STATE OF OKLAHOMA

1st Session of the 53rd Legislature (2011)

COMMITTEE SUBSTITUTE
FOR ENGROSSED
HOUSE BILL 2033 By: Sullivan of the House

and

Anderson of the Senate

COMMITTEE SUBSTITUTE

[labor - Standards for Workplace Drug and Alcohol Testing Act - repealer- effective date]

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

SECTION 1. AMENDATORY 40 O.S. 2001, Section 551, is amended to read as follows:

Section 551. Sections ~~1~~ 551 through ~~15~~ 563 of this ~~act~~ title shall be known and may be cited as the "Standards for Workplace Drug and Alcohol Testing Act".

SECTION 2. AMENDATORY 40 O.S. 2001, Section 552, as amended by Section 5, Chapter 190, O.S.L. 2005 (40 O.S. Supp. 2010, Section 552), is amended to read as follows:

Section 552. As used in the Standards for Workplace Drug and Alcohol Testing Act:

1. "Alcohol" means ethyl alcohol or ethanol;

2. "Applicant" means a person who has applied for a position with an employer and received a conditional offer of employment;

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 different chemical principles and is of equal or greater accuracy than the prior 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. Adulteration of a specimen or of a drug or alcohol test shall be considered as a refusal to test;

8. "Employee" means any person who supplies ~~a service~~ labor for remuneration ~~or pursuant to any contract for hire to a private or public~~ to his or her employer in this state and shall not include an independent contractor, subcontractor or employees of an independent contractor; provided, however, an independent contractor, subcontractor, or employees of an independent contractor, may be subject to a workplace drug or alcohol testing policy under the

terms of the contractual agreement when the drug or alcohol testing policy applies to other workers at the job site or workers who are in the same or similar classification or group;

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 or alcohol testing 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:~~

~~(1) the physical symptoms or manifestations of being under the influence of a drug or alcohol while at work or on duty, or~~

~~(2) the direct observation of drug or alcohol use 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.~~ 12. "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.~~ 13. "Testing facility" means ~~any person, including any laboratory, hospital, clinic or~~ a facility~~, either off or on the premises of the employer,~~ which provides laboratory services to test samples for the presence of drugs or alcohol ~~in the human body~~. ~~The administration of on site drug or alcohol screening tests to applicants or employees to screen out negative test results are not laboratory services under this paragraph, provided the on site tests used are cleared by the federal Food and Drug Administration for commercial marketing or by the National Highway Traffic Safety Administration for alcohol testing, and all positive results of such tests are confirmed by a testing facility in accordance with the Standards for Workplace Drug and Alcohol Testing Act.~~

SECTION 3. AMENDATORY 40 O.S. 2001, Section 554, as last amended by Section 11, Chapter 132, O.S.L. 2008 (40 O.S. Supp. 2010, Section 554), is amended to read as follows:

Section 554. Employers may conduct drug and alcohol testing in accordance with the Standards for Workplace Drug and Alcohol Testing Act. Employers who choose to conduct drug or alcohol testing may only request or require an applicant or employee to undergo testing under any of the following circumstances:

1. Applicant testing: A public or private employer may request or require ~~a job~~ an applicant~~, upon a conditional offer of employment,~~ to undergo drug or alcohol testing 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., and provided that such testing is required for all applicants who have received a conditional offer of employment for a particular employment classification~~;

2. ~~Reasonable suspicion~~ For-cause testing: A public or private employer may request or require an employee to undergo drug or alcohol testing ~~if the employer has a reasonable suspicion that the employee has violated the employer's written policy~~ at any time it reasonably believes that the employee may be under the influence of drugs or alcohol, including, but not limited to, the following circumstances:

a. drugs or alcohol on or about the employee's person or in the employee's vicinity,

b. conduct on the employee's part that suggests impairment or influence of drugs or alcohol,

c. a report of drug or alcohol use while at work or on duty,

d. information that an employee has tampered with drug or alcohol testing at any time,

e. negative performance patterns, or

f. excessive or unexplained absenteeism or tardiness;

3. Post-accident testing: A public or private employer may require an employee to undergo drug or alcohol testing if the employee or another person has sustained ~~a work-related~~ an injury while at work or the employer's property has been damaged, including damage to equipment~~, in an amount reasonably estimated at the time of the accident to exceed Five Hundred Dollars ($500.00)~~. For purposes of workers' compensation, no employee who tests positive for the presence of substances defined and consumed pursuant to Section 465.20 of Title 63 of the Oklahoma Statutes, alcohol, illegal drugs, or illegally used chemicals, or refuses to take a drug or alcohol test required by the employer, shall be eligible for such compensation ~~unless the employee proves by a preponderance of the evidence that the substances, alcohol, illegal drugs, or illegally used chemicals were not the proximate cause of the injury or accident~~;

4. Random testing: A public or private employer may request or require an employee or all members of an employment classification or group to undergo drug or alcohol testing ~~on a random selection basis,~~ at random and may limit its random testing programs to particular employment classifications or groups, 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,

d. are engaged in activities which directly affect the safety of others, ~~or~~

e. are working for a public hospital including any hospital owned or operated by a municipality, county, or public trust, or

f. work in direct contact with inmates in the custody of the Department of Corrections or work in direct contact with juvenile delinquents or children in need of supervision in the custody of the Department of Human Services;

5. Scheduled, periodic testing: A public or private employer may request or require an employee to undergo drug or alcohol testing if the test is conducted as a routine 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~~ as part of the employer's written policy, except that a public employer may require scheduled, periodic testing only of employees who:

a. are police or peace officers,

b. have drug interdiction responsibilities,

c. are authorized to carry firearms,

d. are engaged in activities which directly affect the safety of others, ~~or~~

e. are working for a public hospital including any hospital owned or operated by a municipality, county, or public trust, or

f. work in direct contact with inmates in the custody of the Department of Corrections or work in direct contact with juvenile delinquents or children in need of supervision in the custody of the Department of Human Services; and

6. Post-rehabilitation testing: A public or private employer may request or require an employee to undergo drug or alcohol testing ~~without prior notice~~ for a period of up to two (2) years commencing with the employee's return to work, following a ~~confirmed~~ positive test or following participation in a drug or alcohol dependency treatment program ~~under an employee benefit plan or at the request of the employer~~.

SECTION 4. AMENDATORY 40 O.S. 2001, Section 555, as last amended by Section 12, Chapter 132, O.S.L. 2008 (40 O.S. Supp. 2010, Section 555), is amended to read as follows:

Section 555. A. ~~No~~ Any employer ~~may request~~ that requests or ~~require~~ requires an applicant or employee to undergo drug or alcohol testing ~~unless the employer has~~ shall first ~~adopted~~ adopt a written~~,~~ ~~detailed~~ policy setting forth the specifics of its drug or alcohol

testing program~~. The written policy shall be uniformly applied to those covered by the policy and shall~~, which may include, but is 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. Substances which may be tested. ~~To comply with the provisions of this paragraph, it~~ It shall be sufficient for an employer to state in the written policy that the substances tested shall be for drugs and alcohol ~~as defined in the Standards for Workplace Drug and Alcohol Testing Act, including controlled substances approved for testing by rule by the State Commissioner of Health~~;

5. Testing methods and collection procedures to be used;

6. Consequences of refusing to undergo testing;

7. Potential adverse personnel action which may be taken as a result of a positive test result;

8. The ~~rights~~ ability of an applicant and employee to explain, in confidence, the test results;

9. The ~~rights~~ ability of an applicant and employee to obtain copies of all information and records related to that individual's testing;

10. Confidentiality requirements; and

11. The available appeal procedures~~, remedies and sanctions~~.

B. An employer who~~ is implementing~~ implements a drug or alcohol testing policy ~~for the first time,~~ or ~~is implementing~~ changes ~~to~~ its policy, shall provide at least ~~thirty (30)~~ ten (10) 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 deliver a copy of the policy, and any changes to the policy, to each employee~~ and shall provide a copy of its policy to each applicant upon his or her ~~receipt of a conditional offer of~~ acceptance of employment~~.~~ ~~Delivery to employees and persons who are offered employment may be accomplished~~ by:

1. Hand-delivery of a paper copy of the policy or changes to the policy;

2. Mailing a paper copy of the policy or changes to the policy through the U.S. Postal Service or a parcel delivery service to the last address given by the employee or ~~prospective employee to the employer~~ applicant; ~~or~~

3. Electronically transmitting a copy of the policy through an e-mail ~~server or the Internet to an electronic mail address assigned by the employer to the employee or prospective employee with~~

~~documented receipt capability, or to an electronic mail address provided by the employee or prospective employee to the employer for the purpose of receiving employment-related e-mails with documented receipt capability~~ or by posting on the employer's website or intranet site; or

4. Posting a copy in a prominent employee access area.

SECTION 5. AMENDATORY 40 O.S. 2001, Section 556, is amended to read as follows:

Section 556. ~~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, if an ~~individual who~~ employee or applicant requests a ~~retest~~ confirmation test of a sample within twenty-four (24) hours of receiving notice of a positive test in order to challenge the results of a positive test, the employee or applicant shall pay all costs of the ~~retest~~ confirmation test, unless the ~~retest~~ confirmation test reverses the findings of the challenged positive test. In such case, the employer shall

reimburse the individual for the costs of the ~~retest~~ confirmation test.

SECTION 6. AMENDATORY 40 O.S. 2001, Section 557, as amended by Section 3, Chapter 277, O.S.L. 2006 (40 O.S. Supp. 2010, Section 557), is amended to read as follows:

Section 557. A. The State Board of Health ~~shall implement and enforce the provisions of the Standards for Workplace Drug and Alcohol Testing 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 initial or confirmation~~ tests ~~either~~ be certified for forensic urine drug testing pursuant to guidelines or regulations of the federal Department of Health and Human Services or be accredited for forensic urine drug testing by the College of American Pathologists or other organizations recognized by the State Board of Health;

2. Qualifications of testing facility personnel; and

3. ~~Body component samples that are appropriate for drug and alcohol testing, to include saliva, urine and hair;~~

~~4. The drugs in addition to marihuana, cocaine, opiates, amphetamines and phencyclidine, and their metabolites, for which testing may be conducted;~~

~~5. Methods of analysis and internal quality control procedures to ensure reliable test results;~~

~~6. Internal review and certification process for test results;~~

~~7. Security measures to preclude adulteration;~~

~~8. Chain of custody procedures;~~

~~9. Retention and storage procedures and durations to ensure availability of samples for retesting;~~

~~10. Procedures for ensuring confidentiality of test results;~~

~~11. Proficiency testing;~~

~~12. Training and qualifications of review officers which shall include, but not be limited to, licensure to practice medicine and surgery or osteopathic medicine or holding a doctorate in clinical chemistry, forensic toxicology, or a similar biomedical science;~~

~~13. Training and qualifications of collection site personnel;~~

~~14. Sample collection procedures that ensure the privacy of the individual and prevent and detect tampering with the sample;~~

~~15. Sample documentation, storage and transportation to the testing facility; and~~

~~16.~~ Procedures for the testing facility to provide the necessary documentation of testing procedures and test results to

the employer requesting testing services as may be required by a court or administrative proceeding.

B. ~~The rules promulgated by the State Board of Health pursuant to the provisions of this act shall in all applicable respects be consistent with any federal laws and regulations for drug and alcohol testing in the workplace and shall include safeguards, standards and procedures not less stringent than those applicable to federally regulated drug and alcohol testing in the workplace, except where to do so would create a conflict with a provision of this act~~ Nothing in the Standards for Workplace Drug and Alcohol Testing Act shall be construed as prohibiting an employer from adopting a policy which allows for testing for drugs or alcohol by another method which is reasonably calculated to detect the presence of drugs or alcohol, including, but not limited to, breathalyzer testing, testing by use of a single-use test device, known as an on-site or quick testing device, to collect, handle, store and ship a sample collected for testing. Provided, however, a breathalyzer test shall not be grounds for immediate termination absent a confirmation test.

SECTION 7. AMENDATORY 40 O.S. 2001, Section 560, is amended to read as follows:

Section 560. 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, including the records of the testing facility, 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 and~~ Records of all drug and alcohol test results and related information maintained by the employer shall be the property of the employer and, upon the request of the applicant or employee tested, shall be made available for inspection and copying to the applicant or employee. An employer shall not release such records to any person other than the applicant, employee or the employer's review officer, unless the applicant or employee, in writing following receipt of the test results, has expressly granted permission for the employer to release such records ~~or pursuant to~~ in order to comply with a valid ~~court~~ judicial or administrative order. 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.

~~C.~~ B. 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~~ 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 a medically acceptable explanation of the positive result, other than the use of drugs, has not been forthcoming from the applicant or employee~~.

~~Provided, however, a~~ A testing facility shall release the results of the drug or alcohol test, and any analysis and information related thereto, to the individual tested upon ~~his~~ request.

SECTION 8. AMENDATORY 40 O.S. 2001, Section 562, is amended to read as follows:

Section 562. 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 an equivalent scientifically accepted method of equal or greater accuracy as approved by rule of the State Board of Health, at the cutoff levels determined by Board rule~~ An employer's policy shall state the disciplinary actions that may be taken upon a refusal to

undergo a drug or alcohol test or for a positive test for the presence of drugs or alcohol.

B. An employer may take disciplinary action, up to and including discharge, against an employee who refuses to undergo drug or alcohol testing conducted in accordance with the provisions of ~~this act~~ Section 551 et seq. of this title or who tests positive for the presence of drugs or alcohol.

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 ~~16~~ 2-406A of this ~~act~~ title. In order to prove misconduct, the employer need only provide proof of a testing policy and either a refusal to take a drug or alcohol test or a positive test result.

D. Notwithstanding any provision of law for confidentiality of drug or alcohol testing results, nothing in the Standards for Workplace Drug and Alcohol Testing Act shall preclude an employer, contracting with another employer, from sharing drug or alcohol testing results of any tested person who works pursuant to such contractual agreement.

SECTION 9. AMENDATORY 40 O.S. 2001, Section 563, is amended to read as follows:

Section 563. A. Any person aggrieved by a willful violation of the Standards for Workplace Drug and Alcohol Testing Act may institute a civil action in a court of competent jurisdiction within ~~two (2) years~~ one (1) year of the ~~person's discovery of the~~ alleged willful violation ~~or of 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. A willful violation of the Standards for Workplace Drug and Alcohol Testing Act requires proof by the preponderance of the evidence that the employer had a specific intent to violate the act.

B. A prevailing party may be awarded ~~declaratory or injunctive relief and 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~~ an additional equal amount as liquidated damages. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person shall operate to reduce the lost wages otherwise allowable. Reasonable costs and attorney fees may be awarded to the prevailing party, whether plaintiff or defendant.

SECTION 10. REPEALER 40 O.S. 2001, Sections 561, 564 and 565, are hereby repealed.

SECTION 11. This act shall become effective November 1, 2011.

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