

As Engrossed: 2/27/91

1 **State of Arkansas**
2 **78th General Assembly**
3 **Regular Session, 1991**
4 **By: Senators Yates and Miles**

A Bill

SENATE BILL 199

For An Act To Be Entitled

8 "AN ACT TO AMEND PROVISIONS OF THE ARKANSAS WORKERS'
9 COMPENSATION LAW PERTAINING TO LIABILITY FOR INJURIES
10 RESULTING FROM DRUG OR ALCOHOL ABUSE; AND FOR OTHER
11 PURPOSES."

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13 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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15 SECTION 1. It is the intent of the legislature to promote worker safety
16 and drug-free workplaces in order that employees in the state be afforded the
17 opportunity to maximize their levels of productivity, and employers to enhance
18 their competitive positions in the market place, and reach their desired
19 levels of success without experiencing the costs, delays, and tragedies
20 associated with work-related accidents resulting from alcohol and drug abuse
21 by employees.

22 It is further the intent of the legislature that drug abuse be
23 discouraged and that employees who choose to engage in drug abuse face the
24 risk of the forfeiture of worker's compensation benefits.

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26 SECTION 2. Arkansas Code 11-9-401 is hereby amended to read as follows:

27 "11-9-401. Employer's liability for compensation.

28 (a) (1) Every employer should secure compensation to his employees and
29 pay or provide compensation for their disability or death from injury arising
30 out of and in the course of employment without regard to fault as a cause of
31 the injury.

32 (2) However, there shall be no liability for compensation under this
33 chapter where the intoxication of the injured employee was a contributing
34 cause of the injury or death, or the injury or death was caused by willful
35 intention of the injured employee to bring about the injury or death of

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1 himself or another.

2 (b)(1) If there was, at the time of the accident, 0.10 percent or more
3 by weight of alcohol in the employee's blood, it shall be presumed that the
4 employee was intoxicated. Percent by weight of alcohol in the blood shall be
5 based upon grams of alcohol per one hundred cubic centimeters or milliliters
6 of blood.

7 (2) If there was, at the time of the accident, evidence of either on or
8 off the job use of a nonprescribed controlled substance as defined in 21
9 U.S.C. 812, Schedules I, II, III, IV, and V, or as thereafter amended, or if
10 the employee's use of a prescribed drug is not in accordance with the
11 instructions for use of that prescription drug, it shall be presumed that the
12 employee was intoxicated.

13 (3) The foregoing provisions of this section shall not be construed as
14 limiting the introduction of any other competent evidence bearing upon the
15 question of whether the employee was under the influence of alcoholic
16 beverages or any illegal or controlled substance.

17 (4)(A) For purposes of this section, an employer has the right to
18 administer drug and alcohol testing or require an employee to submit to a drug
19 and/or alcohol test as soon as practicable after any alleged job accident.

20 (B) If the employee refuses to submit to a drug and alcohol test
21 immediately after the alleged job accident, then it shall be presumed that the
22 employee was intoxicated at the time of the injury or death.

23 (5) The employer's burden of proof in order to support a finding of
24 intoxication due to a positive drug or alcohol test, and a presumption of
25 causation due to such intoxication, shall be a preponderance of the evidence.
26 In meeting this burden, the results of a valid drug or alcohol test shall be
27 considered admissible evidence. *However, if, prior to the employee's injury,*
28 *the employer had actual notice of an expressly acquiesced in the employee's*
29 *presence at the work place while under the influence of such alcohol or drugs,*
30 *the presumption specified in this section shall not apply.*

31 (6) All sample collection and testing for drugs under this section
32 shall be performed in accordance with rules and regulations adopted by the
33 Arkansas Workers' Compensation Commission which ensure the following:

34 (A) The collection of samples shall be performed under *the National*
35 *Institute on Drug Abuse (NIDA) guidelines as they apply to the United States*

1 *Department of Transportation and the Department of Defense, including the*
 2 *drugs to be tested and cutoff levels.*

3 (B) Samples shall be collected and tested with due regard to the
 4 privacy of the individual being tested, and in a manner reasonably calculated
 5 to prevent substitutions or interference with the collection or testing of
 6 reliable samples.

7 (C) Sample collection shall be documented, and the documentation
 8 procedures shall include:

9 (i) Labeling of samples so as reasonably to preclude the probability of
 10 erroneous identification of test result; and

11 (ii) An opportunity for the employee to provide notification of any
 12 information which he considers relevant to the test, including
 13 identification of currently or recently used prescription or
 14 nonprescription drugs, or other relevant medical information.

15 (D) Sample collection, storage, and transportation to the place of
 16 testing shall be performed so as reasonably to preclude the probability of
 17 sample contamination or adulteration; and

18 (E) Sample testing shall conform to scientifically accepted analytical
 19 methods and procedures. Drug testing shall include verification or
 20 confirmation of any positive test result by gas chromatography-mass
 21 spectroscopy, or other comparably reliable analytical method, before the
 22 result of any test may be used as a basis for any disqualification pursuant to
 23 this section. Test results which do not exclude the possibility of passive
 24 inhalation of marijuana may not be used as a basis for disqualification under
 25 this section.

26 (7) All information, interviews, reports, statements, memoranda, or
 27 test results received by the employer through its drug testing program are
 28 confidential communications and may not be used or received in evidence,
 29 obtained in discovery, or disclosed in any public or private proceedings,
 30 except in a proceeding related to a claim for compensation under Arkansas
 31 Workers' Compensation Law, in a claim for unemployment compensation,
 32 proceeding, hearing or civil litigation where drug use by the tested employee
 33 is relevant.

34 (8) (A) No employee whose drug or alcohol test result is confirmed as
 35 positive in accordance with the provisions of this section shall, by virtue of

1 the result alone, be defined as a person having a 'handicap' as cited in the
2 Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990.

3 (B) No physician-patient relationship is created between an employee
4 and an employer or any person performing or evaluating a drug or alcohol test,
5 solely by the establishment, implementation, or administration of a testing
6 program.

7 (C) Nothing in this section shall be construed to restrict an
8 employer's authority to prohibit an employee's non-prescribed use of drugs or
9 alcohol or reporting to work under the influence of drugs or alcohol or
10 possession, use, sale or solicitation of drugs, including convictions for
11 drug-related offenses, and taking action to discipline or discharge an
12 employee based upon a violation of those prohibitions.

13 (D) Nothing in this section shall be construed to operate
14 retroactively, and nothing in this section shall abrogate the right of an
15 employer to conduct drug or alcohol tests, or implementing employee drug or
16 alcohol testing programs.

17 (E) If an employee refuses to submit to a drug or alcohol test, the
18 employer shall not be barred from discharging or disciplining the employee.

19 (F) No cause of action for wrongful discharge, tort of outrage,
20 defamation of character, libel, slander, or damage to reputation arises in
21 favor of any person against an employer who uses drug or alcohol testing in
22 accordance with this section and rules and regulation adopted pursuant hereto.

23 (9) All rights and remedies granted under ACA 11-9-105 shall apply to
24 this section.

25 (c) The primary obligation to pay compensation is upon the employer,
26 and the procurement of a policy of insurance by an employer to cover the
27 obligation in respect to this chapter shall not relieve him of the
28 obligation."

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30 SECTION 3. Arkansas Code 11-9-707(4) is hereby repealed.

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32 SECTION 4. All provisions of this act of a general and permanent nature
33 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
34 Revision Commission shall incorporate the same in the Code.

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1 SECTION 5. If any provision of this act or the application thereof to
2 any person or circumstance is held invalid, such invalidity shall not affect
3 other provisions or applications of the act which can be given effect without
4 the invalid provision or application, and to this end the provisions of this
5 act are declared to be severable.

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7 SECTION 6. All laws and parts of laws in conflict with this act are
8 hereby repealed.

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10 /s/Yates et al

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