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Published Second Quarter 2006

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EMPLOYMENT: HOW TO HANDLE AN OSHA INVESTIGATION

By Thomas R. Wyatt

You know the routine. An accident happens at the worksite, and immediately compliance officers from the Occupational Safety and Health Administration (OSHA) swoop down, looking to second-guess your company's safety procedures and assess fines and penalties, including possible criminal penalties. Can anything be done?

Yes. The Fourth Amendment of the U.S. Constitution prohibits searches and inspections without a court-ordered search warrant, and that applies to OSHA as well. The right can be waived, however, if the employer consents to a warrantless inspection, even if he is unaware of his rights. OSHA is not even legally obligated to advise the employer of its right to insist upon a warrant. Thus, the second issue an employer should consider when faced with a phone call from an OSHA compliance officer is whether or not to insist upon a warrant. The first issue, of course, is to retain experienced counsel, who can help you with all the other issues.

It may or may not be such a good idea to insist upon a warrant. Among the factors that should be considered by the employer are the reason why OSHA seeks to inspect in the first place, i.e. the seriousness of the accident; whether OSHA is likely to find a violation if an inspection is conducted immediately; and how comprehensively OSHA intends to carry out the search.

There are many advantages to insisting upon a warrant. First, OSHA may not be successful in obtaining a warrant and may simply decide to abandon your case for other, possibly more pressing cases. The court may also

narrow the scope of the inspection that OSHA can conduct. Of course, most obvious is the simple fact that the employer might be able to buy time to clean up its shop from many operations. Some opinions believe that a warrant should not be insisted upon, under the belief that OSHA could somehow get "irritated" and decide to increase the scope of the inspection. In my experience, large bureaucracies such as OSHA do not get "irritated." To the contrary, depending on the type of accident that occurred, a stiff resistance might cause OSHA to "back off" to some extent, and pursue other avenues including settlement.

Once the inspection begins, the compliance officer is required by law to hold an opening conference, during which he must establish any ground rules covering the scope of the

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This publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.



## EMPLOYMENT: HOW TO HANDLE AN OSHA INVESTIGATION CONT'D

inspection. Make sure to keep a complete record of what occurs during the inspection. At this time, no less than at any time during the entire investigation, the employer must remain in control. Do not permit the compliance officer to have unsupervised access to a jobsite. Insist upon accompanying the compliance officer during his inspection, even if he protests.

After the inspection has occurred (with or without a warrant), the compliance officer will generally describe any hazards or violations he found on your premises. Be sure to make a record of any issues discussed, and be

sure you fully understand the basis of any alleged violation. It cannot be overemphasized — never admit to any wrongdoing at any time during the inspection process. Again, contrary to some opinions, admitting guilt does not earn you any “points” with OSHA, and it will almost certainly be held against you if you decide to contest the citations.

An OSHA investigation is certainly not pleasant. However, it does not mean the end of the world is nigh. Proper preparedness and good counsel can help lead you through the valley of the shadow of death.

*Got OSHA problems? In addition to his workers' compensation litigation, Tom Wyatt has an extensive OSHA and intentional tort defense practice. Contact Tom for more information.*

## WORKERS' COMPENSATION: PAYROLL REPORTING CHANGE FOR CONSTRUCTION INDUSTRY

By RBS Staff

The Bureau of Workers' Compensation (BWC) has adjusted the construction industry reporting limitation to \$1,056 per week for reportable payroll to a construction industry classification for the 2006 calendar year.

When an employee's actual reportable payroll exceeds \$1,056, any amount over \$1,056 is

not reportable to the Ohio BWC. If an employee earns under \$1,056 in any week, actual wages need to be reported to the BWC. The corporate officer maximum is still \$800 per week (or \$20,800 every six months). This applies to officers that are reportable under a construction industry manual classification. The payroll of clerical employees of a con-

struction industry employer is fully reportable, even if the weekly wages exceed \$1,056.

*If you have any questions regarding reporting requirements or industry classifications, please contact the RBS office.*

## EMPLOYMENT: INQUIRIES INTO AN EMPLOYEE'S LAWFUL DRUG USE MAY COST YOU

By Jerry P. Cline

With soaring health care costs and workers' compensation premiums, many employers have adopted policies designed to reduce the amount of drug and/or alcohol-related incidents in the workplace. Many of these policies require employee disclosures of lawful prescription drug and/or over-the-counter medication use while at work. **But beware** — while drug-free workplace policies are positive initiatives and have enumerable benefits, your policy could run afoul of the Americans with Disabilities Act (ADA) if not drafted properly, and may result in a disability discrimination lawsuit.

Under the ADA, the general rule is that an employer is forbidden to make inquiries of its employees that may reveal the employee's disability, unless the inquiry is *job-related* and *consistent with business necessity*. Generally speaking, the employer may only inquire of an employee's legal drug use if that drug use

could make the employee a danger to himself or to others in performing the essential functions of his job. In that regard, I recently reviewed a client's Drug Free Workplace Policy (DFWP) to ensure compliance with federal regulations. This policy required all employees to report their use of prescription and/or over-the-counter drugs, regardless of whether or not the use of these drugs raised any legitimate safety concerns. This policy, if implemented, would have been a clear violation of the ADA because the inquiry, in most cases, would have had no connection to any legitimate business necessity.

Of course, legal drug use by an employee may raise legitimate safety concerns. For example, it would be permissible for an employer to require a crane operator to report the use of prescription medication that may cause drowsiness. However, if this same crane operator uses aspirin or allergy medication that

raises no legitimate safety concerns, the employee would not have to report this use to the employer because the inquiry would not be job-related or consistent with any business necessity.

So remember — when asking about an employee's use of legal drugs, make sure you first ask yourself if the inquiry is *job-related* and *consistent with business necessity*. Narrow your inquiry only to medications that could make the employee a danger to himself or others in performing the essential functions of his job. Otherwise, it could cost you.

*Jerry's practice involves general employment relations law, discrimination litigation, and workers' compensation. If you have any questions about employee drug policies or any other employment law issues, please do not hesitate to contact him at any time.*

# WORKERS' COMPENSATION: WORKERS' COMP BILL PASSES HOUSE AND SENATE

By Jennifer Bennett

On March 9, 2006, the House and Senate passed a comprehensive workers' compensation reform bill we mentioned in our newsletter approximately one year ago. Although it has not yet been signed by Governor Taft, his signature is expected soon. The bill would then become effective 90 days after Governor Taft's signature. There are some significant additions and deletions between the bill's first incarnation of a year ago, and its finished form. As such, it is important to set forth the particulars of the bill as it appears now.

Once officially signed into law, the bill would:

1. Require an injured worker to provide objective evidence of "substantial" aggravation of a pre-existing condition, rather than a mere allegation of increased pain. If this is proven by the injured worker, medical treatment is limited to treatment needed to return the injured worker to the pre-injury level of impairment.
2. Reduce the time an inactive workers' compensation claim can remain open to 5 years.
3. Clarify the requirement for Permanent Total Disability (PTD).
4. Limit non-working wage loss benefits to 52 total weeks.
5. Eliminate a claimant's automatic right to dismiss an employer's appeal filed in the court of common pleas. This provision also increases the amount of attorney's fees for a successful claimant from a maximum of \$2,500, to \$4,200.

6. Make rape or sexual assault in the workplace a compensable injury.
7. Reduce the gap between the termination of Temporary Total Disability benefits and PTD benefits from 40 weeks to 26 weeks.
8. Increase fines and penalties for an employer lapse in workers' compensation coverage.
9. Establish an injured workers' average weekly wage and rate of PTD by the existing law on the date of the injury.
10. Permit self-insured employers to opt out of the surplus fund reimbursement in certain cases.
11. Increase the deductible that state-funded employers can pay up front for medical-only claims, from \$1,000 to \$5,000.
12. Increase the state minimum wage to equal the federal minimum currently at \$5.15.
13. Designate BWC's Special Investigations Unit as a "Criminal Justice Agency."

*As further updates become available, we will keep you apprised. If you have any questions concerning the potential ramifications of the bill's provisions, please feel free to contact Jennifer or any of the workers' compensation attorneys at RBS.*

## self-insured [corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues which self-insured employers face. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Thomas Wyatt at (216) 447-1551 for additional information and membership details.

## EMPLOYMENT LAW BREAKFAST BRIEFINGS

*Presented by Lynn Schonberg & David Andrews, in conjunction with Nick Phillips  
of HR Department Unlimited*

- Location:** 6000 Freedom Square Drive, Independence  
In the Ground Floor Amphitheatre
- Time:** 8:30 a.m. to 10:30 a.m.
- Registration:** Please contact Melody at (216) 447-1551 for information,  
or register online at [www.rbslaw.com](http://www.rbslaw.com)
- (No cost to RBS clients and HRDU Members)

**September 14, 2006**

### *Hiring the Perfect Employee*

Okay, maybe we can't promise the perfect employee, but we can definitely make sure that you are doing all that the law will allow to help you find just the right employee. We'll cover all the aspects of hiring from developing your applicant pool, to screening applicants, interviewing and the post-offer/pre-hire process.

**December 7, 2006**

### *2006 and beyond – Annual HR Legal Update*

This annual year-end session will review all the employment law developments of 2006 and look forward to what is coming for employers in '07.

## ABC, NORTHERN OHIO CHAPTER SEMINARS

ABC conducts an ongoing series of safety training for employers, including the popular OSHA 10-Hour and OSHA 30-Hour classes. All training participants must register one week in advance with Jennifer at (440) 717-0389.

Location: All Cleveland training will be held at the NOC-ABC Training Center, 9255 Market Place West, Broadview Heights, Ohio 44147. For Perrysburg locations, call for details.

ABC also offers apprenticeship and training for a variety of crafts in 2006. Many of these programs and more are offered at a special discounted rate for ABC members. Please call Jennifer for more information.

### **SAFETY COURSES ARE AVAILABLE ONLINE THROUGH ABC!**

Employees can take the course from any computer — at work, home, or the library. This can result in significant savings to companies, in both time and travel costs!

## SAVE THESE DATES!

June 16 - ABC Western Region Golf outing.