

ASSEMBLY, No. 2500

STATE OF NEW JERSEY

INTRODUCED NOVEMBER 14, 1996

By Assemblyman BAGGER

1 AN ACT concerning drug testing.

2

3 **BE IT ENACTED** by the Senate and General Assembly of the State
4 of New Jersey:

5

6 1. For purposes of this act:

7 "Alcohol" means ethyl alcohol, hydrated oxide of ethyl, distilled
8 spirits, wine, malt beverages and intoxicating liquors, from whatever
9 source or by whatever means produced.

10 "Chain of custody" means the methodology of tracking specified
11 materials, specimens or substances for the purpose of maintaining
12 control and accountability from initial collection to final disposition for
13 all such materials, specimens or substances and providing
14 accountability at each stage in handling, testing and sorting materials,
15 specimens or substances and reporting test results.

16 "Confirmation test" or "confirmed drug test" means a second drug
17 test used to identify the presence of a specific drug or metabolite in a
18 specimen.

19 "Cut-off detection level" means the level at which the presence of
20 a drug can be reasonably detected by an initial and confirmation test
21 performed by a laboratory meeting the standards specified in this act.
22 The threshold detection level indicates the level at which a valid
23 conclusion can be drawn that the drug is present in the job applicant's
24 or employee's specimen.

25 "Department" means the Department of Health.

26 "Drug" means alcohol; amphetamines; cannabinoids; cocaine;
27 phencyclidine (PC); hallucinogens; methaqualone; opiates;
28 barbiturates; benzodiazepines; synthetic narcotics; designer drugs;
29 controlled dangerous substances and controlled substance analogs or
30 volatile substances which produce the psychological or physiological
31 effects of a controlled dangerous substance through deliberate
32 inhalation or a metabolite of any of these substances.

33 "Employee" means any person who works for salary, wages, or
34 other remuneration for an employer.

35 "Employer" means a public or private employer which has one or
36 more employees within this State, or which has offered or may offer
37 employment to one or more individuals in this State.

1 "Initial drug test" or "initial test" means an immunoassay procedure
2 or an equivalent, approved by the federal Food and Drug
3 Administration, to identify negative and presumptive positive
4 specimens, or any other accepted procedure that is more accurate, cost
5 effective and approved by the federal Food and Drug Administration
6 and the department.

7 "Job applicant" means a person who has applied for a position with
8 an employer.

9 "Medical review officer" means a physician knowledgeable in the
10 effects of drugs on the human body and how drugs are detected by
11 drug tests and who is familiar with drug test technology and how such
12 tests should be administered.

13 "Neutral selection" means a mechanism for selecting employees for
14 drug tests that (1) results in an equal probability that any employee
15 from a group of employees subject to the selection mechanism will be
16 selected, and (2) does not give an employer discretion to waive the
17 selection of any employee selected under the mechanism.

18 "Reasonable suspicion drug testing" means drug testing based on a
19 belief that an employee is using or has used drugs in violation of the
20 employer's policy. The belief shall be drawn from specific objective
21 and articulated facts and reasonable inferences drawn from those facts
22 in light of experience, and may be based upon, among other things:

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

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

28 (3) A report of drug use provided by reliable and credible sources;

29 (4) Evidence that an individual has tampered with a drug test,
30 during his employment with the current employer;

31 (5) Information that an employee has caused, or contributed to an
32 accident while at work;

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

36 "Specimen" means tissue, blood, breath, urine, saliva or other
37 product of the human body capable of revealing the presence of drugs
38 or their metabolites.

39

40 2. An employer is authorized to conduct the following types of
41 drug tests:

42 a. Employers may require job applicants to submit to a drug test as
43 a condition of the employment and may use a refusal to submit to a
44 drug test or initial positive drug test result as a basis for refusal to
45 hire. An employer who conducts drug testing of job applicants shall
46 notify the applicants in writing upon application, and prior to the

1 collection of the specimen for the drug test, that the applicants may be
2 tested for the presence of drugs.

3 b. (1) An employer may require any and all employees to submit
4 to reasonable suspicion drug testing as a condition of continued
5 employment.

6 (2) There is created a rebuttable presumption that the employer
7 had reasonable suspicion to test for drugs if the specimen provided by
8 the employee tested positive for drugs in a confirmation test.

9 (3) If drug testing is conducted based on reasonable suspicion, the
10 employer shall promptly detail in writing the circumstances which
11 formed the basis of the determination that reasonable suspicion existed
12 to warrant the drug testing. A copy of this documentation shall be
13 given to the employee upon request and the original documentation
14 shall be kept confidential by the employer pursuant to section 12 of
15 this act and retained by the employer for at least one year.

16 c. An employer may require an employee to submit to a drug test
17 as a condition of continued employment if the test is conducted as part
18 of a routinely scheduled employee fitness for duty medical examination
19 that is part of the employer's established policy or which is scheduled
20 routinely for all members of an employment classification or group.

21 d. An employer may require job applicants, as a condition of
22 employment, or employees, as a condition of continued employment,
23 to submit to neutral selection drug testing.

24

25 3. a. All drug testing conducted by an employer in accordance
26 with the provisions of this act shall be in conformity with the standards
27 and procedures established in this act.

28 b. All specimen collection and testing for drugs under this act shall
29 be performed in accordance with the following procedures:

30 (1) The collection of specimens shall be performed under
31 reasonable and sanitary conditions. Individual dignity shall be
32 preserved to the extent practicable;

33 (2) Specimens shall be collected in a manner reasonably calculated
34 to prevent substitution of specimens and interference with the
35 collection or testing of specimens;

36 (3) Specimen collection shall be documented, and the
37 documentation procedures shall include:

38 (a) labeling of specimen containers to reasonably preclude the
39 likelihood of erroneous identification of test results; and

40 (b) an opportunity for the employee or applicant to provide any
41 information that the employee or applicant considers relevant to the
42 test;

43 (4) Specimen storage and transportation to the testing site shall be
44 performed in a reasonable manner to preclude specimen contamination
45 or adulteration; and

46 (5) Specimen testing for drugs shall conform to scientifically

- 1 accepted analytical methods and procedures.
- 2 c. A specimen for a drug test under this act may be taken or
3 collected by any of the following persons:
- 4 (1) A physician, a physician's assistant, a registered professional
5 nurse, a licensed practical nurse, a nurse practitioner, or a trained
6 attendant deemed qualified by the employer;
- 7 (2) A qualified person employed by a licensed laboratory; or
- 8 (3) A certified paramedic who is present at the scene of an accident
9 for the purpose of rendering emergency medical service or treatment.
- 10 d. Employers may establish a program to train and certify persons
11 to collect specimens and conduct on-site drug tests in the workplace.
12 Employers may designate employees for this training and certification,
13 or may utilize any person so trained and certified.
- 14 e. A person who collects or takes a specimen for a drug test
15 conducted pursuant to this act shall collect an amount sufficient for
16 two drug tests as defined by the department.
- 17 f. Any drug testing conducted or requested by an employer under
18 this act shall occur during or immediately after the regular work period
19 of current employees, and shall be deemed to be performed during
20 work time for purposes of determining compensation and benefits for
21 current employees.
- 22 g. An employer testing for drugs under this act may only conduct
23 those tests necessary to determine the presence of drugs in the
24 specimen.
- 25 h. A confirmation test shall use a method of equal or greater
26 sensitivity than that used on the initial drug test. If an initial drug test
27 is negative, there shall be no confirmation test. All confirmed positive
28 drug test results shall be reviewed by a medical review officer before
29 being used by an employer.
- 30
- 31 4. a. Every specimen of an employee that produces a confirmed
32 positive result shall be preserved in a frozen state for a period of 90
33 days from the time the results of the confirmed positive test are mailed
34 or otherwise delivered to the employer. During this period, the
35 employee who has provided the specimen shall be permitted by the
36 employer to have a portion of the specimen retested, at the employee's
37 expense, at a licensed laboratory chosen by the employee. The
38 licensed laboratory shall be responsible for the transfer of the portion
39 of the specimen to be retested, and for the integrity of the chain of
40 custody during such transfer.
- 41 b. Within five working days after receipt of a confirmed positive
42 test result, an employer shall, in writing, inform an employee of such
43 positive test result and inform the employee in writing of the
44 consequences of such a report and the options available to him.
- 45 c. An employee may request and receive from the employer a copy
46 of the test result report. Within 10 working days after receiving notice

1 of a confirmed positive test result, the employee may submit
2 information to an employer explaining the test results, and why the
3 results do not constitute a violation of the employer's policy. If an
4 employee's explanation of the positive test results is not satisfactory
5 to the employer, a written explanation submitted by the employer as
6 to why the employee's explanation is unsatisfactory, along with the
7 report of positive results, shall be made part of the employee's medical
8 and personnel records.

9

10 5. a. An employer testing for drugs under this act shall not
11 discharge, or request or require rehabilitation of, an employee on the
12 basis of a positive drug test result that has not been verified by a
13 confirmation test.

14 b. In addition to the limitation pursuant to subsection a. of this
15 section, an employer testing for drugs under this act shall not
16 discharge an employee for whom a confirmed positive drug test result
17 was the first time the employee has tested positive for any drug while
18 in the employ of the employer unless the following conditions have
19 been met;

20 (1) the employer has first given the employee an opportunity to
21 participate in, at the employee's own expense or pursuant to coverage
22 under an employee benefit plan, drug abuse assessment, and if
23 necessary, drug abuse rehabilitation, and

24 (2) the employee has either refused to participate in the assessment
25 or rehabilitation program or has failed to successfully complete such
26 program, as evidenced by withdrawal from the program before its
27 completion or a report from the program indicating unsatisfactory
28 compliance, or by a positive drug test result on a confirmation test
29 after completion of the program; or

30 (3) the employee's work performance has been inadequate, or the
31 employee has caused or contributed to an accident, or the employee
32 has taken or omitted to take any other action which ordinarily would
33 result in the discharge or discipline of the employee.

34 c. An employer shall not discharge, discipline, discriminate against
35 or request or require rehabilitation of an employee on the basis of
36 medical history information revealed to the employer pursuant to this
37 act unless the employee had an affirmative obligation to provide such
38 information before, upon, or after hire.

39

40 6. An employee or job applicant whose drug test result is positive
41 in accordance with the provisions of this act shall not, by virtue of that
42 result alone, be defined as a person with a disability or handicap.

43

44 7. a. An employer who discharges or disciplines an employee on
45 the basis of a confirmed positive drug test in accordance with this act
46 shall be considered to have discharged or disciplined the employee for

1 cause.

2 b. An employee discharged on the basis of a confirmed positive
3 drug test in accordance with this act shall be considered to have been
4 discharged for willful misconduct under State law.

5

6 8. a. If an employee refuses to submit to drug testing administered
7 in accordance with this act, the employer shall not be barred from
8 discharging, disciplining or referring the employee to assessment or
9 drug abuse rehabilitation.

10 b. An employer may temporarily suspend an employee from his
11 position, or transfer an employee to another position, after obtaining
12 the results of a positive on-site initial drug test or confirmed positive
13 drug test if the employee's position is one which would create a health
14 or safety risk to the employee, to fellow employees, or to the public,
15 should the employee be affected by the use of a drug.

16

17 9. An employee or job applicant required to submit to a drug test
18 under this act may be requested by an employer to sign a statement
19 indicating that he has read and understands the employer's drug testing
20 policy and notice. An employee's or job applicant's refusal to sign
21 such a statement shall not invalidate the results of any drug test, or bar
22 the employer from administering the drug test or from taking action
23 consistent with the terms of an applicable collective bargaining
24 agreement or the employer's drug testing policy, or from refusing to
25 hire the job applicant.

26

27 10. The employer shall pay the costs of all drug tests under this act
28 to which it requires, or requests, an employee or job applicant to
29 submit.

30

31 11. No physician-patient relationship is created between an
32 employee or job applicant and an employer, medical review officer, or
33 any person performing or evaluating a drug test solely by the
34 establishment, implementation, or administration of drug-testing in
35 accordance with this act.

36

37 12. a. All information, interviews, reports, statements,
38 memoranda, and test results, written or otherwise received by the
39 employer through drug-testing under this act are confidential
40 communications and may not be used or received in evidence, obtained
41 in discovery, or disclosed in any public or private proceedings, except
42 in accordance with this act.

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

45 c. An employer shall not release to any person other than the
46 employee or job applicant, or employer medical, supervisory, or other

1 personnel, as designated by the employer on a need-to-know basis,
2 information related to drug test results under this act unless:

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

5 (2) It is necessary to introduce a confirmed positive test result into
6 an arbitration proceeding pursuant to a collective bargaining
7 agreement, an administrative hearing under applicable State or local
8 law, or a judicial proceeding, provided that the information is relevant
9 to the hearing or proceeding, or the information must be disclosed to
10 a federal or State agency or other unit of this State or United States
11 government as required under law, regulation, or order, or in
12 accordance with compliance requirements of a State or federal
13 government contract, or disclosed to a drug abuse rehabilitation
14 program for the purpose of evaluation or treatment of an employee; or

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

19 d. The confidentiality provisions of this section shall not apply to
20 other parts of an employee's or job applicant's personnel or medical
21 files.

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

25

26 13. a. Five days after a drug test has been completed by a
27 laboratory, the laboratory shall report to the employer the result of the
28 test.

29 b. A laboratory or employer report of a drug test result under this
30 act shall, at a minimum, state:

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

33 (2) Any confirmed positive drug test results on a specimen which
34 tested positive on an initial test, or a negative drug test result on a
35 specimen. Reports shall not make reference to initial or confirmation
36 tests when reporting positive or negative results;

37 (3) A list of the drugs tested for; and

38 (4) The type of tests conducted for both initial and confirmation
39 tests and the cut-off detection levels of the tests.

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

43

44 14. The department may adopt, pursuant to the "Administrative
45 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), rules and
46 regulations to implement this act by establishing:

- 1 a. standards for drug testing laboratory licensing, suspension, and
- 2 revocation of a license;
- 3 b. specimens that are appropriate for drug testing;
- 4 c. methods of analysis and procedures to ensure reliable drug
- 5 testing results, including standards for initial and confirmation tests
- 6 and on-site tests;
- 7 d. guidelines on how to establish cut-off detection levels for drugs
- 8 or their metabolites for the purposes of determining a positive drug
- 9 test result;
- 10 e. chain-of-custody procedures to ensure proper identification,
- 11 labeling, and handling of specimens being tested; and
- 12 f. retention and storage procedures to ensure reliable results on
- 13 confirmation tests and retests.

14

15 15. a. Upon a violation of any of the provisions of this act, an

16 aggrieved job applicant, employee or former employee may, within six

17 months of the violation or the exhaustion of any internal administrative

18 remedies available to the aggrieved party, institute a civil action in a

19 court of competent jurisdiction to obtain relief. The court may order

20 one or more of the following:

- 21 (1) An injunction to restrain the continued violation of this act;
- 22 (2) The reinstatement of the person to the same position held
- 23 before the unlawful drug testing, disciplinary action or discharge, or
- 24 to an equivalent position;
- 25 (3) The reinstatement of full employee benefits and seniority rights;
- 26 (4) Compensation for lost wages, benefits and other remuneration
- 27 to which the person would have been entitled but for a violation of the
- 28 act.

29 b. For the purposes of this act, damages shall be limited to the

30 recovery of compensatory damages directly resulting from injury or

31 loss caused by a violation of this act, and shall not include

32 noneconomic losses.

33 c. A person or collective bargaining agent may bring an action

34 under this section only after first exhausting all applicable grievance

35 procedures and arbitration proceeding requirements under a collective

36 bargaining agreement; provided that, the person's right to bring an

37 action under this section shall not be affected by a decision of a

38 collective bargaining agent not to pursue a grievance.

39

40 16. a. Any employer who complies with the provisions of this act

41 shall not be liable in any civil action arising from any drug testing

42 performed in compliance with this act.

43 b. Pursuant to any claim alleging a violation of this act, including

44 a claim under this act in which it is alleged that an employer's action

45 with respect to a person was based on an incorrect drug test result,

46 there shall be a rebuttable presumption that the test result was valid if

1 the employer complied with the provisions of this act.

2 c. No cause of action for defamation of character, libel, slander, or
3 damage to reputation shall arise in favor of any person against an
4 employer who has established a program of drug testing in accordance
5 with this act, unless:

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

9 (2) the information disclosed was based on an incorrect drug test
10 result;

11 (3) the incorrect drug test result was disclosed with malice; and

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

15

16 17. No cause of action shall arise in favor of any person based
17 upon the failure of an employer to establish drug testing in accordance
18 with this act.

19

20 18. The drug testing procedures provided in this act do not apply
21 if the specific work performed requires employees or job applicants to
22 be subject to drug testing pursuant to:

23 a. federal regulations that specifically preempt State and local
24 regulation of drug testing with respect to such employees and job
25 applicants;

26 b. federal regulations or requirements enacted or implemented in
27 connection with the operation of federally regulated facilities;

28 c. federal contracts where the drug testing is conducted for safety,
29 or protection of sensitive or proprietary data or national security; or

30 d. State agency rules that adopt federal regulations applicable to
31 the interstate component of a federally regulated activity.

32

33 19. This act shall take effect on the 180th day after enactment,
34 except that any rules and regulations to implement the provisions of
35 this act may be promulgated prior to the effective date.

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37

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STATEMENT

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40 Under the bill, an employer may require pre-employment drug tests,
41 drug tests for reasonable suspicion of drug use or as part of a routine
42 medical examination for determining fitness for duty and neutral
43 selection drug tests. All drug testing conducted by the employer in
44 accordance with the provisions of this bill must be in conformity with
45 the standards and procedures established in the bill and by the
46 Department of Health. An employer may only conduct those tests

1 necessary to determine the presence of drugs in the specimen. Also,
2 a confirmation drug test must be of equal or greater sensitivity than
3 used on the initial drug test. If an initial drug test is negative, there
4 shall be no confirmation drug test.

5 An employer testing for drugs in accordance with the provisions of
6 this bill may not discharge, or request or require rehabilitation of, any
7 employee on the basis of a positive drug test result that has not been
8 verified by a confirmation drug test. In addition, an employer may not
9 discharge an employee for whom a confirmed positive drug test result
10 was the first time the employee has tested positive for any drug while
11 in the employ of the employer unless (1) the employee has an
12 opportunity to participate in a drug abuse assessment and drug abuse
13 rehabilitation, if necessary, and the employee refused to participate in
14 the assessment or rehabilitation program, has failed to complete
15 successfully such program, or has a positive drug test result on a
16 confirmation test after completion of the program or (2) the
17 employee's work performance has been inadequate or contributed to
18 an accident. An employer who discharges or disciplines an employee
19 on the basis of a confirmed positive drug test in accordance with the
20 provisions of this bill shall be considered to have discharged or
21 disciplined the employee for cause. If an employee refuses to submit
22 to drug testing administered in accordance with this bill, the employer
23 may discharge or discipline the employee or refer the employee to drug
24 abuse assessment or rehabilitation. An employer may temporarily
25 suspend an employee, or transfer that employee to another position,
26 after obtaining the results of a positive on-site initial drug test or
27 confirmed positive drug test if the employee's position could create a
28 health or safety risk.

29 The bill provides that information and documents received by an
30 employer through drug testing pursuant to the provisions of this bill
31 are confidential communications, except in certain circumstances.

32 Upon a violation of any provision of the bill, an aggrieved job
33 applicant, employee or former employee may institute an action in
34 court to obtain relief. The court may order one or more of the
35 following:

36 (1) An injunction to restrain the continued violation of the
37 provisions of the bill;

38 (2) The reinstatement of the person to the same position held
39 before the unlawful drug testing, disciplinary action or discharge, or
40 to an equivalent position;

41 (3) The reinstatement of full employee benefits and seniority rights;

42 (4) Compensation for lost wages, benefits and other remuneration
43 to which the person would have been entitled but for a violation of the
44 provisions of the bill.

45 An employer who complies with the provisions of this bill shall not
46 be liable in any civil action arising from any drug testing performed in

1 compliance with the provisions of the bill. In addition, no cause of
2 action shall arise in favor of any person based upon the failure of an
3 employer to establish drug testing in accordance with this bill.

4 The bill permits the Department of Health to adopt rules and
5 regulations establishing standards for drug testing laboratory licensing
6 and procedures for drug testing.

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11 Concerns certain standards and liability for drug testing.