

INFORMATION BRIEF

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Updated: January 2010

Workplace Drug and Alcohol Testing

This information brief summarizes the provisions of Minnesota's Drug and Alcohol Testing in the Workplace Act, which contains restrictions on when an employer may test employees for drugs or alcohol and requires that certain procedures be followed when such testing is done. Note that this publication does not address issues that employers may encounter under federal law, including the Americans With Disabilities Act (ADA) and other federal statutes.

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Application of the Law

This section explains what employers and employees are covered under Minnesota's Drug and Alcohol Testing in the Workplace Act, what kinds of testing are covered, and what kinds of circumstances may be included or excluded.

Who is Covered

The act applies broadly to all employers, defined to include "any person or entity located or doing business in this state and having one or more employees." This definition includes the state and all political or other governmental subdivisions. [Minn. Stat. § 181.950](#), subd. 7.

The act defines "employee" as any person, including an independent contractor, who performs services for compensation. [Minn. Stat. § 181.950](#), subd. 6.

The law also protects job applicants, defined as any person who has applied for work with an employer. It includes anyone who has received a job offer from an employer that is contingent on the applicant passing a drug or alcohol test. [Minn. Stat. § 181.950](#), subd. 9.

The act does not apply to anyone who is required to undergo drug testing under certain federal laws or regulations, or under certain state agency rules that adopt federal regulations. [Minn. Stat. § 181.957](#).

What Testing is Covered

For the purposes of the Minnesota laws, "drug and alcohol testing" is broadly defined to mean "analysis of a body component sample" that is designed to detect evidence of drugs, alcohol, or their metabolites (remnants left as drugs and alcohol are broken down by the body) in the sample. [Minn. Stat. § 181.950](#), subd. 5.

When Testing is Permitted

As a general rule, drug and alcohol testing of employees and applicants, whether required or merely requested by the employer, is not permitted except where it is explicitly authorized by statute and unless certain procedures are followed. In any event, in order for the testing to be permissible, it must be conducted for some nonarbitrary reason, must be carried out pursuant to a written drug and alcohol testing policy that meets statutory requirements, and must be conducted by a properly accredited or licensed testing laboratory. [Minn. Stat. § 181.951](#), subd. 1.

Drug and alcohol testing is permitted only in the following circumstances:

- *Job applicant testing.* If a job applicant has received a conditional job offer, the employer may require or ask that applicant to undergo testing, as long as all applicants who receive conditional job offers for the same position are required or asked to undergo testing. [Minn. Stat. § 181.951](#), subd. 2.

- *Routine physicals.* An employer may require employees to take a test as part of a routine physical offered by the employer, as long as the physical takes place no more often than once a year and the employee receives at least two weeks' notice that a test may be required as part of the physical. [Minn. Stat. § 181.951](#), subd. 3.
- *Random testing.* An employer may require an employee to submit to random testing *only* if (1) they are employed in safety-sensitive positions, defined in the statute as jobs in which an impairment caused by drug or alcohol usage would threaten the safety or health of any person, or (2) they are employed as professional athletes and subject to a collective bargaining agreement permitting random testing. [Minn. Stat. § 181.951](#), subd. 4.
- *Reasonable suspicion testing.* An employer may require an employee to take a test if the employer has a reasonable suspicion that the employee is under the influence of drugs or alcohol; has violated the employer's written rules on drug or alcohol use on the job, at the job site, or while operating the employer's vehicle, machinery or equipment; has sustained a personal injury or caused another employee to sustain a personal injury; has caused a work-related accident; or was operating a vehicle or other equipment involved in a work-related accident. [Minn. Stat. § 181.951](#), subd. 5.
- *Treatment program testing.* If an employer has referred an employee to a chemical dependency treatment or evaluation program or if the employee is participating in chemical dependency treatment under the employer's benefit plan, the employer may require the employee to submit to random testing without notice during the evaluation or treatment period and for two years after the end of any prescribed treatment. [Minn. Stat. § 181.951](#), subd. 6.

Even if one of these circumstances is present, the act specifically provides that an employer has no legal duty to test an employee. [Minn. Stat. § 181.951](#), subd. 7.

Drug and Alcohol Policies

In order to request or require that employees or applicants submit to testing (which is only permitted in the circumstances listed above), an employer must perform the testing in accordance with a written drug and alcohol policy that meets several statutory requirements.

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The policy must explain who is subject to testing under the policy and when testing may be requested or required. It must outline what disciplinary consequences may occur based on a positive test result and what right to appeal the employee may have in the event of a positive result. Finally, it must explain the employee's right to refuse testing (and the consequences of refusal) as well as the employee's right to explain a positive result on a confirmatory test (explained below) and to take and pay for a confirmatory retest. [Minn. Stat. § 181.952](#), subd. 1.

Notice

The employer must give written notice of the policy to all affected employees at the time they become affected. This means that current employees must be given notice when the policy is adopted, employees who transfer from nonaffected to affected positions must be given notice at the time of the transfer, and job applicants must be given notice when they are hired or, if a conditional job offer is to be made contingent on passing a test, before that test occurs. In addition to these specific notice requirements, the employer must post notice in an “appropriate and conspicuous” location at the workplace, stating that the policy exists and that employees can inspect the policy during regular work hours “in the employer’s personnel office or other suitable locations.” [Minn. Stat. § 181.952](#), subd. 2.

Reliability Safeguards

Much of the Minnesota law in this area consists of specific procedural requirements that are designed to ensure that any testing that results in adverse action against an employee yields a correct and reliable result.

Use of Approved Testing Laboratory

The act requires an employer to use a testing laboratory that is accredited, certified, or licensed by specified entities that are considered trustworthy. [Minn. Stat. § 181.953](#), subd. 1.

Procedures at the Laboratory

Chain of custody. If the laboratory is not certified by the National Institute on Drug Abuse (which imposes certain chain-of-custody procedures), then it must follow chain-of-custody requirements outlined in the statute. “Chain of custody” generally refers to requirements that the sample be accounted for at all times, so that there is no opportunity, for example, for an unknown person to tamper with the sample while it is unattended. The minimum chain-of-custody requirements are that:

- (1) there be a traceable record of possession from the time the sample arrives at the laboratory until the testing is performed (for example, employee A stored the sample in secure location 1 until it was given directly to employee B, who kept it at secure location 2 until it was given directly to employee C, who performed the test);
- (2) at all times the sample be with or visible to an authorized person, or at a secure location where it was placed by an authorized person;
- (3) the sample be accompanied by a written chain-of-custody record; and

- (4) the people who handle the sample personally record their transfer of the sample to others on the chain-of-custody record. [Minn. Stat. § 181.953](#), subds. 3 and 5.

Confirmatory tests. A laboratory must perform a confirmatory test (second test) of any sample that produces a positive result on the initial test. [Minn. Stat. § 181.953](#), subd. 3.

Timing of report. A laboratory must report a negative test result to the employer within three working days of the result. For a positive result, the laboratory must report the result within three working days of the confirmatory test. [Minn. Stat. § 181.953](#), subd. 3.

Retaining samples. The laboratory must retain for six months all samples that tested positive. [Minn. Stat. § 181.953](#), subd. 3.

Limitations on Employers

Employer-owned laboratories. An employer may not use a laboratory it owns and operates to test its own employees, except that a laboratory operated by a state agency may test employees of a different state agency. [Minn. Stat. § 181.953](#), subd. 4.

Employer chain of custody. The employer is subject to the same chain-of-custody requirements imposed on laboratories. In other words, the employer must be able to account for and document who had a sample and where it was at all times between when it was collected and when it was turned over to the laboratory. [Minn. Stat. § 181.953](#), subd. 5.

Fairness Safeguards

Many of the law's provisions address the need to ensure not only that a sample meets scientific requirements for reliability, but that the employee has the ability to respond and have his or her rights respected during the testing process.

Initial Form

Before an employee or applicant is asked to undergo a drug test, he or she must be given a form on which he or she can acknowledge that he or she has seen the employer's written policy, can disclose any medications that he or she is taking or has recently taken, and can provide any other information that might affect the reliability of the result. [Minn. Stat. § 181.953](#), subd. 6.

Notice of Result

The employee must be given written notice of a test result report within three working days of the employer's receipt of the result. The notice must explain whether the result is negative (whether on an initial test or a confirmatory test) or positive. The notice also must state that the employee has the right to a copy of the test result report. Finally, the notice must inform the employee of many of the rights afforded to the employee after a result is received, including the right to access to reports, the right to ask for a confirmatory retest, the limitations on discipline or

discharge (or the withdrawal of an offer of employment, in the case of an applicant), and the right to submit explanatory information. These rights are explained in more detail below. [Minn. Stat. § 181.953](#), subs. 7 and 8.

The Continuing Right to Submit Information

Any time within three working days after the employee receives notice that a confirmatory test has shown a positive result, the employee may submit information to the employer that might explain the result. [Minn. Stat. § 181.953](#), subd. 6.

The Right to Request a Retest

During the five-working-day period after notice of a positive result, the employee has the right to request a confirmatory retest (a third test). This confirmatory retest is at the employee's expense, and the original laboratory must be notified within three working days of the employee's request that the employee wants the confirmatory retest done at that laboratory or wants the sample transferred to a different licensed lab for the retest. Chain-of-custody procedures must be followed when the sample is transferred between laboratories, and the threshold for detection must be the same. [Minn. Stat. § 181.953](#), subd. 9.

Limitations on Using a Test Result

Some of the limits on employer use of test results are logically connected to the rights employees are given. For example, an employer is prohibited from taking action against an employee (or withdrawing an offer of employment to an applicant) based on a test that has not been confirmed by a confirmatory test, or based on a positive confirmatory test where there was then a confirmatory retest with a negative result. There are, however, some additional special limitations.

First offenses. An employer may not take action against an employee based on a test result that was the first positive result on a test required by that employer unless the employer has first offered the employee the opportunity to participate, at the employee's own expense or pursuant to the employee's benefit plan, in a drug or alcohol treatment or counseling program, and the employee has failed to participate in the program or to complete it successfully. The employer must consult with a qualified person (as outlined in the statute) in deciding what kind of treatment to offer. The employee may be found to have failed to complete the program successfully if he or she either withdraws before the program is over or if there is a positive test result on a confirmatory test after the program is over. This limitation does not apply to job applicants, but only current employees. [Minn. Stat. § 181.953](#), subd. 10.

Temporary suspensions. If an initial test result is positive and the confirmatory test has not yet been done, an employer may suspend an employee pending the results of the confirmatory test only if the employer reasonably believes that the suspension is necessary to protect the employee, the employee's coworkers, or the public. If the confirmatory test comes back

negative (or if a confirmatory retest is negative), the employee must be reinstated with back pay. [Minn. Stat. § 181.953](#), subd. 10.

Use of information submitted by employee. If an employee submits medical information either before or after a test to offer possible explanations of any positive result (such as medications the employee is taking), the employer may not take any adverse action based on that information unless the employee had been already under an affirmative duty to disclose the information irrespective of the test. [Minn. Stat. § 181.953](#), subd. 10.

Access to reports. An employee must be given access to information in the employee's personnel file that relates to positive test results and to the testing process, including all information gathered as part of that process. The employee must also have access to information concerning the conclusions that the employer drew from the tests and the actions the employer took in reliance on the results. [Minn. Stat. § 181.953](#), subd. 10.

Confidentiality and Privacy

A laboratory that has conducted a test on a sample may tell the employer only whether the sample contains evidence of drugs or alcohol. It is not permitted to disclose other information learned during testing (for example, the presence of any evidence of other illnesses). [Minn. Stat. § 181.954](#), subd. 1.

The statute provides that test result reports, as well as other information gathered during the testing process, are "private and confidential information" in the case of private sector employers, and are private data on individuals for public sector employers (this references the Data Practices Act). The information may not be disclosed by the employer or the laboratory to any other employer or to any third-party individual, private organization, or state agency without the written consent of the employee or applicant tested. [Minn. Stat. § 181.954](#), subd. 2.

In a few cases, exceptions are made to the general rule requiring information from testing to remain confidential. First, the information can be used in an arbitration proceeding conducted under a collective bargaining agreement, an administrative hearing, or a judicial proceeding, as long as it is relevant to the proceeding. Second, it may also be disclosed to federal agencies as required by federal law, regulation, order, or in accordance with a federal government contract. Finally, the information may be disclosed to a substance abuse treatment facility for the purposes of evaluating or treating the employee. [Minn. Stat. § 181.954](#), subd. 3.

Positive test results from an employer drug or alcohol testing program *are not admissible* in any criminal proceeding against the employee or applicant. [Minn. Stat. § 181.954](#), subd. 4.

Remedies for a Violation

Before an employee or a collective bargaining agent can bring an action under these statutes, the person must first try to resolve the problem using grievance procedures and arbitration proceedings provided under any applicable collective bargaining agreement. If the collective bargaining agent chooses not to pursue a grievance, the employee may bring an action under the laws. [Minn. Stat. § 181.956](#), subd. 1.

An employer or laboratory that violates the statute is liable to the employee for damages, and attorney fees may also be awarded if the court finds that the employer acted knowingly or recklessly. In addition to damages, the employee may be entitled to an injunction that essentially orders an employer or laboratory not to do any act in violation of the statute. Finally, the employee may also be entitled to other “equitable relief” (meaning relief other than an award of money), including reinstatement to the job with back pay. [Minn. Stat. § 181.956](#), subds. 2, 3, and 4.

No employer may retaliate against an employee for asserting his or her rights under these provisions. [Minn. Stat. § 181.956](#), subd. 5.

For more information about employment laws, visit the employment and labor area of our web site, www.house.mn/hrd/hrd.htm.