

## 26 §683. TESTING PROCEDURES

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No employer may require, request or suggest that any employee or applicant submit to a substance abuse test except in compliance with this section. All actions taken under a substance abuse testing program shall comply with this subchapter, rules adopted under this subchapter and the employer's written policy approved under section 686. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

**1. Employee assistance program required.** Before establishing any substance abuse testing program for employees, an employer with over 20 full-time employees must have a functioning employee assistance program.

A. The employer may meet this requirement by participating in a cooperative employee assistance program that serves the employees of more than one employer. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

B. The employee assistance program must be certified by the Office of Substance Abuse under rules adopted pursuant to section 687. The rules must ensure that the employee assistance programs have the necessary personnel, facilities and procedures to meet minimum standards of professionalism and effectiveness in assisting employees. [1995, c. 283, §1 (AMD).]

[ 1995, c. 283, §1 (AMD) .]

**2. Written policy.** Before establishing any substance abuse testing program, an employer must develop or, as required in section 684, subsection 3, paragraph C, must appoint an employee committee to develop a written policy in compliance with this subchapter providing for, at a minimum:

A. The procedure and consequences of an employee's voluntary admission of a substance abuse problem and any available assistance, including the availability and procedure of the employer's employee assistance program; [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF) .]

B. When substance abuse testing may occur. The written policy must describe:

- (1) Which positions, if any, will be subject to testing, including any positions subject to random or arbitrary testing under section 684, subsection 3. For applicant testing and probable cause testing of employees, an employer may designate that all positions are subject to testing; and
- (2) The procedure to be followed in selecting employees to be tested on a random or arbitrary basis under section 684, subsection 3; [1989, c. 832, §6 (AMD) .]

C. The collection of samples.

(1) The collection of any sample for use in a substance abuse test must be conducted in a medical facility and supervised by a licensed physician or nurse. A medical facility includes a first aid station located at the work site.

(2) An employer may not require an employee or applicant to remove any clothing for the purpose of collecting a urine sample, except that:

(a) An employer may require that an employee or applicant leave any personal belongings other than clothing and any unnecessary coat, jacket or similar outer garments outside the collection area; or

(b) If it is the standard practice of an off-site medical facility to require the removal of clothing when collecting a urine sample for any purpose, the physician or nurse supervising the collection of the sample in that facility may require the employee or applicant to remove their clothing.

(3) No employee or applicant may be required to provide a urine sample while being observed, directly or indirectly, by another individual.

(4) The employer may take additional actions necessary to ensure the integrity of a urine sample if the sample collector or testing laboratory determines that the sample may have been substituted, adulterated, diluted or otherwise tampered with in an attempt to influence test results. The Department of Health and Human Services shall adopt rules governing when those additional actions are justified and the scope of those actions. These rules may not permit the direct or indirect observation of the collection of a urine sample. If an employee or applicant is found to have twice substituted, adulterated, diluted or otherwise tampered with the employee's or applicant's urine sample, as determined under the rules adopted by the department, the employee or applicant is deemed to have refused to submit to a substance abuse test.

(5) If the employer proposes to use the type of screening test described in section 682, subsection 7, paragraph A, subparagraph (1), the employer's policy must include:

(a) Procedures to ensure the confidentiality of test results as required in section 685, subsection 3; and

(b) Procedures for training persons performing the test in the proper manner of collecting samples and reading results, maintaining a proper chain of custody and complying with other applicable provisions of this subchapter; [2001, c. 556, §2 (AMD); 2003, c. 689, Pt. B, §6 (REV).]

D. The storage of samples before testing sufficient to inhibit deterioration of the sample; [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

E. The chain of custody of samples sufficient to protect the sample from tampering and to verify the identity of each sample and test result; [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

F. The substances of abuse to be tested for; [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

G. The cutoff levels for both screening and confirmation tests at which the presence of a substance of abuse in a sample is considered a positive test result.

(1) Cutoff levels for confirmation tests for marijuana may not be lower than 15 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for urine samples.

(2) The Department of Health and Human Services shall adopt rules under section 687 regulating screening and confirmation cutoff levels for other substances of abuse, including those substances tested for in blood samples under subsection 5, paragraph B, to ensure that levels are set within known tolerances of test methods and above mere trace amounts. An employer may request that the Department of Health and Human Services establish a cutoff level for any substance of abuse for which the department has not established a cutoff level.

(3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and Human Services does not have established cutoff levels or procedures for any specific federally recognized substance abuse test, the minimum cutoff levels and procedures that apply are those set forth in the Federal Register, Volume 69, No. 71, sections 3.4 to 3.7 on pages 19697 and 19698; [2009, c. 133, §2 (AMD).]

H. The consequences of a confirmed positive substance abuse test result; [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

I. The consequences for refusal to submit to a substance abuse test; [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

J. Opportunities and procedures for rehabilitation following a confirmed positive result; [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

K. A procedure under which an employee or applicant who receives a confirmed positive result may appeal and contest the accuracy of that result. The policy must include a mechanism that provides an opportunity to appeal at no cost to the appellant; and [1995, c. 324, §4 (AMD).]

L. Any other matters required by rules adopted by the Department of Labor under section 687. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

An employer must consult with the employer's employees in the development of any portion of a substance abuse testing policy under this subsection that relates to the employees. The employer is not required to consult with the employees on those portions of a policy that relate only to applicants. The employer shall send a copy of the final written policy to the Department of Labor for review under section 686. The employer may not implement the policy until the Department of Labor approves the policy. The employer shall send a copy of any proposed change in an approved written policy to the Department of Labor for review under section 686. The employer may not implement the change until the Department of Labor approves the change.

[ 2009, c. 133, §2 (AMD) .]

**3. Copies to employees and applicants.** The employer shall provide each employee with a copy of the written policy approved by the Department of Labor under section 686 at least 30 days before any portion of the written policy applicable to employees takes effect. The employer shall provide each employee with a copy of any change in a written policy approved by the Department of Labor under section 686 at least 60 days before any portion of the change applicable to employees takes effect. The Department of Labor may waive the 60-day notice for the implementation of an amendment covering employees if the amendment was necessary to comply with the law or if, in the judgment of the department, the amendment promotes the purpose of the law and does not lessen the protection of an individual employee. If an employer intends to test an applicant, the employer shall provide the applicant with a copy of the written policy under subsection 2 before administering a substance abuse test to the applicant. The 30-day and 60-day notice periods provided for employees under this subsection do not apply to applicants.

[ 1995, c. 324, §5 (AMD) .]

**4. Consent forms prohibited.** An employer may not require, request or suggest that any employee or applicant sign or agree to any form or agreement that attempts to:

A. Absolve the employer from any potential liability arising out of the imposition of the substance abuse test; or [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

B. Waive an employee's or applicant's rights or eliminate or diminish an employer's obligations under this subchapter except as provided in subsection 4-A. [2007, c. 339, §1 (AMD).]

Any form or agreement prohibited by this subsection is void.

[ 2007, c. 339, §1 (AMD) .]

**4-A. Waivers for temporary employment.** An employment agency, as defined in section 611, may request a written waiver for a temporary placement from an individual already in its employ or on a roster of eligibility as long as the client company has an approved substance abuse testing policy and the individual has not been assigned work at the client company in the 30 days previous to the request. The waiver is only to allow a test that might not otherwise be allowed under this subchapter. The test must otherwise comply with the standards of this subchapter and the employment agency's approved policy regarding applicant testing. The agency may not take adverse action against the individual for refusal to sign a waiver.

[ 2007, c. 339, §2 (NEW) .]

**5. Right to obtain other samples.** At the request of the employee or applicant at the time the test sample is taken, the employer shall, at that time:

A. Segregate a portion of the sample for that person's own testing. Within 5 days after notice of the test result is given to the employee or applicant, the employee or applicant shall notify the employer of the testing laboratory selected by the employee or applicant. This laboratory must comply with the

requirements of this section related to testing laboratories. When the employer receives notice of the employee or applicant's selection, the employer shall promptly send the segregated portion of the sample to the named testing laboratory, subject to the same chain of custody requirements applicable to testing of the employer's portion of the sample. The employee or applicant shall pay the costs of these tests. Payment for these tests may not be required earlier than when notice of the choice of laboratory is given to the employer; and [1995, c. 324, §6 (AMD).]

B. In the case of an employee, have a blood sample taken from the employee by a licensed physician, registered physician's assistant, registered nurse or a person certified by the Department of Health and Human Services to draw blood samples. The employer shall have this sample tested for the presence of alcohol or marijuana metabolites, if those substances are to be tested for under the employer's written policy. If the employee requests that a blood sample be taken as provided in this paragraph, the employer may not test any other sample from the employee for the presence of these substances.

(1) The Department of Health and Human Services may identify, by rules adopted under section 687, other substances of abuse for which an employee may request a blood sample be tested instead of a urine sample if the department determines that a sufficient correlation exists between the presence of the substance in an individual's blood and its effect upon the individual's performance.

(2) No employer may require, request or suggest that any employee or applicant provide a blood sample for substance abuse testing purposes nor may any employer conduct a substance abuse test upon a blood sample except as provided in this paragraph.

(3) Applicants do not have the right to require the employer to test a blood sample as provided in this paragraph. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF); 2003, c. 689, Pt. B, §6 (REV).]

[1995, c. 324, §6 (AMD); 2003, c. 689, Pt. B, §6 (REV).]

**5-A. Point of collection screening test.** Except as provided in this subsection, all provisions of this subchapter regulating screening tests apply to noninstrumented point of collection test devices described in section 682, subsection 7, paragraph A, subparagraph (1).

A. A noninstrumented point of collection test described in section 682, subsection 7, paragraph A, subparagraph (1) may be performed at the point of collection rather than in a laboratory. Subsections 6 and 7 and subsection 8, paragraphs A to C do not apply to such screening tests. Subsection 5 applies only to a sample that results in a positive test result. [2001, c. 556, §3 (NEW).]

B. Any sample that results in a negative test result must be destroyed. Any sample that results in a positive test result must be sent to a qualified testing laboratory consistent with subsections 6 to 8 for confirmation testing. [2001, c. 556, §3 (NEW).]

C. A person who performs a point of collection screening test or a confirmation test may release the results of that test only as follows.

(1) For a point of collection screening test that results in a preliminary positive or negative test result, the person performing the test shall release the test result to the employee who is the subject of the test immediately.

(2) For a point of collection screening test that results in a preliminary positive test result, the person performing the test may not release the test result to the employer until after the result of the confirmation test has been determined.

(3) For a point of collection screening test that results in a preliminary negative test result, the person performing the test may not release the test result to the employer until after the result of a confirmation test would have been determined if one had been performed.

(4) For a confirmation test, the person performing the test shall release the result immediately to the employee who is the subject of the test and to the employer. [ 2005, c. 443, §1 (NEW). ]

[ 2005, c. 443, §1 (AMD) . ]

**6. Qualified testing laboratories required.** No employer may perform any substance abuse test administered to any of that employer's employees. An employer may perform screening tests administered to applicants if the employer's testing facilities comply with the requirements for testing laboratories under this subsection. Except as provided in subsection 5-A, any substance abuse test administered under this subchapter must be performed in a qualified testing laboratory that complies with this subsection.

A. [1989, c. 832, §8 (RP). ]

B. The laboratory must have written testing procedures and procedures to ensure a clear chain of custody. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF). ]

C. The laboratory must demonstrate satisfactory performance in the proficiency testing program of the National Institute on Drug Abuse, the College of American Pathology or the American Association for Clinical Chemistry. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF) . ]

D. The laboratory must comply with rules adopted by the Department of Health and Human Services under section 687. These rules shall ensure that:

(1) The laboratory possesses all licenses or certifications that the department finds necessary or desirable to ensure reliable and accurate test results;

(2) The laboratory follows proper quality control procedures, including, but not limited to:

(a) The use of internal quality controls during each substance abuse test conducted under this subchapter, including the use of blind samples and samples of known concentrations which are used to check the performance and calibration of testing equipment;

(b) The internal review and certification process for test results, including the qualifications of the person who performs that function in the testing laboratory; and

(c) Security measures implemented by the testing laboratory; and

(3) Other necessary and proper actions are taken to ensure reliable and accurate test results.

[1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF); 2003, c. 689, Pt. B, §6 (REV). ]

[ 2001, c. 556, §4 (AMD); 2003, c. 689, Pt. B, §6 (REV) . ]

**7. Testing procedure.** A testing laboratory shall perform a screening test on each sample submitted by the employer for only those substances of abuse that the employer requests to be identified. If a screening test result is negative, no further test may be conducted on that sample. If a screening test result is positive, a confirmation test shall be performed on that sample. A testing laboratory shall retain all confirmed positive samples for one year in a manner that will inhibit deterioration of the samples and allow subsequent retesting. All other samples shall be disposed of immediately after testing.

[ 1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF) . ]

**8. Laboratory report of test results.** This subsection governs the reporting of test results.

A. A laboratory report of test results shall, at a minimum, state:

(1) The name of the laboratory that performed the test or tests;

(2) Any confirmed positive results on any tested sample.

(a) Unless the employee or applicant consents, test results shall not be reported in numerical or quantitative form but shall state only that the test result was positive or negative. This division does not apply if the test or the test results become the subject of any grievance procedure, administrative proceeding or civil action.

(b) A testing laboratory and the employer must ensure that an employee's unconfirmed positive screening test result cannot be determined by the employer in any manner, including, but not limited to, the method of billing the employer for the tests performed by the laboratory and the time within which results are provided to the employer. This division does not apply to test results for applicants;

(3) The sensitivity or cutoff level of the confirmation test; and

(4) Any available information concerning the margin of accuracy and precision of the test methods employed.

The report shall not disclose the presence or absence of evidence of any physical or mental condition or of any substance other than the specific substances of abuse that the employer requested to be identified. A testing laboratory shall retain records of confirmed positive results in a numerical or quantitative form for at least 2 years. [1989, c. 832, §9 (AMD).]

B. The employer shall promptly notify the employee or applicant tested of the test result. Upon request of an employee or applicant, the employer shall promptly provide a legible copy of the laboratory report to the employee or applicant. Within 3 working days after notice of a confirmed positive test result, the employee or applicant may submit information to the employer explaining or contesting the results. [1989, c. 832, §9 (AMD).]

C. The testing laboratory shall send test reports for samples segregated at an employee's or applicant's request under subsection 5, paragraph A, to both the employer and the employee or applicant tested. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

D. Every employer whose policy is approved by the Department of Labor under section 686 shall annually send to the department a compilation of the results of all substance abuse tests administered by that employer in the previous calendar year. This report shall provide separate categories for employees and applicants and shall be presented in statistical form so that no person who was tested by that employer can be identified from the report. The report shall include a separate category for any tests conducted on a random or arbitrary basis under section 684, subsection 3. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

[ 1989, c. 832, §9 (AMD) .]

**9. Costs.** The employer shall pay the costs of all substance abuse tests which the employer requires, requests or suggests that an employee or applicant submit. Except as provided in paragraph A, the employee or applicant shall pay the costs of any additional substance abuse tests.

Costs of a substance abuse test administered at the request of an employee under subsection 5, paragraph B, shall be paid:

A. By the employer if the test results are negative for all substances of abuse tested for in the sample; and [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

B. By the employee if the test results in a confirmed positive result for any of the substances of abuse tested for in the sample. [1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF).]

[ 1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF) .]

**10. Limitation on use of tests.** An employer may administer substance abuse tests to employees or applicants only for the purpose of discovering the use of any substance of abuse likely to cause impairment of the user or the use of any scheduled drug. No employer may have substance abuse tests administered to an employee or applicant for the purpose of discovering any other information.

[ 1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF) .]

**11. Rules.** The Department of Health and Human Services shall adopt any rules under section 687 regulating substance abuse testing procedures that it finds necessary or desirable to ensure accurate and reliable substance abuse testing and to protect the privacy rights of employees and applicants.

[ 1989, c. 536, §§1, 2 (NEW); 1989, c. 604, §§2, 3 (AFF); 2003, c. 689, Pt. B, §6 (REV) .]

#### SECTION HISTORY

1989, c. 536, §§1,2 (NEW). 1989, c. 604, §§1-3 (AMD). 1989, c. 832, §§6-9 (AMD). 1995, c. 283, §1 (AMD). 1995, c. 324, §§4-6 (AMD). 1999, c. 199, §1 (AMD). 2001, c. 556, §§2-4 (AMD). 2003, c. 547, §1 (AMD). 2003, c. 689, §B6 (REV). 2005, c. 443, §1 (AMD). 2007, c. 339, §§1, 2 (AMD). 2009, c. 133, §2 (AMD).

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