

1 ENGROSSED HOUSE
2 BILL NO. 2033

By: Sullivan of the House

3 and

4 Anderson of the Senate

5
6 (labor - amending various sections in Title 40 -
7 Standards for Workplace Drug and Alcohol Testing
8 Act - repealing 3 sections in Title 40 -
9 effective date)

10

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

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

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

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

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

- 22 1. "Alcohol" means ethyl alcohol or ethanol;
23 2. "Applicant" means a person who has applied for a position
24 with an employer;

1 3. "Board" means the State Board of Health;

2 4. "Confirmation test" means a drug ~~or alcohol~~ test on a sample
3 to substantiate the results of a prior drug ~~or alcohol~~ test on the
4 same sample ~~and which uses different chemical principles and is of~~
5 ~~equal or greater accuracy than the prior drug or alcohol test;~~

6 5. "Department" means the State Department of Health;

7 6. "Drug" means amphetamines, cannabinoids, cocaine,
8 phencyclidine (PCP), hallucinogens, methaqualone, opiates,
9 barbiturates, benzodiazepines, synthetic narcotics, designer drugs,
10 or a metabolite of any of the substances listed herein;

11 7. "Drug or alcohol test" means a chemical test administered
12 for the purpose of determining the presence or absence of a drug or
13 its metabolites or alcohol in a person's bodily tissue, fluids or
14 products. Adulteration of a specimen or of a drug or alcohol test
15 shall also be considered as a refusal to test;

16 8. "Employee" means any person who supplies a ~~service~~ labor for
17 remuneration ~~or pursuant to any contract for hire to a private or~~
18 ~~public~~ from his or her employer, in this state. An independent
19 contractor is not an employee for purposes of this act, nor is an
20 employee of an independent contractor an employee of the person or
21 entity that is in a contractual relationship with the independent
22 contractor;

23 9. "Employer" means any person, firm, corporation, partnership,
24 association, nonprofit organization or public employer, which has

1 one or more employees within this state, or which has offered or may
2 offer employment to one or more individuals in this state;

3 10. "Public employer" means the State of Oklahoma or any
4 political subdivision thereof, including any department, agency,
5 board, commission, institution, authority, public trust,
6 municipality, county, district or instrumentalities thereof;

7 ~~11. "Random selection basis" means a mechanism for selecting~~
8 ~~employees for drug or alcohol testing that:~~

9 a. ~~results in an equal probability that any employee from~~
10 ~~a group of employees subject to the selection~~
11 ~~mechanism will be selected, and~~

12 b. ~~does not give an employer discretion to waive the~~
13 ~~selection of any employee selected under the~~
14 ~~mechanism;~~

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

20 a. ~~observable phenomena, such as:~~

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

24

1 ~~premises of the employer, which provides laboratory services to test~~
2 ~~samples for the presence of drugs or alcohol in the human body. The~~
3 ~~administration of on-site drug or alcohol screening tests to~~
4 ~~applicants or employees to screen out negative test results are not~~
5 ~~laboratory services under this paragraph, provided the on-site tests~~
6 ~~used are cleared by the federal Food and Drug Administration for~~
7 ~~commercial marketing or by the National Highway Traffic Safety~~
8 ~~Administration for alcohol testing, and all positive results of such~~
9 ~~tests are confirmed by a testing facility in accordance with the~~
10 ~~Standards for Workplace Drug and Alcohol Testing Act.~~

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

14 Section 554. Employers may conduct drug and alcohol testing in
15 accordance with this act. Employers who choose to conduct drug or
16 alcohol testing may only request or require an applicant or employee
17 to undergo testing under any of the following circumstances:

18 1. Applicant testing: A public or private employer may request
19 or require a job applicant, upon a conditional offer of employment,
20 to undergo drug or alcohol testing and may use a refusal to undergo
21 testing or a ~~confirmed~~ positive test result as a basis for refusal
22 to hire, provided that such testing does not violate the provisions
23 of the Americans with Disabilities Act of 1990, 42 U.S.C., Section
24 12101 et seq., ~~and provided that such testing is required for all~~

1 ~~applicants who have received a conditional offer of employment for a~~
2 ~~particular employment classification;~~

3 2. ~~Reasonable suspicion~~ For-cause testing: A public or private
4 employer may request or require an employee to undergo drug or
5 alcohol testing ~~if the employer has a reasonable suspicion that the~~
6 ~~employee has violated the employer's written policy~~ at any time it
7 believes that the employee may be under the influence of drugs or
8 alcohol, including, but not limited to, the following circumstances:
9 drugs or alcohol on or about the employee's person or in the
10 employee's vicinity, conduct on the employee's part that suggests
11 impairment or influence of drugs or alcohol, a report of drug or
12 alcohol use while at work or on duty, information that an employee
13 has tampered with drug or alcohol testing at any time, negative
14 performance patterns, and/or excessive or unexplained absenteeism or
15 tardiness;

16 3. Post-accident testing: A public or private employer may
17 require an employee to undergo drug or alcohol testing if the
18 employee or another person has sustained ~~a work-related~~ an injury
19 while at work or the employer's property has been damaged, including
20 damage to equipment, ~~in an amount reasonably estimated at the time~~
21 ~~of the accident to exceed Five Hundred Dollars (\$500.00).~~ For
22 purposes of workers' compensation, no employee who tests positive
23 for the presence of substances defined and consumed pursuant to
24 Section 465.20 of Title 63 of the Oklahoma Statutes, alcohol,

1 illegal drugs, or illegally used chemicals or refuses to take a drug
2 or alcohol test required by the employer shall be eligible for such
3 compensation ~~unless the employee proves by a preponderance of the~~
4 ~~evidence that the substances, alcohol, illegal drugs, or illegally~~
5 ~~used chemicals were not the proximate cause of the injury or~~
6 ~~accident;~~

7 4. Random testing: A public or private employer may request or
8 require ~~an employee~~ all members of an employment classification or
9 group to undergo drug or alcohol testing ~~on a random selection~~
10 ~~basis,~~ at random and may limit its random testing programs to
11 particular employment classifications or groups, except that a
12 public employer may require random testing only of employees who:

- 13 a. are police or peace officers,
- 14 b. have drug interdiction responsibilities,
- 15 c. are authorized to carry firearms,
- 16 d. are engaged in activities which directly affect the
17 safety of others, ~~or~~
- 18 e. are working for a public hospital including city,
19 county, and/or public trust, or
- 20 f. work in direct contact with inmates in the custody of
21 the Department of Corrections or work in direct
22 contact with juvenile delinquents or children in need
23 of supervision in the custody of the Department of
24 Human Services;

1 5. Scheduled, periodic testing: A public or private employer
2 may request or require an employee to undergo drug or alcohol
3 testing if the test is conducted as a routine part of a routinely
4 scheduled employee fitness-for-duty medical examination or is
5 scheduled routinely ~~for all members of an employment classification~~
6 ~~or group and which is part of the employer's written policy,~~
7 provided that such testing does not violate the provisions of the
8 Americans with Disabilities Act of 1990, 42 U.S.C., Section 12101 et
9 seq., except that a public employer may require scheduled, periodic
10 testing only of employees who:

- 11 a. are police or peace officers,
- 12 b. have drug interdiction responsibilities,
- 13 c. are authorized to carry firearms,
- 14 d. are engaged in activities which directly affect the
15 safety of others, ~~or~~
- 16 e. are working for a public hospital including city,
17 county, and/or public trust, or
- 18 f. work in direct contact with inmates in the custody of
19 the Department of Corrections or work in direct
20 contact with juvenile delinquents or children in need
21 of supervision in the custody of the Department of
22 Human Services; and

23 6. Post-rehabilitation testing: A public or private employer
24 may request or require an employee to undergo drug or alcohol

1 testing ~~without prior notice~~ for a period of up to two (2) years
2 commencing with the employee's return to work, following a ~~confirmed~~
3 positive test or following participation in a drug or alcohol
4 dependency treatment program ~~under an employee benefit plan or at~~
5 ~~the request of the employer.~~

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

9 Section 555. A. ~~No~~ Any employer ~~may request~~ that requests or
10 ~~require~~ requires an applicant or employee to undergo drug ~~or~~ and
11 alcohol testing ~~unless the employer has~~ shall first ~~adopted~~ adopt a
12 written, ~~detailed~~ policy setting forth the specifics of its drug or
13 alcohol testing program. ~~The written policy shall be uniformly~~
14 ~~applied to those covered by the policy and shall,~~ which may include,
15 but not be limited to, the following information:

16 1. A statement of the employer's policy respecting drug or
17 alcohol use by employees;

18 2. Which applicants and employees are subject to testing;

19 3. Circumstances under which testing may be requested or
20 required;

21 4. Substances which may be tested. ~~To comply with the~~
22 ~~provisions of this paragraph, it~~ It shall be sufficient for an
23 employer to state in the written policy that the substances tested
24 shall be for drugs and alcohol ~~as defined in the Standards for~~

1 ~~Workplace Drug and Alcohol Testing Act, including, without~~
2 limitation, controlled substances approved for testing by rule by
3 the State Commissioner of Health. This provision shall not limit
4 the employer's right to test, nor subject the employer to liability
5 for taking any disciplinary action for testing, for other substances
6 not approved by the State Commissioner of Health;

7 5. Testing methods and collection procedures to be used;

8 6. Consequences of refusing to undergo testing;

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

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

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

16 10. Confidentiality requirements; and

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

18 B. ~~An employer who is implementing a drug or alcohol testing~~
19 ~~policy for the first time, or is implementing changes to its policy,~~
20 ~~shall provide at least thirty (30) days' notice to its employees~~
21 ~~prior to implementation of the policy or changes to the policy.~~

22 C. An employer shall ~~post~~ deliver a copy of the drug or alcohol
23 testing policy, and any changes to the policy, ~~in a prominent~~
24 ~~employee access area in the place of employment and shall deliver a~~

1 ~~copy of the policy, and any changes to the policy, to each employee~~
2 ~~and to each applicant upon his or her receipt of a conditional offer~~
3 ~~of employment to each employee.~~ Delivery to employees ~~and persons~~
4 ~~who are offered employment~~ may be accomplished by:

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

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

11 3. Electronically transmitting a copy of the policy through an
12 ~~e-mail server or the Internet to an electronic mail address assigned~~
13 ~~by the employer to the employee or prospective employee with~~
14 ~~documented receipt capability, or to an electronic mail address~~
15 ~~provided by the employee or prospective employee to the employer for~~
16 ~~the purpose of receiving employment related e-mails with documented~~
17 ~~receipt capability~~ or by posting on the employer's website or
18 intranet site; or

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

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

22 Section 556. ~~A.~~ Any drug or alcohol testing by an employer
23 shall ~~occur during or immediately after the regular work period of~~
24

1 ~~current employees and shall~~ be deemed work time for purposes of
2 compensation and benefits for current employees.

3 ~~B.~~ An employer shall pay all costs of testing for drugs or
4 alcohol required by the employer, ~~including confirmation tests~~
5 ~~required by this act and the cost of transportation if the testing~~
6 ~~of a current employee is conducted at a place other than the~~
7 ~~workplace.~~ Provided, however, if the employer's policy so allows
8 and an individual who employee or applicant requests a ~~retest~~
9 confirmation test of a sample in order to challenge the results of a
10 positive drug test shall, the employee or applicant may pay all
11 costs of the ~~retest~~ confirmation test, unless the ~~retest~~
12 confirmation test reverses the findings of the challenged positive
13 test. In such case, the employer shall reimburse the individual for
14 the costs of the ~~retest~~ confirmation test.

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

18 Section 557. A. ~~The State Board of Health shall implement and~~
19 ~~enforce the provisions of the Standards for Workplace Drug and~~
20 ~~Alcohol Testing Act.~~ The Board shall have the power and duty to
21 promulgate, prescribe, amend and repeal rules for the licensure and
22 regulation of testing facilities ~~and for the establishment and~~
23 ~~regulation of minimum testing standards and procedures,~~ which shall
24 include, but not be limited to, the following:

- 1 1. Qualifications of testing facilities which shall include the
2 requirement that facilities doing urine analysis ~~for initial or~~
3 ~~confirmation~~ tests either be certified for forensic urine drug
4 testing pursuant to guidelines or regulations of the federal
5 Department of Health and Human Services or be accredited for
6 forensic urine drug testing by the College of American Pathologists
7 or other organizations recognized by the State Board of Health;
- 8 2. Qualifications of testing facility personnel; and
- 9 3. ~~Body component samples that are appropriate for drug and~~
10 ~~alcohol testing, to include saliva, urine and hair;~~
- 11 4. ~~The drugs in addition to marihuana, cocaine, opiates,~~
12 ~~amphetamines and phencyclidine, and their metabolites, for which~~
13 ~~testing may be conducted;~~
- 14 5. ~~Methods of analysis and internal quality control procedures~~
15 ~~to ensure reliable test results;~~
- 16 6. ~~Internal review and certification process for test results;~~
- 17 7. ~~Security measures to preclude adulteration;~~
- 18 8. ~~Chain of custody procedures;~~
- 19 9. ~~Retention and storage procedures and durations to ensure~~
20 ~~availability of samples for retesting;~~
- 21 10. ~~Procedures for ensuring confidentiality of test results;~~
- 22 11. ~~Proficiency testing;~~
- 23 12. ~~Training and qualifications of review officers which shall~~
24 ~~include, but not be limited to, licensure to practice medicine and~~

1 ~~surgery or osteopathic medicine or holding a doctorate in clinical~~
2 ~~chemistry, forensic toxicology, or a similar biomedical science;~~

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

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

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

8 ~~16. Procedures for the testing facility to provide the~~
9 ~~necessary documentation of testing procedures and test results to~~
10 ~~the employer requesting testing services as may be required by a~~
11 ~~court or administrative proceeding.~~

12 ~~B. The rules promulgated by the State Board of Health pursuant~~
13 ~~to the provisions of this act shall in all applicable respects be~~
14 ~~consistent with any federal laws and regulations for drug and~~
15 ~~alcohol testing in the workplace and shall include safeguards,~~
16 ~~standards and procedures not less stringent than those applicable to~~
17 ~~federally regulated drug and alcohol testing in the workplace,~~
18 ~~except where to do so would create a conflict with a provision of~~
19 ~~this act~~

20 Nothing in this act shall be construed as prohibiting an
21 employer from adopting a policy which allows for testing of alcohol
22 or drugs by another method which is reasonably calculated to detect
23 the presence of drugs or alcohol, including, but not limited to,
24 breathalyzer testing, testing by use of a single-use test device

1 (also known as an on-site or quick testing device) to collect,
2 handle, store and ship a sample collected for testing.

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

5 Section 560. A. ~~Employers shall maintain all drug and alcohol~~
6 ~~test results and related information, including, but not limited to,~~
7 ~~interviews, reports, statements and memoranda, as confidential~~
8 ~~records, separate from other personnel records. Such records,~~
9 ~~including the records of the testing facility, shall not be used in~~
10 ~~any criminal proceeding, or any civil or administrative proceeding,~~
11 ~~except in those actions taken by the employer or in any action~~
12 ~~involving the individual tested and the employer or unless such~~
13 ~~records are ordered released pursuant to a valid court order.~~

14 B. ~~The records described in subsection A of this section and~~
15 Records of all drug and alcohol test results and related information
16 maintained by the employer shall be the property of the employer
17 and, upon the request of the applicant or employee tested, shall be
18 made available for inspection and copying to the applicant or
19 employee. An employer shall not release such records to any person
20 other than the applicant, employee or the employer's review officer,
21 unless the applicant or employee, in writing following receipt of
22 the test results, has expressly granted permission for the employer
23 to release such records ~~or pursuant to~~ in order to comply with a
24 valid court judicial or administrative order. A written record of

1 the chain of custody of the sample shall be maintained from the time
2 of the collection of the sample until the sample is no longer
3 required.

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

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

11 2. ~~The presence of any drug other than the drug or its~~
12 ~~metabolites that the employer requested be identified and for which~~
13 ~~a medically acceptable explanation of the positive result, other~~
14 ~~than the use of drugs, has not been forthcoming from the applicant~~
15 ~~or employee.~~

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

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

22 Section 562. A. ~~No disciplinary action, except for a temporary~~
23 ~~suspension or a temporary transfer to another position, may be taken~~
24 ~~by an employer against an employee based on a positive test result~~

1 ~~unless the test result has been confirmed by a second test using gas~~
2 ~~chromatography, gas chromatography mass spectroscopy, or an~~
3 ~~equivalent scientifically accepted method of equal or greater~~
4 ~~accuracy as approved by rule of the State Board of Health, at the~~
5 ~~cutoff levels determined by Board rule~~ An employer's policy shall
6 state the disciplinary actions that may be taken upon a refusal to
7 undergo a drug or alcohol test or a positive test for the presence
8 of drugs or alcohol.

9 B. An employer may take disciplinary action, up to and
10 including discharge, against an employee who refuses to undergo drug
11 or alcohol testing conducted in accordance with the provisions of
12 this act or who tests positive for the presence of drugs or alcohol.

13 C. An employee discharged on the basis of a refusal to undergo
14 drug or alcohol testing or a ~~confirmed~~ positive drug or alcohol test
15 ~~conducted in accordance with the provisions of this act~~ shall be
16 considered to have been discharged for misconduct for purposes of
17 unemployment compensation benefits as provided for in Section ~~16~~ 2-
18 406A of this ~~act~~ title. In order to prove misconduct, the employer
19 need only provide proof of a testing policy and either a refusal to
20 take a drug test or a positive test result.

21 D. Notwithstanding any other language in this act, nothing in
22 this act shall preclude an employer, contracting with another
23 employer, from sharing drug or alcohol testing results with that
24

1 other contracting employer for any worker working on the employer's
2 property.

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

5 Section 563. A. Any person aggrieved by a willful violation of
6 ~~the Standards for Workplace Drug and Alcohol Testing Act~~ this act
7 may institute a civil action in a court of competent jurisdiction
8 within ~~two (2) years~~ one (1) year of the ~~person's discovery of the~~
9 ~~alleged willful violation or of the exhaustion of any internal~~
10 ~~administrative remedies available to the person,~~ or be barred from
11 obtaining the relief provided for in subsection B of this section.
12 A willful violation of this act requires proof by the preponderance
13 of the evidence that the employer had a specific intent to violate
14 this act.

15 B. A prevailing party may be awarded ~~declaratory or injunctive~~
16 ~~relief and compensatory damages which may include, but not be~~
17 ~~limited to, employment, reinstatement, promotion, the payment of~~
18 ~~lost wages and other remuneration~~ to which the person would have
19 been entitled and ~~payment of and reinstatement to full benefits and~~
20 ~~seniority rights~~ an additional equal amount as liquidated damages.
21 Interim earnings or amounts earnable with reasonable diligence by
22 the aggrieved person shall operate to reduce the back pay otherwise
23 allowable. Reasonable costs and attorney fees may be awarded to the
24 prevailing party, whether plaintiff or defendant.

1 SECTION 10. REPEALER 40 O.S. 2001, Section 561, is
2 hereby repealed.

3 SECTION 11. REPEALER 40 O.S. 2001, Section 564, is
4 hereby repealed.

5 SECTION 12. REPEALER 40 O.S. 2001, Section 565, is
6 hereby repealed.

7 SECTION 13. This act shall become effective November 1, 2011.
8 Passed the House of Representatives the 17th day of March, 2011.

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Presiding Officer of the House of
Representatives

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13 Passed the Senate the ____ day of _____, 2011.

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Presiding Officer of the Senate

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