

INFORMATION BRIEF

Research Department

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Workplace Drug and Alcohol Testing

This information brief summarizes the provisions of Minnesota's Drug and Alcohol Testing in the Workplace Act.

Who is Covered

The law applies to all employers, defined as "any person or entity located or doing business in this state and having one or more employees," and includes the state and all political or other governmental subdivisions. The act defines "employee" as any person, including an independent contractor or person working for an independent contractor, who performs services for compensation. Job applicants are also protected. A job applicant is any person who has applied for work with an employer and anyone who has a job offer contingent upon passing a drug or alcohol test.

When Testing is Permitted

Drug and alcohol testing of employees and applicants is permitted only as explicitly authorized by statute. Testing can only be done under a written drug and alcohol testing policy that meets statutory requirements and must be conducted by an accredited or licensed testing laboratory.

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

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- *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.
- *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 than once a year and the employee receives at least two weeks' written notice of the testing requirement.
- *Random testing.* An employer may require employees to submit to random testing *only* if they are employed (1) 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) are professional athletes and subject to a collective bargaining agreement permitting random testing.
- *Reasonable suspicion testing.* An employer may require an employee to take a test if there is 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, possession, sale, or transfer while 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.
- *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 employee's benefit plan, the employer may request or require the employee to submit to testing without notice during the evaluation or treatment period and for two years after the end of any prescribed treatment.

Required Employer Policies

An employer must perform the testing in accordance with a written drug and alcohol policy that meets several statutory requirements.

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 confirmatory positive test result, the employee's right to refuse testing, the consequences of refusal, and the employee's right to explain a positive result on a confirmatory test and to take and pay for a confirmatory retest.

The employer must give written notice of the policy to all affected employees at the time they become affected. 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.

Reliability Safeguards

An employer must use a testing laboratory that is accredited, certified, or licensed by entities specified in law. 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.

If the laboratory is not certified by the National Institute on Drug Abuse it must follow chain-of-custody requirements outlined in the statute. The minimum chain-of-custody requirements are that:

- (1) there be a traceable record of possession from the time the sample is collected through the time it arrives at the laboratory;
- (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) those who handle the sample personally record their transfer of the sample to others on the chain-of-custody record.

Rights of Employees and Job Applicants

Prior to being asked to undergo a drug test, an employee or job applicant must be given a form on which to acknowledge having seen the employer's written policy.

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 inform the employee of the rights afforded to the employee after a result is received. Upon a positive result on an initial screening test, the employee must be notified of the right to explain the positive result. The employer may request that the person disclose any medications that he or she is taking or has recently taken, and any other information that might affect the reliability of the result. Upon a positive result on a confirmatory test, an employee or applicant may submit additional information to the employer or request a confirmatory retest to be paid for by the employee or applicant.

Limitations on Using a Test Result

An employer is prohibited from taking action against an employee (or withdrawing an offer of employment to an applicant) based on a positive result that has not been confirmed by a confirmatory test.

An employer may not take action against an employee based on a test result that was the first confirmatory positive result unless the employer has first offered the employee the opportunity to participate, at the employee's own expense or under 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.

If an initial test result is positive and the confirmatory test has not yet been done or a confirmatory retest has been requested, 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.

Confidentiality

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.

The statute provides that test result reports, as well as other information gathered during the testing process, are confidential information and cannot 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.

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.

Positive test results from an employer drug or alcohol testing program are not admissible in any criminal proceeding against the employee or applicant.

Remedies for a Violation

An employer or laboratory that violates the statute is liable to the employee for damages. Reasonable attorney fees may be awarded if the employer knowingly or recklessly violated the law. In addition to damages, the employee may be entitled to an injunction ordering an employer or laboratory not to commit any act in violation of the statute. Finally, the employee may also be entitled to other equitable relief, including reinstatement to the job with back pay.

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