

State of Arkansas

77th General Assembly

A Bill

SENATE BILL

Third Extraordinary Session, 1989

CALL ITEM 34

By: Senators Yates, Canada, and Gibson

For An Act To Be Entitled

"THE WORKPLACE DRUG TESTING ACT."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. This act may be cited as the Workplace Drug Testing Act.

SECTION 2. (a) The Arkansas General Assembly finds that a healthy and productive workforce, safe working conditions free from the effects of drugs and alcohol, and maintenance of the quality of products produced and services rendered in this State, are important to employers, employees, and the general public. The General Assembly further finds that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services. Therefore, in balancing the interests of employers, employees, and the welfare of the general public, the General Assembly finds that fair and equitable testing for drugs and alcohol in the workplace, in accordance with this act, is in the best interest of all parties.

(b) The General Assembly does not intend to prohibit any employee from seeking damages or job reinstatement, if action was taken by the employer based on a false drug or alcohol test result.

SECTION 3. It is the purpose of this act:

(1) To set standards for the implementation of drug testing programs in employment;

(2) To ensure that drug test procedures are implemented in a manner fair to employees and achieve reliable results; and

(3) To encourage employers to provide employees who have drug abuse

problems an opportunity for assessment and rehabilitation.

SECTION 4. For the purpose of this act:

(1) "Alcohol" means ethyl alcohol or ethanol.

(2) "Confirmation test" means a drug test on a sample or specimen to substantiate the results of a prior drug test on the sample or specimen. The confirmation test must use an alternate method of equal or greater sensitivity than that used in the previous drug test.

(3) "Drug test" means a chemical test administered for the purpose of determining the presence or absence of a drug or metabolites in a person's bodily fluids.

(4) "Drugs" means any substance recognized as a drug in the United States Pharmacopeia, the National Formulary, the Homeopathic Pharmacopeia, or other drug compendia, or supplement to any of those compendia.

(5) "Employee" means any person in the service of an employer as defined in subsection (6) of this section.

(6) "Employer" means any individual, organization, or government body, subdivision or agency thereof, including partnership, association, trustee, estate, corporation, joint stock company, insurance company or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, and any common carrier by mail, motor, water, air or express company doing business in or operating within the State of Arkansas, which has one or more employees within this State, or which has offered or may offer employment to one or more individuals in this State.

(7) "Illegal drug" means any substance, other than alcohol, having psychological or physiological effects or both on a human being and that is not a prescription or non-prescription medication, including controlled substances and controlled substance analogs or volatile substances which produce the psychological or physiological effects or both of a controlled substance through deliberate inhalation which is listed in Schedules I through VI of the Arkansas Uniform Controlled Substances Act.

(8) "Initial test" means an initial drug test to determine the presence or absence of drugs or their metabolites in samples or specimens.

(9) "Neutral selection basis" means a mechanism for selecting employees for drug tests that:

(A) results in an equal probability that any employee from a group

of employees subject to the selection mechanism will be selected; and

(B) does not give an employer discretion to waive the selection of any employee selected under the mechanism.

(10) "Prescription or non-prescription medication" means a drug prescribed for use by a duly licensed physician, dentist, or other medical practitioner licensed to issue prescriptions or a drug that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

(11) "Prospective employee" means any person who has made application to an employer, whether written or oral, to become an employee.

(12) "Reasonable suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience, and may be based upon, among other things:

(A) Observable phenomena, such as direct observation of drug use or the physical symptoms or manifestations of being under the influence of a drug;

(B) Abnormal conduct or erratic behavior while at work, absenteeism, tardiness, or deterioration in work performance;

(C) A report of drug use provided by reliable and credible sources and which has been independently corroborated;

(D) Evidence that an individual has tampered with a drug test during his or her employ with the current employer;

(E) Information that an employee has caused or contributed to an accident while at work;

(F) Evidence that an employee is involved in the use, possession, sale, solicitation, or transfer of drugs while working or while on the employer's premises or operating the employer's vehicle, machinery, or equipment.

(13) "Sample" means urine, blood, breath, saliva, or hair.

(14) "Specimen" means a tissue or product of the human body chemically capable of revealing the presence of drugs in the human body.

SECTION 5. It is lawful for an employer to test employees or prospective employees for the presence of drugs or alcohol, in accordance with the provi-

sions of this act, as a condition of hiring or continued employment. However, employers and management must submit to the testing themselves on a periodic basis and with the same frequency as the testing of employees, if employees are tested for the presence of drugs or alcohol.

SECTION 6. (a) Any employee who may be required by an employer to submit to a drug test shall be provided, at least thirty (30) days prior to the implementation of a drug testing program, a written policy statement from the employer which contains:

(1) A general statement of the employer's policy on employee drug use which will include identifying both the grounds on which an employee may be required to submit to a drug test and the actions the employer may take against an employee on the basis of a positive confirmed drug test result, or other violation of the employer's drug use policy;

(2) A statement advising the employee of the existence of this act;

(3) A general statement concerning confidentiality;

(4) Procedures for how employees can confidentially report the use of prescription or non-prescription medications prior to being tested;

(5) Circumstances under which drug testing may occur, and a description of which positions will be subject to testing on a reasonable suspicion, neutral selection or other basis;

(6) The consequences of refusing to submit to a drug test;

(7) Information on opportunities for assessment and rehabilitation if an employee has a positive confirmed test result and the employer determines that discipline or discharge is not necessary or appropriate.

(8) A statement that an employee who receives a positive confirmed drug test result may contest the accuracy of that result or explain it;

(9) A list of all drugs for which the employer might test. Each drug shall be described by its brand name or common name, as applicable, as well as its chemical name.

(10) A statement regarding any applicable collective bargaining agreement or contract.

(b) An employer shall post the notice in an appropriate and conspicuous location on the employer's premises and copies of the policy will be available for inspection during regular business hours by employees in the employer's personnel office or other suitable locations.

(c) An employer who conducts job applicant drug testing shall notify the prospective employee, in writing, upon application and prior to the collection of the specimen for the drug test, that the prospective employee may be tested for the presence of drugs or their metabolites.

(d) An employee or prospective employee required to submit to a drug test may be requested by an employer to sign a statement indicating that he or she has read and understands the employer's drug testing policy. An employee's or prospective employee's refusal to sign such a statement shall not invalidate the results of any drug test, or bar the employer from administering the drug test or from taking action consistent with the terms of an applicable collective bargaining agreement or the employer's drug testing policy, or from refusing to hire the prospective employee.

SECTION 7. (a) Within the terms of a written policy, an employer may require the collection and testing of samples or specimens for the following purposes:

(1) Prospective employee testing, which is where employers can require prospective employees to submit to a drug test as a condition of the employment application and may use a refusal to submit to a test or positive confirmed test result as a basis for refusal to hire.

(2) Reasonable suspicion testing, where an employer may require all employees to submit to reasonable suspicion drug testing and there is created a rebuttable presumption that the employer had reasonable suspicion to test for drugs if the specimen provided by the employee tested positive for drugs in a confirmatory drug test.

(3) Neutral selection, routine, and follow-up testing, where:

(A) An employer may require an employee to submit to a drug test on a neutral selection basis when the nature of the employee's position would create a health or safety risk to the employee, to fellow employees or to the public, or a security risk in the workplace, should the employee be affected by the use of a drug.

(B) An employer may require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness for duty medical examination that is part of the employer's established policy and/or which is scheduled routinely for all members of an employment classification or group;

(C) An employer may require an employee to submit to neutral selection or routine drug tests if the employee in the course of his or her employment enters a drug abuse rehabilitation program, and as a follow-up to such rehabilitation, or if previous drug testing of the employee within a twelve (12) month period resulted in a positive confirmed test result, or the drug test is conducted in accordance with the terms of an applicable collective bargaining agreement or contract that permits the employer to administer drug tests on a neutral selection or routine basis.

(4) Investigations of individual employee impairment, accidents in the workplace, or incidents of workplace theft.

(b) If an employee is participating in drug abuse rehabilitation, drug testing may be conducted by the rehabilitation provider as deemed appropriate by the provider.

SECTION 8. In order to test reliably for the presence of drugs or alcohol, an employer may require a sample or specimen from his employees and prospective employees, and may require presentation of reliable identification to the person collecting the samples or specimens. Collection of the sample or specimen shall be in conformance with the requirements of this act. The employer may designate the type of sample or specimen to be used for testing.

SECTION 9. (a) Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period. Such testing by the employer shall be deemed work time for the purposes of compensation and benefits for current employees.

(b) An employer shall pay all costs of testing for drugs or alcohol required by the employer, including the cost of transportation if the testing of a current employee is conducted at a location other than the workplace.

SECTION 10. All sample and specimen collection and testing for drugs and alcohol under this act shall be performed in accordance with the following conditions:

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

(2) Samples and specimens shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably

calculated to prevent substitutions or interference with the collection or testing of reliable samples or specimens;

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

(A) Labeling of samples or specimens so as to reasonably preclude the probability of erroneous identification of test results; and

(B) An opportunity for the employee or prospective employee to provide notification of any information which may be considered as relevant to the test, including identification of currently or recently used prescriptions or non-prescription drugs, or other relevant medical information.

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

(5) Sample or specimen testing shall comply to scientifically accepted analytical methods and procedures. Testing for drugs shall include an immunoassay screening test and any positive test results will be confirmed by gas chromatography-mass spectrometry (GC/MS), before the result of any test may be used as a basis for any action by an employer.

(6) Each confirmation test conducted under this act, not including the taking or collecting of a sample or specimen to be tested, shall be conducted by a laboratory meeting the requirements as set forth in Section 14 of this act.

(7) A sample or specimen for a drug test may be taken or collected by any of the following persons:

(A) A physician, a registered professional nurse, a licensed practical nurse, or a nurse practitioner, as defined under Arkansas law;

(B) A qualified person employed by a licensed laboratory; or

(C) Any person deemed qualified by the Arkansas Department of Health;

(8) The Arkansas Department of Health shall establish a program to train and certify persons to collect samples or specimens and to conduct on-site drug tests in the workplace. Employers may designate employees for this training and certification, or may utilize any person so trained and certified;

(9) Every sample or specimen that produces a positive confirmed result shall be preserved in a frozen state by the licensed laboratory that conducts

the confirmation test for a period of ninety (90) days from the time the results of the positive confirmed test are mailed or otherwise delivered to the employer. During this period, the employee who has provided the sample or specimen shall be permitted by the employer to have a portion of the sample or specimen retested, at the employee's expense, at a licensed laboratory chosen by the employee. The licensed laboratory that has performed the test for the employer shall be responsible for the transfer of the portion of the sample or specimen to be retested, and for the integrity of the chain of custody during such transfer;

(10) Within five (5) working days after receipt of a positive confirmed test result report from the testing laboratory, an employer shall, in writing, inform an employee of such positive test result and inform the employee in writing of the consequences of such a report and the options available to him or her;

(11) An employee may request and receive from the employer a copy of the test result report;

(12) Within ten (10) working days after receiving notice of a positive confirmed test result, the employee may submit information to an employer explaining the test results, and why the results do not constitute a violation of the employer's policy. If an employee's explanation of the positive test results is not satisfactory to the employer, a written explanation submitted by the employer as to why the employee's explanation is unsatisfactory, along with the report of positive results, shall be made part of the employee's medical and personnel records;

(13) An employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or prospective employee on the basis of a positive test result that has not been verified by a confirmatory test.

SECTION 11. Upon receipt of a verified or 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 sample or specimen, an employer may use the test or refusal as the basis for disciplinary or rehabilitative actions, which may include the following:

(1) A requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional



drug or alcohol testing, as a condition of continued employment;

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

(3) Termination of employment;

(4) Refusal to hire a prospective employee; or

(5) Other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

SECTION 12. (a) An employee or prospective employee whose drug test result is confirmed as positive in accordance with the provisions of this act shall not, by virtue of the result alone, be defined as a person with a "handicap."

(b) An employer who discharges or disciplines an employee on the basis of a positive confirmed drug test in accordance with this act shall be considered to have discharged or disciplined the employee for cause.

(c) An employee discharged on the basis of a positive confirmed drug test in accordance with this act shall be considered to have been discharged for willful misconduct under Arkansas law.

(d) A physician-patient relationship is not created between an employee or prospective employee, and an employer or any person performing or evaluating the drug test, solely by the establishment or implementation of a drug testing program.

(e) This act shall not prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules.

(f) This act shall not be retroactive and shall not abrogate the right of an employer under Arkansas law to conduct drug tests prior to the effective implementation date of this act. A drug test conducted by an employer before the effective date of this act is not subject to this act.

(g) This act does not prohibit an employer from conducting medical screening or other tests required by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screenings or tests shall be limited to the specific substances expressly identified in the applicable statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests.

SECTION 13. (a) All information, interviews, reports, statements, memoranda, and test results, written or otherwise received by the employer through its 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 proceedings, except in accordance with this act.

(b) Any information obtained by an employer pursuant to this act shall be the property of the employer.

(c) An employer shall not release to any person other than the employee or job applicant, or employer medical, supervisory, or other personnel, as designated by the employer on a need-to-know basis, information related to drug test results unless:

(1) The employee or job applicant has expressly, in writing, granted permission for the employer to release such information; or

(2) It is necessary to introduce a positive confirmed test result into an arbitration proceeding pursuant to a collective bargaining agreement, an administrative hearing under applicable Arkansas law or city or county ordinance, or a judicial proceeding, provided that information is relevant to the hearing or proceeding, or the information must be disclosed to a federal or state agency or other unit of the state or United States government as required under law, regulation, or order, or in accordance with compliance requirements of a state or federal government contract, or disclosed to a drug abuse rehabilitation program for the purpose of evaluation or treatment of an employee; or

(3) There is a risk to public health or safety that can be minimized or prevented by the release of such information. Unless such risk is immediate, a court order permitting the release shall be obtained prior to the release of the information.

(d) The above confidentiality provisions do not apply to other parts of an employee's or job applicant's personnel or medical files.

(e) If an employee refuses to sign a written consent form for release of information to persons as permitted in this act, the employer shall not be barred from discharging or disciplining the employee.

SECTION 14. (a) A laboratory shall not conduct confirmation drug tests unless:

(1) The director of the laboratory and the laboratory are licensed in accordance with Arkansas law;

(2) The laboratory has written testing procedures and written procedures to ensure a chain of custody;

(3) The laboratory demonstrates satisfactory performance in the proficiency testing program of the National Institute on Drug Abuse, the College of American Pathology or the American Association for Clinical Chemistry or the equivalent; and

(4) The laboratory follows proper quality control procedures, including, but not limited to:

(A) The use of internal quality controls including the use of samples of known concentrations which are used to check the performance and calibration of testing equipment, and periodic use of blind samples for overall accuracy;

(B) An internal review and certification process for test results, conducted by a person qualified to perform that function in the testing laboratory;

(C) Security measures implemented by the testing laboratory to preclude adulteration of specimens and test results; and

(D) Other necessary and proper actions are taken to ensure reliable and accurate test results.

(b) A laboratory shall disclose to the employer a written test result report within five (5) working days after the test.

(c) All laboratory reports of a test result shall, at a minimum, state:

(1) The name and address of the laboratory that performed the test and the positive identification of the person tested;

(2) Any positive confirmed drug test results on a specimen which tested positive on an initial test, or a negative drug test result on a specimen. Reports should not make reference to initial or confirmatory tests when reporting positive or negative results;

(3) A list of the drugs tested for;

(4) The type of tests conducted for both initial and confirmation tests and the cut-off levels of the tests; and

(5) The report shall not disclose the presence or absence of any physical or mental condition or of any drug other than the specific drug and its metabolites that an employer requests to be identified.

(d) The Arkansas Department of Health shall adopt rules concerning:

- (1) Standards for drug testing laboratory licensing, suspension, and revocation of a license;
- (2) Body specimens that are appropriate for drug testing;
- (3) Methods of analysis and procedures to ensure reliable drug testing results, including standards for initial tests and confirmatory tests;
- (4) Guidelines on how to establish cut-off detection levels for drugs or their metabolites for the purposes of determining a positive test result;
- (5) Chain-of-custody procedures to ensure proper identification, labeling, and handling of specimens being tested; and
- (6) Retention and storage procedures to ensure reliable results on confirmation tests and retests.

SECTION 15. (a) Upon an alleged violation of the provisions of this act, a person may institute a civil action in a court of competent jurisdiction within six (6) months of the alleged violation or the exhaustion of any internal administrative remedies available to the person, or be barred from obtaining the following relief. Relief may include and is limited to:

- (1) An injunction to restrain the continued violation of this act;
- (2) The reinstatement of the person to the same position held before the unlawful drug testing, disciplinary action or discharge, or to an equivalent position;
- (3) The reinstatement of full employee benefits and seniority rights;
- (4) Compensation for lost wages, benefits and other remuneration to which the person would have been entitled but for a violation of the act;
- (5) Payment by the employer of reasonable costs.

(b) Any employer who complies with the provisions of this act shall be without liability from all civil actions arising from any drug testing programs or procedures performed in compliance with this act.

(c) Pursuant to any claim alleging a violation of this act, including a claim under this act where it is alleged that an employer's action with respect to a person was based on an incorrect test result, there shall be a rebuttable presumption that the test result was valid if the employer complied with the provisions of this act.

(d) No cause of action for defamation of character, libel, slander, or damage to reputation arises in favor of any person against an employer who has established a program of drug testing in accordance with this act, unless:

(1) Information regarded as confidential is released not in accordance with an information release form signed by the person or otherwise not in accordance with this act; and

(2) The information disclosed was based on an incorrect test result; and

(3) The incorrect test result was disclosed with malice; and

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

(e) No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug testing.

SECTION 16. The drug testing procedures provided here do not apply where the specific work performed requires employees or job applicants to be subject to drug testing pursuant to:

(1) Federal regulations that specifically preempt state and local regulation of drug testing with respect to such employees and job applicants;

(2) Federal regulations or requirements enacted or implemented in connection with the operation of federally regulated facilities;

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

(4) State agency rules that adopt federal regulations applicable to the interstate component of a federally regulated activity.

SECTION 17. All state agencies shall implement a policy of pre-employment drug testing in accordance with the provisions of this act as a condition of hiring prospective employees effective July 1, 1991, and no person shall be employed by any state agency who fails a drug test implemented and conducted in accordance with the provisions of this act. Furthermore, state agencies are authorized to institute other types of drug testing programs in accordance with the provisions of this act.

SECTION 18. All provisions of this act of a general and permanent nature

are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 19. All laws and parts of laws in conflict with this act are hereby repealed.