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State of Minnesota
HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH SESSION

H. F. No. 3277

03/24/2014 Authored by Erhardt

The bill was read for the first time and referred to the Committee on Labor, Workplace and Regulated Industries

1.1 A bill for an act
1.2 relating to employers; permitting and regulating on-site drug and alcohol testing
1.3 at employer work sites; amending Minnesota Statutes 2012, sections 181.950,
1.4 subdivisions 5, 8, by adding a subdivision; 181.951, subdivision 1; 181.952;
1.5 181.953, subdivisions 1, 3, 4, 5, 7, by adding a subdivision; 181.954, subdivision
1.6 1; proposing coding for new law in Minnesota Statutes, chapter 181.

1.7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.8 Section 1. Minnesota Statutes 2012, section 181.950, subdivision 5, is amended to read:

1.9 Subd. 5. **Drug and alcohol testing.** "Drug and alcohol testing," "drug or alcohol
1.10 testing," and "drug or alcohol test" mean analysis of a body component sample according
1.11 to the standards established under one of the programs listed in section 181.953,
1.12 subdivision 1, for the purpose of measuring the presence or absence of drugs, alcohol,
1.13 or their metabolites in the sample tested.

1.14 Sec. 2. Minnesota Statutes 2012, section 181.950, subdivision 8, is amended to read:

1.15 Subd. 8. **Initial screening test.** "Initial screening test" means a drug or alcohol
1.16 test which is either:

1.17 (1) a test that uses a method of analysis under one of the programs listed in section
1.18 181.953, subdivision 1; or

1.19 (2) an on-site test as defined in subdivision 9a.

1.20 Sec. 3. Minnesota Statutes 2012, section 181.950, is amended by adding a subdivision
1.21 to read:

1.22 Subd. 9a. **On-site test.** "On-site test" means a drug or alcohol test that:

2.1 (1) can be administered at the employer's work site or elsewhere and does not require
 2.2 the involvement of a laboratory, including testing by use of a single-use test device, known
 2.3 as an on-site or quick testing device;

2.4 (2)(i) is in the form of a sealed container or cartridge that has a validity check, a
 2.5 nonresealable closure, or an evidentiary tape that ensures detection of any tampering;

2.6 (ii) is self-contained and individually packaged;

2.7 (iii) is discarded after each test; and

2.8 (iv) does not allow any test component or constituent of a test system to interact
 2.9 between tests; and

2.10 (3) has been cleared by the United States Food and Drug Administration for
 2.11 commercial marketing under section 510(k) of the federal Food, Drug, and Cosmetic Act
 2.12 in the case of a drug test, or meets federal Department of Transportation guidelines as
 2.13 provided by Code of Federal Regulations, title 49, section 40, in the case of an alcohol test.

2.14 Sec. 4. Minnesota Statutes 2012, section 181.951, subdivision 1, is amended to read:

2.15 Subdivision 1. **Limitations on testing.** (a) An employer may not request or require
 2.16 an employee or job applicant to undergo drug and alcohol testing except as authorized
 2.17 in this section.

2.18 (b) An employer may not request or require an employee or job applicant to undergo
 2.19 drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol
 2.20 testing policy that contains the minimum information required in section 181.952; and,
 2.21 except in the case of an on-site test conducted in compliance with section 181.9535, is
 2.22 conducted by a testing laboratory which participates in one of the programs listed in
 2.23 section 181.953, subdivision 1.

2.24 (c) An employer may not request or require an employee or job applicant to undergo
 2.25 drug and alcohol testing on an arbitrary and capricious basis.

2.26 Sec. 5. Minnesota Statutes 2012, section 181.952, is amended to read:

2.27 **181.952 POLICY CONTENTS; PRIOR WRITTEN NOTICE.**

2.28 Subdivision 1. **Contents of the policy.** An employer's drug and alcohol testing
 2.29 policy must, at a minimum, set forth the following information:

2.30 (1) the employees or job applicants subject to testing under the policy;

2.31 (2) the circumstances under which drug or alcohol testing may be requested or
 2.32 required;

2.33 (3) whether the employer uses on-site testing;

3.1 ~~(3)~~ (4) the right of an employee or job applicant to refuse to undergo drug and
 3.2 alcohol testing and the consequences of refusal;

3.3 ~~(4)~~ (5) any disciplinary or other adverse personnel action that may be taken based on
 3.4 a confirmatory test verifying a positive test result on an initial screening test;

3.5 ~~(5)~~ (6) the right of an employee or job applicant to explain a positive test result on a
 3.6 confirmatory test or request and pay for a confirmatory retest; and

3.7 ~~(6)~~ (7) any other appeal procedures available.

3.8 Subd. 2. **Notice.** An employer shall provide written notice of its drug and alcohol
 3.9 testing policy to all affected employees upon adoption of the policy or modification of
 3.10 the policy, to a previously nonaffected employee upon transfer to an affected position
 3.11 under the policy, and to a job applicant upon hire and before any testing of the applicant
 3.12 if the job offer is made contingent on the applicant passing drug and alcohol testing.

3.13 An employer shall also post notice in an appropriate and conspicuous location on the
 3.14 employer's premises that the employer has adopted a drug and alcohol testing policy and
 3.15 that copies of the policy are available for inspection during regular business hours by its
 3.16 employees or job applicants in the employer's personnel office or other suitable locations.

3.17 Sec. 6. Minnesota Statutes 2012, section 181.953, subdivision 1, is amended to read:

3.18 Subdivision 1. **Use of licensed, accredited, or certified laboratory required.** (a)
 3.19 Except when conducting an on-site test according to the requirements of section 181.9535,
 3.20 an employer who requests or requires an employee or job applicant to undergo drug or
 3.21 alcohol testing shall use the services of a testing laboratory that meets one of the following
 3.22 criteria for drug testing:

3.23 (1) is certified by the National Institute on Drug Abuse as meeting the mandatory
 3.24 guidelines published at 53 Federal Register 11970 to 11989, April 11, 1988;

3.25 (2) is accredited by the College of American Pathologists, 325 Waukegan Road,
 3.26 Northfield, Illinois, 60093-2750, under the forensic urine drug testing laboratory program;
 3.27 or

3.28 (3) is licensed to test for drugs by the state of New York, Department of Health,
 3.29 under Public Health Law, article 5, title V, and rules adopted under that law.

3.30 (b) For alcohol testing, the laboratory must either be:

3.31 (1) licensed to test for drugs and alcohol by the state of New York, Department of
 3.32 Health, under Public Health Law, article 5, title V, and the rules adopted under that law; or

3.33 (2) accredited by the College of American Pathologists, 325 Waukegan Road,
 3.34 Northfield, Illinois, 60093-2750, in the laboratory accreditation program.

4.1 Sec. 7. Minnesota Statutes 2012, section 181.953, subdivision 3, is amended to read:

4.2 Subd. 3. **Laboratory testing, reporting, and sample retention requirements.** A
4.3 testing laboratory that is not certified by the National Institute on Drug Abuse according to
4.4 subdivision 1 shall follow the chain-of-custody procedures prescribed for employers in
4.5 subdivision 5. A testing laboratory shall conduct a confirmatory test on all samples that
4.6 produced a positive test result on an initial screening test. A laboratory shall disclose to the
4.7 employer a written test result report for each sample tested within three working days after
4.8 a negative test result on an initial screening test or, when the initial screening test produced
4.9 a positive test result, within three working days after a confirmatory test. A test report must
4.10 indicate the drugs, alcohol, or drug or alcohol metabolites tested for and whether the test
4.11 produced negative or positive test results. A laboratory shall retain and properly store for
4.12 at least six months all samples that produced a positive test result. For the purposes of this
4.13 subdivision, a test performed by a testing laboratory on a sample that has already produced
4.14 a positive result in an on-site test is a confirmatory test and not an initial screening test.

4.15 Sec. 8. Minnesota Statutes 2012, section 181.953, subdivision 4, is amended to read:

4.16 Subd. 4. **Prohibitions on employers.** An employer may not conduct drug or
4.17 alcohol testing of its own employees and job applicants using a testing laboratory owned
4.18 and operated by the employer; except that, one agency of the state may test the employees
4.19 of another agency of the state. Except as provided in subdivision 9, an employer may
4.20 not request or require an employee or job applicant to contribute to, or pay the cost of,
4.21 drug or alcohol testing under sections 181.950 to 181.954. Nothing in this subdivision
4.22 prevents an employer from conducting an on-site test that complies with the requirements
4.23 of section 181.9535.

4.24 Sec. 9. Minnesota Statutes 2012, section 181.953, subdivision 5, is amended to read:

4.25 Subd. 5. **Employer chain-of-custody procedures.** An employer shall establish
4.26 its own reliable chain-of-custody procedures to ensure proper record keeping, handling,
4.27 labeling, and identification of the samples to be tested. The procedures must require
4.28 the following:

4.29 (1) possession of a sample must be traceable to the employee from whom the sample
4.30 is collected, from the time the sample is collected through the time the sample is delivered
4.31 to the laboratory or, in the case of an on-site test that produces a negative result, otherwise
4.32 disposed of by the employer or other person conducting the test;

4.33 (2) the sample must always be in the possession of, must always be in view of, or
4.34 must be placed in a secured area by a person authorized to handle the sample;

- 5.1 (3) a sample must be accompanied by a written chain-of-custody record; and
 5.2 (4) individuals relinquishing or accepting possession of the sample must record
 5.3 the time the possession of the sample was transferred and must sign and date the
 5.4 chain-of-custody record at the time of transfer.

5.5 Sec. 10. Minnesota Statutes 2012, section 181.953, is amended by adding a subdivision
 5.6 to read:

5.7 Subd. 5a. **Adulteration prohibited.** No employer or other party having control over
 5.8 a sample collected from an employee shall adulterate, tamper with, or change the chemical
 5.9 composition of a sample with the intent of affecting the test results. This subdivision does
 5.10 not prohibit any action that is taken in accordance with the manufacturer instructions of an
 5.11 on-site test or is performed by a laboratory in the normal course of its testing procedures.

5.12 Sec. 11. Minnesota Statutes 2012, section 181.953, subdivision 7, is amended to read:

5.13 Subd. 7. **Notice of test results.** (a) Within three working days after receipt of
 5.14 a test result report from the a testing laboratory, an employer shall inform in writing an
 5.15 employee or job applicant who has undergone drug or alcohol testing of (1) a negative test
 5.16 result on an initial screening test or of a negative or positive test result on a confirmatory
 5.17 test and (2) the right provided in subdivision 8. In the case of a positive test result on a
 5.18 confirmatory test, the employer shall also, at the time of this notice, inform the employee
 5.19 or job applicant in writing of the rights provided in subdivisions 6, paragraph (b), 9, and
 5.20 either subdivision 10 or 11, whichever applies.

5.21 (b) No later than the first business day after an employer or other person completes
 5.22 an on-site test, the person shall inform an employee or job applicant who has undergone
 5.23 drug or alcohol testing of:

5.24 (1) the positive or negative result of the on-site test; and

5.25 (2) in the case of a positive result:

5.26 (i) that the original sample is being sent to a testing laboratory where a confirmatory
 5.27 test will be completed; or

5.28 (ii) if the original sample is degraded, is no longer in existence, or was a sample
 5.29 taken for a single-use test device, known as an on-site or quick testing device, that the
 5.30 employee must undergo drug or alcohol testing at a laboratory at which time a new initial
 5.31 test must be conducted according to the requirements of this section.

5.32 (c) All information required to be given to an employee under sections 181.950 to
 5.33 181.957 must be provided in the employee's predominant language, if that language
 5.34 is known to the employer. The employer or other person administering the test may

6.1 use printed information, translators, or interpreters as appropriate to the particular
6.2 circumstances.

6.3 Sec. 12. **[181.9535] ON-SITE TESTING.**

6.4 Subdivision 1. **Scope.** Any employer who conducts an on-site test must comply with
6.5 the requirements of this section. An employer must not discharge, discipline, discriminate
6.6 against, or request or require rehabilitation of an employee on the basis of a positive test
6.7 result from an on-site test.

6.8 Subd. 2. **Employees covered by collective bargaining agreement.** On-site testing
6.9 must not be used to test any employee who is covered by a collective bargaining agreement
6.10 unless the collective bargaining agreement expressly authorizes the use of on-site testing.

6.11 Subd. 3. **Person administering test.** An employer may use an on-site test either by
6.12 conducting the test at the work site or by having the test performed elsewhere by a person
6.13 authorized by the employer to perform the test, provided that any third party performing a
6.14 test on an employer's behalf must comply with the requirements of this subdivision. An
6.15 on-site test may be administered only by an individual who:

6.16 (1) has been trained on the proper procedure for administering the test and accurate
6.17 evaluation of test results, including:

6.18 (i) instruction on the contents of the manufacturer's package insert as submitted and
6.19 approved by the federal Food and Drug Administration; and

6.20 (ii) completion of the manufacturer's self-test and written examination, if any;

6.21 (2) has agreed in writing with the employer to hold all information related to any
6.22 phase of the drug test confidential according to state law; and

6.23 (3) has received information from the employer regarding the employer's drug and
6.24 alcohol testing policy, the collection and handling methods to be used, and the protections
6.25 available to the employee.

6.26 Subd. 4. **Test to be conducted according to manufacturer's instructions.** An
6.27 on-site test must be conducted according to the instructions provided by the manufacturer
6.28 of the testing product or products being used. If a manufacturer recommends particular
6.29 procedures to maximize the reliability of the test, those practices must be followed by
6.30 the employer.

6.31 Subd. 5. **Collection site.** The employer or other person administering the on-site
6.32 test must provide a safe, private, and clean site for collection of the sample. If the sample
6.33 involves the collection of urine, the person administering the test must not directly observe
6.34 the employee or job applicant while the employee or applicant is providing the sample.

7.1 Subd. 6. **Requirements for sample container.** Employers may use on-site testing
7.2 only if the testing process provides for collection of the sample using a container that:

7.3 (1) can be securely closed by the employee once the initial screen testing process has
7.4 been completed and cannot be opened except at the laboratory as part of a confirmatory
7.5 testing process;

7.6 (2) when closed after the sample is provided, has no holes or other openings that
7.7 would allow access to the sample; and

7.8 (3) is otherwise designed in such a way that the employer or person administering
7.9 the test has no direct access to the sample at any time after the initial process is completed
7.10 and before the sample is disposed of or the container is opened by a testing laboratory as
7.11 part of a confirmatory test.

7.12 Subd. 7. **Adulteration testing by employer.** If the sample involves the collection
7.13 of urine, no employer may open or bring any substance or object in contact with any
7.14 sample that has been provided by an employee in a collection device that has been closed
7.15 according to the manufacturer's instructions. If a sample is tested for adulterants, the
7.16 employee or applicant must be allowed to observe the procedure.

7.17 Subd. 8. **Employee control over disposable items.** (a) If an on-site test uses any
7.18 disposable, single-use equipment, such as collection containers or items used to test for
7.19 adulteration of the sample, those items must be individually packaged and must remain
7.20 sealed until immediately before use. With respect to these disposable, single-use items,
7.21 the person administering the test must permit the employee to:

7.22 (1) inspect the item while it is still sealed and observe the unsealing of the package;
7.23 and

7.24 (2) observe the item at all times between when it is opened and when its use is
7.25 completed.

7.26 (b) Before any on-site testing is performed, an employer must inform an employee
7.27 both orally and in writing of the employee's rights under this subdivision.

7.28 Subd. 9. **Recording results.** If the on-site test does not create a permanent record
7.29 documenting the result, then the person administering the test must immediately document
7.30 the result of the test by creating a written document describing the test result. This
7.31 document must state:

7.32 (1) whether the result was positive or negative; and

7.33 (2) describe what was observed, such as changes in color or the appearance of
7.34 marks or symbols, that led the individual administering the test to conclude that the result
7.35 was positive or negative. If the on-site test is designed to create a permanent record of
7.36 the result, or if the employer creates any written record of a test result, the record must

8.1 be retained by the employer for at least three years, and a copy of the record must be
8.2 available to the employee if copying is practical.

8.3 Subd. 10. **Handling of urine sample.** If the sample involves the collection of
8.4 urine, the employer or other person administering the test must employ chain-of-custody
8.5 procedures according to section 181.953, subdivision 5, in connection with any on-site
8.6 testing. If the result of an on-site test is negative, the person administering the test shall
8.7 immediately dispose of the sample. If the result of an on-site test is positive, the person
8.8 administering the test shall transport the original sample to a testing laboratory which shall
8.9 perform a confirmatory test, unless the original sample was taken for use with a single-use
8.10 test device, known as an on-site or quick testing device. In conducting the confirmatory test,
8.11 the testing laboratory must comply in all respects with the requirements of section 181.953.

8.12 Subd. 11. **Freedom to collectively bargain.** The provisions of section 181.955
8.13 apply to all on-site testing and on-site testing policies of employers.

8.14 Subd. 12. **Federal preemption.** The provisions of section 181.957 apply to all
8.15 on-site testing and on-site testing policies of employers.

8.16 Sec. 13. Minnesota Statutes 2012, section 181.954, subdivision 1, is amended to read:

8.17 Subdivision 1. **Privacy limitations.** (a) A laboratory may only disclose to the
8.18 employer test result data regarding the presence or absence of drugs, alcohol, or their
8.19 metabolites in a sample tested.

8.20 (b) An employer who collects a sample from an employee to perform an on-site test
8.21 must not retain or use the sample for any purpose other than determining (1) whether the
8.22 sample has been adulterated; and (2) the presence or absence of drugs, alcohol, or their
8.23 metabolites in the sample. Any other information the employer obtains from the process
8.24 of collecting, testing, storing, or transporting the sample must not be recorded by the
8.25 employer and must not be used as grounds for discipline, dismissal, or other action against
8.26 an employee or prospective employee.