



STATES CONTINUE TO ADD REQUIREMENTS TO DRUG TESTING:

Are you Ready?

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Recent Changes in State Drug Testing Laws



States Continue to Tinker

- Many states have enacted workplace drug testing programs or laws governing the performance of forensic drug testing of employees located within the state.
- Some of those state programs apply to all employees within the state, public and private, while other legislation and rules are targeted to specific classes of employees.
- In the last several years, states have passed laws or issued regulations that *inter alia* confirmed the applicability of their laws to testing performed outside of the state, created testing cut-offs, incorporated federal testing protocols, or created new rules for specific types of testing.



Maine

- Maine has had a mandatory workplace drug testing program since 1994.
- In 2011, the Maine Legislature amended its Substance Abuse Testing Act to exempt any employer “subject to a federally mandated drug and alcohol testing program, including, but not limited to, testing mandated by the federal Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143, Title V,” from its provisions. (681(8)).



Maine

- According to the Maine Department of Health & Human Services “if an employer has any employees who are subject to a federally mandated drug-and-alcohol testing program working in Maine, that employer may expand the federal testing pool to cover all employees and forego a policy with the State.”

http://www.maine.gov/labor/labor_laws/substance_abuse_testing/ (April 18, 2014).

Maine

- Also in 2011, the Maine Department of Health & Human Services amended its regulations to incorporate current U.S. Department of Health and Human Services cut-off levels into its testing program. (265(C)).
 - Amended regulations to permit testing of hair, oral fluid, and sweat specimens.
 - Oral fluid, hair, and sweat must be collected in accordance with federal guidelines. (265(B)(6)–(8)).
 - Provides mandatory screening and confirmation cut-off levels for hair, oral fluid, and sweat specimens. (265(C)).
 - Amended its definition of confirmation testing to include testing using “liquid chromatography.” (265(A)(7)(b)).



Illinois

- Prior to 2011, Illinois law did not contain specific requirements for worker's compensation drug testing.
- In 2011, Illinois revised its worker's compensation statute to require split specimen collections for worker's compensation post-accident testing.
 - Legislature also tasked Worker's Compensation Commission with promulgating additional testing regulations.



Illinois

- Regulations published in November 2012 raise questions as to obligations of laboratories to (1) report drug or metabolite concentrations below standard cut-off levels; (2) an MROs interpretation of those results; and (3) compliance.



Illinois

For post-accident testing, Illinois Workers' Compensation regulations now:

- Require the use of a 7-part form, and specific certifications by collector and certifying scientist.
- Require specific language for a certification by the certifying scientist: “I certify that the specimen has been examined upon receipt, analyzed, and that the results set forth are for that specimen.” No guidance is provided whether this language must appear verbatim.
- Provide for different retention periods of specimens than HHS/DOT.

Illinois

- Define a “positive result” as “the result reported by a laboratory when a specimen contains a drug or intoxicating compound or alcohol concentration of .08 or greater.” 50 Ill. Admin. Code. § 9140.5.
 - No cut-offs provided by regulations.
 - Analyte concentration in urine admissible in hearings to show impairment and intoxication.
- Define a “negative” result as “the result reported by a laboratory to an MRO when a specimen contains no drugs, other intoxicating compounds, or less than .08 of alcohol concentration and the specimen is a valid specimen. 50 Ill. Admin. Code. § 9140.5.

Failure to comply with the requirements results in loss of rebuttable presumption for the employer.

Arizona

- In 2011, Arizona made significant changes to its workplace drug testing statute.
- Statute is voluntary, but employers that comply with its provisions enjoy immunity from claims or litigation arising from actions taken in good faith based on positive drug test results. (23-493.06).
- The 2011 revisions provided definitions for specific terms under the statute. (23-493).
 - Current use of any drug.
 - Drug use that is recent enough to give rise to reasonable belief use is ongoing.
 - Recognized bases for a “Good Faith” determination by employers
 - Includes observation, test results, government records, statements, or other information believed to be reliable.



Arizona

- Significant changes include guidance as to an employer's classification of safety-sensitive positions and determinations regarding on-the-job impairment.
 - Safety-sensitive position
 - Any position that employer believes in good faith could affect the safety or health of the employee or others.
 - Impairment
 - Lengthy description of symptoms giving rise to reasonable suspicion of drug or alcohol use.



Arizona

- The 2011 revisions also expanded the claims or actions from which compliant employers are immune. (23-493.06).
 - Actions based on belief employee used drugs at work.
 - Actions based on belief employee was impaired at work.
 - Actions based on employer's exclusion from performing safety-sensitive job duties or removal from safety-sensitive position.

New York

- New York State defines clinical laboratories as any laboratory that measures or otherwise describes the presence or absence of various substances, components, or organisms in the human body, which has been interpreted to include workplace testing for controlled substances.
- In 2009, the New York Legislature amended its clinical laboratory statute to clarify that its provisions applied to any laboratory “whether located within the state or outside the state” that performed testing on specimens or samples collected in New York. (A7913 2009–10 Leg.)

New York

The Wadsworth Center of New York State's Department of Health is responsible for enforcing the rules applicable to forensic workplace drug testing of New York donors.

- In 2008, Wadsworth issued standards of practice for forensic toxicology workplace drug testing.
- In 2012, Wadsworth re-issued those standards along with other specialty testing standards.
 - Wadsworth's Standards of Practice for Workplace Drug Testing include comprehensive program requirements, including the requirement that test results be reported to a Medical Review Officer. (FTS 28).



Montana

- In 2011, Montana amended its mandatory workplace drug testing statute for employees in safety-sensitive positions.
 - The amendment added drivers and public health workers as covered employees. 39-2-206(4).
 - Focus of revisions was medical marijuana.
 - Employees not protected for medical use of marijuana that affects ability to perform job duties or conflicts with *bona fide* job qualification.



North Carolina

- North Carolina has a mandatory workplace drug testing statute applicable to all employees.
- In 2009, North Carolina revised its statute to all screening only testing for pre-employment drug testing.
 - Donor may waive confirmation testing in writing. (95-232(c1)).
 - Waiver may be given at collection or after report of presumptive positive screen result.



Rhode Island

- Rhode Island amended its testing law in both 2011 & 2013.
 - The 2011 amendment was minimal and involved the exemption of certain union workers participating in a national program. 28-6.5-1(e)(2).
 - The 2013 amendment revised the standard for reasonable suspicion drug testing.
 - Employer must now document observations on which a decision to test an employee based upon a suspicion of impairment. 28-6.5-1(a)(1).



Utah

- Utah amended its mandatory drug testing statute applicable to private employers in 2010.
 - Utah also has a separate mandatory testing law applicable to state employees.
- The amendments:
 - Clarified language;
 - Provided additional confirmation requirements; and
 - Addressed presumptions available to employers.



Utah

- Specific program changes included:
 - Confirmation testing of urine specimens must be performed by HHS-certified laboratory. 34-38-6(6)(b)(ii).
 - Rebuttable presumption exists if physician reviews test results. 34-38-10(3)(a).



Tennessee

- Since 1997, Tennessee employers who adopted a drug-free workplace program in conformance with state requirements have qualified for reduced worker's compensation insurance premiums.
- The Tennessee Department of Labor promulgated comprehensive regulations applicable to employers and industry participants performing Tennessee Drug Free testing. (0800-02-12-.07).
- In 2012, Tennessee amended its rules to adopt current U.S. Department of Health & Human Services cut-offs for covered drug testing. (0800-02-12-.01)(17).



Other Significant Changes in Drug Testing



State Programs

- In addition to direct changes to state laws that affect employers and industry participants, changes have also occurred in the posture or future posture of notable state programs.
- Two of the states with some of the most comprehensive drug testing programs in the nation have experienced or are experiencing significant changes in the enforcement or applicability of rules regarding workplace drug testing of private employees.



Federal Programs

Also on the horizon are significant changes to the U.S. Health and Human Services Mandatory Guidelines for Drug Testing of Federal Employees. The Mandatory Guidelines form the basis for the rules applicable to federal agency testing of private employees in safety-sensitive occupations and are referenced or incorporated into numerous state testing programs. The Mandatory Guidelines are also widely-considered to represent industry standards for forensic workplace drug testing and serve as an impetus for changes in state law programs.



Florida

- For many years, Florida had what was considered to be the most robust and comprehensive mandatory workplace drug testing programs in the country. Under the authority of two separate statutes, the Florida Agency for Health Care Administration enforced workplace drug testing requirements applicable to private and public employees.
- In a 2009 decision, a Florida court of appeals expressly found that an employer's compliance with the Florida drug testing requirements was voluntary.

Laguerre v. Palm Beach Newspapers, Inc.,
20 So. 3d 392 (2009).



Oklahoma

In September 2010, the United States District Court in Northern Oklahoma held that an Employer ***willfully*** violated the Oklahoma Workplace Drug and Alcohol Testing Act when it terminated an employee for testing positive for Phenobarbital—a barbiturate that employers across the United States commonly include in their workplace drug tests.

Creekmore v. Pomeroy IT Solutions, Inc. (2010).



Oklahoma continued

- The court took the view, based upon Oklahoma promulgated by the Department of Health regulations, that an employer may only test for Schedule I, II, and III drugs. Since phenobarbital is a Schedule IV drug, the court found that the employer willfully violated the Oklahoma Testing Act by testing for it.
- After this ruling, the Oklahoma legislature amended the Oklahoma Standards for Workplace Drug and Alcohol Testing Act to limit the Oklahoma Department of Health's enforcement power to authority implement regulations related to the Act.



Oklahoma continued

- Since the legislature's action in 2011, however, the Oklahoma Department of Health has not issue revised regulations or changed its stance on its rulemaking and enforcement authority.
- In February 2014, a bill was introduced in the Oklahoma Legislature that would transfer all workplace drug and alcohol enforcement and rulemaking authority from the Department of Health to Oklahoma's Department of Labor. SB 1716.



Electronic Federal CCF

SAMHSA is seeking OMB approval for an electronic CCF and has solicited comments. Federal Register Vol. 78, No. 135, Pages 42091-42099.

- Comment period ended in August 2013.
- Proposed implementation was to be September 2013.
 - Would allow the Public Burden Statement to be separate.
 - Would allow the instructions and the Privacy Act Statement to be separate.
 - Would allow the bottle labels/seals to be printed separately, and not as a part of Copy 1 of the Federal CCF.
 - Would allow the use of an electronic form.



Pending Medical Marijuana Laws

- States continue to explore and adopt legislation permitting the medical use of marijuana.
- Many other states are considering legislation at this time, which do not uniformly address the issue of employment protections.



Minnesota

- Senate passed bill on May 16, 2014.
 - Governor has agreed to sign the bill.
- Smoking prohibited.
 - Can only administer marijuana via liquids, oils, and pills.
 - Patients may vaporize, but only using oils or liquids.
 - Will provide some protection from discrimination in employment.



Florida

- **Vote on Constitutional Amendment set for November 2014 elections.**
 - Recent polls show measure would pass.
- **Amendment provides few details of what program would actually provide.**
 - Previous bills introduced in Florida did provide for employee protections.
 - Detailed regulations will be drafted if legislation is passed.

Missouri

- House Bill would explicitly prohibit discrimination in hiring on basis of “status” as qualified patient or caregiver.
 - However, bill also allows discipline for failing a drug test if employer would be at issue with federal laws for not disciplining employee.
 - No action on bill since January 2014.
- Senate Bill introduced in February 2014 provides more protection.
 - Medical marijuana is to be treated by an employer like any other prescribed substance.
 - Committee voted to move bill forward in April 2014.



Iowa

- 3 bills - two are companion bills, (i.e. identical bills in separate houses).
- The companion bills state an employee is not protected on the worksite and is silent to other issues.
 - Last action was in February 2014.
- The second bill would prohibit discrimination against patients and caregivers “solely” for being card holders.
 - Last action was in January 2013.



Georgia

- Employees would be protected from discrimination for their status as a card holder.
- Would also protect employees from adverse action for a positive drug test for marijuana unless that employee was impaired or used/possessed marijuana at their employment site during work hours.
- Patients not to be considered under the influence of marijuana because of metabolites “insufficient to cause impairment” in their drug test.
- Last action in March 2014.



New York and Puerto Rico

- **New York**

- Two bills are pending, would provide limited employee protection for status as a patient/caregiver.
- Latest action taken on one of the bills was in May 2014.
- All bills are still active.

- **Puerto Rico**

- One bill.
- Does not provide any explicit employment protections.
- Last action in March 2014.



Ohio & Pennsylvania

- **Ohio**
 - Would provide broad employment protections to all regulated persons under the statute if person in compliance with statute.
 - Would prohibit patient impairment at work although mere metabolite concentration in patient's specimen is insufficient to show impairment.
 - Last action was in May 2013.
- **Pennsylvania**
 - Would provide licensing board and criminal protection, but contains no explicit employee protections.
 - Was sent to committee in January 2014.



Pending Recreational Marijuana Laws

- Other states continue to explore legislation permitting the recreational use of marijuana.
- Most of the laws do not address employers or provide explicit employer protections to take action against marijuana use.
 - However, one state has attempted to protect employees from drug tests.



Alaska and Rhode Island

- **Alaska**

- A proposed initiative to regulate the production and retail sale of marijuana will appear on the November 2014 ballot.
- Initiative explicitly provides employers not required to accommodate marijuana possession/use. Silent on drug testing.

- **Rhode Island**

- Two identical bills in house and senate. Bill would tax and legalize marijuana. Bill provides employers do not have to accommodate use, possession, or impairment while working. Silent on drug testing.
- DUI – no DUI if metabolites “insufficient to cause impairment” are found in blood/urine sample.
- House Bill last acted on in April 2014. To be held for further study. Senate Bill last acted on in February 2014 and sent to committee.



Massachusetts and New Jersey

- **Massachusetts**

- One bill to tax and regulate marijuana.
- Silent on issues of employment.
- Last action on bill on April 24, 2014 where a hearing was held by judiciary committee.

- **New Jersey**

- Two bills to legalize marijuana, one is standard legislation, other would put measure on ballot.
- Neither bill provides employee protections and one explicitly states the employer can take any action in regards to recreational marijuana against employee.
- New Jersey Governor has stated will veto any recreational marijuana bill if passed.



Ohio and Pennsylvania

- **Ohio**

- Would put issue to tax and regulate marijuana on a ballot if passed.
- Statute explicitly provides employer can take any action in regards to marijuana use.
- Last action was in May 2013 where it was sent to committee.

- **Pennsylvania**

- Two bills, the first would tax and regulate marijuana and would allow an employer to take action against an employee except: “a random drug test showing the mere presence of a nonintoxicating level of marijuana may not be the basis of the termination of employment or another disciplinary action against the employee.”
 - Last action was in April 2013 when bill was introduced.
- The second bill would provide for a non-binding statewide referendum relating to legalizing marijuana
 - The last action was in March 2014.



Washington D.C.

One Bill and One Proposed Initiative

- The current bill would tax and regulate marijuana in Washington D.C.
 - Silent as to employers/employment situations.
 - Last acted upon in September 2013.
- Proposed Initiative
 - The D.C. Board of elections cleared a group to attempt to obtain signatures to obtain a ballot vote on legalizing medical marijuana.
 - They are in the process of gathering signatures.