

Senator Karen Mayne proposes the following substitute bill:

WORKERS' COMPENSATION AND EMPLOYEE MISCONDUCT

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karen Mayne

House Sponsor: Mike K. McKell

LONG TITLE

General Description:

This bill modifies the Workers' Compensation Act to address use of controlled substances or alcohol.

Highlighted Provisions:

This bill:

- ▶ addresses reductions or prohibitions on receipt of disability compensation related to the use of controlled substances or alcohol on the basis of the degree to which the conduct is a contributing cause of an injury;
- ▶ addresses knowing use of a controlled substance not obtained under a prescription;
- ▶ clarifies burden of proof to rebut presumption;
- ▶ addresses what an employee can prove to rebut presumption;
- ▶ requires split testing; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



26 AMENDS:

27 **34A-2-302**, as last amended by Laws of Utah 2000, Chapter 295



29 *Be it enacted by the Legislature of the state of Utah:*

30 Section 1. Section **34A-2-302** is amended to read:

31 **34A-2-302. Employee's willful misconduct -- Penalty.**

32 (1) For purposes of this section:

33 (a) "Controlled substance" is as defined in Section **58-37-2**[~~;~~].

34 (b) "Local government employee" is as defined in Section **34-41-101**[~~;~~].

35 (c) "Local governmental entity" is as defined in Section **34-41-101**[~~;~~].

36 (d) "State institution of higher education" is as defined in Section **34-41-101**[~~;~~~~and~~].

37 (e) "Valid prescription" is a prescription, as defined in Section **58-37-2**, that:

38 (i) is prescribed for a controlled substance for use by the employee for whom it was
39 prescribed; and

40 (ii) has not been altered or forged.

41 (2) An employee may not:

42 (a) remove, displace, damage, destroy, or carry away any safety device or safeguard
43 provided for use in any employment or place of employment;

44 (b) interfere in any way with the use of a safety device or safeguard described in
45 Subsection (2)(a) by any other person;

46 (c) interfere with the use of any method or process adopted for the protection of any
47 employee in the employer's employment or place of employment; or

48 (d) fail or neglect to follow and obey orders and to do every other thing reasonably
49 necessary to protect the life, health, and safety of employees.

50 (3) Except in case of injury resulting in death:

51 (a) compensation provided for by this chapter shall be reduced 15% when injury is
52 caused by the willful failure of the employee:

53 (i) to use safety devices when provided by the employer; or

54 (ii) to obey any order or reasonable rule adopted by the employer for the safety of the
55 employee; and

56 (b) except when the employer permitted, encouraged, or had actual knowledge of the

57 conduct described in Subsection ~~[(3)(b)(i) through (iii)]~~ (4):

58 (i) disability compensation may not be awarded under this chapter or ~~[Title 34A,~~

59 Chapter 3, Utah Occupational Disease Act, to an employee when the major contributing cause
60 of the employee's injury is the employee's conduct described in Subsection (4); or

61 (ii) disability compensation to an employee under this chapter or Chapter 3, Utah
62 Occupational Disease Act, shall be reduced by 15% when the employee's conduct is a
63 contributing cause of the employee's injury but not the major contributing cause.

64 (4) The conduct described in Subsection (3)(b) is the employee's:

65 ~~[(i)]~~ (a) knowing use of a controlled substance that the employee did not obtain under a
66 valid prescription;

67 ~~[(ii)]~~ (b) intentional abuse of a controlled substance that the employee obtained under a
68 valid prescription if the employee uses the controlled substance intentionally:

69 ~~[(A)]~~ (i) in excess of prescribed therapeutic amounts; or

70 ~~[(B)]~~ (ii) in an otherwise abusive manner; or

71 ~~[(iii)]~~ (c) intoxication from alcohol with a blood or breath alcohol concentration of .08
72 grams or greater as shown by a chemical test.

73 ~~[(4)]~~ (5) (a) For purposes of ~~[Subsection]~~ Subsections (3) and (4), as shown by a

74 chemical test that conforms to scientifically accepted analytical methods and procedures and

75 includes verification or confirmation of any positive test result by gas chromatography, gas

76 chromatography-mass spectroscopy, or other comparably reliable analytical method, before the

77 result of the test may be used as a basis for the presumption, it is presumed that the major

78 contributing cause of the employee's injury is the employee's conduct described in ~~[Subsections~~

79 ~~(3)(b)(i) through (iii)]~~ Subsection (4) if at the time of the injury:

80 (i) the employee has in the employee's system:

81 (A) any amount of a controlled substance or its metabolites if the employee did not
82 obtain the controlled substance under a valid prescription; or

83 (B) a controlled substance the employee obtained under a valid prescription or the
84 metabolites of the controlled substance if the amount in the employee's system is consistent
85 with the employee using the controlled substance intentionally:

86 (I) in excess of prescribed therapeutic amounts; or

87 (II) in an otherwise abusive manner; or

88 (ii) the employee has a blood or breath alcohol concentration of .08 grams or greater.

89 (b) The presumption created under Subsection ~~[(4)]~~ (5)(a) may be rebutted by a
90 preponderance of the evidence showing that:

91 (i) the chemical test creating the presumption is inaccurate because the employer failed
92 to comply with:

93 (A) Sections 34-38-4 through 34-38-6; or

94 (B) if the employer is a local governmental entity or state institution of higher
95 education, Section 34-41-104 and Subsection 34-41-103(5);

96 (ii) the employee did not engage in the conduct described in ~~[Subsections (3)(b)(i)~~
97 ~~through (iii)]~~ Subsection (4);

98 (iii) the test results do not exclude the possibility of passive inhalation of marijuana
99 because the concentration of total urinary cannabinoids is less than 50 nanograms/ml as
100 determined by a test conducted in accordance with:

101 (A) Sections 34-38-4 through 34-38-6; or

102 (B) if the employer is a local governmental entity or state institution of higher
103 education, Section 34-41-104 and Subsection 34-41-103(5);

104 (iv) a competent medical opinion from a physician verifies that the amount of
105 controlled substances, metabolites, or alcohol in the employee's system ~~[of the following]~~ does
106 not support a finding that the conduct described in ~~[Subsections (3)(b)(i) through (iii)]~~
107 Subsection (4) was the major contributing cause of the employee's injury~~[:]~~ or a contributing
108 cause of the employee's injury; or

109 ~~[(A) any amount of a controlled substance or its metabolites if the employee did not~~
110 ~~obtain the controlled substance under a valid prescription; or]~~

111 ~~[(B) a controlled substance the employee obtained under a valid prescription or the~~
112 ~~metabolites of the controlled substance if the amount in the employee's system is consistent~~
113 ~~with the employee using the controlled substance intentionally;]~~

114 ~~[(F) in excess of prescribed therapeutic amounts; or]~~

115 ~~[(H) in an otherwise abusive manner;]~~

116 ~~[(C) alcohol; or]~~

117 ~~[(D) a combination of Subsections (4)(b)(iii)(A) through (C); or]~~

118 (v) (A) the conduct described in ~~[Subsections (3)(b)(i) through (iii)]~~ Subsection (4) was

119 not ~~[the major]~~ a contributing cause of the employee's injury[-]; or

120 (B) the employee's mental and physical condition were not impaired at the time of the
121 injury.

122 (c) (i) Except as provided in Subsections ~~[(4)]~~ (5)(c)(ii) and (iii), if a chemical test that
123 creates the presumption under Subsection ~~[(4)]~~ (5)(a) is taken at the request of the employer,
124 the employer shall comply with:

125 (A) Title 34, Chapter 38, Drug and Alcohol Testing; or

126 (B) if the employee is a local governmental employee or an employee of a state
127 institution of higher education, Title 34, Chapter 41, Local Governmental Entity Drug-Free
128 Workplace Policies.

129 (ii) Notwithstanding Section 34-38-13, the results of a test taken under Title 34,
130 Chapter 38, Drug and Alcohol Testing, may be disclosed to the extent necessary to establish or
131 rebut the presumption created under Subsection ~~[(4)]~~ (5)(a).

132 (iii) Notwithstanding Section 34-41-103, the results of a test taken under Title 34,
133 Chapter 41, Local Governmental Entity Drug-Free Workplace Policies, may be disclosed to the
134 extent necessary to establish or rebut the presumption created under Subsection ~~[(4)]~~ (5)(a).

135 (6) (a) A test sample taken pursuant to this section shall be taken as a split sample.

136 (b) One part of the sample is to be used by the employer for testing pursuant to
137 Subsection (5)(a):

138 (i) at a testing facility selected by the employer; and

139 (ii) at the employer's or the employer's workers' compensation carrier's expense.

140 (c) The testing facility selected under Subsection (6)(b) shall hold the part of the
141 sample not used under Subsection (6)(b) until the sooner of:

142 (i) six months from the date of the original test; or

143 (ii) when the employee requests that the sample be tested.

144 (d) The employee has only six months from the date of the original test to have the
145 remaining sample tested:

146 (i) at the employee's expense; and

147 (ii) at the testing facility selected by the employee, except that the test shall meet the
148 requirements of Subsection (5)(a).

149 ~~[(5)]~~ (7) If any provision of this section, or the application of any provision of this

150 section to any person or circumstance, is held invalid, the remainder of this section shall be
151 given effect without the invalid provision or application.