# **12 DEPARTMENT OF LABOR**

**170 BUREAU OF LABOR STANDARDS**

**Chapter 7: RULES RELATING TO SUBSTANCE ABUSE TESTING**

SECTION 1. DEFINITIONS

 A. Authorizing Statute - means 26 M.R.S.A. c.7, sub-c. III-A.

 B. Department - means the Maine Department of Labor, Bureau of Labor Standards. (Note: Any correspondence should be directed to Director, Bureau of Labor Standards, State House Station #45, Augusta, Maine 04333-0045.)

 C. Department of Human Services Rules - means rules adopted by the Department of Human Services under the authority of, or referenced in, 26 M.R.S.A. c. 7, sub-c. III-A.

 D. Director - means the Director of the Bureau of Labor Standards, Maine Department of Labor or designee.

 E. Employee Assistance Program (EAP) -- means an employee assistance program certified by the Department of Human Services or the Office of Substance Abuse.

 F. Policy - means an employer's written substance abuse testing policy as it will be presented to the employees or applicants covered.

 G. Random or Arbitrary - means a method of selecting those to be tested where all potential testees have an equal chance of selection by chance or where testing is based on criteria unrelated to substance abuse such as an anniversary or hiring.

 H. Point of Collection Testing (POCT) ‑ means an initial screening test performed at the site where the sample is collected using a non‑instrumented testing device approved for that purpose by the federal Food & Drug Administration.

SECTION 2. EMPLOYEE CONSULTATION AND EMPLOYEE AND APPLICANT NOTIFICATION REQUIREMENTS

 A. An employer shall consult with the employer's employees in the development of any section of a substance abuse testing policy and/or amendment which refers to employee testing. Consult means a two‑way communication between the employer and the employees regarding the proposed substance abuse testing policy. A committee formed to develop a random or arbitrary testing program under part 3 (CC) does not meet this requirement except as it regards the random or arbitrary program.

 B. An employer shall give, at the time of its submission, individual written notice to employees that it has submitted a substance abuse testing policy and/or amendment to the Department for review. The notice must inform employees that they may submit written comments to the Department, as well as where and how an employee may review the proposed policy if not provided with the notice. The notice must inform employees of the manner and time frame in which they may comment to the Department and must display prominently the address of the Department. This requirement covers all policies even those which do not in any way pertain to employees.

 C. An employer whose policy includes employee testing shall provide each employee with a copy of the written policy approved by the Department at least 30 days before the policy takes effect.

 D. An employer whose amendment includes employee testing shall provide each employee with a copy of the written amendment approved by the Department at least 60 days before the amendment takes effect.

 E. An employer shall provide a copy of the approved written policy to applicants before administering a substance abuse test. At a minimum, each applicant must be notified in writing at the time of application that they may be subject to a substance abuse test if selected for employment or placed on a roster, as well as where they may review the statute and the employer's written policy.

 F. Nothing in this section is meant to inhibit additional methods of applicant and/or employee involvement.

SECTION 3. REQUIREMENTS FOR EMPLOYERS' WRITTEN SUBSTANCE ABUSE POLICY

 A. Policy Format

 1. Individual employer policies must be a single document) written in a manner that is understandable to a large majority of the employees and applicants. Provisions should be made within the policy for additional information or assistance to be made available to an employee or applicant, if requested.

 2. To facilitate prompt review of and action on individually submitted employer policies, a specific format is requested. Failure to comply with the requested format may result in the submission being returned without Department approval.

 3. The authorizing statute is very specific in many areas; therefore, it is required that the employer use both the statute and Department of Labor and Human Service's rules in developing a policy.

 4. The following outline should be used in developing a policy as a minimum standard. Employers are encouraged to write the policy as a narrative. The sections concerning probable cause testing of employees, random or arbitrary testing of employees, and testing of applicants are optional, but must be included if they are to be a part of the employer's substance abuse testing policy.

 a. Covered Establishment

 i. Company name

 AA. Location

 BB. Mailing address

 CC. Phone number

 ii. Contact regarding substance abuse testing policy

 AA. Location

 BB. Phone number

 b. Scope of Testing

 i. Substances to be tested for:

 AA. Specify substances and specify for each as allowed by statute and Department of Human Services rules,

 1) test procedure to be used and cut-off limit for positive screening test,

 2) test procedure to be used and cut-off limit for positive confirmation test.

 ii. Probable Cause Testing of Employees:

 AA. Classifications or position titles of employees that will be tested based on probable cause. An employer may elect to cover all employees under probable cause testing.

 BB. Classifications or position titles that may make a determination of probable cause.

 CC. Method by which determination will be communicated to the employee.

 iii. Random or Arbitrary Testing of Employees:

 AA. If the employer and the employees have negotiated an agreement covering random or arbitrary testing of employees, the policy shall so state that it is a product of a bargained agreement and Identify those classifications or position titles that are subject to random or arbitrary testing, as well as the procedure for selecting those individuals to be tested.

 The collective bargaining agreement or appropriate sections; must be attached to the submission as an exhibit.

 BB. If the employer does not have a collective bargaining agreement which covers random or arbitrary testing, the policy must show:

 1) Those classifications or position titles which are subject to random or arbitrary testing.

 a) The policy must include for each classification or position title a concise statement as to why the work is of a nature which would create an unreasonable threat to the health or safety of the public or co-workers if the employee were under the influence of a substance of abuse.

 (NOTE: It is the stated statutory intent that this section be "narrowly construed.")

 b) A more complete description of each position and a full justification for random or arbitrary testing must be submitted as an attachment provided with the policy.

 2) The procedure for selecting those individuals to be tested.

 CC. An employer having 50 or more employees who are not covered by a collective bargaining agreement may establish a random. or arbitrary testing program which applies to all employees. The written policy with respect to the parts of the policy addressing the random or arbitrary testing program must meet the standards below.

 1) The employer shall appoint a committee of employees to develop the random or arbitrary testing program. The committee must consist of:

 a) at least 10 of the employer's employees from a cross‑section of employees eligible to be tested; and

 b) a medical professional trained in substance abuse testing procedures. If no such person is employed by the employer, the employer shall obtain the services of a person meeting these qualifications to serve on the committee.

 2) Selection of employees to be tested under the random or arbitrary testing program must be done as follows:

 a) Selection of employees to be tested must be performed by a person or entity not subject to influence by the employer, such as a Medical Review Officer.

 b) Selection must be from a list of all subject employees provided by the employer. The list may not contain information that would identify the employees to the person or entity making the selection.

 c) Employees covered under a collective bargaining agreement may not be included in the testing allowed pursuant to this paragraph unless they agree to be included under a collective bargaining agreement.

 3) The policy developed by the committee must be approved by the Department of Labor. The employer may not change the policy regarding the random or arbitrary testing program without approval of the committee. The employer may choose not to submit the random or arbitrary testing program for approval and not to establish random or arbitrary testing program.

 4) The employer may not discriminate against employees who participate or refuse to participate on the committee.

 iv. Testing of Applicants:

 AA. Classifications or position titles to be tested. An employer may elect to cover all applicants under applicant testing.

 c. Consequences of Testing:

 i. Action to be taken for refusal to submit to a test.

 AA. Employee

 BB. Applicant

 ii. Action to be taken between a test and receipt of test results.

 iii. Action to be taken based on confirmed positive result from a test of an employee.

 AA. Opportunity for rehabilitation

 BB. Action to be taken upon refusal to use rehabilitation resources.

 CC. Procedures for returning the employee to the previously held job or position after rehabilitation.

 iv. Action to be taken based on a subsequent confirmed positive test result.

 v. Action to be taken based on a confirmed positive result from a test of an applicant.

 vi. Action to be taken based on an employee's voluntary admission of a substance abuse problem and description of any available assistance and procedure for the employee.

 d. Testing Procedures:

 i. Identify sample collection facility or facilities.

 ii. Method of sample collection.

 a) Right of the testee to segregate a portion of the sample for testing at a laboratory of their choice.

 b) Procedure regarding removal of clothing. (Note: This should describe the specific procedure to be used at the facility or facilities where sample collection takes place.)

 c) Statement that the testee will not be observed, directly or indirectly.

 d) Any actions that will be taken to ensure that the sample has not been substituted, adulterated, diluted or otherwise tampered with must be described. These actions must conform with the Department of Human Services Rules.

 e) If and how the employer will use point of collect tests.

 iii. Storage of sample.

 iv. Chain of custody.

 v. identify testing facility or facilities.

 vi. Procedure for notifying employee or applicant of the result.

 vii. Procedure for an employee or applicant to appeal and contest the accuracy of a confirmed positive result. At least one option for the appeal process must be at no cost to the employee or applicant.

 e. Description of Rehabilitation Service

 i. Description of employee assistance program services.

 ii. Description of any additional rehabilitation services.

 iii. Procedure to obtain services.

 vii. Description of any possible employee payment for rehabilitation services allowed under 26 M.R.S.A. Section 685, 2., c.

SECTION 4. DEPARTMENT OF LABOR REVIEW PROCESS

 A. Submission

 1. Employers wishing to establish a substance abuse testing program after January 1, 1990 shall submit to the Director **two** copies of the following.

 a. A signed letter of submission from an authorized company official.

 b. A written policy in compliance with the authorizing statutes and applicable rules adopted by the Departments of Labor and Human Services.

 c. Additional submissions which are not part of the policy, but which will assist the Department in reviewing the policy as applicable.

 i. Description of the method the employer used in consulting with employees in the development of the policy, as well as the substance and impact of that consultation, if applicable.

 ii. Description of the method the employer used to inform employees of the submission of the plan to the Department, manner and time frame that employees may comment to the Department.

 iii. Description of the method to be used by the employer to notify employees following approval of the policy. At a minimum, this method must provide each employee with a copy of the approved policy, and a notice as to the effective date(s) on which testing may begin, if applicable.

 iv. Blank samples of any and all forms, information sheets, or other materials used by the employer with their employees and applicants relating to the substance abuse testing program.

 v. A copy of a collective bargaining agreement or appropriate sections must be included by those employers having a labor-management agreement concerning substance abuse testing.

 vi. Any additional detailed information to support employer's rationale for determination of any specific classifications or position titles as appropriate for random or arbitrary testing.

 vii. Certification by the Department of Human Services of compliance of testing laboratories and procedures with the authorizing statute and appropriate Department of Human Services rules.

 viii. Certification by the Department of Human Services of compliance of the employee assistance program with the authorizing statute and appropriate Department of Human Services or Office of Substance Abuse rules.

 ix. Signed employer certification that submittal complies with all applicable statutes and regulations including employee notification requirements.

 (Note: This can be presented as a part of the transmittal letter in Section 4 A, 1 a.)

 2. The Department shall notify the employer in writing of the date it has received the employer's submission.

 B. Review Process

 1. The Department review will be to assure compliance with the authorizing statute and applicable rules.

 2. The Department shall allow a minimum of ten days to receive employees' written comments before a final approval determination is made. The ten days will start when the employer notifies employees that it has submitted a policy to the Department for consideration, and has made copies available to interested employees or their representative.

 The comment period will not preclude the Department from starting its review, requesting additional information or clarification, or denying a part or all of a plan that is not in compliance.

 3. The Department may consult with the Department of Human Services and/or the Office of Substance Abuse during a review to ensure compliance with their rules or the statute.

 C. Notification

 The employer will be notified at the earliest possible date of the need for additional information, clarification, and of the Departments final action.

 1. Denial

 a. The Department may deny approval of an entire policy if it is in noncompliance with the authorizing statute and applicable rules and/or is an incomplete submission.

 b. A portion of a policy may be denied while other significant portions that are in compliance with the authorizing statutes and applicable rules are approved as long as that part denied is not basic to the whole. Whenever possible, the Department will seek to act on an employer's policy as a whole.

 c. The Department shall notify the employer in writing of its decision and identify the area(s) where the policy was in noncompliance.

 2. Approval

 a. The Department shall notify the employer in writing as to the date of the approval.

 b. The employer must wait a minimum of thirty (30) days after employees are notified as required by statute and these rules to start Initial testing. Testing of applicants may commence at any time after a policy has been approved.

SECTION 5. AMENDMENT OR DISCONTINUANCE OF APPROVED PROGRAM

 A. Amendment

 1. The same procedures that govern the establishment of a substance abuse testing policy will apply to amending an existing approved program except as provided for below.

 2. The employer must wait a minimum of sixty (60) days after employees are notified as required by statute and these rules to start testing under the amendment. Testing of applicants may commence at any time after an amendment has been approved.

 3. Approved policies will need to comply with statutory or regulatory changes prior to the effective dates of such changes through amendments as appropriate.

 4. Employers with approved policies must notify the Department of any changes In EAP services, sample collection and/or testing facilities used. Notification must include certification of the new service provider(s) from the Department of Human Services. If the services, methods, or practices as described in the policy remain unchanged, the change of service provider(s) does not constitute an amendment. If described services, methods, or practices are changed, an amendment is needed.

 5. Changes to job titles or classifications used in a policy which do not change the testing status of an employee do not constitute an amendment. Any changes which change the testing status of any employee will be considered an amendment.

 6. Changes of address or of the company contact person(s) do not constitute an amendment, although policies must be revised and the Department notified.

 B. Discontinuance

 1. An employer shall notify the Department and employees In writing if it chooses to discontinue an approved substance abuse testing policy. The notice must include the effective date.

 2. The Department shall withdraw approval for any discontinued policy.

 3. Discontinuance of a portion of a policy will be treated as an amendment.

SECTION 6. ONGOING POLICY REVIEW AND DEPARTMENT RESPONSIBILITIES

 A. The Department may review any approved policy at any time and may grant limited approval or withdraw approval from the policy, in whole or part, if it is found in noncompliance, or there is insufficient evidence to establish compliance.

 B. The Department reserves the right to request additional information from an employer with an approved policy at any time.

 C. The Department may establish a time period for regular review or re‑application of existing approved policies.

 D. The Department shall notify all employers with approved policies and the Department of Human Services of any proposed amendments of these rules.

STATUTORY AUTHORITY: 26 M.R.S.A. c. 7, sub-c. III-A

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