Introduction

Effective October 13, 2004, the Ohio workers' compensation law will provide that an employee who tests positive for controlled substances or alcohol at a certain level within a certain period of time after an accident may forfeit his entitlement to workers' compensation benefits. The law would raise a rebuttable presumption that the employee's injury was the result of the employee's being intoxicated or under the influence of a controlled substance not prescribed by a physician. Workers' compensation benefits would then be denied pursuant to R.C. 4123.54. The presumption is rebuttable, which means that the employee may then offer evidence to indicate that the injury would have occurred irrespective of the use of alcohol or drugs. The following is an analysis of the law and some questions that all employers -- including Ohio's public libraries, both governmental and association libraries -- need to address.

Background

Effective April 10, 2001, the Ohio General Assembly amended R.C. 4123.54 to provide that, where an employee tested positive for drugs or alcohol at certain levels after an accident, a rebuttable presumption arose that the injury was the result of drug or alcohol use. If the presumption was not rebutted, workers' compensation benefits were forfeited by the drug or alcohol user. In State, ex rel. Ohio AFL-CIO, v. Ohio Bureau of Workers' Compensation, et al., the Ohio AFL-CIO and the United Auto Workers challenged this amendment. On December 18, 2002, a narrow majority of the Ohio Supreme Court invalidated the law.
**Case Analysis**

The case was filed by the Ohio AFL-CIO and the UAW against the Bureau of Workers' Compensation and the Industrial Commission to stop the implementation of the drug and alcohol provisions of the Ohio workers' compensation law. This was an unusual case in that no injured worker or other person who claimed that he was harmed by the law was a party to the lawsuit. Rather, the unions disagreed with the law and challenged it in an original action in the Supreme Court. A majority of the Supreme Court decided to hear the case and that majority held the law to be unconstitutional.

The Syllabus of the Court's decision read as follows:

2000 Am. Sub. H.B. No. 122, which permits the warrantless drug and alcohol testing of injured workers without any individualized suspicion of drug or alcohol use, violates the protections against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution.

The case was decided by a divided court with Justices Douglas, Resnick and Sweeney concurring in the majority opinion authored by Justice Pfeifer. Chief Justice Moyer and Justices Lundberg Stratton and Cook dissented from the decision.

The workers' compensation law had been amended only to provide that, where an employee tested positive for drugs or alcohol at certain levels and within a certain time after an injury, a rebuttable presumption arose that the injury was caused by the employee's drug or alcohol use. The law permitted the employee to offer evidence to rebut that presumption. The workers' compensation law neither required nor permitted post-accident testing; rather, the amendment to the workers' compensation law only dealt with the effect of a positive test.
The Court held that a drug or alcohol test undertaken without individualized suspicion violated the protection against unreasonable searches contained in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution. Before the constitutional limitations referenced in the majority's opinion regarding an unreasonable search come into play, there must be some "state action." In this case, the Court held that the potential forfeiture of workers' compensation benefits by a private employer's use of drug or alcohol test results created a "complete entanglement of private and state action" sufficient to constitute "state action" so as to place the activity within the coverage of the Fourth Amendment of the United States Constitution. Toward the end of its opinion, the majority also observed that the drug and alcohol testing provisions of workers' compensation law also violated the illegal search and seizure provisions of the Ohio Constitution. Again, there is a requirement that some state action occur before the Ohio constitutional proscriptions applies. The "entanglement" language quoted above is the way that the Court reached the requirement of there being some state action for Ohio constitutional purposes as well.

The "New" Law

In response to the Supreme Court's decision, H.B. No. 223 was introduced to define the conditions under which post-injury chemical testing of an employee may establish the rebuttable presumption that the employee's injury was caused by the use of alcohol or an unprescribed controlled substance. The bill created what is called a "qualifying" chemical test. The modifier "qualifying" was chosen to
distinguish the statutory test from a random, at-will, or other chemical test. As pointed out above, where a chemical test is to be used for workers’ compensation purposes, the Supreme Court has held that there is sufficient state action so as to create both federal and state constitutional requirements that the "search" was reasonable. The bill sets forth instances where such testing would be reasonable and they include:

Where the employer had reasonable cause to suspect that the employee may have been intoxicated or under the influence of a controlled substance;

At the request of a police officer pursuant to a traffic stop;

At the request of a licensed physician who is not employed by the employer.

The bill also provides that an employer has reasonable cause to suspect that an employee may be intoxicated or under the influence where the employer has evidence that an employee was or is using alcohol or controlled substance on the basis of (1) specific objective facts or (2) reasonable inferences which may be drawn from those facts. The bill provides that such facts may include:

(1) Observable phenomena such as direct observation of use, possession, or distribution of alcohol or a controlled substance, or of the physical symptoms of being under the influence of alcohol or a controlled substance, such as but not limited to slurred speech, dilated pupils, odor of alcohol or a controlled substance, changes in affect, or dynamic mood swings;

(2) A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance such as frequent absenteeism, excessive tardiness, or recurrent accidents, that appears to be related to the use of alcohol or a controlled substance, and does not appear to be attributable to other factors;
(3) The identification of an employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;

(4) A report of use of alcohol or a controlled substance provided by a reliable and credible source;

(5) Repeated or flagrant violations of the safety or work rules of the employee's employer, that are determined by the employee's supervisor to propose a substantial risk of physical injury or property damage and that appear to be related to the use of alcohol or a controlled substance and that do not appear attributable to other factors.

These examples of when an employer may reasonably believe there to have been drug or alcohol influence and activity in the workplace were taken from the drug free workplace program of the Ohio Bureau of Workers' Compensation, which is set forth at Ohio Administrative Code 4123-17-58. These examples were created by the administrative agency charged with the responsibility for administering the workers' compensation law; the law that exists to address the consequences of workplace injuries. Further, the rules were presented to the legislatively created workers' compensation oversight commission for review and consent.

Summary

Two decades ago, the Ohio Supreme Court held in Phelps v. Positive Action Tool that where an employee drinks intoxicating beverages to a certain extent, as a matter of law he has abandoned his employment and, when he is injured in such an impaired condition, he is not entitled to workers' compensation benefits. In that earlier case, the Supreme Court specifically noted the blood alcohol content of the injured worker, which could only have been determined by testing. In the case decided
in December 2002, the Court held that testing the worker without any "individualized suspicion" of drug or alcohol use would violate the constitutional guarantee to be free from unreasonable searches. Because there was no case before the Supreme Court presenting a real situation arising under the statute, we do not know what the majority of that Court would have considered "individualized suspicion" sufficient to make drug testing a "reasonable search" for use in the workers' compensation proceedings.

However, in articulating what would be such a "reasonable search" in the new law, the General Assembly directly addressed the concerns of the Supreme Court by setting forth a logical and reasonable set of criteria to be used in determining whether there is reason to test.

**Remaining Issues**

Prior to the effective date of the new law, all employers – including public libraries -- need to address some general issues.

- First, if an employer decides to conduct testing, it must notify employees that the failing of a test, or the refusal to submit to a test, may work a forfeiture of workers' compensation benefits. The Bureau of Workers' Compensation is sending notices to all Ohio employers to be posted regarding that fact and there is no reason for an employer to deviate from using the Bureau's form.
Second, employers with collective bargaining agreements need to determine whether the drug testing has been addressed in the collective bargaining process.

Third, for governmental public libraries organized under Chapter 3375 of the Revised Code, because of the Ohio Supreme Court’s focus on the illegal search and seizure provisions of the Ohio Constitution in striking down the prior law, and because by the very nature of a governmental library its actions are “state action” which are the subject of those provisions, library directors will wish to check with their county prosecutor to determine whether drug testing under the circumstances defined in the workers’ compensation law would constitute reasonable cause by a governmental entity. Given that governmental libraries will stand in precisely the same posture as any other political subdivision client of the county prosecutor, we believe libraries would be best advised to follow the prosecutor’s advice in this area.

And, finally, employers need to locate a drug testing laboratory that meets the statutory requirement that the facility be “certified by the United States Department of Health and Human Services or laboratories that meet or exceed the standards of that department.”