

SHORT TITLE: Labor; creating the Standards for Workplace Drug and Alcohol Testing Act; requiring employers choosing to conduct drug or alcohol testing to comply with act and rules; stating circumstances under which employer may choose to conduct drug or alcohol testing; requiring State Board of Health to implement and enforce act and promulgate rules for licensure, regulation, minimum testing standards and procedures; disqualifying certain discharged employees from eligibility for unemployment compensation benefits; codification; effective date.

STATE OF OKLAHOMA

1st Session of the 44th Legislature (1993)

SENATE BILL NO. 143

By: Muegge of the Senate

and

Roach of the House

AS INTRODUCED

An Act relating to labor; creating Standards for Workplace Drug and Alcohol Testing Act; providing short title; defining terms; construing act; requiring employers choosing to conduct drug or alcohol testing to comply with act and rules; exempting testing pursuant to federal law or regulation; stating circumstances under which employer may choose to conduct drug or alcohol testing; prohibiting drug or alcohol testing unless employer adopts written policy and stating information to be included in policy; requiring certain notice to employees; requiring policy and changes be posted and given to certain persons; requiring testing occur during certain time period and deeming such time as work time; requiring employer to pay costs of testing with certain exception; requiring State Board of Health to implement and enforce act and promulgate rules for licensure, regulation, minimum testing standards and procedures; requiring certain testing facilities be licensed by Board and requiring promulgation of certain rules; setting maximum licensure fee; providing for administrative fine for unlicensed facilities; stating conditions for

sample collection and testing; making certain records and information confidential and prohibiting their use in certain proceedings with certain exception; making records property of employer; limiting availability of records to certain persons under certain conditions; prohibiting disclosure of certain information; requiring employer provide drug and alcohol education program whenever possible and requiring program include certain information; prohibiting disciplinary action based on positive test with certain exceptions and unless certain conditions are met; allowing disciplinary action for refusal to undergo testing; considering certain action as discharge for misconduct; stating statute of limitation; requiring prevailing party be awarded certain relief or compensatory damages and certain costs and fees; providing penalties; disqualifying certain discharged employees from eligibility for unemployment compensation benefits; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 551 of Title 40, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 14 of this act shall be known and may be cited as the "Standards for Workplace Drug and Alcohol Testing Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 552 of Title 40, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Alcohol" means ethyl alcohol or ethanol;
2. "Applicant" means a person who has applied for a position with an employer;
3. "Board" means the State Board of Health;
4. "Confirmation test" means a drug or alcohol test on a sample to substantiate the results of a prior drug or alcohol test on the same sample and which uses a method of equal or greater sensitivity than that used in the previous drug or alcohol test;
5. "Department" means the State Department of Health;
6. "Drug" means amphetamines, cannabinoids, cocaine, phencyclidine (PCP), hallucinogens, methaqualone, opiates, barbiturates, benzodiazepines, synthetic narcotics, designer drugs, or a metabolite of any of the substances listed herein;
7. "Drug or alcohol test" means a chemical test administered for the purpose of determining the presence or absence of a drug or its metabolites or alcohol in a person's bodily tissue, fluids or products;
8. "Employee" means any person who supplies a service for remuneration or pursuant to any contract for hire to a private or public employer in this state;
9. "Employer" means any person, firm, corporation, partnership, association, nonprofit organization or public employer, which has one or more employees within this state, or which has offered or may offer employment to one or more individuals in this state;
10. "Public employer" means the State of Oklahoma or any political subdivision thereof, including any department, agency, board, commission, institution, authority, public trust, municipality, county, district or instrumentalities thereof;

11. "Random selection basis" means a mechanism for selecting employees for drug tests that:

- a. results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected, and
- b. does not give an employer discretion to waive the selection of any employee selected under the mechanism;

12. "Reasonable suspicion" means a belief that an employee is using or has used drugs or alcohol in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience, and may be based upon, among other things:

- a. observable phenomena, such as direct observation of drug or alcohol use while at work or on duty or the physical symptoms or manifestations of being under the influence of a drug or alcohol while at work or on duty,
- b. a report of drug or alcohol use while at work or on duty, provided by reliable and credible sources and which has been independently corroborated,
- c. evidence that an individual has tampered with a drug or alcohol test during his employment with the current employer, or
- d. evidence that an employee is involved in the use, possession, sale, solicitation or transfer of drugs while on duty or while on the employer's premises or operating the employer's vehicle, machinery or equipment;

13. "Review officer" means a person, qualified by the State Board of Health, who is responsible for receiving results from a testing facility which have been generated by an employer's drug or

alcohol testing program, and who has knowledge and training to interpret and evaluate an individual's test results together with the individual's medical history and any other relevant information;

14. "Sample" means tissue, fluid or product of the human body chemically capable of revealing the presence of drugs or alcohol in the human body; and

15. "Testing facility" means any person, including any laboratory, hospital, clinic or facility, either off or on the premises of the employer, which provides laboratory services to test for the presence of drugs or alcohol in the human body.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 553 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. The Standards for Workplace Drug and Alcohol Testing Act shall not be construed as requiring or encouraging employers to conduct drug or alcohol testing.

B. Except as provided in subsection C of this section, employers who choose to conduct drug or alcohol testing shall be governed by the provisions of this act and the rules promulgated pursuant thereto.

C. Drug or alcohol testing required by and conducted pursuant to federal law or regulation shall be exempt from the provisions of this act and the rules promulgated pursuant thereto.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 554 of Title 40, unless there is created a duplication in numbering, reads as follows:

Employers who choose to conduct drug or alcohol testing may only request or require an applicant or employee to undergo testing under the following circumstances:

1. Applicant testing: An employer may request or require a job applicant, upon a conditional offer of employment, to undergo a drug or alcohol test and may use a refusal to undergo testing or a

confirmed positive test result as a basis for refusal to hire, provided that such testing does not violate the provisions of the Americans with Disabilities Act of 1990, 42 U.S.C., Section 12101 et seq.;

2. Reasonable suspicion testing: An employer may request or require an employee to undergo a drug or alcohol test if the employer has a reasonable suspicion that the employee has violated the employer's written policy prohibiting the use, possession, sale or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicles, machinery or equipment;

3. Post-accident testing: An employer may request or require an employee to undergo a drug or alcohol test if the employer has a reasonable suspicion that the employee or another person has sustained a work-related injury as a direct result of the employee's use of drugs or alcohol while at work or on duty;

4. Random testing: An employer may request or require an employee to undergo drug or alcohol testing on a random selection basis, except that a public employer may require random testing only of employees who:

- a. are police or peace officers,
- b. have drug interdiction responsibilities,
- c. are authorized to carry firearms, or
- d. are engaged in activities which directly affect the safety of others;

5. Scheduled, periodic testing: An employer may request or require an employee to undergo a drug or alcohol test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination or is scheduled routinely for all members of an employment classification or group and which is part of the employer's written policy; and

6. Post-rehabilitation testing: An employer may request or require an employee to undergo drug or alcohol testing without prior notice for a period of up to one (1) year, commencing with the employee's return to work, following a confirmed positive test or following participation in a chemical or alcohol dependency treatment program under an employee benefit plan or at the request of the employer.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 555 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. No employer may request or require an applicant or employee to undergo a drug or alcohol test unless the employer has first adopted a written, detailed policy setting forth the specifics of its drug or alcohol testing program. The written policy shall include, but not be limited to, the following information:

1. A statement of the employer's policy respecting drug or alcohol use by employees;
2. Which applicants and employees are subject to testing;
3. Circumstances under which testing may be requested or required;
4. Testing methods and collection procedures to be used;
5. Consequences of refusing to undergo testing;
6. Potential adverse personnel action which may be taken as a result of a positive test result;
7. The rights of an applicant and employee to explain, in confidence, the test results;
8. The rights of an applicant and employee to obtain all information and records related to that individual's testing;
9. Confidentiality requirements; and
10. The available appeal procedures, remedies and sanctions.

B. An employer who is implementing a drug or alcohol testing policy for the first time, or is implementing changes to its policy,

shall provide at least thirty (30) days' notice to its employees prior to implementation of the policy or changes to the policy.

C. An employer shall post a copy of the drug or alcohol testing policy, and any changes to the policy, in a prominent employee access area in the place of employment and shall give a copy of the policy, and any changes to the policy, to each applicant and employee.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 556 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.

B. An employer shall pay all costs of testing for drugs or alcohol required by the employer, including confirmation tests required by this act and the cost of transportation if the testing of a current employee is conducted at a place other than the workplace. Provided, however, an individual who requests a retest of a sample in order to challenge the results of a positive test shall pay all costs of the retest, unless the retest reverses the findings of the challenged positive test. In such case, the employer shall reimburse the individual for the costs of the retest.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 557 of Title 40, unless there is created a duplication in numbering, reads as follows:

The State Board of Health shall implement and enforce the provisions of Sections 1 through 14 of this act. The Board shall have the power and duty to promulgate, prescribe, amend and repeal rules for the licensure and regulation of testing facilities and for the establishment and regulation of minimum testing standards and

procedures, which shall include, but not be limited to, the following:

1. Qualifications of testing facilities which shall include the requirement that facilities doing urine analysis for confirmation tests be either certified by the National Institute on Drug Abuse or be accredited by the College of American Pathologists;
2. Qualifications of testing facility personnel;
3. Body component samples that are appropriate for drug and alcohol testing;
4. Methods of analysis and internal quality control procedures to ensure reliable testing results;
5. Internal review and certification process for test results;
6. Security measures to preclude adulteration;
7. Chain-of-custody procedures;
8. Retention and storage procedures and durations to ensure availability of samples for retesting;
9. Procedures for ensuring confidentiality of test results;
10. Proficiency testing;
11. Qualifications of review officers;
12. Qualification and training of collection site personnel;
13. Sample collection procedures that ensure the privacy of the individual and prevent and detect tampering with the sample; and
14. Sample documentation, storage and transportation to the testing facility.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 558 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. On and after January 1, 1994, no testing facility shall provide laboratory services to an employer to test for the presence or absence of drugs or alcohol unless it is licensed by the State Department of Health to perform such tests. The State Department of Health shall promulgate rules relating to the issuance of such

license, including rules governing license revocation, suspension and nonrenewal.

B. The fees for licensure of the testing facilities by the State Department of Health shall be set by the State Board of Health and shall not be more than One Hundred Fifty Dollars (\$150.00) annually.

C. Any testing facility providing laboratory services to an employer to test for the evidence of drugs or alcohol which is not licensed by the State Department of Health pursuant to this section shall be subject to an administrative fine of not more than Five Hundred Dollars (\$500.00) for each offense. Each test performed by the unlicensed testing facility in violation of this section shall constitute a separate offense.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 559 of Title 40, unless there is created a duplication in numbering, reads as follows:

All sample collection and testing for drugs and alcohol pursuant to the provisions of this act shall be conducted in accordance with the following conditions:

1. Samples shall be collected and tested only by individuals deemed qualified by the State Board of Health and may be collected on the premises of the employer;
2. Only samples deemed appropriate by the State Board of Health for drug and alcohol testing shall be collected;
3. The collection of samples shall be performed under reasonable and sanitary conditions;
4. Samples shall be collected and tested with due regard to the privacy of the individual being tested. In the instances of urinalysis, no employer or representative, agent or designee of the employer shall directly observe an applicant or employee in the process of producing a urine sample; provided, however, collection

shall be in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

5. Sample collection shall be documented, and the documentation procedures shall include:

- a. labeling of samples so as reasonably to preclude the probability of erroneous identification of test results, and
- b. an opportunity for the applicant or employee to provide notification of any information which the applicant or employee considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs, or other relevant information;

6. Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration;

7. Sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method as provided by Board rule, at the cutoff levels as determined by Board rule, before the result of any test may be used as a basis for refusal to hire a job applicant or any action by an employer pursuant to Section 13 of this act; and

8. A written record of the chain of custody of the sample shall be maintained from the time of the collection of the sample until the sample is no longer required.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 560 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. Employers shall maintain all drug and alcohol test results and related information, including, but not limited to, interviews,

reports, statements and memoranda, as confidential records, separate from other personnel records. Such records shall not be used in any criminal proceeding, or any civil or administrative proceeding, except in those actions taken by the employer or in any action involving the individual tested and the employer, or unless such records are ordered released pursuant to a valid court order.

B. The records described in subsection A of this section shall be the property of the employer and, upon the request of the applicant or employee tested, shall be made available to the applicant or employee. An employer shall not release such records to any person other than the applicant or employee, or the employer's review officer, unless the applicant or employee, in writing, has expressly granted permission for the employer to release such records.

C. A testing facility, or any agent, representative or designee of the facility, or any review officer, shall not disclose to any employer, based on the analysis of a sample collected from an applicant or employee for the purpose of testing for the presence of drugs or alcohol, any information relating to:

1. The general health, pregnancy or other physical or mental condition of the applicant or employee; or

2. The presence of any drug other than the drug or its metabolites that the employer requested be identified and for which an adequate explanation of the positive result, other than the use of drugs, has not been forthcoming from the applicant or employee.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 561 of Title 40, unless there is created a duplication in numbering, reads as follows:

Employers shall provide a drug and alcohol education program for their employees whenever possible. This program at a minimum shall provide information on drug and alcohol abuse and a list of

resources available in the community which provide substance abuse recovery, treatment or counseling programs.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 562 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. No disciplinary action, except for a temporary suspension or a temporary transfer to another position, may be taken by an employer against an employee based on a positive test result unless the test result has been confirmed by a second test using gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method, as provided by rule of the State Board of Health at the cutoff levels determined by Board rule.

B. An employer may take disciplinary action against an employee who refuses to undergo drug or alcohol testing conducted in accordance with the provisions of this act.

C. An employee discharged on the basis of a refusal to undergo drug or alcohol testing or a confirmed positive drug or alcohol test conducted in accordance with the provisions of this act shall be considered to have been discharged for misconduct for purposes of unemployment compensation benefits as provided for in Section 15 of this act.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 563 of Title 40, unless there is created a duplication in numbering, reads as follows:

A. Any person aggrieved by a violation of Sections 1 through 14 of this act may institute a civil action in a court of competent jurisdiction within one (1) year of the alleged violation or upon the exhaustion of any internal administrative remedies available to the person, or be barred from obtaining the relief provided for in subsection B of this section.

B. A prevailing party shall be awarded declaratory or injunctive relief or compensatory damages which may include, but not

be limited to, employment, reinstatement, promotion, the payment of lost wages and other remuneration to which the person would have been entitled and payment of and reinstatement to full benefits and seniority rights. Reasonable costs and attorney fees shall be awarded to the prevailing party.

SECTION 14. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 564 of Title 40, unless there is created a duplication in numbering, reads as follows:

Any person who willfully and knowingly violates the provisions of this act shall be guilty of a misdemeanor and, upon conviction, punishable by a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Thousand Dollars (\$5,000.00) or imprisonment in the county jail for not more than one (1) year, or by both such fine and imprisonment.

SECTION 15. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 2-406A of Title 40, unless there is created a duplication in numbering, reads as follows:

An employee discharged on the basis of a refusal to undergo drug or alcohol testing or a confirmed positive drug or alcohol test conducted in accordance with the provisions of the Standards for Workplace Drug and Alcohol Testing Act shall be considered to have been discharged for misconduct and shall be disqualified for benefits pursuant to the provisions of Section 2-406 of Title 40 of the Oklahoma Statutes.

SECTION 16. This act shall become effective September 1, 1993.

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