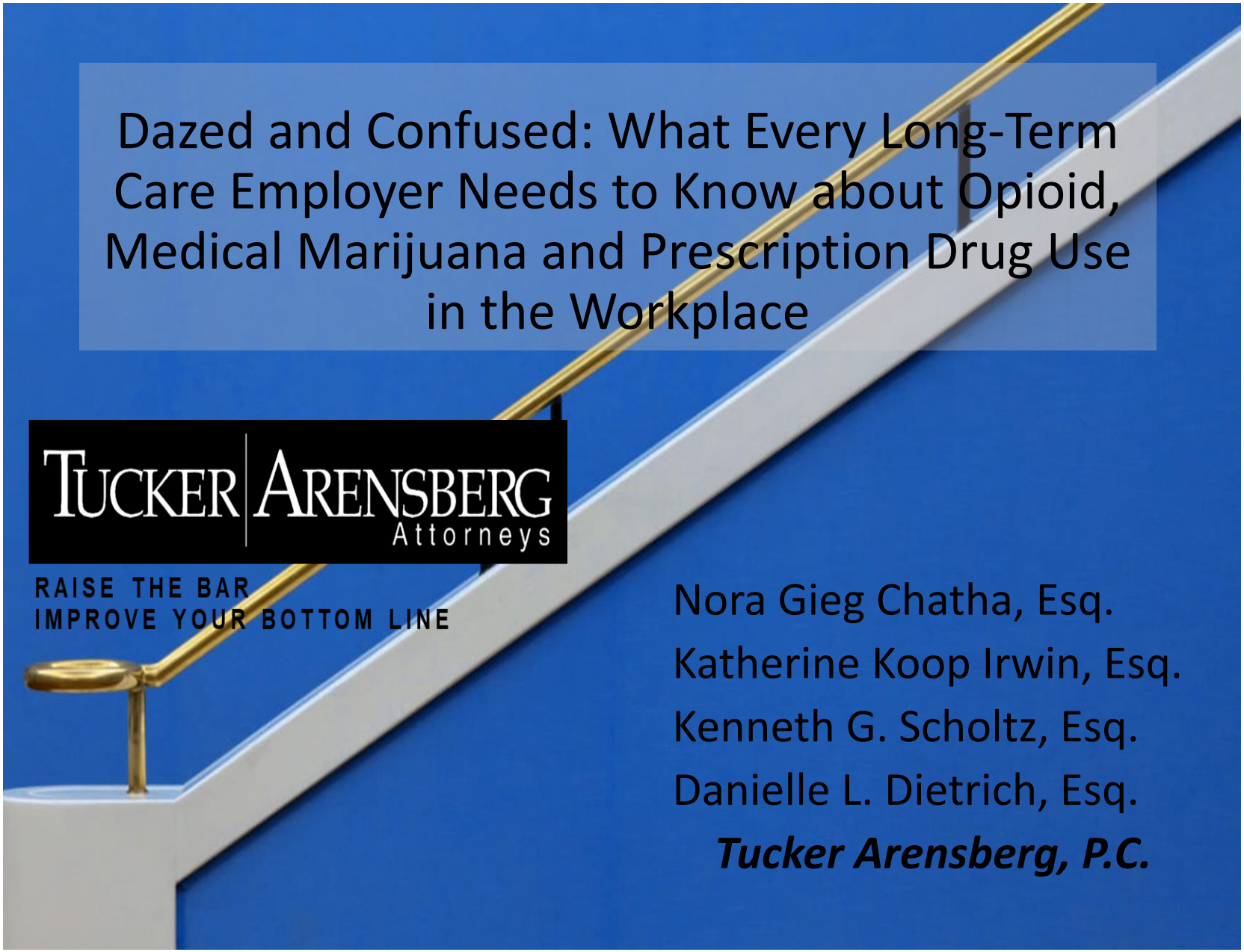
Dazed and Confused: What Every Long-Term Care Employer Needs to Know about Opioid, Medical Marijuana and Prescription Drug Use in the Workplace



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RAISE THE BAR
IMPROVE YOUR BOTTOM LINE

Nora Gieg Chatha, Esq.
Katherine Koop Irwin, Esq.
Kenneth G. Scholtz, Esq.
Danielle L. Dietrich, Esq.
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Statistics About Drugs and Alcohol Use in the Workplace

- A report issued in 1998 by the National Institute on Alcohol Abuse and Alcoholism and the National Institute on Drug Abuse, it is estimated that the cost of alcohol and drug abuse for 1995 was $276.4 billion, of which $166.5 billion was for alcohol abuse and $109.8 billion was for drug abuse.
- In addition, statistics showed that a majority of drug and alcohol abusers in the United States were employed: 75 percent of illicit drug users over 18, nearly 80 percent of binge and heavy drinkers, and 60 percent of adults with substance abuse problems.
- It has been reported that 10 percent to 25 percent of the American population is “sometimes on the job under the influence of alcohol or some illicit drug.

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Regulatory Framework

– Drug-Free Workplace Act
– Americans with Disabilities Act
– Rehabilitation Act
– Family and Medical Leave Act
–Pennsylvania Human Relations Act
- Pennsylvania's Medical Marijuana Act

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ADA Overview

- Prohibits discrimination in employment against a "qualified individual" on the basis of disability.
- Discrimination includes failure to make reasonable accommodations to known limitations of an "otherwise qualified" person with a disability.

42 U.S.C. § 12112

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Definition of Disability

- Physical or mental impairment that substantially limits one or more major life activities;
- A record of a substantially limiting impairment;

or

- Being regarded as (treated by an employer as) having a substantially limiting impairment;
  42 U.S.C. § 12102(1)
- Major Life Activities: non-exhaustive list of major life activities, like caring for oneself, performing manual tasks, seeing, hearing, eating, etc.;
- Major life activities include “the operation of a major bodily function.”

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Does the ADA Protect Employees with Substance Abuse Problems?

Prior to the ADAAA, courts held alcoholism could be a disability if it substantially limited a major life activity.

Under ADAAA, employers should assume alcoholism is a disability.

The ADA does not protect an individual who currently engages in the illegal use of drugs, but may protect a recovered drug addict who is no longer engaging in the illegal use of drugs.

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Does the ADA Protect Employees with Substance Abuse Problems?

Exemption for current illegal drug use does not include employees who:

- Successfully completed rehab and are no longer using;
- Are participating in supervised rehab and are no longer using; or
- Are erroneously regarded as using illegal drugs.

42 U.S.C. § 12114

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May an employer require an employee who is an alcoholic or who illegally uses drugs to meet the same standards of performance and conduct applied to other employees?

- Yes. The ADA specifically provides that employers may require an employee who is an alcoholic or who engages in the illegal use of drugs to meet the same standards of performance and behavior as other employees.[84] This means that poor job performance or unsatisfactory behavior – such as absenteeism, tardiness, insubordination, or on-the-job accidents – related to an employee's alcoholism or illegal use of drugs need not be tolerated if similar performance or conduct would not be acceptable for other employees.

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An employer has a lax attitude about employees arriving at work on time. One day a supervisor sees an employee he knows to be a recovered alcoholic come in late. Although the employee's tardiness is no worse than other workers and there is no evidence to suggest the tardiness is related to drinking, the supervisor believes such conduct may signal that the employee is drinking again. Thus, the employer reprimands the employee for being tardy.

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An employee who has a been disciplined a number of times for various issues is designated to take a drug test as part of a company wide random drug screen. As the employee is heading to the drug test, he stops his supervisor and states that he has a history of drug dependence, that he has not done drugs in a few weeks, but fears he may test positive. Before taking the test, he asks for time away from work to enter a rehab facility.

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Under the ADA, Employers May

- Hold employees who abuse drugs or alcohol to same "qualification standards" for job performance or behavior as other employees, even if unsatisfactory behavior or performance is related to drug use or alcoholism.
- Prohibit use of alcohol or illegal use of drugs at work or during work hours.
- Prohibit employees from working under the influence of drugs or alcohol.
- Request documentation that employee has disability and requires accommodation.

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The ADA Also Does Not Prohibit:

- Screening new hires for illegal drugs
- After completing a rehabilitation program, testing employees for illegal drug use pursuant to "reasonable policies or procedures."
- Random testing for drugs or alcohol on an individual pursuant to "last chance" agreement.
- Drug or alcohol testing where employer has objective evidence that employee cannot perform essential functions of job or poses direct threat.
- Asking an applicant if they have ever used illegal drugs.

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Medical Marijuana By the Numbers

83,000 Pennsylvanians have been issued medical marijuana cards.

1,000 physicians are approved to certify patients to participate in program and **56** dispensaries across state.

State dispensaries have completed nearly **600,000** medical marijuana sales, amounting to **$132million** in total sales.

The state has collected over **$2 million** in tax revenue from growers and processors.

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PA's Medical Marijuana Act's Employment Provisions

Pennsylvania MMA's Non-discrimination provision:

> "No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana."

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Employment Provisions

Employers do not have to "make any accommodation of the use of medical marijuana on the property or premises of any place of employment."

Law is unclear if you must permit employee to bring medical marijuana onto premises – if not using it. Likely not required to do so!

"This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace **or** for working while under the influence of medical marijuana **when the employee's conduct falls below the standard of care normally accepted for the position**."

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What does the Department of Transportation have to say about Medical Marijuana?

The Department of Transportation's Drug and Alcohol Testing Regulation does not authorize "medical marijuana" under a state law to be a valid medical explanation for a transportation employee's positive drug test result.

- **§ 40.151** "As an MRO, you are prohibited from doing the following as part of the verification process:
  (e) You must not verify a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted.)

Therefore, Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use "medical marijuana."

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THC's Psychological Effects

Other effects include:

- altered senses (for example, seeing brighter colors)
- altered sense of time
- changes in mood
- impaired body movement
- difficulty with thinking and problem-solving
- impaired memory
- hallucinations (when taken in high doses)
- delusions (when taken in high doses)
- psychosis (when taken in high doses)

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- Effects of smoking marijuana are noticeable within minutes after the first toke, and usually reach peak levels after 30 minutes.
- Most physical and psychological effects of marijuana will return to normal within 5 hours after administration, with exceptional strains or high potency THC effects reported to last for 24 hours.
- If marijuana is ingested orally, it takes longer to be absorbed into the blood, usually from 20 minutes to 1.5 hours.

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Court Decisions

Callaghan v. Darlington Fabrics Corp., 2017 WL 2321181 (R.I. Super. May 23, 2017)

- "I get high with a little help from my friends"
- Similar anti-discrimination provisions to Pennsylvania's medical marijuana law

Noffsinger v. SSC Niantic Operating Co., LLC, 2017 WL 3401260 (D. Conn. Aug. 8, 2017)

- Case was about Marino, which is a legal, synthetic form or marijuana

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Whitmire v. Wal-Mart Stores Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019)

- Court rejected Wal-Mart's argument that the AMMA did not provide for a private cause of action.
- Battle of the experts:
  - Whitemire's post-accident drug screen tested positive for marijuana metabolites at a quantitative value of greater than 1000 ng/ml.
  - "At the metabolite stage, the metabolic component detected in the urine is 'inactive,' in the sense that it is incapable of causing impairment. Many drugs will continue to appear in the urine in metabolite form for days or even weeks after use. A urine test, while indicative of what has been in the bloodstream in the past, says nothing conclusive about what is presently in the bloodstream."

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First Medical Marijuana Lawsuit Filed in Allegheny County

Kristen Stewart v. Belcan Technical Services, Inc., Lanxess, GD-19-006754

Filed on May 8, 2019

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Fact Scenario

- A Certified Nursing Assistant, Mary, is prescribed medical marijuana. Mary knows that she is not permitted to report to work under the influence of medical marijuana per her employer's policy.
- On one particular day, Mary vapes too much marijuana in the morning before her afternoon shift, albeit unintentionally. Mary is still impaired at the time she is reports to work. Once at work, Mary talks to her co-worker who notices that Mary is slurring her words a bit. Soon after, Mary trips and falls in a resident's room, significantly injuring her back.
- **What should the employer do from an employment and workers' compensation perspective?**

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Post-Injury Drug Testing

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- Workers' Comp Defense Attorney since 2002

- Clients include:
  - Hospitals and health care systems;
  - Nursing homes;
  - Home health aid/therapy companies;
  - Utility companies, heavy manufacturing, coal mines, school districts and municipalities, big box stores, etc.

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PA Workers' Compensation Act - Basics

The terms "injury" and "personal injury," as used in this act, shall be construed to mean an injury to an employee, regardless of his previous physical condition…arising in the course of his employment and related thereto, and such disease or infection as naturally results from the injury or is aggravated, reactivated or accelerated by the injury…"

PA Workers' Compensation Act, 77 P.S. §411

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PA Workers' Comp / OSHA

PA Workers' Comp Act, 77 P.S. §101, et seq., covers and applies to all employers within Commonwealth…claims recoverable for any employee injured while in furtherance of interests.

By contrast OSHA is **Federal**, a subdivision of the U.S. Dept. of Labor. OSHA covers most private sector employers and employees. **Nursing homes and hospitals are deemed "high hazard" industries.**

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Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees.

OSHA's role is to help ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance.

OSHA, 29 C.F.R. §24, et seq.

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When can you drug test employees?

- Pre-employment (post-offer);
- Random;
- Reasonable suspicion;
- Return from suspension/time off; and
- Post-accident.

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Clarity on Post-Accident Drug Testing

- Permitted by OSHA, but viewed as potential deterrent to injury reporting.
- Permitted by PA Workers' Comp Act, but positive drug test does not translate to valid claim denial.
- Post-accident drug testing policy can lower insurance premiums (Workers' Comp and GL/PL policies).

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Why Have a Drug Testing Policy?

- Determining whether injury/accident occurred while worker was high;
- determining whether injury/accident was caused by worker being high (there is a difference…);
- deterring drug use by workforce; and
- save on insurance premiums (WC, GL/PL).

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Drug Testing Policy Logistics.

- Majority of employers “farm out” testing to labs/services.

- Contemporaneousness is key.
- Proper handling of test results.
- Privacy concerns.
- Evidentiary burdens.

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Detection Deadlines…

- Most drugs are “out of your system” within 48 hours.
- Testing variations can increase probability of detection – but waiting does not enhance your position as an employer.
- Factors such as age, height, weight, body fat level, hydration level, ethnicity – and frequency/duration of use – all affect your “deadline” for effective testing.

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OSHA – Recordkeeping Requirements

Since 1986, forms required by OSHA for recording and reporting injuries have remained the same – but now (since 2016) must be submitted in digital format via dol.gov

The use of the recordkeeping forms and recordkeeping guidelines by employers helps to ensure the uniformity of the safety and health data utilized by BLS and OSHA.

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OSHA – Recordkeeping Requirements

Three (3) forms used for 30+ years.

Form 300

– included very specific injury/accident information, worker name, job title, classification of injury and claim information.

Form 300A

– included statistics/summary of injuries.

Form 301

– specific injury/employee info (not submitted to OSHA).

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OSHA's Form 300 (Rev. 01/2004)

Log of Work-Related Injuries and Illnesses

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

Year 20__ __

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

You must record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. You must also record significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional. You must also record work-related injuries and illnesses that meet any of the specific recording criteria listed in 29 CFR Part 1904.8 through 1904.12. Feel free to use two lines for a single case if you need to. You must complete an Injury and Illness Incident Report (OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, call your local OSHA office for help.

Establishment name ______________________

City ______________ State ______________

Identify the person | **Describe the case** | **Classify the case** — CHECK ONLY ONE box for each case based on the most serious outcome for that case: | Enter the number of days the injured or ill worker was: | Check the "Injury" column or choose one type of illness:

(A) Case no.	(B) Employee's name	(C) Job title (e.g., Welder)	(D) Date of injury or onset of illness	(E) Where the event occurred (e.g., Loading dock north end)	(F) Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill (e.g., Second degree burns on right forearm from acetylene torch)	(G) Death	(H) Days away from work	(I) Remained at Work: Job transfer or restriction	(J) Remained at Work: Other record-able cases	(K) Away from work	(L) On job transfer or restriction	(M) (1) Injury	(2) Skin disorder	(3) Respiratory condition	(4) Poisoning	(5) Hearing loss	(6) All other illnesses
			/ month/day			☐	☐	☐	☐	___ days	___ days	☐	☐	☐	☐	☐	☐
			/ month/day			☐	☐	☐	☐	___ days	___ days	☐	☐	☐	☐	☐	☐
			/ month/day			☐	☐	☐	☐	___ days	___ days	☐	☐	☐	☐	☐	☐
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					Page totals ➤	___	___	___	___	___	___	___ Injury (1)	___ Skin disorder (2)	___ Respiratory condition (3)	___ Poisoning (4)	___ Hearing loss (5)	___ All other illnesses (6)

Be sure to transfer these totals to the Summary page (Form 300A) before you post it.

Public reporting burden for this collection of information is estimated to average 14 minutes per response, including time to review the instructions, search and gather the data needed, and complete and review the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. If you have any comments about these estimates or any other aspects of this data collection, contact: US Department of Labor, OSHA Office of Statistical Analysis, Room N-3644, 200 Constitution Avenue, NW, Washington, DC 20210. Do not send the completed forms to this office.

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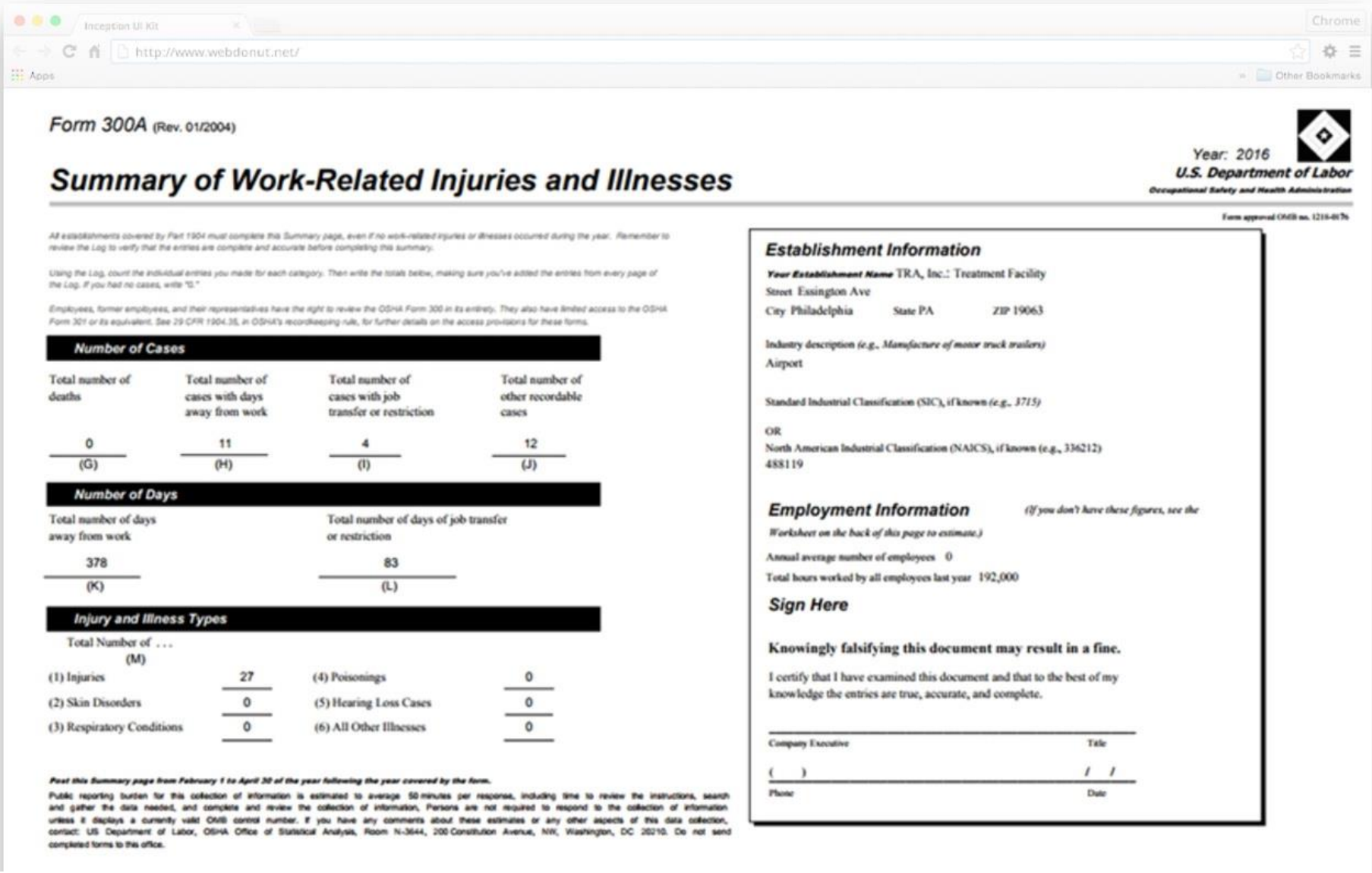

Form 300A (Rev. 01/2004)

Summary of Work-Related Injuries and Illnesses

Year: 2016

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1218-0176

All establishments covered by Part 1904 must complete this Summary page, even if no work-related injuries or illnesses occurred during the year. Remember to review the Log to verify that the entries are complete and accurate before completing this summary.

Using the Log, count the individual entries you made for each category. Then write the totals below, making sure you've added the entries from every page of the Log. If you had no cases, write "0."

Employees, former employees, and their representatives have the right to review the OSHA Form 300 in its entirety. They also have limited access to the OSHA Form 301 or its equivalent. See 29 CFR 1904.35, in OSHA's recordkeeping rule, for further details on the access provisions for these forms.

Number of Cases

Total number of deaths	Total number of cases with days away from work	Total number of cases with job transfer or restriction	Total number of other recordable cases
0	11	4	12
(G)	(H)	(I)	(J)

Number of Days

Total number of days away from work	Total number of days of job transfer or restriction
378	83
(K)	(L)

Injury and Illness Types

Total Number of . . . (M)			
(1) Injuries	27	(4) Poisonings	0
(2) Skin Disorders	0	(5) Hearing Loss Cases	0
(3) Respiratory Conditions	0	(6) All Other Illnesses	0

Post this Summary page from February 1 to April 30 of the year following the year covered by the form.

Public reporting burden for this collection of information is estimated to average 50 minutes per response, including time to review the instructions, search and gather the data needed, and complete and review the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. If you have any comments about these estimates or any other aspects of this data collection, contact: US Department of Labor, OSHA Office of Statistical Analysis, Room N-3644, 200 Constitution Avenue, NW, Washington, DC 20210. Do not send completed forms to this office.

Establishment Information

Your Establishment Name TRA, Inc.: Treatment Facility
Street Essington Ave
City Philadelphia State PA ZIP 19063

Industry description *(e.g., Manufacture of motor truck trailers)*
Airport

Standard Industrial Classification (SIC), if known *(e.g., 3715)*

OR
North American Industrial Classification (NAICS), if known (e.g., 336212)
488119

Employment Information

(If you don't have these figures, see the Worksheet on the back of this page to estimate.)

Annual average number of employees 0
Total hours worked by all employees last year 192,000

Sign Here

Knowingly falsifying this document may result in a fine.

I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete.

Company Executive Title

( ) / /

Phone Date

OSHA's Form 301
Injury and Illness Incident Report

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB no. 1220-0176

This Injury and Illness Incident Report is one of the first forms you must fill out when a recordable work-related injury or illness has occurred. Together with the Log of Work-Related Injuries and Illnesses and the accompanying Summary, these forms help the employer and OSHA develop a picture of the extent and severity of work-related incidents.

Within 7 calendar days after you receive information that a recordable work-related injury or illness has occurred, you must fill out this form or an equivalent. Some state workers' compensation, insurance, or other reports may be acceptable substitutes. To be considered an equivalent form, any substitute must contain all the information asked for on this form.

According to Public Law 91-596 and 29 CFR 1904, OSHA's recordkeeping rule, you must keep this form on file for 5 years following the year to which it pertains.

If you need additional copies of this form, you may photocopy and use as many as you need.

Completed by _____

Title _____

Phone (____) ____-____ **Date** ____/____/____

Information about the employee

1) Full name _____

2) Street _____

City _____ State _____ ZIP _____

3) Date of birth ____/____/____

4) Date hired ____/____/____

5) ☐ Male
☐ Female

Information about the physician or other health care professional

6) Name of physician or other health care professional _____

7) If treatment was given away from the worksite, where was it given?

Facility _____

Street _____

City _____ State _____ ZIP _____

8) Was employee treated in an emergency room?
☐ No
☐ Yes

9) Was employee hospitalized overnight as an in-patient?
☐ No
☐ Yes

Information about the case

10) Case number from the Log _____ (Transfer the case number from the Log after you record the case.)

11) Date of injury or illness ____/____/____

12) Time employee began work _____ AM / PM

13) Time of event _____ AM / PM ☐ Check if time cannot be determined

14) **What was the employee doing just before the incident occurred?** Describe the activity, as well as the tools, equipment, or material the employee was using. Be specific. *Examples:* "climbing a ladder while carrying roofing materials"; "spraying chlorine from hand sprayer"; "daily computer key-entry."

15) **What happened?** Tell us how the injury occurred. *Examples:* "When ladder slipped on wet floor, worker fell 20 feet"; "Worker was sprayed with chlorine when gasket broke during replacement"; "Worker developed soreness in wrist over time."

16) **What was the injury or illness?** Tell us the part of the body that was affected and how it was affected; be more specific than "hurt," "pain," or sore. *Examples:* "strained back"; "chemical burn, hand"; "carpal tunnel syndrome."

17) **What object or substance directly harmed the employee?** *Examples:* "concrete floor"; "chlorine"; "radial arm saw." *If this question does not apply to the incident, leave it blank.*

18) **If the employee died, when did death occur?** Date of death ____/____/____

Public reporting burden for this collection of information is estimated to average 14 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. If you have any comments about this estimate or any other aspects of this collection, including suggestions for reducing this burden, contact: U.S. Department of Labor, OSHA, Office of Statistics, Room N-3644, 200 Constitution Avenue, NW, Washington, DC 20210. Do not send the completed forms to this office.

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OSHA - 2016 Electronic Data Rule

Form 300A required for submission, **Form 301** required for "holding," and **Form 300** is no longer required. 29 CFR 1904.41(a)(1).

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OSHA - 2016 Electronic Data Rule

One of the goals of this recordkeeping rule was to improve the completeness and accuracy of injury and illness data collected by employers and reported to OSHA. **When workers are discouraged from reporting occupational injuries and illnesses, the information gathered and reported is incomplete and inaccurate.**

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In response to public pressure – OSHA released three memoranda for further guidance…(10/19/2016, 11/10/2016 and 10/11/2018).

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OSHA - 2016 Electronic Data Rule

The rule includes *three* provisions that are intended to address the issue of reporting:

1) An employer's procedure for reporting work-related injuries and illnesses must be reasonable and must not deter or discourage employees from reporting.

2) Employer's must inform employees of their right to report work-related injuries and illnesses free from retaliation.

3) An employer may not retaliate against employees for reporting work-related injuries or illnesses.

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OSHA Clarity on Drug Testing Policy?

Section 11(c) of OSHA regulations already prohibits any person from discharging or otherwise discriminating against an employee who reports a fatality, injury, or illness. However, OSHA could not act under that section unless an employee filed a complaint with OSHA within 30 days of the retaliation.

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OSHA Clarity on Drug Testing Policy?

In contrast, under the final (new) rule, OSHA will be able to cite an employer for retaliation even if the employee did not file a complaint, or if the employer has a program that deters or discourages reporting through the threat of retaliation. 81 Fed. Reg. 29624 (8/10/2016).

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Starting in 2016, OSHA has given its compliance officers the authority to issue citations to employers based on perceived retaliation in the workplace.

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OSHA Clarity on Drug Testing

- The rule ***does not*** ban appropriate disciplinary, incentive, or drug-testing programs as described above.

- However, it allows OSHA to issue citations for retaliatory actions against workers when these programs are used to discourage workers from exercising their right to report workplace injuries and illnesses. Employers should review their reporting procedures, programs, and policies for elements that may result in retaliatory actions against an employee for reporting an injury or illness.

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New OSHA Reporting Rule

- Does not prohibit drug testing.

- Does prohibit employers from "using drug testing, or the threat of drug testing, as a form of retaliation against employees who report injuries or illnesses."

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DRUG FREE WORKPLACE

Reporting a work injury will subject you to a mandatory drug test!

A positive drug test will result in:

- **Contact to local authorities;**
- **Termination of your employment;**
- **Denial of your Workers' Compensation claim.**

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Scenario 1: (from OSHA memoranda for further guidance)

Employer required Employee X to take a drug test after Employee X reported work-related carpal tunnel syndrome.

Employer had no reasonable basis for suspecting that drug use could have contributed to her condition, and it had no other reasonable basis for requiring her to take a drug test. Rather, Employer routinely subjects all employees who report work-related injuries to a drug test regardless of the circumstances surrounding the injury.

Question: Did Employer violate section 1904.35(b)(1)(iv) by subjecting Employee X to a drug test simply because she reported a work-related injury?

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Answer: *Yes*. Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries. Rather, employers must have a legitimate business reason for requiring a drug test, such as a reasonable belief that drug use contributed to the injury.

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Scenario 2: Employee X was injured when he inadvertently drove a forklift into a piece of stationary equipment, and he reported the injury to Employer. Employer required Employee X to take a drug test.

Question: Did Employer violate section 1904.35(b)(1)(iv) for drug testing Employee X?

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Answer: *No*. Because Employee X's conduct—the manner in which he operated the forklift—contributed to his injury, and because drug use can affect conduct, it was objectively reasonable to require Employee X to take a drug test after Employer learned of his injury. Drug testing an employee who engaged in conduct that caused an injury is objectively reasonable because conduct can be affected by drug use.

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Scenario 3: Employer requires all employees who report lost-time injuries to take a drug test regardless of whether drug use could have contributed to the injury because the drug testing requirement is included in the collective bargaining agreement at the workplace. Employer drug tests Employee Z when she reports a lost-time injury that could not reasonably have been caused by drug use, such as a bee sting or carpal tunnel syndrome. The employer had no reasonable basis for suspecting that drug use could have contributed to her injury and had no other reasonable basis for requiring the test.

Question: Did Employer violate section 1904.35(b)(1)(iv) by drug testing Employee Z pursuant to a collective bargaining agreement?

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Answer: *Yes*. Section 1904.35(b)(1)(iv) prohibits an employer from taking adverse action against employees simply because they report work-related injuries absent a reasonable belief that drug use could have contributed to the injury or another reasonable basis for requiring a drug test. Although OSHA does not intend for section 1904.35(b)(1)(iv) to supersede other state or federal programs addressing post-injury drug testing of employees, collective bargaining agreements may not supersede section 1904.35(b)(1)(iv).

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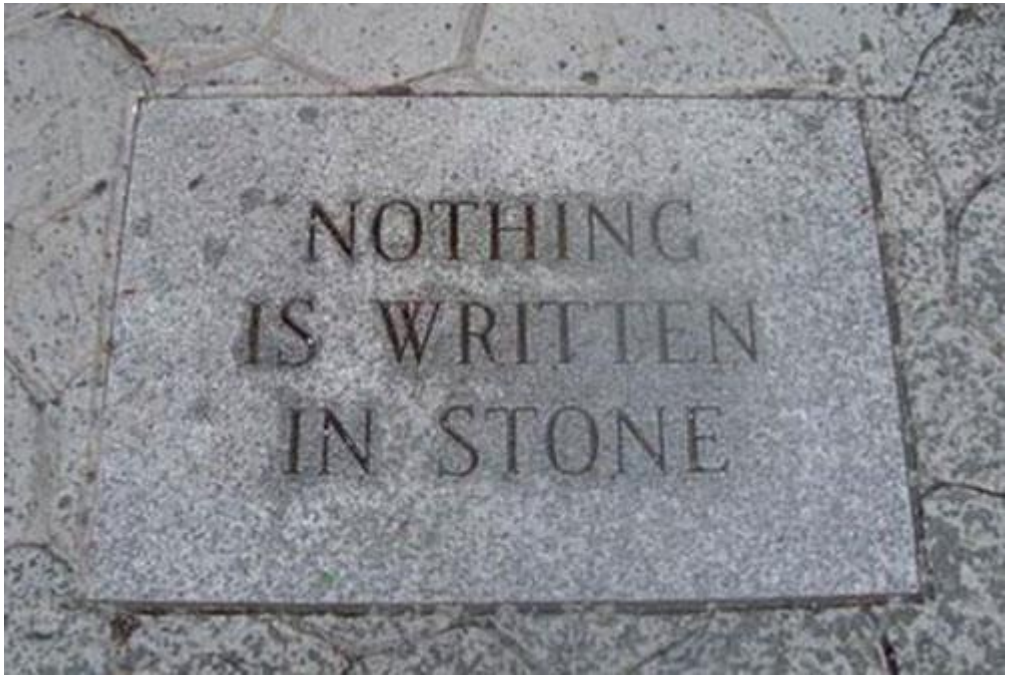
No more memoranda for further guidance …right?



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Citing privacy concerns, OSHA issued a final rule on Jan. 25, 2019 to require submission of only Form 300A, an annual summary of injuries and illnesses, instead of the two more detailed forms.

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For Immediate Release

January 24, 2019

Contact: Office of Communications

U.S. Department of Labor Issues Final Rule to Protect Privacy of Workers

WASHINGTON, DC – To protect worker privacy, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has issued a final rule that eliminates the requirement for establishments with 250 or more employees to electronically submit information from OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report) to OSHA each year. These establishments are still required to electronically submit information from OSHA Form 300A (Summary of Work-Related Injuries and Illnesses).

By preventing routine government collection of information that may be quite sensitive, including descriptions of workers' injuries and body parts affected, OSHA is avoiding the risk that such information might be publicly disclosed under the Freedom of Information Act (FOIA). This rule will better protect personally identifiable information or data that could be re-identified with a particular worker by removing the requirement for covered employers to submit their information from Forms 300 and 301. The final rule does not alter an employer's duty to maintain OSHA Forms 300 and 301 on-site, and OSHA will continue to obtain these forms as needed through inspections and enforcement actions.

In addition, this rule will allow OSHA to focus its resources on initiatives that its past experience has shown to be useful—including continued use of information from severe injury reports that helps target areas of concern, and seeking to fully utilize a large volume of data from Form 300A—rather than on collecting and processing information from Forms 300 and 301 with uncertain value for OSHA enforcement and compliance assistance.

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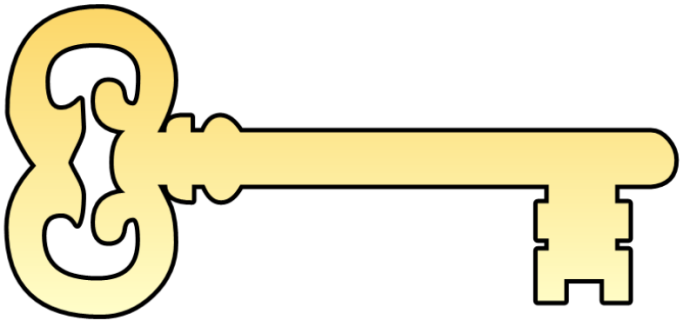
"…that eliminates the requirement for establishments with 250 or more employees to electronically submit information from OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report) to OSHA each year."



"These establishments will continue to be required to maintain those records on-site, and OSHA will continue to obtain them as needed through inspections and enforcement actions."

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Several states sue Federal Government over OSHA Rollback…

New Jersey, Illinois, Maryland, Massachusetts, Minnesota and New York claim that this quick reversal without a "reasoned explanation" violates the Administrative Procedure Act and court precedent.

"New Jersey workers – and workers across the country – have the right to know about dangerous conditions on the job," New Jersey Attorney General Gurbir S. Grewal said in a March 6 press release. "Public reporting of workplace safety information helps states enforce our labor laws, forces employers to remove hazards, and empowers workers to demand improvements. Workers deserve that transparency, and the federal government should not be trying to take it away."

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Enforcement – not what it used to be?

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Is Trump Administration Pulling Reigns on OSHA?

- According to the AFL-CIO, as of fiscal year 2017, there were only **1,821 workplace inspectors** in both federal and state agencies combined, covering **about 9 million workplaces** nationwide;
- 47 inspectors resigned in 2017-2018, **none were replaced;**
- Currently **lowest number of inspectors in 48 year history of OSHA**; and
- Budget has remained basically level.

www.thenation.com/article/worplace-industries-osha-trump/, Michelle Chen, March 27, 2019 "Declining Federal Oversight of Workplace Safety Could Have Fatal Consequences"; see also, www.nelp.org/news-releases/workplace-fatalities-rising-trump-osha-enforcement-declines/ March 14, 2019 "WORKPLACE FATALITIES RISING UNDER TRUMP OSHA AS ENFORCEMENT DECLINES."

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Enforcement cause and effect…

Evidence linking drug use to work accidents and injuries – review of "Dirty Dozen" reports includes no indication of drug use as cause of any. Purdue Pharma made the list for targeting sales of opioids to injured workers.

2019 Dirty Dozen includes Facebook and other social media sites – whose employees are exposed to violent and offensive posts and photos. Amazon – six worker deaths at fulfillment centers in 2018, and 11 since 2013.

http://www.coshnetwork.org/2019-Dirty-Dozen-Release.

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Handling Drug Test Results

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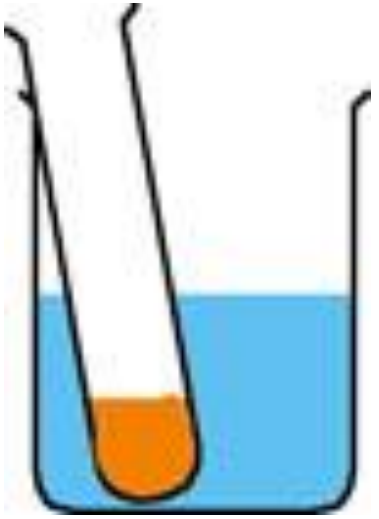
For use of evidence of a positive test in a Court of law, state rules of evidence require drug test results must include proof, and authentication of proper chain of custody to be deemed valid.

Erisco Industries, Inc. v. WCAB (Luvine), 955 A.2d 1065 (Pa. Cmwlth. Ct. 2008).



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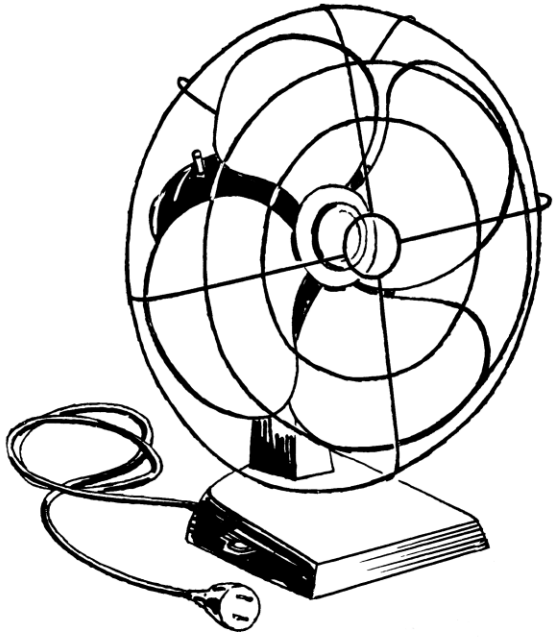
Proving Causation…

McCombs v. WCAB (Anchor Hocking), 2008 Pa. Commw. Unpub. LEXIS 430 (Pa. Cmwlth. Ct. 2008).



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- Claimant admits to smoking marijuana on day of injury;
- Claimant admits to not eating and “feeling dizzy;”
- Co-worker testifies Claimant “looked like hell” on day of injury;
- Manner of injury consistent with dizziness.

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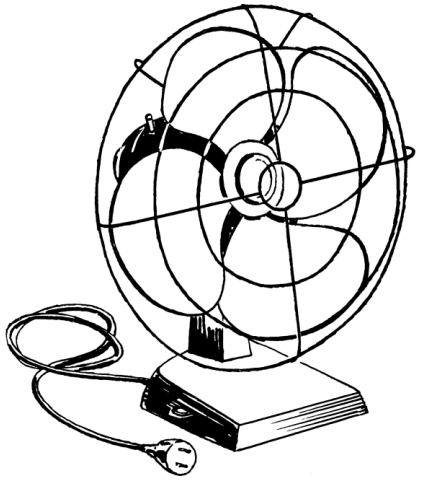
- Post-injury drug test positive for marijuana use;
- Employer medical expert report references use of marijuana;
- Employer medical expert does not offer opinion regarding how marijuana use could have caused or contributed injury.



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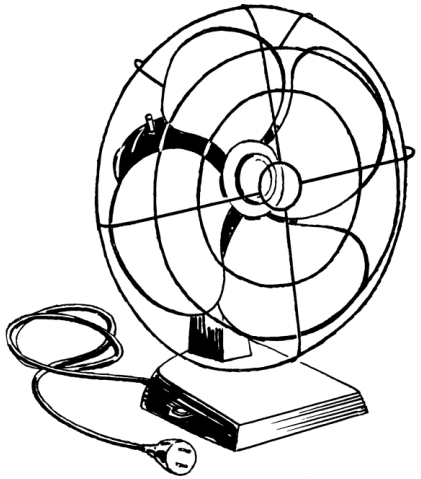
AWARD for CLAIMANT.

McCombs v. WCAB (Anchor Hocking), 2008 Pa. Commw. Unpub. LEXIS 430 (Pa. Cmwlth. Ct. 2008).



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Can you deny claim where injured worker is taking medication for *the* work injury?

Greene v. WCAB (Hussey Copper, Ltd.), 783 A.2d 883; 2001 Pa. Commw. LEXIS 701 (Pa.Cmwlth. Ct. 2001).

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Can you fire an employee, and deny ongoing Workers' Comp benefits at the same time when a post-injury drug test comes back positive?

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The "Fault" or "Bad Faith" Defense…

Violation of a drug use policy is a valid basis for termination of employment. Termination of employment does not however extinguish Workers' Comp recovery rights. But if the drug use is confirmed by a properly performed test with properly handled results, and it is determined the drug use was a cause of the injury - you have a rock solid defense against any claim for Workers' Comp benefits.

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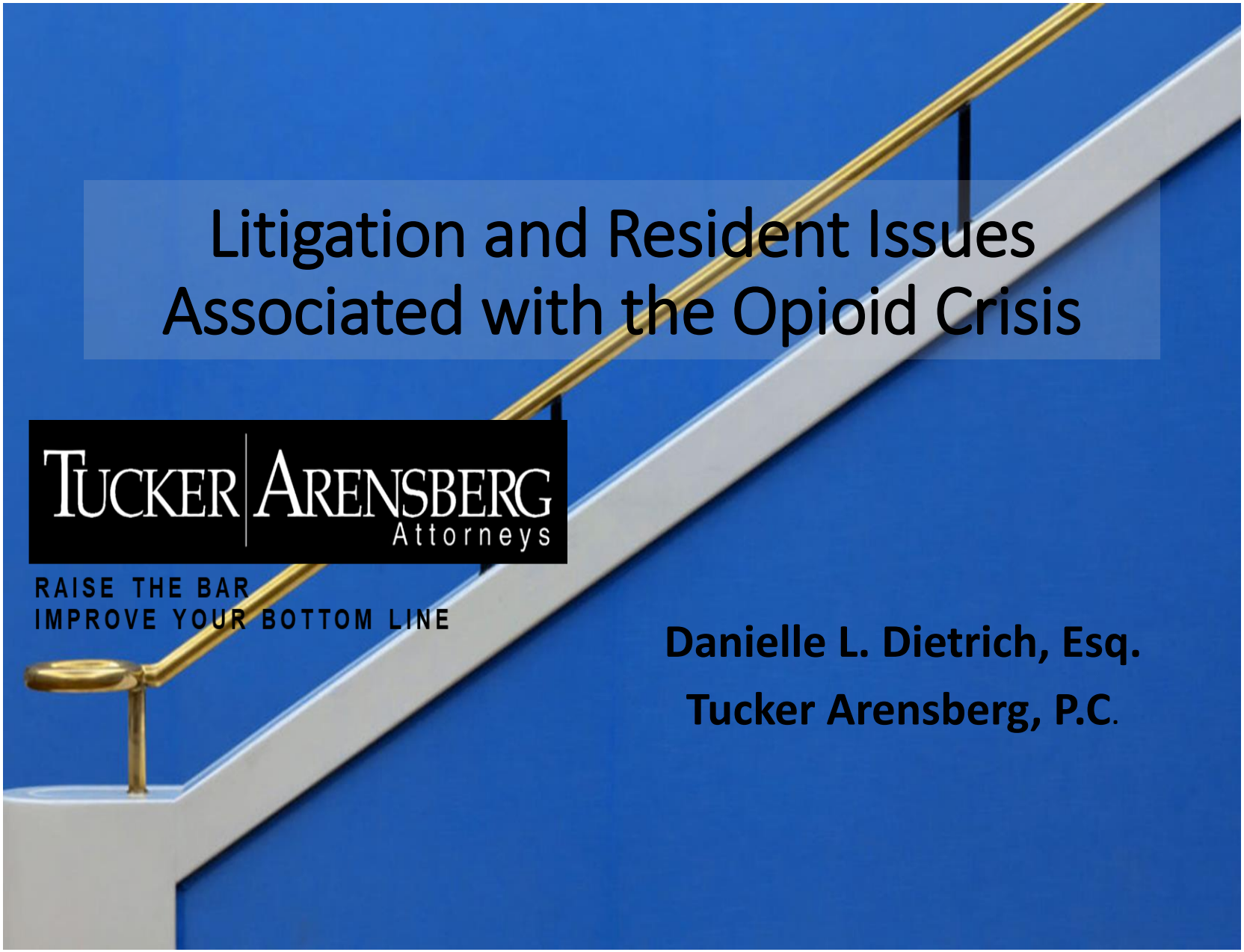
Litigation and Resident Issues Associated with the Opioid Crisis



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RAISE THE BAR
IMPROVE YOUR BOTTOM LINE

Danielle L. Dietrich, Esq.

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Who We Are

Danielle Dietrich represents skilled nursing facilities, assisted living facilities and personal care homes with a variety of legal needs. These services include (among other things) navigating the public benefits system, drafting internal policies, dealing with problematic family members or residents, defending appeals of discharge notices, collections, and responding to audits. With regards to Medical Assistance-Long Term Care, she handles appeals (to both the Bureau of Hearings and Appeals and the Commonwealth Court), getting hard-to-obtain verifications and filing requests for undue hardship waivers. Danielle also assist facilities in seeking guardians for their residents, or taking legal action against families misappropriating money from residents.

Danielle can be reached at (412) 594-5605 or *ddietrich@tuckerlaw.com*.

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Opioid Litigation Is BIG Business

- Governmental agencies suing Big Pharma
- Johnson & Johnson $572MM judgment in Oklahoma
- Purdue Pharma $270MM settlement in Oklahoma
- McKesson $37MM settlement in West Virginia
- McKesson $150MM settlement with DOJ
- Mallinckrodt $30MM settlement with Cuyahoga & Summit Counties in Ohio

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Opioid Litigation Is BIG Business

- Pennsylvania Attorney General suing Purdue Pharma.
  - Over 500,000 sales calls to doctors in PA since 2007.
- Federal Multidistrict Litigation (MDL) against the big three: AmeriSource Bergen, McKesson Corp. and Cardinal Health
- Purdue Pharma offering to settle more than 2,000 lawsuits from US states and cities for $10-$12 billion.
- More than a dozen PA counties have sued opioid makers and distributors.

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Big Pharma Pointing Fingers

- Attempting to spread the blame to prescribers and health care facilities.
- Huge corporations mean resources to litigate.
- Subpoenas to “dig up dirt.”
- Issuing subpoenas in large numbers.
- Looking for info on patients and details of number of prescriptions, dosage, etc.

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Opioid Litigation: Next Big Thing For Personal Injury Attorneys?

- Overdoses of both residents and staff.
- Law firms marketing as “Pennsylvania Opioid Litigation Lawyers.”
- Lawsuits for failure to have naloxone.
- Lawsuits for lack of adequate training of staff on how to treat residents. with substance abuse disorder.
- Potential fines.

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What To Do If You Receive A Subpoena

- Step 1- your organization should consult an attorney
- Consider HIPAA or potential liability issues
- Subpoena may be defective
  - Procedurally defective
  - Improper jurisdiction
  - Method of service may be improper
  - Requested information may be overbroad
  - Other objections
- You can fight a subpoena

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Where are the drugs coming from? Dealing with problem visitors

- What does your facility's policy say?
- Does it comply with regs?
- How is policy communicated?
- Resident's capacity
- Resident's medical condition

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Assisted Living Visitors

55 Pa. Code § 2800.42 governs rights of your residents:

(o) A resident has the right to freely associate, organize and communicate privately with his friends, family, physician, attorney and other persons.

(r) A resident has the right to receive visitors at any time provided that the visits do not adversely affect other residents. A residence may adopt reasonable policies and procedures related to visits and access. If the residence adopts those policies and procedures, they will be binding on the residence.

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Personal Care Home Visitors

55 Pa. Code § 2600.42 governs rights of your residents:

(m) A resident has the right to leave and return to the home at times consistent with the home rules and the resident's support plan.

(o) A resident has the right to freely associate, organize and communicate with others privately.

(r) A resident has the right to receive visitors for a minimum of 12 hours a day, 7 days per week.

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Skilled Nursing Facility Visitors

- 42 C.F.R. § 483.10 governs visitors:
  - (f) *Self-determination*. The resident has the right to and the facility must promote and facilitate resident self-determination through support of resident choice…
  - (f)(4)(ii): The facility must provide immediate access to a resident by immediate family and other relatives of the resident, subject to the resident's right to deny or withdraw consent at any time.
  - (f)(4)(iii): The facility must provide immediate access to a resident by others who are visiting with the consent of the resident, subject to reasonable clinical and safety restrictions and the resident's right to deny or withdraw consent at any time.

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Skilled Nursing Facility Visitors

- 42 C.F.R. § 483.10 continued:
  - (f)(4)(v): The facility must have written policies and procedures regarding the visitation right of residents, including those setting forth any clinically necessary or reasonable restriction or limitation, when such limitations may apply consistent with the requirements of this subpart, that the facility may need to place on such rights and the reasons for clinical or safety restriction or limitation.

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Skilled Nursing Facility Visitors

- 42 C.F.R. § 483.10 continued:
  - (f)(4)(vi): A facility must meet the following requirements:
    - (A) Inform each resident (or resident representative, where appropriate) of his or her visitation rights and related facility policy and procedures, including any clinical or safety restriction or limitation on such rights, consistent with the requirements of this subpart, the reasons for the restriction or limitation, and to whom the restrictions apply, when he or she is informed of his or her other rights under this section.

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Skilled Nursing Facility Visitors

- 42 C.F.R. § 483.10 continued:
  - (f)(4)(vi): A facility must meet the following requirements:
    - (B) Inform each resident of the right, subject to his or her consent, to receive the visitors whom he or she designates, including, but not limited to, a spouse (including a same-sex spouse), a domestic partner (including a same-sex domestic partner), another family member, or a friend, and his or her right to withdraw or deny such consent at any time.
    - (C) Not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identify, sexual orientation, or disability.
    - (D) Ensure that all visitors enjoy full and equal visitation privileges consistent with resident preferences.

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HIPAA Concerns: What Can You Disclose?

- SNFs, ALFs and PCHs are hotbeds for HIPAA disclosures
- Social media examples
- When can you disclosure information about a resident's substance abuse disorder?

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HIPAA Concerns: What Can You Disclose?

- Health professionals can share health information with a patient's loved ones in emergency or dangerous situations. 45 C.F.R. § 164.510

- You can share such information without a patient's consent when:
  - The provider determines that sharing health information with family and close friends who are involved in the care of the patient is in the best interest of an *incapacitated* or *unconscious* patient. The information must be directly related to the family or friend's involvement in the patient's health care or payment of care.
    - DHS example: A provider may use professional judgment to talk to the parents of someone incapacitated by an opioid overdose about the overdose and related medical information, but generally could not share medical information unrelated to the overdose without permission.

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HIPAA Concerns: What Can You Disclose? (cont.)

- If you are informing persons in a position to prevent or lessen a *serious and imminent threat to a patient's health or safety*.
  - DHS Example: A doctor whose patient has overdosed on opioids is presumed to have complied with HIPAA if the doctor informs family, friends or caregivers of the opioid abuse after determining, based on the facts and circumstances, that the patient poses a serious and imminent threat to his or her health through continued opioid abuse upon discharge.

    (Source: How HIPAA Allows Doctors to Respond to the Opioid Crisis: https://www.hhs.gov/sites/default/files/hipaa-opioid-crisis.pdf)

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HIPAA Concerns: What Can You Disclose?

- A patient's decision-making capacity may change
  - HIPAA recognizes that decision making capacity may be temporary and situational. It does not require permanent incapacitation. For instance, patient may be unconscious upon admission, but several hours or days later regain consciousness and ability to make decisions.
  - If this happens, must give patient opportunity to agree or object before sharing any additional health info.

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Questions?

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THANK YOU FOR ATTENDING!

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