

# Law Library Association

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Tom Enneking, Editor

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## Ohio's Drug Test Defense to Workers' Compensation Claims to Become Effective in October

Reprinted with permission from Porter Wright Morris & Arthur LLP  
Workers' Compensation Law Alert dated August 2004. Contact Brian D. Hall,  
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With the signing by Governor Taft of Sub. H.B. 223, Ohio employers will regain (beginning October 13, 2004) a meaningful opportunity to defend against workers' compensation claims based upon the results of drug and alcohol tests. As most Ohio employers will recall, the prior statute created a rebuttable presumption that an employee's injury was caused by being under the influence of drugs and alcohol when he or she either refused to take a post-accident drug or alcohol test or obtained certain specified results on the test. The Ohio Supreme Court declared this statute unconstitutional largely because the statute created an incentive for employers to require testing even in the absence of any suspicion that the employee had used drugs or alcohol prior to being injured.

The new statute addresses the Supreme Court's concerns by establishing minimum requirements that must be in place before the rebuttable presumption will apply. First, the employer must conspicuously post a notice in the same location as its certificate of workers' compensation coverage. This notice must explain to employees that the results of, or the refusal to submit to, any chemical test described in the statute may affect the employee's ability to receive workers' compensation benefits. The

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### The Cincinnati Law Library Association

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<http://www.hamilton-co.org/cinlawlib/>

## What's Up With Wireless?


David P. Whelan


This article first appeared in *The Philadelphia Lawyer*, Summer 2004.  
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You can take the lawyer out of the law office but, increasingly, you cannot take the law office away from the lawyer. Wireless networking is the latest technology to enable lawyers to work wherever and whenever they want.


Unlike many technologies, wireless networking sounds like what it is. One computer talks to another without transmitting over wires. Instead,


*Cont'd. on page 3*


 Use your dart board to evaluate potential damages.


 Run to the courthouse every time you need a docket.

 Surf a bunch of Internet sites to track down personal and criminal information.

 Dash to the library to check a case or statute.

 Create your own forms.

 Ignore the 500,000 expert-authored briefs available online and search manually. Good luck.

 Totally your choice.

## Or you can use Westlaw<sup>®</sup> Litigator.

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*Rebuttable Presumption, cont'd from page 1*

Bureau of Workers' Compensation is expected to produce such a notice and provide it to Ohio employers with their next certificate of coverage.

Second, the rebuttable presumption will apply only if the employee either submitted to a qualifying chemical test demonstrating alcohol or drug levels exceeding the limits set forth in the statute or if the employee refused to take the test after being given proper notice of the implications of such a refusal. In addition, the test must have been offered under one of the following conditions:

1. the employer had "reasonable cause" to believe that the employee was intoxicated or under the influence of a controlled substance not prescribed by his or her physician;
2. at the request of a police officer pursuant to a traffic stop and not at the request of the employer; or
3. at the request of a licensed physician who is not employed by the employer and not at the request of the employer.

Finally, the employer must use a laboratory certified by the United States Department of Health and Human Services or a laboratory that meets or exceeds the Department's certification standards to process the test results.

The statute also provides that an employer has a reasonable suspicion when, but not limited to, situations in which it has evidence that the employee is using alcohol or a controlled substance drawn from specific, objective facts and reasonable inferences drawn from those facts in light of experience and training. These facts and inferences may be based on, but are not limited to, any of the following:

1. observation of the employee, such as direct observation of the employee in possession of alcohol or a controlled substance or physical symptoms such as slurred speech, dilated pupils, an odor of alcohol, etc.;
2. a pattern of abnormal conduct, erratic, or aberrant behavior or deteriorating work performance (including attendance problems and recurring 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 the employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;

*Cont'd on page 4*

*Wireless, cont'd from page 1*

the request – to download e-mail, print a document, or read a Web page – travels through the air to the nearest antenna, that relays it to complete the request.

Most law firms, whether sole practitioners or global firms, already have networks using wire that can transmit enormous amounts of data, as much as 1,000 megabits per second (Mbps). The wired network may not be accessible everywhere inside the firm's offices, however, and it may not be accessible at all outside the office.

This is where wireless enters the picture. This is not the phone-equivalent wireless, where you insert a cellular/wireless card into your laptop and transmit wirelessly but at dial-up modem speeds of 56 kilobits per second (Kbps). Wireless networking, sometimes known as "wi-fi" for wireless fidelity, uses one of the three members of the 802.11 family of standards developed in the last few years. These three standards – 802.11a, 802.11b, and 802.11g – enable laptops and PDAs to communicate with the Internet and local area network (LAN) resources at speeds that are comparable to wired networks – from 10 to 54 Mbps. This alphabet soup is important because 802.11a networks cannot talk to antennas from 802.11b/g networks.

W-fi networks are not new, though. But some recent changes are enabling lawyers to use wireless more effectively and more often. The most interesting development is the growth in commercial and public wireless network "hot spots," where anyone with a wi-fi antenna can connect to a network.

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*Rebuttable Presumption, cont'd from page 3*

4. a report of the use of alcohol or a controlled substance provided by a reliable and credible source; or
5. repeated or flagrant violations of the employer's safety or work rules that are determined by the employee's supervisor to pose 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 to be attributable to other factors.

Although this statute mandates a "reasonable suspicion" standard to create the rebuttable presumption, it must be remembered that this statute is a workers' compensation statute only. Indeed, the statute specifically states that "[n]othing in this section shall be construed to affect the rights of an employer to test employees for alcohol or controlled substance abuse." As a result, this new law should not provide the basis for any claim that a private employer may not have random drug testing programs or conduct post-accident tests after all accidents and take appropriate employment action based upon those test results or the employee's refusal to take the test. This statute only provides that the results of such tests, or the employee's refusal to submit to such tests, may not be used to create the rebuttable presumption in defense of any workers' compensation claim.

As we noted in a Workers' Compensation Law Alert dated January 2003 (*Ohio Supreme Court Strikes Down Workers' Compensation Drug Testing Law as an Unconstitutional Invasion of Privacy*), employers that require drug and/or alcohol testing upon a

standard less than reasonable suspicion should continue to insist that all applicants sign an acknowledgment of possible drug testing. The signed acknowledgment should indicate the applicant's understanding that he/she will be subject to such testing and the employment ramifications of refusing to take the test or incurring a positive test result. Unionized employers may need to negotiate with the union in order to make any policy changes. Particularly in the public sector, where policies are scrutinized for constitutional adherence, employers also should consider whether to limit testing policies to accidents involving injuries requiring more than simple first aid or involving property damage in excess of a certain amount. Employers may also want to limit testing to safety or security sensitive positions.

## Library Trustee Publishes Homeland Security Treatise

James O'Reilly, professor of law at the University of Cincinnati, and the newest member of library's Board of Trustees, is co-author and general editor of the Homeland Security Deskbook: Private Sector Impacts of the Defense against Terrorism, published by Matthew Bender.

Dedicated to the memory of those first responders who died as a result of the attack on the World Trade Center in New York City on September 11, 2001, the topics covered include "challenges to practicing attorneys," "the organization of homeland security functions," business liabilities, communications, and cyber security.

Mr. O'Reilly, who authored several chapters of the Homeland Security Deskbook himself, has also published 29 additional texts and 135 articles during his tenure at University of Cincinnati. He chaired the American Bar Association's Section on Administrative Law & Regulatory Practice, and is currently vice-chair of ABA's Homeland Security Committee.

### In Honor of Judge Robert Kraft

To honor the memory of the Honorable Robert S. Kraft, who served on the Hamilton County Court of Common Pleas from 1977-2003 and who passed away on September 6, 2004, the Cincinnati Law Library Association is dedicating one of its conference rooms in his name.

Judge Kraft also served for many years on the law library's board of trustees.

*Wireless, Cont'd from page 3*

The most common hot spots are commercial, either inside a hotel or restaurant, or hosted by an affiliate of a network like Boingo or T-Mobile. Whether it is at Starbucks or Hamburger Mary's restaurant, or the Cincinnati Hotel, wireless access is growing. In some cities, public parks have wireless access points available for use without any subscription.

You can find hot spots – whether in Cincinnati or on the road – by using one of the many finder sites on the Internet. Some wireless network vendors like Intel offer finders, while others are more generic, including WiFinder and Wi-Fi HotSpot List. Most hot spots will support the 802.11b or 802.11g technologies, so make sure that the hot spot that you select has the technology that you need.

Another imminent arrival on the wireless scene is far less sexy and yet may remove a hurdle to using wireless in a firm or home office. This technology is power over Ethernet. In the bad old days of 2003, a laptop wireless antenna would transmit data to an access point antenna that was attached to the ceiling. Each access point had a network wire connecting it to the LAN or Internet. In addition, there were electrical wires providing power to the access point. The trick was to run both network and electrical wire up walls and along ceilings to install the access point.

No longer. Power over Ethernet (PoE for short, a.k.a. 802.3af) supports the transmission of the electrical current necessary over the network cable. This eliminates the need to pull separate electrical wires when installing an access point. While some wires is still involved, at least a network wires is unlikely to make your hair stand on end if handled improperly.

The most significant hurdle wireless networking has faced is the security hackles it raises. First, by default, most wireless access points are bought and installed with all security features turned off. Second, the security features that have existed, including wired equivalent privacy (WEP), have only brought a modicum of security to a wireless network and have been cracked by hackers. A new security method, called either Wi-Fi Protected Access (WPA) or 802.11i, incorporates a new encryption method. New hardware using either WPA or 802.11i will

provide a greater degree of encryption to data that is sent or received over a wireless network. At the end of the day, though it is important to make sure that the deadbolt is engaged on the door. Buy an access point, or upgrade your current access point, so that it can take advantage of the latest encryption enhancements. When it is installed, make sure that the security has been turned on.

Security is also an issue for the roaming wireless user. If you connect to a hot spot, you are joining an unknowable network of other users at the same coffee shop. These users might also be sitting anywhere within the typical 1,500-foot transmission range of an access point, including elsewhere within the same building as the hot spot or outside in a car or on the sidewalk. A lawyer using public hot spots should make sure to secure his or her laptop with a software firewall like ZoneAlarm or BlackICE.

Fortunately, wireless has become cheap and easy to acquire. In most cases, your best bet is to buy an 802.11g or 802.11a wireless card for your laptop. These transmit and receive at the fastest speeds and are more likely to come with the latest security features. Remember that many personal digital assistants (PDAs) now offer wi-fi, including the Palm Tungsten C or HP iPaq h5555 Pocket PC. If you want to add wireless to your office, only buy “dual-band” access points, which support 802.11a and 802.11g. That will increase the likelihood that any antenna you buy, or that your clients bring to your office, will work on your network.

Lawyers who want to keep their law office with them even when they are away from it can benefit from wireless technology, in flexibility and efficiency. Invest in an antenna and see if it doesn't change how you practice.



*Law Library Wireless, Cont'd from page 8*

The network uses technology called "wi-fi" or 802.11b / 802.11g wireless to enable computers to send requests through the air to antennas located throughout the Library. The wireless network is available only to Association members. The network is protected by a firewall and provides access to the Internet. You will need to register your computer the first time you access the network. Bring your laptop or PDA to the Circulation desk and we will take your MAC address – a number that is unique to your wireless network antenna, whether on a PC or Mac – and add you to our list of authorized users.

Don't have your own wi-fi antenna? Bring in your laptop and you can use one of two 802.11b antennas available for checkout to members at the Circulation desk. You may need your CD-ROM drive to install the necessary software the first time you use one of the Library's antennas. We have also added lockers near the reference desk in case you would like to leave your laptop in the Library while you appear in court.

You can learn more about wireless networks in *What's Up with Wireless* in this issue of the Library's newsletter.

### Wireless Networking Resources

#### HotSpot Finders

Intel: <http://intel.jiwire.com>

WiFinder: <http://www.wifinder.com>

WiFiFreeSpot: <http://www.wififreespot.com>

Wi-Fi Hotspot List: <http://www.wi-fihotspotlist.com>

#### Software Firewalls

BlackICE: <http://blackice.iss.net>

McAfee: <http://www.mcafeesecurity.com>

Microsoft Windows XP:

<http://www.microsoft.com/windowsxp>

ZoneAlarm: <http://www.zonealarm.com>

#### Local Hotspots

In addition to the **Cincinnati Law Library**, you can find wireless access in a number of locations in Greater Cincinnati

Awakening's Coffee (C)	The Brew House (C)
Champion's Grille (C)	Cincinnatian Hotel (\$)
Crowne Plaza Hotel (\$)	Enzo's Coffee (C)
Hamburger Mary's (C)	Hyatt Netherland Hotel (\$)
La Tea Room Café (C)	NKU Chase College of Law (C)
Panera Bread (\$)	Piatt park (\$)
UC College of Law Library (C)	\$= service fee; C=customers only

## Collection and Service Changes

### Lockers for Member Use

Have you ever had to research at the library for several consecutive days? If so, you've probably wondered what to do with all of your belongings while you're away. Do you take everything with you, only to unpack each and every morning, or do you risk hiding them somewhere in the library?

The library is pleased to offer its membership access to six lockers, located behind the reference desk. You are required to check out locks and keys at the circulation desk; locks and keys circulate for 48 hours.

### New Print Titles at the Library

- *Anderson's Ohio Real Estate Handbook*. Anderson, 2004.
- *The Complete QDRO Handbook*. Carrad, David Clayton. Chicago, 2004.
- *Eyewitness Identification: Legal and Practical Problems*. Sobel, Nathan R. West, 2003.
- *International Trade Practice*. Kaye, Harvey and Christopher A. Dunn. Thomson West, 2004.
- *Kentucky Criminal and Traffic Law Manual*. LexisNexis, 2004.
- *Multiemployer Plans*. Alicia M. Kershaw. Tax Management, 2003.
- *National Survey of State Laws*. Leiter, Richard A. Thomson Gale, 2005.
- *Prosecutorial Misconduct*. Joseph A. Lawless. LexisNexis, 2003.
- *State and Local Tax Lawyer*. Boelter, Arthur H. Thomson West, 2004.
- *Statistical Abstract of the United States* [electronic resource]. Bureau of the Census, 2003.

## The *Ohio Administrative Code* and Legislative History

Tom Enneking

How did section 5101:1-30-63 of the *Ohio Administrative Code* read in 1995. This may be difficult to discover because even the largest of local law libraries usually do not retain superceded copies of the *OAC*. The solution to this quandary is quite simple -- the researcher needs look no further than the *Ohio Monthly Record*.

According to *Ohio Revised Code* § 103.05, the *OAC* is to be updated at least monthly, and these revisions be compiled into the Code at least annually. Before such revisions are incorporated into the Code, they are first printed in the *Ohio Monthly Record*. The *OMR* is the official publication of current state rule making activity and contains the full text of final rules and regulations.

To navigate the *OMR*, one must use the "Rule Number Table." New rules and regulations are compiled in two binder sets spanning July of one year to June of the next. The first binder contains the text of the rules, whereas the second contains tables, and lists, including the Rule Number Table. Reference is made from the table to the month in which the new rule was printed. A subject index is available at the end of each issue. WestLaw provides information regarding new regulations, but only a summary.

Not only does a researcher need familiarity with the *OMR*, but also has to know how to read the "History" section attached to an *OAC* regulation. For example, a regulation that was amended in January 1992 will have the following three-part citation: 1991-92 OMR 1397. The 1991-92 is the year of amendment and the *OMR* volume to consult, *OMR* is an abbreviation for the *Ohio Monthly Record*, and the 1397 refers to the page number. A researcher puts all three elements together to discover how an *OAC* regulation read in the past.

### Further Reading

Putnam, Melanie K. and Susan M. Schaefgen. *Ohio Legal Research Guide*. Buffalo, NY: William S. Hein & Co., Inc., 1997. Chapter 10: Ohio Administrative Code, Rules and Regulations, pp. 197-206.

## Election Year 2004

As you all know, 2004 is an election year, and in the presidential election, Ohio is a hotly contested state. There are also Ohio- and Cincinnati-related issues that are attracting much attention, most notably Issue 1 and Issue 3. For more information on the upcoming election and its issues, please consult the following websites:

Hamilton County Board of Elections: <http://www.hamilton-co.org/boe/>

Cincinnati League of Women Voters: <http://www.lwvcincinnati.org/>

### Did You Know Our Members Receive:

- ❖ Free Westlaw Access in the Library
- ❖ Free Internet Access in the Library
- ❖ Free Wireless "wi-fi" Internet access
- ❖ Free Access to CD-ROM law libraries and forms
- ❖ Free Reference Assistance, in person, by phone, or via e-mail
- ❖ Extensive Ohio and Federal primary law collection in print and electronic formats
- ❖ Practice materials, including:
  - handbooks
  - rules
  - treatises
  - jury verdicts
- ❖ Borrowing privileges to nearly all materials in the Library's collection, including CLE materials.



## Professionalism CLE at the Library

Are you an Ohio lawyer in need of your **mandatory** professionalism CLE credit? The Cincinnati Law Library will offer a one-hour CLE led by Professor James O'Reilly of the University of Cincinnati College of Law called **Dialogue on Lessons Taught and Lessons Learned as New Lawyers Enter Practice**. This course has been approved by the Ohio Supreme Court Commission on Continuing Legal Education for 1 CLE credit hour (1 hour of professionalism).

Join us at the Law Library on Wednesday, November 17, 2004, from 3pm-4pm. Library Association **members: \$10**; Non-members: \$25.

Please call Madonna Gresser at (513) 946-5300 to reserve a place or register online at <http://www.hamilton-co.org/cinlawlib/cle/signup.html>.

## Law Library Goes Wireless

David P. Whelan

Ever needed Internet access while you were in the courthouse and wanted to use your own computer? Members of the Cincinnati Law Library Association can now access the Internet over the Library's wireless "hot spot" that covers the main reading room and members' lounge on the 6<sup>th</sup> floor of the Hamilton County Courthouse. Surf the Internet, check your e-mail, your law firm's extranet, or use one of the Library's premium databases! While many other Cincinnati wireless sites require a monthly fee to use their network, the Library's network is free to Association members.

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**Cincinnati Law Library Association  
Hamilton County Courthouse  
1000 Main Street, Room 601  
Cincinnati, OH 45202**

ADDRESS CORRECTION REQUESTED

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# NOVEMBER 2004 LIBRARY NEWSLETTER