

WORKERS' COMPENSATION AND EMPLOYEE MISCONDUCT

2014 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Karen Mayne

House Sponsor: _____

LONG TITLE

General Description:

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

Highlighted Provisions:

This bill:

- ▶ changes the degree to which use of controlled substances or alcohol is considered a contributing cause of an injury;
- ▶ addresses knowing use of a controlled substance not obtained under a prescription;
- ▶ addresses standard to rebut presumption;
- ▶ requires that the employee's mental and physical condition is not diminished or compromised at the time of injury;
- ▶ requires samples be taken to allow for split testing; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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



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

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

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

(1) For purposes of this section:

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

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

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

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

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

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

(ii) has not been altered or forged.

(2) An employee may not:

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

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

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

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

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

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

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

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

(b) except when the employer permitted, encouraged, or had actual knowledge of the conduct described in Subsection (3)(b)(i) through (iii), disability compensation may not be awarded under this chapter or [~~Title 34A,~~] Chapter 3, Utah Occupational Disease Act, to an

59 employee when [~~the major~~] a contributing cause of the employee's injury is the employee's:

60 (i) knowing use of a controlled substance that the employee did not obtain under a
61 valid prescription;

62 (ii) intentional abuse of a controlled substance that the employee obtained under a valid
63 prescription if the employee uses the controlled substance intentionally:

64 (A) in excess of prescribed therapeutic amounts; or

65 (B) in an otherwise abusive manner; or

66 (iii) intoxication from alcohol with a blood or breath alcohol concentration of .08
67 grams or greater as shown by a chemical test.

68 (4) (a) For purposes of Subsection (3), as shown by a chemical test that conforms to
69 scientifically accepted analytical methods and procedures and includes verification or
70 confirmation of any positive test result by gas chromatography, gas chromatography-mass
71 spectroscopy, or other comparably reliable analytical method, before the result of the test may
72 be used as a basis for the presumption, it is presumed that [~~the major~~] a contributing cause of
73 the employee's injury is the employee's conduct described in Subsections (3)(b)(i) through (iii)
74 if at the time of the injury:

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

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

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

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

82 (II) in an otherwise abusive manner; or

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

84 (b) The presumption created under Subsection (4)(a) may be rebutted by clear and
85 convincing evidence showing that:

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

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

89 (B) if the employer is a local governmental entity or state institution of higher

90 education, Section 34-41-104 and Subsection 34-41-103(5);

91 (ii) the employee did not engage in the conduct described in Subsections (3)(b)(i)
92 through (iii);

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

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

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

99 (iv) a competent medical opinion from a physician verifies that the amount in the
100 employee's system of the following does not support a finding that the conduct described in
101 Subsections (3)(b)(i) through (iii) was [~~the major~~] a contributing cause of the employee's
102 injury:

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

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

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

109 (II) in an otherwise abusive manner;

110 (C) alcohol; or

111 (D) a combination of Subsections (4)(b)(iii)(A) through (C); or

112 (v) the conduct described in Subsections (3)(b)(i) through (iii) was not [~~the major~~] a
113 contributing cause of the employee's injury or the employee's mental and physical condition
114 were in no respect diminished or compromised at the time of the injury.

115 (c) (i) Except as provided in Subsections (4)(c)(ii) and (iii), if a chemical test that
116 creates the presumption under Subsection (4)(a) is taken at the request of the employer, the
117 employer shall comply with:

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

119 (B) if the employee is a local governmental employee or an employee of a state
120 institution of higher education, Title 34, Chapter 41, Local Governmental Entity Drug-Free

121 Workplace Policies.

122 (ii) Notwithstanding Section 34-38-13, the results of a test taken under Title 34,
123 Chapter 38, Drug and Alcohol Testing, may be disclosed to the extent necessary to establish or
124 rebut the presumption created under Subsection (4)(a).

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

128 (d) In taking samples for a test conducted under this section, the employer shall require
129 the employee to provide two samples to permit the employee to have a test conducted that
130 confirms or refutes the test taken under Subsection (4)(a).

131 (5) If any provision of this section, or the application of any provision of this section to
132 any person or circumstance, is held invalid, the remainder of this section shall be given effect
133 without the invalid provision or application.

Legislative Review Note
as of 1-23-14 10:08 AM

Office of Legislative Research and General Counsel