

WORKPLACE DRUG AND ALCOHOL TESTING

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Trisha S. Beck

Senate Sponsor: Karen Mayne

LONG TITLE

Committee Note:

The Business and Labor Interim Committee recommended this bill.

General Description:

This bill modifies provisions related to an employer testing for drugs and alcohol.

Highlighted Provisions:

This bill:

- ▶ modifies terminology;
- ▶ clarifies effect of complying with the chapter;
- ▶ requires certain confirmation testing to be done by a certified laboratory;
- ▶ addresses grounds for employer action;
- ▶ addresses presumptions in applying employer protections from liability; and
- ▶ makes technical and conforming amendments.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

34-38-1, as enacted by Laws of Utah 1987, Chapter 234

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



- 28 **34-38-3**, as last amended by Laws of Utah 2001, Chapter 107
- 29 **34-38-6**, as enacted by Laws of Utah 1987, Chapter 234
- 30 **34-38-8**, as enacted by Laws of Utah 1987, Chapter 234
- 31 **34-38-10**, as enacted by Laws of Utah 1987, Chapter 234
- 32 **34-38-11**, as enacted by Laws of Utah 1987, Chapter 234
- 33 **34-38-14**, as last amended by Laws of Utah 2001, Chapter 73



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

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

37 **34-38-1. Legislative findings -- Purpose and intent of chapter.**

38 (1) The Legislature finds that a healthy and productive work force, safe working
 39 conditions free from the effects of drugs and alcohol, and maintenance of the quality of
 40 products produced and services rendered in this state, are important to employers, employees,
 41 and the general public. The Legislature further finds that the abuse of drugs and alcohol creates
 42 a variety of workplace problems, including increased injuries on the job, increased
 43 absenteeism, increased financial burden on health and benefit programs, increased workplace
 44 theft, decreased employee morale, decreased productivity, and a decline in the quality of
 45 products and services.

46 ~~[Therefore, in balancing the interests of employers, employees, and the welfare of the~~
 47 ~~general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the~~
 48 ~~workplace, in accordance with this chapter, is in the best interest of all parties.]~~

49 (2) The Legislature does not intend to prohibit ~~[any]~~ an employee from seeking
 50 damages or job reinstatement, if action ~~[was]~~ is taken by ~~[his]~~ the employer ~~[based on a false~~
 51 ~~drug or alcohol]~~ on the basis of an inaccurate test result.

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

53 **34-38-2. Definitions.**

54 For purposes of this chapter:

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

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

59 (3) (a) "Employer" means ~~[any] a person[, firm, or corporation]~~, including ~~[any] a~~
 60 public utility or transit district, ~~[which]~~ that has one or more workers or operators employed in
 61 the same business, or in or about the same establishment, under any contract of hire, express or
 62 implied, oral or written.

63 (b) "Employer" does not include the federal or state government, or other local political
 64 subdivisions.

65 (4) "Employee" means ~~[any person]~~ an individual in the service of an employer~~[-, as~~
 66 ~~defined by Subsection (3);]~~ for compensation.

67 (5) "Failed test" means a confirmed drug or alcohol test that indicates that the sample
 68 tested is:

69 (a) positive;

70 (b) adulterated; or

71 (c) substituted.

72 (6) "Inaccurate test result" means a test result that is treated as a positive test result,
 73 when the sample should not have resulted in a positive test result.

74 (7) "Licensed physician" means an individual who is licensed:

75 (a) as a doctor of medicine under Title 58, Chapter 67, Utah Medical Practice Act, or
 76 similar law of another state; or

77 (b) as an osteopathic physician or surgeon under Title 58, Chapter 68, Utah
 78 Osteopathic Medical Practice Act, or similar law of another state.

79 ~~[(5)]~~ (8) "Prospective employee" means [any person who has made application] an
 80 individual who applies to an employer, [whether written or oral] either in writing or orally, to
 81 become [his] the employer's employee.

82 ~~[(6)]~~ (9) "Sample" means urine, blood, breath, saliva, or hair.

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

84 **34-38-3. Testing for drugs or alcohol.**

85 (1) ~~[It is not unlawful for an]~~ If an employer ~~[to test employees or prospective~~
 86 ~~employees]~~ tests an employee or prospective employee for the presence of drugs or alcohol~~[-, in~~
 87 ~~accordance with the provisions of this chapter;]~~ as a condition of hiring or continued
 88 employment, the employer is protected from liability as provided in this chapter if the employer
 89 complies with this chapter. However, employers and management in general shall submit to

90 the testing themselves on a periodic basis.

91 (2) (a) ~~[Any]~~ An organization [which is operating] that operates a storage facility or
92 transfer facility or ~~[which]~~ that is engaged in the transportation of high-level nuclear waste or
93 greater than class C radioactive waste within the exterior boundaries of the state shall establish
94 a mandatory drug testing program regarding drugs and alcohol for prospective and existing
95 employees as a condition of hiring any employee or the continued employment of any
96 employee. As a part of the program, employers and management in general shall submit to the
97 testing themselves on a periodic basis. The program shall implement testing standards and
98 procedures established under Subsection (2)(b).

99 (b) The executive director of the Department of Environmental Quality, in consultation
100 with the Labor Commission under Section 34A-1-103, shall by rule establish standards for
101 timing of testing and dosage for impairment for the drug and alcohol testing program under this
102 Subsection (2). The standards shall address the protection of the safety, health, and welfare of
103 the public.

104 Section 4. Section ~~34-38-6~~ is amended to read:

105 **34-38-6. Requirements for collection and testing.**

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

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

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

111 (a) with due regard to the privacy of the individual being tested[;]; and

112 (b) in a manner reasonably calculated to prevent substitutions or interference with the
113 collection or testing of a reliable [samples;] sample.

114 ~~[(3) sample]~~ (4) The sample collection shall be documented[, and the]. The
115 documentation procedures ~~[shall]~~ required by this Subsection (4) include:

116 (a) labeling of ~~[samples]~~ a sample so as reasonably to preclude the probability of
117 erroneous identification of test results; and

118 (b) an opportunity for the employee or prospective employee to provide notification of
119 any information ~~[which he]~~ that the employee or prospective employee considers relevant to
120 the test, including:

121 (i) identification of currently or recently used prescription or nonprescription drugs[;];

122 or

123 (ii) other relevant medical information.

124 [~~(4) sample~~] (5) Sample collection, storage, and transportation to the place of testing
125 shall be performed so as reasonably to preclude the probability of sample contamination or
126 adulteration[; and].

127 [~~(5) sample testing~~] (6) (a) Testing of a sample shall conform to scientifically accepted
128 analytical methods and procedures. [~~Testing~~]

129 (b) Before a test of a sample may be considered a failed test and used as a basis for an
130 action by an employer under Section 34-38-8, testing of the sample shall include [verification
131 or] a confirmation [of any positive test result] test:

132 (i) by gas chromatography, gas chromatography-mass spectroscopy, or other
133 comparably reliable analytical method[; ~~before the result of any test may be used as a basis for~~
134 ~~any action by an employer under Section 34-38-8.]; and~~

135 (ii) if the sample used for a test is a urine sample, by a laboratory that is certified by the
136 United States Department of Health and Human Services under the National Laboratory
137 Certification Program.

138 Section 5. Section **34-38-8** is amended to read:

139 **34-38-8. Employer's disciplinary or rehabilitative actions.**

140 [~~Upon receipt of a verified or confirmed positive drug or alcohol test result which~~]

141 (1) An employer may take an action described in Subsection (2) if:

142 (a) the employer receives a test result that:

143 (i) indicates a failed test;

144 (ii) is confirmed as required by Subsection 34-38-6(6); and

145 (iii) indicates a violation of the employer's written policy[;]; or [upon the refusal of]

146 (b) an employee or prospective employee refuses to provide a sample[; an].

147 (2) An employer may use [that] a test result or a refusal described in Subsection (1) as
148 the basis for disciplinary or rehabilitative actions, which may include the following:

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

152 [~~2~~] (b) suspension of the employee with or without pay for a period of time;

153 [~~3~~] (c) termination of employment;

154 [~~4~~] (d) refusal to hire a prospective employee; or

155 [~~5~~] (e) other disciplinary measures in conformance with the employer's usual

156 procedures, including ~~any~~ a collective bargaining agreement.

157 Section 6. Section 34-38-10 is amended to read:

158 **34-38-10. No cause of action arises against employer unless inaccurate test result**
159 **-- Presumption and limitation of damages in claim against employer.**

160 (1) ~~No~~ A cause of action ~~arises~~ may not arise in favor of ~~any~~ a person against an
161 employer who ~~has established~~ establishes a program of drug or alcohol testing in accordance
162 with this chapter, and who ~~has taken any~~ takes an action under Section 34-38-8, unless the
163 ~~employer's action was based on a false test result~~ employer takes the action on the basis of an
164 inaccurate test result.

165 (2) ~~In any claim~~ If a person bringing a claim, including a claim under Section
166 34-38-11, ~~where it is alleged~~ alleges that an employer's action ~~was~~ is based on ~~a false~~ an
167 inaccurate test result:

168 (a) there is a rebuttable presumption that the test result ~~was~~ is valid if the employer
169 ~~complied with the provisions of~~ complies with Section 34-38-6; and

170 (b) the employer is not liable for monetary damages if ~~his~~ the employer's reliance on
171 ~~a false~~ an inaccurate test result ~~was~~ is reasonable and in good faith.

172 (3) (a) There is a rebuttable presumption that the employer complies with Section
173 34-38-6 if as part of the employer's drug and alcohol testing program a licensed physician who
174 is trained in the interpretation of drug and alcohol test results:

175 (i) provides medical assessment of a result that indicates a failed test;

176 (ii) requests re-analysis of a test result if necessary; and

177 (iii) makes a determination whether or not alcohol or other drug use has occurred.

178 (b) A court may find that an employer complies with Section 34-38-6 notwithstanding
179 that the employer's drug and alcohol testing program does not include an action described in
180 Subsection (3)(a).

181 Section 7. Section 34-38-11 is amended to read:

182 **34-38-11. Bases for cause of action for defamation, libel, slander, or damage to**

183 **reputation.**

184 No cause of action for defamation of character, libel, slander, or damage to reputation
185 arises in favor of any person against an employer who has established a program of drug or
186 alcohol testing in accordance with this chapter, unless:

187 (1) the results of that test were disclosed to any person other than the employer, an
188 authorized employee or agent of the employer, the tested employee, or the tested prospective
189 employee;

190 (2) the information disclosed ~~[was]~~ is based on ~~[a false]~~ an inaccurate test result;

191 (3) ~~[the false]~~ an inaccurate test result ~~[was]~~ is disclosed with malice; and

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

194 Section 8. Section **34-38-14** is amended to read:

195 **34-38-14. Employee not "disabled."**

196 An employee or prospective employee whose drug or alcohol test ~~[results are verified~~
197 ~~or]~~ result is confirmed as positive in accordance with ~~[the provisions of]~~ this chapter may not,
198 because of those results alone, be defined as a person with a "disability" for purposes of Title
199 34A, Chapter 5, Utah Antidiscrimination Act.

Legislative Review Note

as of 10-23-09 6:58 AM

Office of Legislative Research and General Counsel

H.B. 23 - Workplace Drug and Alcohol Testing

Fiscal Note

2010 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 local governments. Business and individuals may be impacted due to the proposed change in statute.
