occurred regardless of whether the employee was intoxicated, the injury will be compensable.

What should your business do to reap the benefit of this change?

- Review your Drug-Free Workplace Policies. Make sure the policy includes an option to conduct a blood test, since it is required to benefit from the rebuttable presumption.
- Consider becoming a certified Drug-Free Workplace through the Kentucky Department of Workers' Claims. If your business is not yet a certified Drug-Free Workplace, Frost Brown Todd

LLC can assist you with your application. Benefits may include up to a 5% discount on your workers' compensation insurance premiums, as well as a reduction in claims, and an increase in productivity.

Best Practices – Implementation of a Drug-Free Workplace

- Train supervisors on how to observe and document questionable behavior. Provide an adequate policy and report form to assist in the consistent application of the policy.
- Under current OSHA regulations you cannot require blanket post-injury drug tests. You must document why a drug test is appropriate under the circumstances based on the mechanism of injury and/or the employee's observable behavior.
- If you do not obtain a blood test, you can still argue that the employee was intoxicated and that the intoxication caused the injury. The most important thing to do is to document your observations of the employee before and after the incident as well as the mechanism of injury. In addition, you need a medical opinion supporting your argument.
- You should 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.

For more information, please contact [Elise Elam](#) or [Joanne Wissman Glass](#) in Frost Brown Todd's [Labor and Employment Practice Group](#).

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