WEST VIRGINIA CODE CHAPTER 21 ARTICLE 3E

WV Legislature

§21-3E-1. Short title.

This article is known as and may be cited as the West Virginia Safer Workplace Act.

WV Legislature

§21-3E-2. Definitions.

For the purposes of this article:

“Alcohol” means ethanol, isopropanol, or methanol.

“Drugs” means any substance considered unlawful for nonprescribed consumption or use under the United States Controlled Substances Act (21 U. S. C. §812).

“Employer” means any person, firm, company, corporation, labor organization, employment agency or joint labor-management committee, which has one or more full-time employee employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written in the state. “Employer” does not include, for purposes of this article, the United States, the state, any of its subdivisions or any other public-sector incorporated municipalities, counties, or other local government entities, or any Native American tribe.

“Employee” means any person in the service of an employer, as defined in this section.

“Good faith” means reasonable reliance on facts, or that which is held to be factual without the intent to deceive or be deceived and without reckless, malicious or negligent disregard for the truth.

“Prospective employee” means any person who has made application to an employer, whether written or oral, to become an employee.

“Sample” means such sample of the human body capable of revealing the presence of alcohol or other drugs or other metabolites.

“Split sample” means a part of the sample that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test result of the primary specimen.

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§21-3E-3. Public policy; applicability.

The Legislature declares that the public policy of this state is to advance the confidence of West Virginia workers that they are in a safe workplace and to enhance the viability of the workplace they labor in by recognizing the right of West Virginia's employers to require mandatory drug testing, not only of applicants, but of current employees: Provided, That this article does not abrogate the right of privacy, including the right of an individual to be let alone and to keep secret his or her private communications, conversations and affairs, as stated in Roach v. Harper, 143 W. Va. 869, but rather determines that the right of privacy is outweighed by the public policy stated in this section if an employer meets the requirements set forth in this article.

This article applies only to employers, as defined in section three of this article, not previously made subject of drug and alcohol testing statutory provisions established by the Legislature including, but not limited to, employers covered by section one, article one-a, chapter twenty-two-a of the code, et seq., and section one, article one-d, chapter twenty-one of the code et seq.

WV Legislature

§21-3E-4. Employers may test current and prospective employees for drugs or alcohol.

It is lawful for an employer to test employees or prospective employees for the presence of drugs or alcohol, in accordance with the provisions of this article, as a condition of continued employment or hiring. However, in order to qualify for a bar from being subjected to legal claims for acting in good faith on the results of a drug or alcohol test, employers must adhere to the accuracy and fairness safeguards outlined in this article.

WV Legislature

§21-3E-5. Collection of samples.

In order to test reliably for the presence of drugs or alcohol, an employer may require samples from its employees and prospective employees, and may require presentation of reliable individual identification from the person being tested to the person collecting the samples. Collection of the sample shall be in conformance with the requirements of this article. The employer may designate the type of sample to be used for this testing.

WV Legislature

§21-3E-6. Scheduling of tests.

Regarding the timing and costs of drug and/or alcohol tests, and in order for an employer to qualify for the benefits of this article:

(1) Any drug or alcohol testing by an employer of employees shall occur during, or immediately before or after, a regular work period. Testing by an employer is worked time for the purposes of compensation and benefits for current employees.

(2) An employer shall pay all actual costs for drug and/or alcohol testing required by the employer of employees and prospective employees.

(3) An employer is required to provide transportation or to pay reasonable transportation costs to current employees if their required tests are conducted at a location other than the employee's normal work site(s).

WV Legislature

§21-3E-7. Testing procedure.

All sample collection and testing of drugs and alcohol under this article shall be performed in accordance with the following conditions:

(1) The collection of samples shall be performed under reasonable and sanitary conditions.

(2) Any observer of the collection of urine samples shall be of the same sex as the employee.

(3) Sample collections shall be documented, and these documentation procedures shall include:

(A) Labeling of samples so as to reasonably preclude the possibility of misidentification of the person tested in relation to the test result provided and handling of samples in accordance with reasonable chain-of-custody and confidentiality procedures; and

(B) An opportunity for the employee, or prospective employee, to voluntarily provide notification of any information which may be considered as relevant to the test, including, but not limited to, identification of currently or recently used prescriptions or nonprescription drugs, or other relevant medical information. This may be accomplished by providing procedures for review by a qualified medical professional to verify a laboratory sample which tests positive in a confirmatory test.

(4) Sample collection, storage and transportation to the place of testing shall be performed so as to reasonably preclude the possibility of sample contamination, adulteration, or misidentification.

(5) Confirmatory drug testing shall be conducted at a laboratory: (i) Certified by the U. S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration; (ii) approved by the U. S. Department of Health and Human Services under the Clinical Laboratory Improvements Act; or (iii) approved by the College of American Pathologists.

(6) Drug and alcohol testing shall include confirmation of any positive test results. For drug testing, confirmation will be by use of a different chemical process than was used by the employer in the initial drug screen. The second confirmatory drug test shall be a chromatographic technique such as gas chromatography/mass spectrometry, or another comparably reliable analytical method. An employer may take any adverse employment action, including job denial to a prospective employee, based only on a confirmed positive drug or alcohol test.

In the event a person desires to challenge the results of his or her initial sample test result, that person shall have the right to have the split sample tested by another laboratory as set forth in subsection four. The cost associated with the testing of the split sample shall be the responsibility of the person challenging the initial sample test results.

WV Legislature

§21-3E-8. Testing policy requirements.

(a) Testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy which has been distributed to every employee subject to testing, and is available for review by prospective employees.

(b) In order to comply with the provisions of this article, employers must provide employees, when requested and/or as appropriate, with information as to the existence and availability of counseling, employee assistance, rehabilitation and/or other drug abuse treatment programs which the employer offers, if any. The employer is not required to offer any of the benefits listed above by this article.

(c) Within the terms of the written policy, an employer may require the collection and testing of samples for, among other legitimate drug abuse prevention and/or treatment purposes, the following:

(1) Deterrence and/or detection of possible illicit drug use, possession, sale, conveyance, or distribution, or manufacture of illegal drugs, intoxicants, or controlled substances in any amount or in any manner, on or off the job, or the abuse of alcohol or prescription drugs;

(2) Investigation of possible individual employee impairment;

(3) Investigation of accidents in the workplace or incidents of workplace theft or other employee misconduct;

(4) Maintenance of safety for employees, customers, clients or the public at large; or

(5) Maintenance of productivity, quality of products or services, or security of property or information.

(d) The collection and testing of samples shall be conducted in accordance with this article and need not be limited to circumstances where there are indications of individual, job-related impairment of an employee or prospective employee.

(e) The employer’s use and disposition of all drug or alcohol test results are subject to the limitations of this article and federal and state law if the employer is to qualify for the legal protections available under this article.

(f) Nothing in this article may be construed to encourage, discourage, restrict, limit, prohibit or require on-site drug or alcohol testing.

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§21-3E-9. Disciplinary procedures.

Upon receipt of a confirmed positive drug or alcohol test result which indicates a violation of the employer's written policy, or upon the refusal of an employee or prospective employee to provide a testing sample, an employer may use that test result or test refusal as a valid basis for disciplinary and/or rehabilitative actions, which may include, among other actions, the following:

(1) A requirement that the employee enroll in an employer-provided or approved rehabilitation, treatment and/or counseling program, which may include additional drug and/or alcohol testing, participation in which may be a condition of continued employment, and the costs of which may or may not be covered by the employer's health plan or policies;

(2) Suspension of the employee, with or without pay, for a designated period of time;

(3) Termination of employment;

(4) Refusal to hire a prospective employee; and/or

(5) Other adverse employment action in conformance with the employer's written policy and procedures, including any relevant collective bargaining agreement provisions.

WV Legislature

§21-3E-10. Sensitive employees.

If the confirmatory drug or alcohol test of an employee is “positive,” and the employee is in a sensitive position where an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, the employer may permanently remove the employee from the sensitive position and transfer or reassign the employee to an available nonsensitive position with comparable pay and benefits, or may take any other action, including termination or other adverse employment action, consistent with the employer’s policy for confirmed positive drug or alcohol test for employees in sensitive positions, provided there are not applicable contractual provisions that expressly prohibit such action.

Employers obligated to perform drug testing under a federal or state mandated drug testing statute will be required to follow whatever additional requirements are mandated by those statutes.

WV Legislature

§21-3E-11. Protection from liability.

No cause of action is or shall be established for any person against any employer who has established a policy and initiated a testing program in accordance with this article, for any of the following:

(1) Actions based on the results of a confirmed positive drug or alcohol test, or the refusal of an employee or job applicant to submit to a drug test;

(2) Failure to test for drugs or alcohol, or failure to test for a specific drug or other controlled substance;

(3) Failure to test for, or if tested for, failure to detect, any specific drug or other substance, any medical condition, any mental, emotional, or psychological disorder or condition; or

(4) Termination or suspension of any substance abuse prevention or testing program or policy.

WV Legislature

§21-3E-12. Cause of action.

(a) No cause of action is or shall be established for any person against an employer who has established a program of drug or alcohol testing in accordance with this article, unless the employee's action was based on a false positive test result, and the employer had actual knowledge that the result was in error, and ignored the true test result because of disregard for the truth and/or the willful intent to deceive or be deceived.

(b) In any claim, including a claim under this article, where it is alleged that an employer's action was based on a false positive test result:

(1) There is a rebuttable presumption that the test result was valid if the employer complied with the provisions of this article; and

(2) The employer is not liable for monetary damages if its reliance on a false positive test result was reasonable and in good faith.

(c) There is no employer liability for any action taken related to a false negative drug or alcohol test.

WV Legislature

§21-3E-13. Defamation.

No cause of action for defamation of character, libel, slander or damage to reputation is or shall be established for any person against any employer who has established a program of drug or alcohol testing in accordance with this article, unless:

(1) The results of that test were disclosed to a person other than the employer, an authorized employee, agent or representative of the employer, the tested employee, or the tested prospective employee, or the authorized agent or representative of the employee; and

(2) All elements of an action for defamation of character, libel, slander or damage to reputation as established by the relevant state statute or common law are satisfied.

WV Legislature

§21-3E-14. No requirement to implement a testing policy.

No cause of action arises in favor of any person against an employer based upon the failure of the employer to establish a program or policy on substance abuse prevention, or to implement drug or alcohol testing.

WV Legislature

§21-3E-15. Confidentiality.

All communications received by an employer relevant to employee or prospective employee drug or alcohol test results and received through the employer's drug testing program are confidential communications and may not be used or received in evidence, obtained in discovery or disclosed in any public or private proceeding, except in a proceeding related to an action taken by an employer under this article.

WV Legislature

§21-3E-16. Employer testing; notice; termination; forfeiture.

If an employer implements a drug-free workplace program in accordance with this article, which includes notice, education, and procedural requirements for testing for drugs and alcohol pursuant to this law, the employer may require the employee to submit to a test for the presence of drugs or alcohol. If an employee is terminated because alcohol or a drug is found to be present in the employee's system at a level proscribed by the employer's policy, the employee, if injured at the time of the intoxication, forfeits indemnity benefits under the Workers' Compensation Laws. However, the employer's drug-free workplace program must notify all employees that it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body and that policy must also state that if an injured employee refuses to submit to a test for drugs or alcohol that employee forfeits eligibility for indemnity benefits under the Workers' Compensation Laws. Employers who do not notify their employees of this condition of employment waive their right to assert that eligibility for benefits is entirely forfeited.

Nothing in this section may be construed or determined to affect §23-4-2(a) of this code and the provisions of said section shall be the sole manner in which intoxication may be proven to establish such intoxication as the proximate cause of an injury for purposes of said chapter.

WV Legislature