

[First Reprint]  
ASSEMBLY, No. 2500

STATE OF NEW JERSEY

INTRODUCED NOVEMBER 14, 1996

By Assemblymen BAGGER and Bucco

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 <sup>1</sup>["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.]<sup>1</sup>

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  
18 <sup>1</sup>[a] the same<sup>1</sup> 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 <sup>1</sup>and Senior  
26 Services<sup>1</sup>.

27 "Drug" means <sup>1</sup>[alcohol;]<sup>1</sup> amphetamines; cannabinoids; cocaine;  
28 phencyclidine (PC); hallucinogens; methaqualone; opiates;  
29 barbiturates; benzodiazepines; synthetic narcotics; designer drugs;  
30 controlled dangerous substances and controlled substance analogs or  
31 volatile substances which produce the psychological or physiological

**EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.**

**Matter underlined thus is new matter.**

**Matter enclosed in superscript numerals has been adopted as follows:**

<sup>1</sup> Assembly AJU committee amendments adopted May 1, 1997.

1 effects of a controlled dangerous substance through deliberate  
2 inhalation or a metabolite of any of these substances.

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

5 "Employer" means a <sup>1</sup> [public or]<sup>1</sup> private employer which has one  
6 or more employees within this State, or which has offered or may offer  
7 employment to one or more individuals in this State.

8 "Initial drug test" or "initial test" means an immunoassay procedure  
9 or an equivalent, approved by the federal Food and Drug  
10 Administration, to identify negative and presumptive positive  
11 specimens, or any other accepted procedure that is more accurate<sup>1</sup> [,  
12 cost effective]<sup>1</sup> and approved by the federal Food and Drug  
13 Administration and the department.

14 "Job applicant" means a person who has applied for a position with  
15 an employer.

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

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

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

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

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

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

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

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

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

43 "Specimen" means tissue, blood, breath, urine, saliva or other  
44 product of the human body capable of revealing the presence of drugs  
45 or their metabolites.

- 1       2. An employer is authorized to conduct the following types of  
2 drug tests:
- 3       a. Employers may require job applicants to submit to a drug test as  
4 a condition of the employment and may use a refusal to submit to a  
5 drug test or initial positive drug test result as a basis for refusal to  
6 hire. An employer who conducts drug testing of job applicants shall  
7 notify the applicants in writing upon application, and prior to the  
8 collection of the specimen for the drug test, that the applicants may be  
9 tested for the presence of drugs.
- 10       b. (1) An employer may require any and all employees to submit  
11 to reasonable suspicion drug testing as a condition of continued  
12 employment.
- 13       (2) There is created a rebuttable presumption that the employer  
14 had reasonable suspicion to test for drugs if the specimen provided by  
15 the employee tested positive for drugs in a confirmation test.
- 16       <sup>1</sup>[(3) If drug testing is conducted based on reasonable suspicion,  
17 the employer shall promptly detail in writing the circumstances which  
18 formed the basis of the determination that reasonable suspicion existed  
19 to warrant the drug testing. A copy of this documentation shall be  
20 given to the employee upon request and the original documentation  
21 shall be kept confidential by the employer pursuant to section 12 of  
22 this act and retained by the employer for at least one year.]<sup>1</sup>
- 23       c. An employer may require an employee to submit to a drug test  
24 as a condition of continued employment if the test is conducted as part  
25 of a routinely scheduled employee fitness for duty medical examination  
26 that is part of the employer's established policy or which is scheduled  
27 routinely for all members of an employment classification or group.
- 28       d. An employer may require job applicants, as a condition of  
29 employment, or employees, as a condition of continued employment,  
30 to submit to neutral selection drug testing.
- 31
- 32       3. a. All drug testing conducted by an employer in accordance  
33 with the provisions of this act shall be in conformity with the standards  
34 and procedures established in this act.
- 35       b. All specimen collection and testing for drugs under this act shall  
36 be performed in accordance with the following procedures:
- 37       (1) The collection of specimens shall be performed under  
38 reasonable and sanitary conditions. Individual dignity shall be  
39 preserved to the extent practicable;
- 40       (2) Specimens shall be collected in a manner reasonably calculated  
41 to prevent substitution of specimens and interference with the  
42 collection or testing of specimens;
- 43       (3) Specimen collection shall be documented, and the  
44 documentation procedures shall include:
- 45       (a) labeling of specimen containers to reasonably preclude the  
46 likelihood of erroneous identification of test results; and

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

1 of the specimen to be retested, and for the integrity of the chain of  
2 custody during such transfer.

3 b. Within five working days after receipt of a confirmed positive  
4 test result, an employer shall, in writing, inform an employee of such  
5 positive test result and inform the employee in writing of the  
6 consequences of such a report and the options available to him.

7 c. An employee may request and receive from the employer a copy  
8 of the test result report. Within 10 working days after receiving notice  
9 of a confirmed positive test result, the employee may submit  
10 information to an employer explaining the test results, and why the  
11 results do not constitute a violation of the employer's policy. <sup>1</sup>[If an  
12 employee's explanation of the positive test results is not satisfactory  
13 to the employer, a written explanation submitted by the employer as  
14 to why the employee's explanation is unsatisfactory, along with the  
15 report of positive results, shall be made part of the employee's medical  
16 and personnel records.]<sup>1</sup>

17

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

22 b. <sup>1</sup>[In] Except as provided in subsection c. of this section, in<sup>1</sup>  
23 addition to the limitation pursuant to subsection a. of this section, an  
24 employer testing for drugs under this act shall not discharge an  
25 employee for whom a confirmed positive drug test result was the first  
26 time the employee has tested positive for any drug while in the employ  
27 of the employer unless the following conditions have been met;

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

32 (2) the employee has either refused to participate in the assessment  
33 or rehabilitation program or has failed to successfully complete such  
34 program, as evidenced by withdrawal from the program before its  
35 completion or a report from the program indicating unsatisfactory  
36 compliance, or by a positive drug test result on a confirmation test  
37 after <sup>1</sup>[completion] commencement<sup>1</sup> of the program; or

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

42 <sup>1</sup>c. In addition to the limitation pursuant to subsection a. of this  
43 section, an employer testing for drugs under this act may discharge an  
44 employee for whom a confirmed positive drug test result was the first  
45 time the employee has tested positive for any drug while in the employ  
46 of the employer if the employee holds a safety-sensitive position. As

1 used in this act, "safety-sensitive position" means a position in which  
2 the job responsibilities involve public safety or the safety of others so  
3 that the attempt to perform these duties in a state of drug impairment  
4 may pose potential danger to co-workers, the workplace or the  
5 public.<sup>1</sup>

6 . <sup>1</sup>[c.]d.<sup>1</sup> An employer shall not discharge, discipline, discriminate  
7 against or request or require rehabilitation of an employee on the basis  
8 of medical history information revealed to the employer pursuant to  
9 this act unless the employee had an affirmative obligation to provide  
10 such information before, upon, or after hire.

11  
12 6. An employee or job applicant whose drug test result is positive  
13 in accordance with the provisions of this act shall not, by virtue of that  
14 result alone, be defined as a person with a disability or handicap.

15  
16 7. a. An employer who discharges or disciplines an employee on  
17 the basis of a confirmed positive drug test in accordance with this act  
18 shall be considered to have discharged or disciplined the employee for  
19 cause.

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

23  
24 8. a. If an employee refuses to submit to drug testing administered  
25 in accordance with this act, the employer shall not be barred from  
26 discharging, disciplining or referring the employee to assessment or  
27 drug abuse rehabilitation.

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

34  
35 9. An employee or job applicant required to submit to a drug test  
36 under this act may be requested by an employer to sign a statement  
37 indicating that he has read and understands the employer's drug testing  
38 policy and notice. An employee's or job applicant's refusal to sign  
39 such a statement shall not invalidate the results of any drug test, or bar  
40 the employer from administering the drug test or from taking action  
41 consistent with the terms of an applicable collective bargaining  
42 agreement or the employer's drug testing policy, or from refusing to  
43 hire the job applicant.

44  
45 10. The employer shall pay the costs of all drug tests under this act  
46 to which it requires, or requests, an employee or job applicant to

1 submit.

2

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

8

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

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

17 c. An employer shall not release to any person other than the  
18 employee or job applicant, or employer medical, supervisory, or other  
19 personnel, as designated by the employer on a need-to-know basis,  
20 information related to drug test results under this act unless:

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

23 (2) It is necessary to introduce a confirmed positive test result into  
24 an arbitration proceeding pursuant to a collective bargaining  
25 agreement, an administrative hearing under applicable State or local  
26 law, or a judicial proceeding, provided that the information is relevant  
27 to the hearing or proceeding, or the information must be disclosed to  
28 a federal or State agency or other unit of this State or United States  
29 government as required under law, regulation, or order, <sup>1</sup>or the  
30 information must be disclosed pursuant to court order.<sup>1</sup> or in  
31 accordance with compliance requirements of a State or federal  
32 government contract, or disclosed to a drug abuse rehabilitation  
33 program for the purpose of evaluation or treatment of an employee; or

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

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

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

44

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

1 test.

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

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

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

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

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

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

16

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

20 a. standards for drug testing laboratory licensing, suspension, and  
21 revocation of a license;

22 b. specimens that are appropriate for drug testing;

23 c. methods of analysis and procedures to ensure reliable drug  
24 testing results, including standards for initial and confirmation tests  
25 and on-site tests;

26 d. guidelines on how to establish cut-off detection levels for drugs  
27 or their metabolites for the purposes of determining a positive drug  
28 test result;

29 e. <sup>1</sup>guidelines for training and certification by employers of persons  
30 collecting specimens and conducting on-site drug tests in the  
31 workplace;

32 f.<sup>1</sup> chain-of-custody procedures to ensure proper identification,  
33 labeling, and handling of specimens being tested; and

34 <sup>1</sup>[f.] g.<sup>1</sup> retention and storage procedures to ensure reliable  
35 results on confirmation tests and retests.

36

37 15. a. Upon a violation of any of the provisions of this act, an  
38 aggrieved job applicant, employee or former employee may, within six  
39 months of the violation or the exhaustion of any internal administrative  
40 remedies available to the aggrieved party, institute a civil action in a  
41 court of competent jurisdiction to obtain relief. The court may order  
42 one or more of the following:

43 (1) An injunction to restrain the continued violation of this act;

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

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

2 (4) Compensation for lost wages, benefits and other remuneration  
3 to which the person would have been entitled but for a violation of the  
4 act.

5 b. For the purposes of this act, damages shall be limited to the  
6 recovery of compensatory damages directly resulting from injury or  
7 loss caused by a violation of this act, and shall not include  
8 noneconomic losses.

9 c. A person or collective bargaining agent may bring an action  
10 under this section only after first exhausting all applicable grievance  
11 procedures and arbitration proceeding requirements under a collective  
12 bargaining agreement; provided that, the person's right to bring an  
13 action under this section shall not be affected by a decision of a  
14 collective bargaining agent not to pursue a grievance.

15

16 16. a. Any employer who complies with the provisions of this act  
17 shall not be liable in any civil action arising from any drug testing  
18 performed in compliance with this act.

19 b. Pursuant to any claim alleging a violation of this act, including  
20 a claim under this act in which it is alleged that an employer's action  
21 with respect to a person was based on an incorrect drug test result,  
22 there shall be a rebuttable presumption that the test result was valid if  
23 the employer complied with the provisions of this act.

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

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

31 (2) the information disclosed was based on an incorrect drug test  
32 result;

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

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

37

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

41

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

45 a. federal regulations that specifically preempt State and local  
46 regulation of drug testing with respect to such employees and job

1 applicants;

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

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

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

8

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

12

13

14

15

16 Concerns certain standards and liability for drug testing.