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BLOOD ALCOHOL LIMIT AMENDMENTS

2020 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: James A. Dunnigan

Senate Sponsor: Curtis S. Bramble

LONG TITLE

Committee Note:

The Business and Labor Interim Committee recommended this bill.

Legislative Vote: 11 voting for 0 voting against 9 absent

General Description:

This bill amends provisions of the Workers' Compensation Act regarding an employee's blood or breath alcohol concentration.

Highlighted Provisions:

This bill:

▶ in relation to certain workers' compensation claims, reduces the blood or breath alcohol concentration threshold at which:

- an employer's permitting, encouraging, or having actual knowledge of an employee's intoxication from alcohol may affect compensation provided under the Workers' Compensation Act;
- it is presumed that the major contributing cause of an employee's injury is the employee's intoxication from alcohol; and
- the termination of an employee from reemployment for the employee's use of alcohol may affect the employee's disability compensation for a disability claim.

Money Appropriated in this Bill:

None

Other Special Clauses:



28 None

29 **Utah Code Sections Affected:**

30 AMENDS:

31 **34A-2-302**, as last amended by Laws of Utah 2014, Chapter 182

32 **34A-2-410.5**, as enacted by Laws of Utah 2008, Chapter 349



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

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

36 **34A-2-302. Employee's willful misconduct -- Penalty.**

37 (1) For purposes of this section:

38 (a) "Controlled substance" is as defined in Section **58-37-2**.

39 (b) "Local government employee" is as defined in Section **34-41-101**.

40 (c) "Local governmental entity" is as defined in Section **34-41-101**.

41 (d) "State institution of higher education" is as defined in Section **34-41-101**.

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

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

45 (ii) has not been altered or forged.

46 (2) An employee may not:

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

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

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

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

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

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

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

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

61 (b) except when the employer permitted, encouraged, or had actual knowledge of the
62 conduct described in Subsection (4):

63 (i) disability compensation may not be awarded under this chapter or Chapter 3, Utah
64 Occupational Disease Act, to an employee when the major contributing cause of the employee's
65 injury is the employee's conduct described in Subsection (4); or

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

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

70 (a) knowing use of a controlled substance that the employee did not obtain under a
71 valid prescription;

72 (b) intentional abuse of a controlled substance that the employee obtained under a valid
73 prescription if the employee uses the controlled substance intentionally:

74 (i) in excess of prescribed therapeutic amounts; or

75 (ii) in an otherwise abusive manner; or

76 (c) intoxication from alcohol with a blood or breath alcohol concentration of [~~08~~] .05
77 grams or greater as shown by a chemical test.

78 (5) (a) For purposes of Subsections (3) and (4), as shown by a chemical test that
79 conforms to scientifically accepted analytical methods and procedures and includes verification
80 or confirmation of any positive test result by gas chromatography, gas chromatography-mass
81 spectroscopy, or other comparably reliable analytical method, before the result of the test may
82 be used as a basis for the presumption, it is presumed that the major contributing cause of the
83 employee's injury is the employee's conduct described in Subsection (4) if at the time of the
84 injury:

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

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

88 (B) a controlled substance the employee obtained under a valid prescription or the
89 metabolites of the controlled substance if the amount in the employee's system is consistent

90 with the employee using the controlled substance intentionally:

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

92 (II) in an otherwise abusive manner; or

93 (ii) the employee has a blood or breath alcohol concentration of [~~.08~~] .05 grams or
94 greater.

95 (b) The presumption created under Subsection (5)(a) may be rebutted by a
96 preponderance of the evidence showing that:

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

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

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

102 (ii) the employee did not engage in the conduct described in Subsection (4);

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

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

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

109 (iv) a competent medical opinion from a physician verifies that the amount of
110 controlled substances, metabolites, or alcohol in the employee's system does not support a
111 finding that the conduct described in Subsection (4) was the major contributing cause of the
112 employee's injury or a contributing cause of the employee's injury; or

113 (v) (A) the conduct described in Subsection (4) was not a contributing cause of the
114 employee's injury; or

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

117 (c) (i) Except as provided in Subsections (5)(c)(ii) and (iii), if a chemical test that
118 creates the presumption under Subsection (5)(a) is taken at the request of the employer, the
119 employer shall comply with:

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

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

124 (ii) Notwithstanding Section 34-38-13, the results of a test taken under Title 34,
125 Chapter 38, Drug and Alcohol Testing, may be disclosed to the extent necessary to establish or
126 rebut the presumption created under Subsection (5)(a).

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

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

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

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

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

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

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

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

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

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

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

144 (7) If any provision of this section, or the application of any provision of this section to
145 any person or circumstance, is held invalid, the remainder of this section shall be given effect
146 without the invalid provision or application.

147 Section 2. Section 34A-2-410.5 is amended to read:

148 **34A-2-410.5. Employee cooperation with reemployment.**

149 (1) As used in this section:

150 (a) "Controlled substance" is as defined in Section 58-37-2.

151 (b) "Correctional facility" means:

- 152 (i) a correctional facility as defined in Section 76-8-311.3; or
- 153 (ii) a facility operated by or contracting with the federal government to house a
- 154 criminal offender in either a secure or nonsecure setting.
- 155 (c) "Disability claim" means a claim for compensation for:
- 156 (i) a temporary total disability benefit; or
- 157 (ii) a temporary partial disability benefit.
- 158 (d) "Local governmental entity" is as defined in Section 34-41-101.
- 159 (e) "Reemployment" means employment that:
- 160 (i) is after an accident or occupational disease that is the basis for a disability claim;
- 161 and
- 162 (ii) in a manner consistent with Subsection (2)(b), offers to an employee an opportunity
- 163 for earnings, considering the employee's:
- 164 (A) education;
- 165 (B) experience; and
- 166 (C) physical and mental impairment or condition.
- 167 (f) "State institution of higher education" means an institution listed in Section
- 168 53B-3-102.
- 169 (g) "Valid prescription" is a prescription, as defined in Section 58-37-2, that is:
- 170 (i) prescribed for a controlled substance for use by the employee for whom it is
- 171 prescribed; and
- 172 (ii) not altered or forged.
- 173 (2) In accordance with this section, the commission may reduce or terminate an
- 174 employee's disability compensation for a disability claim for good cause shown by the
- 175 employer including if:
- 176 (a) the employer terminates the employee from the reemployment and the termination
- 177 is:
- 178 (i) reasonable;
- 179 (ii) for cause; and
- 180 (iii) as a result, in whole or in part, of:
- 181 (A) criminal conduct;
- 182 (B) violent conduct; or

183 (C) a violation of a reasonable, written workplace health, safety, licensure, or
184 nondiscrimination rule that is applied in a manner that is reasonable and nondiscriminatory;

185 (b) the employee is incarcerated in a correctional facility for a period of time that
186 would result in the termination of the employee's reemployment in accordance with a
187 reasonable, written workplace rule that is applied in a manner that is reasonable and
188 nondiscriminatory; or

189 (c) subject to Subsection (6), the employee is terminated from the reemployment:

190 (i) (A) for use of a controlled substance that the employee did not obtain under a valid
191 prescription;

192 (B) for intentional abuse of a controlled substance that the employee obtained under a
193 valid prescription, if the employee uses the controlled substance intentionally:

194 (I) in excess of a prescribed therapeutic amount; or

195 (II) in an otherwise abusive manner; or

196 (C) for the use of alcohol that results in intoxication from alcohol with a blood or
197 breath alcohol concentration of [~~.08~~] .05 grams or greater; and

198 (ii) in accordance with a reasonable, written workplace rule that is applied in a manner
199 that is reasonable and nondiscriminatory.

200 (3) Notwithstanding the other provisions of this section, the employee described in
201 Subsection (2) is eligible for medical benefits to the extent otherwise allowed under this title.

202 (4) (a) An employer or the employer's insurance carrier may file an application for a
203 hearing with the Division of Adjudication to request that an employee's disability
204 compensation for a disability claim be reduced or terminated under this section.

205 (b) An action under this Subsection (4) is barred if an application for a hearing is not
206 filed within one year from the day on which the employer terminates the employee from
207 reemployment as described in Subsection (2).

208 (c) An employer or the employer's insurance carrier shall notify the employee that the
209 employer or employer's insurance carrier has filed a request for a hearing under this section
210 within three business days of the day on which the filing is made.

211 (5) (a) The commission may reduce or terminate the disability compensation of an
212 employee for a disability claim if after a hearing requested under Subsection (4), the
213 commission determines that the conditions of Subsection (2) are met.

214 (b) The commission shall issue an order as to whether or not an employee's disability
215 compensation is reduced or terminated under this section by no later than 45 days from the day
216 on which an application for a hearing is filed.

217 (c) A reduction or termination of disability compensation under this Subsection (5)
218 takes effect on the day determined by the commission.

219 (d) If the disability compensation is ordered terminated or reduced, the employer or
220 employer's insurance carrier shall treat a resulting overpayment as an offset against the
221 employer's or employer's insurance carrier's future obligations to pay disability compensation to
222 the employee.

223 (6) (a) For purposes of Subsection (2)(c), the commission may consider a chemical test
224 that conforms to scientifically accepted analytical methods and procedures and includes
225 verification or confirmation of any positive test result by gas chromatography, gas
226 chromatography-mass spectroscopy, or other comparably reliable analytical method showing
227 that the employee has:

228 (i) in the employee's system during employment:

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

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

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

235 (II) in an otherwise abusive manner; or

236 (ii) a blood or breath alcohol concentration of [~~.08~~] .05 grams or greater during
237 employment.

238 (b) A local governmental entity or state institution of higher education shall comply
239 with Title 34, Chapter 41, Local Governmental Entity Drug-Free Workplace Policies, in
240 engaging in a test for a controlled substance that is the basis of a presumption under this
241 section.

242 (7) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
243 commission may make rules:

244 (a) describing factors to be considered under Subsection (2); and

245 (b) related to the procedures for a request for a hearing under this section.

246 (8) The adjudication of a dispute arising under this section is governed by Part 8,
247 Adjudication.

248 (9) An issue related to an employee's cooperation with regard to a claim for
249 compensation for permanent total disability benefits is governed by Section [34A-2-413](#).