

CHAPTER 388—H.F.No. 42

An act relating to employment; regulating drug and alcohol testing of employees and job applicants; proposing coding for new law in Minnesota Statutes, chapter 181.

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

DRUG AND ALCOHOL TESTING IN THE WORKPLACE

Section 1. [181.950] DEFINITIONS.

Subdivision 1. APPLICABILITY. For the purposes of sections 1 to 8, the terms and phrases defined in this section have the meanings given them.

Subd. 2. CONFIRMATORY TEST; CONFIRMATORY RETEST. "Confirmatory test" and "confirmatory retest" mean a drug or alcohol test that uses a method of analysis approved by the commissioner under section 4, subdivision 1, as being reliable for providing specific data as to the drugs, alcohol, or their metabolites detected in an initial screening test.

Subd. 3. COMMISSIONER. "Commissioner" means the commissioner of the department of health.

Subd. 4. DRUG. "Drug" means a controlled substance as defined in section 152.01, subdivision 4.

Subd. 5. DRUG AND ALCOHOL TESTING. "Drug and alcohol testing," "drug or alcohol testing," and "drug or alcohol test" mean analysis of a body component sample approved by the commissioner under section 4, subdivision 1, for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested.

Subd. 6. EMPLOYEE. "Employee" means a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer.

Subd. 7. EMPLOYER. "Employer" means a person or entity located or doing business in this state and having one or more employees, and includes the state and all political or other governmental subdivisions of the state.

Subd. 8. INITIAL SCREENING TEST. "Initial screening test" means a drug or alcohol test which uses a method of analysis approved by the commissioner under section 4, subdivision 1, as being capable of providing data as to general classes of drugs, alcohol, or their metabolites.

Subd. 9. JOB APPLICANT. "Job applicant" means a person, independent contractor, or person working for an independent contractor who applies to become an employee of an employer, and includes a person who has received a job offer made contingent on the person passing drug or alcohol testing.

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Subd. 10. POSITIVE TEST RESULT. “Positive test result” means a finding of the presence of drugs, alcohol, or their metabolites in the sample tested in levels at or above the threshold detection levels set by the commissioner under section 4, subdivision 1.

Subd. 11. RANDOM SELECTION BASIS. “Random selection basis” means a mechanism for selection of employees that (1) results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected and (2) does not give an employer discretion to waive the selection of any employee selected under the mechanism.

Subd. 12. REASONABLE SUSPICION. “Reasonable suspicion” means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.

Subd. 13. SAFETY-SENSITIVE POSITION. “Safety-sensitive position” means a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person.

Sec. 2. [181.951] AUTHORIZED DRUG AND ALCOHOL TESTING.

Subdivision 1. LIMITATIONS ON TESTING. (a) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section.

(b) An employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required in section 3; and, is conducted by a testing laboratory licensed under section 4, subdivision 1, or by a nonlicensed laboratory as transitionally allowed under section 4, subdivision 2.

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

Subd. 2. JOB APPLICANT TESTING. An employer may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position. If the job offer is withdrawn, as provided in section 4, subdivision 11, the employer shall inform the job applicant of the reason for its action.

Subd. 3. ROUTINE PHYSICAL EXAMINATION TESTING. An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.

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Subd. 4. RANDOM TESTING. An employer may request or require only employees in safety-sensitive positions to undergo drug and alcohol testing on a random selection basis.

Subd. 5. REASONABLE SUSPICION TESTING. An employer may request or require an employee to undergo drug and alcohol testing if the employer has a reasonable suspicion that the employee:

(1) is under the influence of drugs or alcohol;

(2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy;

(3) has sustained a personal injury, as that term is defined in section 176.011, subdivision 16, or has caused another employee to sustain a personal injury; or

(4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

Subd. 6. TREATMENT PROGRAM TESTING. An employer may request or require an employee to undergo drug and alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan, in which case the employee may be requested or required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency treatment program.

Subd. 7. NO LEGAL DUTY TO TEST. Employers do not have a legal duty to request or require an employee or job applicant to undergo drug or alcohol testing as authorized in this section.

Sec. 3. [181.952] POLICY CONTENTS; PRIOR WRITTEN NOTICE.

Subdivision 1. CONTENTS OF THE POLICY. An employer's drug and alcohol testing policy must, at a minimum, set forth the following information:

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

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

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

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

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

(6) any other appeal procedures available.

Subd. 2. **NOTICE.** An employer shall provide written notice of its drug and alcohol testing policy to all affected employees upon adoption of the policy, to a previously nonaffected employee upon transfer to an affected position under the policy, and to a job applicant upon hire and before any testing of the applicant if the job offer is made contingent on the applicant passing drug and alcohol testing. An employer shall also post notice in an appropriate and conspicuous location on the employer's premises that the employer has adopted a drug and alcohol testing policy and that copies of the policy are available for inspection during regular business hours by its employees or job applicants in the employer's personnel office or other suitable locations.

Sec. 4. [181.953] **RELIABILITY AND FAIRNESS SAFEGUARDS.**

Subdivision 1. **USE OF LICENSED LABORATORY REQUIRED.** (a) An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory licensed by the commissioner under this subdivision.

(b) The commissioner shall adopt rules by January 1, 1988, governing:

(1) standards for licensing, suspension, and revocation of a license;

(2) body component samples that are appropriate for drug and alcohol testing;

(3) procedures for taking a sample that ensure privacy to employees and job applicants to the extent practicable, consistent with preventing tampering with the sample;

(4) methods of analysis and procedures to ensure reliable drug and alcohol testing results, including standards for initial screening tests and confirmatory tests;

(5) threshold detection levels for drugs, alcohol, or their metabolites for purposes of determining a positive test result;

(6) chain-of-custody procedures to ensure proper identification, labeling, and handling of the samples being tested; and

(7) retention and storage procedures to ensure reliable results on confirmatory tests or confirmatory retests of original samples.

(c) The commissioner shall also grant licenses to laboratories conducting drug and alcohol testing that are located in another state, provided that either: (1) the laboratory is licensed by the other state or by a federal agency to conduct

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drug and alcohol testing and the other state's or federal agency's rules governing standards, methods, and procedures meet or exceed those adopted under this subdivision; or (2) the laboratory has agreed in writing with the commissioner to comply with the rules adopted under this subdivision. A laboratory licensed under this paragraph must also, as a condition of obtaining and retaining a license, agree in writing with the commissioner to comply with the other requirements for laboratories set forth in sections 1 to 5 and to be subject to the remedies set forth in section 7.

(d) The commissioner shall charge laboratories an annual license fee. The fee may vary depending on the number of Minnesota employee samples tested annually at a laboratory. Fee receipts must be deposited in the state treasury and credited to a special account and are appropriated to the commissioner to administer this subdivision, and to purchase or lease laboratory equipment as accumulated fee receipts make equipment purchases or leases possible. Notwithstanding section 144.122, the commissioner shall set the license fee at an amount so that the total fees collected will recover the costs of administering this subdivision, and allow an additional amount to be credited to the special account each year sufficient to allow the commissioner to obtain appropriate laboratory equipment for use in administering this subdivision by July 1, 1994.

Subd. 2. TRANSITIONAL LABORATORY REQUIREMENTS. Before rules are adopted and licenses issued under subdivision 1, an employer may use the services of a nonlicensed testing laboratory that agrees in writing with the commissioner to comply with the following requirements:

(1) The director of the laboratory must be a full-time employee of the laboratory and must possess a doctoral or master's degree in biological or medical science and have at least three years experience in an analytical toxicology laboratory.

(2) The laboratory must be participating in and continuing to demonstrate satisfactory performance in the drug proficiency testing program of the college of American pathology or American association for clinical chemists.

(3) The drug and alcohol testing must be limited to analysis of a sample of blood or urine from the employee or job applicant subject to testing.

(4) The methods of analysis for drug and alcohol testing are limited to any enzyme multiplied immunoassay method for initial screening tests and any chromatography mass spectrometry method for confirmatory tests and confirmatory retests.

(5) The laboratory must have in writing and use laboratory chain-of-custody procedures that ensure reliable and properly handled and identified testing results.

(6) All initial screening test, confirmatory test, and confirmatory retest results must be reviewed and certified as accurate by a qualified scientist.

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(7) A test report must indicate the drugs, alcohol, or their metabolites tested for and whether the test produced negative or positive test results.

(8) The laboratory must provide the commissioner with information requested by the commissioner regarding the laboratory's current operations and activities relating to drug and alcohol testing.

(9) The laboratory must agree to comply with the requirements for laboratories set forth in sections 1 to 5 and to be subject to the remedies set forth in section 7.

Subd. 3. LABORATORY TESTING, REPORTING, AND SAMPLE RETENTION REQUIREMENTS. A testing laboratory shall conduct a confirmatory test on all samples that produced a positive test result on an initial screening test. A laboratory shall disclose to the employer a written test result report for each sample tested within three working days after a negative test result on an initial screening test or, when the initial screening test produced a positive test result, within three working days after a confirmatory test. A laboratory shall retain and properly store for at least six months all samples that produced a positive test result.

Subd. 4. PROHIBITIONS ON EMPLOYERS. An employer may not conduct drug or alcohol testing of its own employees and job applicants using a testing laboratory owned and operated by the employer, except that, one agency of the state may test the employees of another agency of the state. Except as provided in subdivision 9, an employer may not request or require an employee or job applicant to contribute to, or pay the cost of, drug or alcohol testing under sections 1 to 5.

Subd. 5. EMPLOYER CHAIN-OF-CUSTODY PROCEDURES. An employer shall comply with the rules adopted by the commissioner under subdivision 1 pertaining to chain-of-custody procedures. Before those rules are adopted, an employer shall establish its own reliable chain-of-custody procedures to ensure proper record keeping, handling, labeling, and identification of the samples to be tested.

Subd. 6. RIGHTS OF EMPLOYEES AND JOB APPLICANTS. (a) Before requesting an employee or job applicant to undergo drug or alcohol testing, an employer shall provide the employee or job applicant with a form, developed by the employer, on which to (1) acknowledge that the employee or job applicant has seen the employer's drug and alcohol testing policy, and (2) indicate any over-the-counter or prescription medications that the individual is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for, a positive test result.

(b) Within three working days after notice of a positive test result on a confirmatory test, the employee or job applicant may submit information to the employer, in addition to any information already submitted under paragraph (a), to explain that result, or may request a confirmatory retest of the original sample at the employee's or job applicant's own expense as provided under subdivision 9.

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

Subd. 8. RIGHT TO TEST RESULT REPORT. An employee or job applicant has the right to request and receive from the employer a copy of the test result report on any drug or alcohol test.

Subd. 9. CONFIRMATORY RETESTS. An employee or job applicant may request a confirmatory retest of the original sample at the employee's or job applicant's own expense after notice of a positive test result on a confirmatory test. Within five working days after notice of the confirmatory test result, the employee or job applicant shall notify the employer in writing of the employee's or job applicant's intention to obtain a confirmatory retest. Within three working days after receipt of the notice, the employer shall notify the original testing laboratory that the employee or job applicant has requested the laboratory to conduct the confirmatory retest or transfer the sample to another laboratory licensed under subdivision 1 to conduct the confirmatory retest. The original testing laboratory shall ensure that the chain-of-custody procedures adopted by the commissioner under subdivision 1 are followed during transfer of the sample to the other laboratory. The confirmatory retest must use the same drug or alcohol threshold detection levels as used in the original confirmatory test. If the confirmatory retest does not confirm the original positive test result, no adverse personnel action based on the original confirmatory test may be taken against the employee or job applicant.

Subd. 10. LIMITATIONS ON EMPLOYEE DISCHARGE, DISCIPLINE, OR DISCRIMINATION. (a) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.

(b) In addition to the limitation under paragraph (a), an employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless the following conditions have been met:

(1) the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and

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(2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

(c) Notwithstanding paragraph (a), an employer may temporarily suspend the tested employee or transfer that employee to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided the employer believes that it is reasonably necessary to protect the health or safety of the employee, co-employees, or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative.

(d) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of medical history information revealed to the employer pursuant to subdivision 6 unless the employee was under an affirmative duty to provide the information before, upon, or after hire.

(e) An employee must be given access to information in the employee's personnel file relating to positive test result reports and other information acquired in the drug and alcohol testing process, and conclusions drawn from and actions taken based on the reports or other acquired information.

Subd. 11. LIMITATION ON WITHDRAWAL OF JOB OFFER. If a job applicant has received a job offer made contingent on the applicant passing drug and alcohol testing, the employer may not withdraw the offer based on a positive test result from an initial screening test that has not been verified by a confirmatory test.

Sec. 5. [181.954] PRIVACY, CONFIDENTIALITY, AND PRIVILEGE SAFEGUARDS.

Subdivision 1. PRIVACY LIMITATIONS. A laboratory may only disclose to the employer test result data regarding the presence or absence of drugs, alcohol, or their metabolites in a sample tested.

Subd. 2. CONFIDENTIALITY LIMITATIONS. Test result reports and other information acquired in the drug or alcohol testing process are, with respect to private sector employees and job applicants, private and confidential information, and, with respect to public sector employees and job applicants, private data on individuals as that phrase is defined in chapter 13, and may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency, or private organization without the written consent of the employee or job applicant tested.

Subd. 3. EXCEPTIONS TO PRIVACY AND CONFIDENTIALITY DISCLOSURE LIMITATIONS. Notwithstanding subdivisions 1 and 2, evidence of a positive test result on a confirmatory test may be: (1) used in an arbitration proceeding pursuant to a collective bargaining agreement, an administrative hearing under chapter 43A or other applicable state or local law, or a judicial proceeding, provided that information is relevant to the hearing or proceeding;

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(2) disclosed to any federal agency or other unit of the United States government as required under federal law, regulation, or order, or in accordance with compliance requirements of a federal government contract; and (3) disclosed to a substance abuse treatment facility for the purpose of evaluation or treatment of the employee.

Subd. 4. PRIVILEGE. Positive test results from an employer drug or alcohol testing program may not be used as evidence in a criminal action against the employee or job applicant tested.

Sec. 6. [181.955] CONSTRUCTION.

Subdivision 1. FREEDOM TO COLLECTIVELY BARGAIN. Sections 1 to 5 shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections.

Subd. 2. EMPLOYEE PROTECTIONS UNDER EXISTING COLLECTIVE BARGAINING AGREEMENTS. Sections 1 to 5 shall not be construed to interfere with or diminish any employee protections relating to drug and alcohol testing already provided under collective bargaining agreements in effect on the effective date of those sections that exceed the minimum standards and requirements for employee protection provided in those sections.

Sec. 7. [181.956] REMEDIES.

Subdivision 1. EXHAUSTION. An employee or collective bargaining agent may bring an action under this section only after first exhausting all applicable grievance procedures and arbitration proceeding requirements under a collective bargaining agreement; provided that, an employee's right to bring an action under this section is not affected by a decision of a collective bargaining agent not to pursue a grievance.

Subd. 2. DAMAGES. In addition to any other remedies provided by law, an employer or laboratory that violates sections 1 to 5 is liable to an employee or job applicant injured by the violation in a civil action for any damages allowable at law. If a violation is found and damages awarded, the court may also award reasonable attorney fees for a cause of action based on a violation of sections 1 to 5 if the court finds that the employer knowingly or recklessly violated sections 1 to 5.

Subd. 3. INJUNCTIVE RELIEF. An employee or job applicant, a state, county, or city attorney, or a collective bargaining agent who fairly and adequately represents the interests of the protected class has standing to bring an action for injunctive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 1 to 5.

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Subd. 4. OTHER EQUITABLE RELIEF. Upon finding a violation of sections 1 to 5, or as part of injunctive relief granted under subdivision 3, a court may, in its discretion, grant any other equitable relief it considers appropriate, including ordering the injured employee or job applicant reinstated with back pay.

Subd. 5. RETALIATION PROHIBITED. An employer may not retaliate against an employee for asserting rights and remedies provided in sections 1 to 5.

Sec. 8. [181.957] FEDERAL PREEMPTION.

Subdivision 1. EXCLUDED EMPLOYEES AND JOB APPLICANTS. Except as provided under subdivision 2, the employee and job applicant protections provided under sections 1 to 7 do not apply to employees and job applicants where the specific work performed requires those employees and job applicants to be subject to drug and alcohol testing pursuant to:

(1) federal regulations that specifically preempt state regulation of drug and alcohol testing with respect to those employees and job applicants;

(2) federal regulations or requirements necessary to operate federally regulated facilities;

(3) federal contracts where the drug and alcohol testing is conducted for security, safety, or protection of sensitive or proprietary data; or

(4) state agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry, and the adoption of those rules is for the purpose of conforming the nonfederally regulated intrastate component of the industry to identical regulation.

Subd. 2. EXCLUSION LIMITED. Employers and testing laboratories must comply with the employee and job applicant protections provided under sections 1 to 7, with respect to employees or job applicants otherwise excluded under subdivision 1 from those protections, to the extent that the provisions of sections 1 to 7 are not inconsistent with or specifically preempted by the federal regulations, contract, or requirements applicable to drug and alcohol testing.

Sec. 9. APPROPRIATION.

(a) \$47,000 is appropriated from the general fund to the commissioner of health for the purpose of administering sections 1 to 8 to be available until June 30, 1988.

(b) Notwithstanding section 4, subdivision 1, paragraph (d), during the biennium ending June 30, 1989, the commissioner shall set the license fee at an amount so that the total fee receipts collected will recover only the costs of administering section 4, subdivision 1, plus the general fund appropriation under this section.

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(c) \$47,000 must be transferred from the special account established under section 4, subdivision 1, paragraph (d), to the general fund on June 30, 1989.

Sec. 10. EFFECTIVE DATE.

Sections 1 to 9 are effective September 1, 1987.

Approved June 3, 1987

CHAPTER 389—H.F.No. 606

An act relating to environment; establishing a petroleum tank release cleanup program; authorizing state action to prevent or correct health and environmental damage resulting from releases from petroleum storage tanks; establishing a petroleum tank release cleanup fund; establishing a petroleum tank release compensation board; authorizing reimbursement from the fund; requiring rulemaking; providing for administration by the pollution control agency and the department of commerce; requiring certification of tank installers; appropriating money; amending Minnesota Statutes 1986, sections 116.46, by adding subdivisions: 116.47; and 116.48, subdivision 4; proposing coding for new law in Minnesota Statutes, chapter 116; proposing coding for new law as Minnesota Statutes, chapter 115C.

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

Section 1. [115C.01] CITATION.

Sections 1 to 10 may be cited as the "petroleum tank release cleanup act."

Sec. 2. [115C.02] DEFINITIONS.

Subdivision 1. APPLICABILITY. The definitions in this section apply to sections 2 to 10.

Subd. 2. AGENCY. "Agency" means the pollution control agency.

Subd. 3. BOARD. "Board" means the petroleum tank release compensation board.

Subd. 4. CORRECTIVE ACTION. "Corrective action" means an action taken to minimize, eliminate, or clean up a release to protect the public health and welfare or the environment.

Subd. 5. DIRECTOR. "Director" means the director of the pollution control agency.

Subd. 6. FUND. "Fund" means the petroleum tank release cleanup fund.

Subd. 7. OPERATOR. "Operator" means a person in control of, or having responsibility for, the daily operation of a tank.

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