

WORKPLACE DRUG TESTING PROGRAMS

2009 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Trisha S. Beck

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies provisions applicable to drug testing programs of nongovernmental employers.

Highlighted Provisions:

This bill:

- ▶ modifies definitions;
- ▶ addresses procedures related to:
 - confirmation of tests;
 - certification by medical review officers; and
 - use of test information;
- ▶ expands the scope of who is included in the section providing that a physician-patient relationship is not created; and
- ▶ makes technical and conforming amendments.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

34-38-2, as enacted by Laws of Utah 1987, Chapter 234



- 28 **34-38-6**, as enacted by Laws of Utah 1987, Chapter 234
- 29 **34-38-8**, as enacted by Laws of Utah 1987, Chapter 234
- 30 **34-38-11**, as enacted by Laws of Utah 1987, Chapter 234
- 31 **34-38-13**, as last amended by Laws of Utah 2004, Chapter 152
- 32 **34-38-14**, as last amended by Laws of Utah 2001, Chapter 73
- 33 **34-38-15**, as enacted by Laws of Utah 1987, Chapter 234

34

35 *Be it enacted by the Legislature of the state of Utah:*

36 Section 1. Section **34-38-2** is amended to read:

37 **34-38-2. Definitions.**

38 For purposes of this chapter:

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

40 ~~[(2) "Drugs" means any substance recognized as a drug in the United States~~
41 ~~Pharmacopoeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug~~
42 ~~compendia, or supplement to any of those compendia.]~~

43 (2) "Confirmation drug test" means a second scientific analysis of a sample to confirm
44 a drug test result.

45 (3) "Confirmed positive drug test" means that a confirmation drug test confirms that
46 the sample originally tested contains a drug, alcohol, or their metabolites in an amount equal to
47 greater than the concentration permitted under an employer's drug testing program.

48 (4) "Drug" means a substance scheduled under Section 58-37-4.

49 (5) "Drug test" means the scientific analysis of a sample for the presence in the human
50 body of a drug, alcohol, or their metabolites.

51 (6) "Drug testing program" means a program that meets the requirements of Section
52 34-38-7 notwithstanding whether it is referred to:

53 (a) as a program;

54 (b) as a policy; or

55 (c) by another name.

56 ~~[(3)]~~ (7) (a) "Employer" means [any] a person[, firm, or corporation], including [any] a
57 public utility or transit district, [which] who has one or more [workers or operators] individuals
58 employed;

- 59 (i) (A) in the same business[;]; or
60 (B) in or about the same establishment[;]; and
61 (ii) under [any] a contract of hire, express or implied, oral or written.
62 (b) "Employer" does not include:
63 (i) the federal [or] government;
64 (ii) state government[;]; or [other]
65 (iii) a local political [subdivisions] subdivision.
66 [(4)] (8) "Employee" means [any person] an individual in the service of an employer[;
67 as defined by Subsection (3);] for compensation.
68 (9) "False test result" means a result of a drug test if the drug test does not comply with
69 this chapter.
70 (10) "Medical review officer" means an individual who:
71 (a) is licensed in any state as:
72 (i) a doctor of medicine; or
73 (ii) a doctor of osteopathic medicine;
74 (b) has knowledge regarding the pharmacology and toxicology of illicit drugs;
75 (c) has training regarding:
76 (i) the collection procedures used to collect a sample for a federal agency;
77 (ii) how to interpret a drug test result reported by a laboratory;
78 (iii) chain of custody, reporting, and record keeping requirements for a sample for a
79 federal agency;
80 (iv) the guidelines adopted by the United States Department of Health and Human
81 Services for federal workplace drug testing programs; and
82 (v) procedures for interpreting, reviewing, and reporting a drug test result for a federal
83 agency; and
84 (d) is certified by one of the following approved by the United States Secretary of
85 Health and Human Services:
86 (i) a nationally recognized entity that certifies medical review officers; or
87 (ii) a subspecialty board of physicians performing a review of federal employee drug
88 test results.
89 (11) "Non-negative test result" means a drug test result that a laboratory determines is:

- 90 (a) positive;
- 91 (b) adulterated;
- 92 (c) diluted;
- 93 (d) substituted; or
- 94 (e) invalid.

95 [~~(5)~~] (12) "Prospective employee" means [~~any~~] a person who [~~has made application~~]
 96 applies to an employer, whether [~~written or oral~~] in writing or orally, to become [~~his~~] the
 97 employer's employee.

98 [~~(6)~~] (13) "Sample" means urine, blood, breath, saliva, or hair.

99 (14) (a) "Test-related information" means information received by an employer through
 100 the employer's drug testing program, including the following:

- 101 (i) an interview;
- 102 (ii) a report;
- 103 (iii) a statement;
- 104 (iv) a memorandum; or
- 105 (v) a test result.

106 (b) "Test-related information" does not include information obtained by a medical
 107 review officer that is not provided to an employer.

108 Section 2. Section **34-38-6** is amended to read:

109 **34-38-6. Requirements for collection and testing.**

110 [~~All sample~~] (1) The collection and drug testing [~~for drugs and alcohol~~] of a sample
 111 under this chapter shall be performed in accordance with [~~the following conditions:~~] this
 112 section.

113 [~~(1) the~~] (2) The collection of [~~samples~~] a sample shall be performed under reasonable
 114 and sanitary conditions[;].

115 [~~(2) samples~~] (3) A sample shall be collected and tested:

- 116 (a) with due regard to the privacy of the individual being tested[;]; and
- 117 (b) in a manner reasonably calculated to prevent [~~substitutions~~] a substitution or
 118 interference with the collection or testing of a reliable [~~samples;~~] sample.

119 [~~(3) sample~~] (4) Sample collection shall be documented, and the documentation
 120 procedures shall include:

121 (a) labeling of ~~[samples]~~ a sample so as reasonably to preclude the probability of
122 erroneous identification of a drug test ~~[results]~~ result; and

123 (b) an opportunity for ~~[the]~~ an employee or prospective employee to provide
124 notification of ~~[any]~~ information ~~[which he]~~ the employee or prospective employee considers
125 relevant to the drug test, including:

126 (i) identification of currently or recently used prescription or nonprescription drugs~~[-]~~;

127 or

128 (ii) other relevant medical information.

129 ~~[(4) sample]~~ (5) Sample collection, storage, and transportation to the place of drug
130 testing shall be performed so as reasonably to preclude the probability of sample
131 ~~[contamination or]~~ adulteration~~[-; and]~~ or erroneous identification.

132 ~~[(5) sample]~~ (6) Sample testing shall conform to scientifically accepted analytical
133 methods and procedures. ~~[Testing shall include verification or confirmation of any positive~~
134 ~~test result by gas chromatography, gas chromatography-mass spectroscopy, or other~~
135 ~~comparably reliable analytical method, before the result of any test may be]~~

136 (7) Before a non-negative test result may be reported to an employer or used as a basis
137 for [any] an action by an employer under Section 34-38-8[-], the drug test result:

138 (a) if positive, must be confirmed by:

139 (i) gas chromatography-mass spectroscopy; or

140 (ii) an other comparably reliable method; and

141 (b) if the sample used for the drug test is a urine sample:

142 (i) must be confirmed by a laboratory that is certified for a federal workplace drug
143 testing program by the Substance Abuse and Mental Health Service Administration of the
144 United States Department of Health and Human Services; and

145 (ii) must be certified by a medical review officer in accordance with Subsection (8).

146 (8) A drug testing program of an employer shall provide that, if the sample used for a
147 drug test is a urine sample:

148 (a) a medical review officer reviews a non-negative test for the purpose of certifying
149 the drug test result;

150 (b) with regard to the laboratory that conducts the drug test reviewed by the medical
151 review officer described in Subsection (8)(a), the medical review officer:

- 152 (i) is not an employee;
- 153 (ii) is not an agent; and
- 154 (iii) does not have a financial interest in the laboratory; and
- 155 (c) an employee or prospective employee has an opportunity to notify a medical review
- 156 officer of medical information that is relevant to interpreting a drug test result, including
- 157 information concerning currently or recently used prescription or nonprescription drugs.

158 Section 3. Section **34-38-8** is amended to read:

159 **34-38-8. Employer's disciplinary or rehabilitative actions.**

160 [~~Upon receipt of a verified or~~]

161 (1) An employer may take a disciplinary or rehabilitative action, including an action
162 described in Subsection (2), on the basis of:

163 (a) receipt of a confirmed positive drug [~~or alcohol~~] test result [~~which~~] that indicates a
164 violation of the employer's [~~written policy, or upon~~] drug testing program; or

165 (b) the refusal of an employee or prospective employee to provide a sample[~~, an~~
166 employer may use that test result or refusal as the basis for].

167 (2) A disciplinary or rehabilitative [~~actions, which may include~~] action permitted under
168 Subsection (1) includes the following:

169 [~~(1)~~] (a) a requirement that the employee enroll in an employer-approved rehabilitation,
170 treatment, or counseling program, which may include additional drug [~~or alcohol~~] testing, as a
171 condition of continued employment;

172 [~~(2)~~] (b) suspension of the employee with or without pay for a period of time;

173 [~~(3)~~] (c) termination of employment;

174 [~~(4)~~] (d) refusal to hire a prospective employee; or

175 [~~(5) other disciplinary measures]~~

176 (e) another disciplinary measure in conformance with the employer's usual procedures,
177 including any collective bargaining agreement.

178 Section 4. Section **34-38-11** is amended to read:

179 **34-38-11. Bases for cause of action for defamation, libel, slander, or damage to**
180 **reputation.**

181 [~~No~~] A cause of action for defamation of character, libel, slander, or damage to
182 reputation [~~arises~~] does not arise in favor of any person against an employer who [~~has~~

183 established a program of drug or alcohol testing] establishes a drug testing program in
 184 accordance with this chapter, unless:

- 185 (1) the results of ~~[that] a drug test [were]~~ are disclosed ~~[to any]~~;
- 186 (a) in a manner inconsistent with Subsections 34-38-6(7) and (8); or
- 187 (b) to a person other than:
- 188 (i) the employer[;];
- 189 (ii) an authorized employee or agent of the employer[;];
- 190 (iii) the tested [employee, or the tested prospective employee;] individual; or
- 191 (iv) a medical review officer;
- 192 (2) the information disclosed ~~[was]~~ is based on a false test result;
- 193 (3) the false test result ~~[was]~~ is disclosed with malice; and
- 194 (4) all elements of an action for defamation of character, libel, slander, or damage to
 195 reputation as established by statute or common law, are satisfied.

196 Section 5. Section ~~34-38-13~~ is amended to read:

197 **~~34-38-13. Confidentiality of test-related information.~~**

198 ~~[(1) For purposes of this section, "test-related information" means the following~~
 199 ~~received by the employer through the employer's drug or alcohol testing program:]~~

200 ~~[(a) information;]~~

201 ~~[(b) interviews;]~~

202 ~~[(c) reports;]~~

203 ~~[(d) statements;]~~

204 ~~[(e) memoranda; or]~~

205 ~~[(f) test results.]~~

206 ~~[(2)]~~ (1) Except as provided in Subsections ~~[(3) and (6)]~~ (2) and (5), test-related
 207 information is a confidential communication and may not be:

- 208 (a) used or received in evidence;
- 209 (b) obtained in discovery; or
- 210 (c) disclosed in ~~[any]~~ a public or private proceeding.

211 ~~[(3)]~~ (2) Test-related information:

212 (a) shall be disclosed to the Division of Occupational and Professional Licensing:

- 213 (i) in the manner provided in Subsection 58-13-5(3); and

214 (ii) only to the extent required under Subsection 58-13-5(3); and

215 (b) may only be used in a proceeding related to:

216 (i) an action taken by the Division of Occupational and Professional Licensing under
217 Section 58-1-401 when the Division of Occupational and Professional Licensing is taking
218 action in whole or in part on the basis of test-related information disclosed under Subsection
219 ~~[(3)]~~ (2)(a);

220 (ii) an action taken by an employer under Section 34-38-8; or

221 (iii) an action under Section 34-38-11.

222 ~~[(4)]~~ (3) Test-related information ~~[shall be]~~ is the property of the employer.

223 ~~[(5)]~~ (4) An employer ~~[is entitled to]~~ may use a drug or alcohol test result as a basis for
224 action under Section 34-38-8.

225 ~~[(6)]~~ (5) An employer may not be examined as a witness with regard to test-related
226 information, except:

227 (a) in a proceeding related to an action taken by the employer under Section 34-38-8;

228 (b) in an action under Section 34-38-11; or

229 (c) in an action described in Subsection ~~[(3)]~~ (2)(b)(i).

230 Section 6. Section **34-38-14** is amended to read:

231 **34-38-14. Employee not "disabled."**

232 An employee or prospective employee ~~[whose drug or alcohol test results are verified or~~
233 ~~confirmed as positive]~~ who has a non-negative test result in accordance with the provisions of
234 this chapter may not, because of those results alone, be defined as a person with a "disability"
235 for purposes of Title 34A, Chapter 5, Utah Antidiscrimination Act.

236 Section 7. Section **34-38-15** is amended to read:

237 **34-38-15. No physician-patient relationship created.**

238 A physician-patient relationship is not created between an employee or prospective
239 employee~~[- and the employer or any person performing the test,]~~ and one of the following
240 solely by the establishment of a drug ~~[or alcohol]~~ testing program ~~[in the workplace.]:~~

241 (1) the employer;

242 (2) a person performing a drug test; or

243 (3) a medical review officer.

Legislative Review Note
as of 1-27-09 5:28 PM

Office of Legislative Research and General Counsel

H.B. 145 - Workplace Drug Testing Programs

Fiscal Note

2009 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals and local governments. Business may be impacted due to changes in the proposed statute.
