WEST VIRGINIA CODE CHAPTER 21 ARTICLE 1D

WV Legislature

§21-1D-1. Short Title.

This article shall be called the West Virginia Alcohol and Drug-Free Workplace Act.

WV Legislature

§21-1D-2. Definitions.

(a) The term "alcohol test" means a procedure conducted to determine if an individual is under the influence of alcohol.

(b) The term "construction", as used in this article, means any construction, reconstruction, improvement, enlargement, painting, decorating or repair of any public improvement let to contract the value of which contract is over $100,000. The term "construction" does not include temporary or emergency repairs.

(c) The term "contractor" means any employer working on a public improvement without regard to whether they are serving as the prime or subcontractor to another.

(d) The term "drug test" means a procedure using at least a nine-panel drug screen in urine specimens that are collected from individuals for the purpose of scientifically analyzing the specimens to determine if the individual ingested, was injected or otherwise exposed to a drug of abuse.

(e) The term "drug of abuse" means any substance listed under subsection (h) of this section and any other substance the employer chooses to test for.

(f) The term "employee" means a laborer, mechanic or other worker. For the purposes of this article, employee does not include those persons as are employed or hired directly by a public authority on a regular or temporary basis engaged exclusively in making temporary or emergency repairs. Furthermore, employee does not include those persons employed by a contractor who does not work in public improvement construction.

(g) The term "medical review officer" means a physician who holds a certificate authorizing them to practice medicine and surgery or osteopathic medicine and surgery, has knowledge of substance abuse disorders, has the appropriate medical training to interpret and evaluate positive drug and alcohol test results together with a person's medical history and other relevant biomedical information, has successfully completed qualification training as outlined in the Code of Federal Regulations at 49 C. F. R. Part 40 §121 (c) and has passed an exam administered by a nationally recognized medical review officer certification board or subspecialty board for medical practitioners in the field of medical review of federally mandated drug testing.

(h) The term "nine-panel drug screen" means a drug-testing program that tests for marijuana, cocaine, opiates including hydromorphone, oxycodone, hydrocodone, phencyclidine, amphetamines, barbiturates, benzodiazepines, methadone and propoxyphene at the substance screening and confirmation limits where provided under federally mandated drug and alcohol testing programs or otherwise accepted as the industry standard.

(i) The term "preemployment drug test" means a drug test taken within the preceding twelve

WV Legislature

months from employment or seven days after hire.

(j) The term "public authority", as used in this article, means any officer, board or commission or other agency of the State of West Virginia, its counties or municipalities or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement, including any institution supported, in whole or in part, by public funds of the State of West Virginia and this article applies to expenditures of these institutions made, in whole or in part, from public funds.

(k) The term "public improvement", as used in this article, includes all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports and all other structures upon which construction may be let to contract by the State of West Virginia, its counties or municipalities or any political subdivision thereof.

(l) The term "random drug testing" means a procedure in which employees who perform safety-sensitive tasks are selected to undergo a drug test by a statistically valid random selection method without prearrangement or planning.

(m) The term "reasonable cause" means a belief based on facts and inferences based primarily upon, but not limited to: (1) Observable phenomena, such as direct observation of use, possession or distribution of alcohol or a drug of abuse, or of the physical symptoms of being under the influence of alcohol or a drug of abuse, such as, but not limited to, slurred speech, dilated pupils, odor of an alcoholic beverage or a drug of abuse, changes in affect or dynamic mood swings; (2) a pattern of abnormal conduct, erratic or aberrant behavior or deteriorating work performance such as frequent absenteeism, excessive tardiness or recurrent accidents, that appears to be related to the use of alcohol or a drug of abuse and does not appear to be attributable to other factors; (3) the identification of an employee as the focus of a criminal investigation into unauthorized possession, use or trafficking of a drug of abuse; (4) a report of use of alcohol or a drug of abuse provided by a reliable and credible source; and (5) repeated or flagrant violations of the safety or work rules of the employee's employer, that are determined by the employee's supervisor to pose a substantial risk of physical injury or property damage and that appears to be related to the use of alcohol or a drug of abuse and that does not appear attributable to other factors.

(n) The term "safety-sensitive duty" means any task or duty fraught with such risks of injury to the employee or others that even a momentary lapse of attention or judgment, or both, can lead to serious bodily harm or death.

(o) The term "under the influence of alcohol" means a concentration of eight hundredths of one percent or more by weight of alcohol in an individual's blood or a concentration of eight hundredths of one gram or more by weight of alcohol per two hundred ten liters of an individual's breath.

WV Legislature

§21-1D-3. Statement of policy.

It is hereby declared to be the policy of the State of West Virginia to require public improvement contractors to have and implement a drug-free workplace policy that requires drug and alcohol testing.

WV Legislature

§21-1D-4. Drug-free workplace policy required for public improvement construction.

Except as provided in section eight of this article, no public authority may award a public improvement contract which is to be let to bid to a contractor unless the terms of the contract require the contractor and its subcontractors to implement and maintain a written drug-free workplace policy in compliance with this article and the contractor and its subcontractors provide a sworn statement in writing, under the penalties of perjury, that they maintain a valid drug-free workplace policy in compliance with this article.The public improvement contract shall provide for the following:

(1) That the contractor implements its drug-free workplace policy;

(2) Cancellation of the contract by the awarding public authority if the contractor:

(A) Fails to implement its drug-free workplace policy;

(B) Fails to provide information regarding implementation of the contractor's drug-free workplace policy at the request of the public authority; or

(C) Provides to the public authority false information regarding the contractor's drug-free workplace policy.

WV Legislature

§21-1D-5. Employee drug-free workplace policy required to bid for a public improvement contract.

After July 1, 2008, any solicitation for a public improvement contract shall require each contractor that submits a bid for the work to submit an affidavit that the contractor has a written plan for a drug-free workplace policy prior to being awarded a contract. If the affidavit is not submitted with the bid submission, the public authority shall promptly request by telephone and electronic mail that the low bidder and second low bidder provide the affidavit within one business day of the request. Failure to submit the affidavit within one business day of receiving the request shall result in disqualification of the bid. A public improvement contract may not be awarded to a contractor who does not have a written plan for a drug-free workplace policy and who has not submitted that plan to the appropriate contracting authority in timely fashion.

For subcontractors, compliance with this section may take place before their work on the public improvement is begun.

A drug-free workplace policy shall include the following:

(1) Establish drug testing and alcohol testing protocols that at a minimum require a contractor to:

(A) Conduct preemployment drug tests of all employees;

(B) Conduct random drug testing that annually tests at least ten percent of the contractor's employees who perform safety-sensitive duties;

(C) Conduct a drug test or alcohol test of any employee who may have caused or contributed to an accident while conducting job duties where reasonable cause exists to suspect that the employee may be intoxicated or under the influence of a controlled substance not prescribed by the employee's physician when, but not limited to, the employer has evidence that an employee is or was using alcohol or a controlled substance drawn from specific documented, objective facts and reasonable inferences drawn from these facts in light of experience and training.

The drug or alcohol test shall be conducted as soon as possible after the accident occurred and after any necessary medical attention has been administered to the employee.

(D) Conduct a drug test or alcohol test of any employee when a trained supervisor has reasonable cause to believe that the employee has reported to work or is working under the influence of a drug of abuse or alcohol. Written documentation as to the nature of a supervisor's reasonable cause shall be created.

In order to ascertain and justify implementation of a reasonable cause test, all supervisors will be trained to recognize drug- and alcohol-related signs and symptoms.

WV Legislature

(2) Require that all drug tests performed pursuant to this section be conducted by a laboratory certified by the United States Department of Health and Human Services or its successor;

(3) Establish standards governing the performance of drug tests by such a laboratory that include, but are not limited to, the following:

(A) The collection of urine specimens of individuals in a scientifically or medically approved manner and under reasonable and sanitary conditions;

(B) The collection and testing of urine specimens with due regard for the privacy of the individual being tested and in a manner reasonably calculated to prevent substitutions or interference with the collection and testing of specimens;

(C) The documentation of urine specimens through procedures that reasonably preclude the possibility of erroneous identification of test results and that provide the individual being tested a reasonable opportunity to furnish information identifying any prescription or nonprescription drugs used by the individual in connection with a medical condition to the medical review officer;

(D) The collection, maintenance, storage and transportation of urine specimens in a manner that reasonably precludes the possibility of contamination or adulteration of the specimens;

(E) The testing of a urine specimen of an individual to determine if the individual ingested, was injected or otherwise introduced with a drug of abuse in a manner that conforms to scientifically accepted analytical methods and procedures that include verification and confirmation of any positive test result by gas chromatography or mass spectrometry.

(4) Establish standards and procedures governing the performance of alcohol tests;

(5) Require that a medical review officer review all drug tests that yield a positive result;

(6) Establish procedures by which an individual who undergoes a drug test or alcohol test may contest a positive test result;

(7) Require that when an employee of a contractor tests positive for a drug of abuse or alcohol, or if an employee is caught adulterating a drug or alcohol test, as defined in section four hundred twelve, article four, chapter sixty-a of this code, the employee is subject to appropriate disciplinary measures up to and including termination from employment, in accordance with the contractor’s written drug-free workplace policy. If not terminated, the employee is subject to random drug or alcohol tests at any time for one year after the positive test;

(8) Require that when a supervisor has reasonable cause to believe an employee is under the influence of a drug of abuse or alcohol at work and requires the employee to take a drug or alcohol test, the employee shall immediately be suspended from performing safety-sensitive

WV Legislature

tasks by the contractor until such time as a drug or alcohol test is performed and results of that test are available;

(9) Require a contractor to provide to any employee testing positive for a drug of abuse or alcohol the list of community resources where employees may seek assistance for themselves or their families as identified in paragraph (D), subdivision (12) of this section;

(10) Require that a contractor assist an employee who voluntarily acknowledges that the employee may have a substance abuse problem by providing the list of community resources where employees may seek assistance for themselves or their families as identified in paragraph (D), subdivision (12) of this section;

(11) Require that a contractor establish a written drug-free workplace policy regarding substance abuse and provide a copy of the written policy to each of its employees and to each applicant for employment. The written policy shall contain, at a minimum, all of the following:

(A) A summary of all the elements of the drug-free workplace policy established in accordance with this article;

(B) A statement that it is the contractor's intention to create a drug-free workplace environment;

(C) Identification of an employee who has been designated the contractor's drug-free workplace representative;

(D) Shall list the types of tests an employee may be subject to, which may include, but are not limited to, the following:

(i) Preemployment;

(ii) Post-accident;

(iii) Random; and

(iv) Reasonable cause.

(12) Require that a contractor provide within six weeks of new employment at least two hours of drug-free workplace employee education for all employees unless that employee has already received such training anytime within a prior two-year period. The employee shall participate in drug-free workplace employee education at least biannually thereafter. The employee education shall include all of the following:

(A) Detailed information about the content of the contractor's specific drug-free workplace policy and an opportunity for employees to ask questions regarding the policy;

WV Legislature

(B) The distribution of a hard copy of the written drug-free workplace policy, including collecting an employee-signed acknowledgment receipt from each employee;

(C) Specific explanation of the basics of drugs and alcohol abuse, including, but not limited to, the disease model, signs and symptoms associated with substance abuse, and the effects and dangers of drugs or alcohol in the workplace; and

(D) A list of community resources where employees may seek assistance for themselves or their families.

(13) Require that a contractor provide at least two hours of drug-free workplace supervisor training for all supervisory employees and annually thereafter. The supervisor training shall include all of the following:

(A) How to recognize a possible drug or alcohol problem;

(B) How to document behaviors that demonstrate a drug or alcohol problem;

(C) How to confront employees with the problem from observed behaviors;

(D) How to initiate reasonable suspicion and post-accident testing;

(E) How to handle the procedures associated with random testing;

(F) How to make an appropriate referral for assessment and assistance;

(G) How to follow up with employees returning to work after a positive test; and

(H) How to handle drug-free workplace responsibilities in a manner that is consistent with the applicable sections of any pertinent collective bargaining agreements.

WV Legislature

§21-1D-5a. Drug-free workplace policy not applicable to workers required to follow federal Department of Transportation drug testing guidelines.

In instances where a worker is required by law to follow United States Department of Transportation drug testing guidelines, no additional drug tests are required under this article.

WV Legislature

§21-1D-6. Drug-free workplace written policy to be kept posted.

A clearly legible copy of the contractor's written drug-free workplace policy shall be kept posted in a prominent and easily accessible place at the public improvement construction site thereof by each contractor subject to the provisions of this article.

WV Legislature

§21-1D-7. Drug-free workplace records and contents open for inspection.

Every contractor shall keep an accurate record showing the names, occupation and safety-sensitive status of all employees, in connection with the construction on the public improvement, and showing any drug tests or alcohol tests performed and employee education and supervisor training received, which record shall be open at all reasonable hours for inspection by the public authority which let the contract and its officers and agents. It is not necessary to preserve the record for a period longer than three years after the termination of the contract.

WV Legislature

§21-1D-7a. Confidentiality; test results not to be used in criminal and administrative proceedings.

All drug testing information specifically related to individual employees is confidential and should be treated as such by anyone authorized to review or compile program records. Drug test results may not be used in a criminal proceeding without the employee's consent.

WV Legislature

§21-1D-7b. Contractor to provide certified drug-free workplace report.

No less than once per year, or upon completion of the project, every contractor shall provide a certified report to the public authority which let the contract. The report shall include:

(1) Information to show that the education and training service to the requirements of section five of this article was provided;

(2) The name of the laboratory certified by the United States Department of Health and Human Services or its successor that performs the drug tests pursuant to this article;

(3) The average number of employees in connection with the construction on the public improvement;

(4) Drug test results for the following categories including the number of positive tests and the number of negative tests:

(A) Preemployment and new hires;

(B) Reasonable suspicion;

(C) Post-accident;

(D) Random.

WV Legislature

§21-1D-8. Penalties for violation of this article.

(a) Any contractor who violates any provision of this article is, for the first offense, guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000; for the second offense, the person is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $1,000 nor more than $5,000; for the third or any subsequent offense within the preceding five years , the person is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $5,000 nor more than $25,000 and the contractor shall be excluded from bidding any additional new public improvement projects for a period of one year.

(b) Any person who directly or indirectly aids, requests or authorizes any other person to violate any of the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $50 nor more than $250.

WV Legislature

§21-1D-9. Existing contracts.

This article applies only to contracts for construction on public improvements awarded after the effective date of this article.

WV Legislature