

Form #2

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2006 AUG 18 P 4:41

OFFICE WEST VIRGINIA
SECRETARY OF STATE

\$5.00



L. Thomas Bulla, Secretary
Department of Commerce
State Capitol
Building 6, Room 525
Charleston, WV 25305-0311

State of West Virginia
Joe Manchin III
Governor

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August 17, 2006

Mr. James Mitchell Dean
Acting Director
Office of Miners' Health, Safety
and Training
1615 Washington Street East
Charleston, West Virginia 25311-2126

Dear Mr. Dean:

Upon review of your request to file the Notice of Comment Period for Interpretive Rule, Title 56, Series 13, which governs drug testing of mine inspectors and mine safety instructors in the State of West Virginia. I find the interpretive rule satisfactory and approve your filing of the regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Thomas Bulla".

L. Thomas Bulla
Cabinet Secretary

TB/db



State of West Virginia

Joe Manchin III, Governor

WV Office of Miners' Health, Safety & Training
James M. Dean, Acting Director
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Drug Testing of Mine Inspectors and Mine Safety Instructors Title 56 Series 13 Interpretive Rule

SUMMARY

The Office of Miners' Health, Safety and Training recognizes that the critical mission of mine inspections requires the maintenance of a drug free work environment and that the practice of mine inspections has several uniquely compelling interests that justify the use of drug testing.

The citizens of the State of West Virginia have a right to expect that mine inspectors, surface mine inspectors, mine safety instructors, and electrical inspectors are at all times both physically and mentally able to perform their duties.

The Office of Miners' Health, Safety and Training believes that there is sufficient evidence to conclude that the use of controlled substances and other forms of drug abuse seriously impairs any mine inspectors, surface mine inspectors, mine safety instructors or electrical inspector's physical and mental health, and thus, their job performance, and places miners, mine personnel, mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors and the general population's lives, health and welfare at risk.

This rule gives authority to the Director and outlines the procedures to implement drug testing of mine inspectors and mine safety instructors who are employed by the West Virginia Office of Miners' Health, Safety and Training.



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STATEMENT OF CIRCUMSTANCE

TITLE 56 SERIES 13
DRUG TESTING OF MINE INSPECTORS AND MINE SAFETY INSTRUCTORS

The agency does not have in place any regulations or rule that gives authority to conduct drug testing of mine inspection and mine safety instructor staff.

Mine operators in the state have policy where they conduct drug testing of coal mine employees and the agency feels that the inspectors who are responsible for conducting mine inspections and instructors responsible for training should be subject to drug screening.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 56 Series 13

Type of Rule: ☐ Legislative ☒ Interpretive ☐ Procedural

Agency: WV Office of Miners' Health Safety and Training

Address: 1615 Washington Street East
Charleston, WV 25311-2126

Phone Number: 304 558-1425 Email: jdean@mines.state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

Contract with entity or corporation (laboratory) for conducting the screening and analysis of specimens for initial and random drug tests.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	4,000.00	3,000.00	3,000.00
Personal Services			
Current Expenses	4,000.00		3,000.00
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues	4,000.00		3,000.00

Rule Title: Title 56 Series 13

Rule Title:

Title 56 Series 13

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

To pay for contract service or laboratory to conduct initial drug testing and random drug testing analysis

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: 8-18-06

Signature of Agency Head or Authorized Representative

C. A. Phillips

TITLE 56
INTERPRETIVE RULES
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING

SERIES 13
DRUG TESTING OF MINE INSPECTORS
AND MINE SAFETY INSTRUCTORS.

§56-13-1. General.

1.1. Scope. -- This regulation clarifies the Office of Miners' Health, Safety and Training authority under W. Va. Code §§ 22A-1-9, 22A-1-12(a) and 22A-1-12(e) to determine whether mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors, or persons seeking appointment as a mine inspector, surface mine inspector, mine safety instructor, or electrical inspector, are of good character, reputation and temperate habits, and do not suffer from physical or mental impairment, incompetency, neglect of duty, or malfeasance in office as a result of controlled substance or drug abuse.

1.2. Authority. -- W. Va. Code §§ 22A-1-6, 22A-1-9, 22A-1-12, and 29A-3-1 et. seq.

1.3. Filing Date. -- _____, 2006

1.4. Effective Date. -- _____, 2006

§56-13-2. Purpose.

2.1. The Office of Miners' Health, Safety and Training recognizes that the critical mission of mine inspections requires the maintenance of a drug free work environment and that the practice of mine inspections has several uniquely compelling interests that justify the use of drug testing. Additionally, the general citizenry of the State of West Virginia has a right to expect that mine inspectors, surface mine inspectors, mine safety instructors, and electrical inspectors are at all times both physically and mentally able to perform their duties. The Office of Miners' Health, Safety and Training believes that there is sufficient evidence to conclude that the use of controlled substances and other forms of drug abuse seriously impairs any mine inspectors, surface mine

inspectors, mine safety instructors or electrical inspector's physical and mental health, and thus, their job performance, and places miners, mine personnel, mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors and the general population's lives, health and welfare at risk.

§56-13-3. Definitions.

3.1. "Collection site" means a place designated by the office where employees present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

3.2. "Confirmation test" means a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principle from that of the screening test. This test shall use either gas chromatography or mass spectrometry.

3.3. "Controlled substance" means a drug, substance or immediate precursor in Schedule I-V as defined by § 60A-1-101(d) of the West Virginia Code.

3.4. "Director" means the director of the Office of Miners' Health, Safety and Training.

3.5. "Drug" means substances recognized as drugs in the official "United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States", or official "National Formulary," or any supplement thereto; substances intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animals; substances (other than food) intended to affect the structure or any function of the body of man or animals; and substances intended for use as a component of any article specified in this section.

3.6. "Drug test" means the compulsory production and submission of urine by an employee for the purpose of analysis to detect prohibited drug use.

3.7. "Electrical inspector" means an electrical inspector as provided for in section eleven, article 1, chapter 22A of the West Virginia Code.

3.9. "Employee" means a mine inspector, prospective mine inspector, mine safety instructor, prospective mine safety instructor, surface mine inspector, prospective surface mine inspector, electrical inspector or prospective electrical inspector.

3.10. "Mine" includes the shafts, slopes, drifts or inclines connected with, or intended in the future to be connected with, excavations penetrating coal seams or strata, which excavations are ventilated by one general air current or divisions thereof, and connected by one general system of mine haulage over which coal may be delivered to one or more points outside the mine, and the surface structures or equipment connected or associated therewith which contribute directly or indirectly to the mining, preparation or handling of coal, or construction thereof.

3.11. "Mine inspector" means a state mine inspector as provided for in section eight, article one, chapter twenty-two a of the West Virginia Code.

3.12. "Mine Safety Instructor" means a state mine safety instructor as provided for in section nine, article one, chapter twenty-two a of the West Virginia Code.

3.13. "Office" means the Office of Miners' Health, Safety and Training.

3.14. "Reasonable cause" means a ground for belief linked to articulable, objective facts or circumstances to warrant submitting an employee to testing.

3.15. "Reasonable cause drug testing" means a drug test ordered by the office for an employee when the office has reasonable cause to believe the employee is under the influence of a controlled substance or alcohol or is a current user of a non-prescribed controlled substance.

3.16. "Screening test" means an immunoassay examination to eliminate urine specimens from further analysis.

3.17. "Surface mine inspector" means a surface mine inspector as provided for in section thirteen, article one, chapter twenty-two a of the West Virginia Code.

§56-13-4. Prohibited Activities.

4.1. Employees of the office shall not:

- a. Illegally possess any controlled substance;
- b. Ingest any controlled substance or any drug or prescription drug unless at the direction of a licensed medical practitioner;
- c. Ingest any prescribed or over-the-counter drug in amounts beyond the recommended dosage;
- d. Use alcohol in any manner while on duty;
- e. Have alcohol in the body system while on duty, regardless of whether alcohol was consumed on or off duty; or
- f. Refuse to participate in any drug test as directed by the Director.

§56-13-5. Drug Testing Procedure.

5.1. All employees of the office as listed in Section 5.5 of this rule form the test pool and are subject to unannounced, random drug testing procedures. Upon implementation of this rule, the Director, at his or her discretion, and at a date prior to January 1, 2007, determined by the Director, may cause all current employees to undergo an initial drug test.

5.2. Implementation of this procedure will be delegated, on a contractual basis, to an entity or corporation approved by the Director.

5.3. All employees of the office may be directed to submit to Reasonable Cause Drug Testing when reasonable cause exists to warrant the testing of such employees.

5.4. The Director may cause a randomly selected panel of employees equaling up to ten percent of the test pool to undergo a random drug test each calendar month.

5.5. It is the intent of this procedure to include in the random drug test pool, those employees whose job responsibilities involve public safety issues which may impact the health, safety, rights and privileges of others or with the

public welfare. Based upon the foregoing criteria, those employees who are deemed to be eligible for inclusion into the random drug test pool are:

- a. Mine inspectors;
- b. Mine safety instructors;
- c. Surface mine inspectors; and
- d. Electrical inspectors.

5.6. Upon arrival at the collection site, the affected employee shall provide positive proof of their identity to the specimen collector prior to the initiation of the collection procedure.

5.7. Employees who refuse to cooperate in the administrative documentation of the testing procedure or undergo a drug test will be deemed to have violated a direct order of the Director and shall be subject to disciplinary action under West Virginia Code § 22A-1-1, et seq.

5.8. The bathroom facility of the collection site shall be private and secure and the specimen collector shall search the facility before the employee enters the same and shall document that it is free of any foreign substances.

5.9. A urine specimen shall be collected in such a manner so as to provide adequate privacy for the employee while ensuring the validity of the sample.

a. Should the employee appear unable or unwilling to provide a specimen at the time of the test, the specimen collector shall document the same on the drug test report form.

b. The employee will be permitted no more than three (3) hours to give a sample, during which time they will remain at the collection site under observation.

c. A maximum of forty fluid ounces of liquids over a three hour period will be provided to stimulate the production of a specimen.

d. Absent an extenuating medical condition documented by a licensed medical practitioner or physician, failure to submit a specimen will be considered a refusal to submit to a drug test.

e. Whenever the specimen collector has a reasonable articulable belief that a specimen has been altered or substituted, a second specimen will be obtained as soon as possible under the direct observation of a same-gender specimen collector or designated member of the office.

5.10. Specimens shall be sealed, labeled and checked against the identity of the employee prior to delivery to the testing lab.

5.11. The testing phase shall consist of a screening test and a confirmation test.

a. The screening test shall be conducted using an immunoassay procedure. An initial positive test will not be conclusive but will be considered as "confirmation pending" and no results will be forwarded to the Director until the results of the confirmation test are obtained.

b. A specimen testing positive will undergo a confirmation test which shall be performed using gas chromatography/mass spectrometry (GC/MS).

5.12. The drug screen tests shall be capable of identifying substances specified by the Director and the testing shall only be performed at a laboratory that has been accredited by the Substance Abuse and Mental Health Services Administration (SAMHSA).

5.13. The laboratory selected to conduct the screening and confirming analysis shall employ nationally accepted standards of quality control, documentation, chain-of-custody, technical expertise and demonstrated efficiency in the analysis of such specimens.

5.14. Specimens yielding a positive confirmation test shall be referred to a Medical Review Officer (MRO) who will be responsible for conducting a telephonic interview with the affected employee to ascertain whether any legitimate cause exists for the positive test result.

a. The MRO may require that the affected employee provide prescriptions or medical records in defense of a claim negating a positive test result.

b. Should circumstances dictate, the MRO may contact the affected employee's pharmacy or physician in order to verify a claimed medical history.

c. Should the affected employee's medical or personal history warrant, the MRO may direct that the affected employee contact a physician in order to perform a medical examination.

d. When the MRO is unable to obtain a satisfactory resolution to a positive confirmation test, the positive test results shall be reported to the Director verbally within twenty-four (24) hours followed by written notification within five (5) days.

5.15. When reasonable cause exists than an employee may be using drugs or abusing alcohol the office may require the employee to undergo a Reasonable Cause Drug Test.

5.16. Reasonable cause drug testing is based on a totality of circumstances. A variety of factors may be considered when establishing reasonable cause. Such factors may include, but are not limited to, the following:

a. A pattern of abnormal conduct or specific behaviors or deviations from expected performance including but not limited to:

1. Frequent absences/tardiness;
2. Serious errors in judgment;
3. Numerous accidents both on and off duty;
4. Chronic missed deadlines;
5. Mood swings, irrational behavior or unpredictable hostility; and/or
6. Repeated instances of violations of policies and procedures.

b. Observation, such as direct observation of use and/or physical symptoms of being under the influence of a controlled substance.

5.17. The Director may place the employee on administrative leave, pending disciplinary action, upon being notified of a positive test result.

5.18. Employees who are the subject of a positive drug test shall have the right to request that a second confirming drug test be performed on the submitted split sample.

a. Split testing will be performed at the sole expense of the employee at the prevailing rate then charged by the testing company and any such request must be made in writing to the Director by the employee immediately upon notification of a positive test result.

b. A different SAMHSA accredited laboratory may be used to perform this test if so requested by the employee.

c. The test will be performed within seventy-two hours of receipt of the request and the results thereof will be reported to the Director by the MRO as soon as they are available.

d. In the event the second drug test results in a negative test result, the office shall reimburse the affected employee all reasonable costs associated with the second drug test.

5.19. The Director, at his/her discretion, may afford the employee an opportunity to seek professional medical and/or psychological treatment for substance abuse for a first violation of this section. As a condition of continuing employment, the employee may be required to agree, in writing, to:

a. Immediately enroll in a substance abuse treatment program approved by the Director;

b. Sign a medical records release authorization and provide timely progress reports to the Director;

c. Successfully complete the substance abuse treatment program; and

d. Submit to unannounced drug tests for a period of not less than twelve (12) calendar months.

5.20. The Director may initiate disciplinary action against an employee who violates a provision of the rule even though the affected employee has been afforded an opportunity to seek professional medical and/or psychological treatment.

5.21. All records pertaining to random drug testing procedures on affected employees shall be deemed to be confidential medical records and shall not be disseminated except at the express direction of the Director.

5.22. The Director may immediately terminate any employee who violates these rules where such termination of the employee is deemed by the Director to be in the best interest of the office or the public in accordance with the requirements set forth in article one, chapter twenty-two a of the West Virginia code.

5.23. All successful applicants for the position of mine inspector, mine safety instructor, surface mine inspector or electrical inspector shall submit to a drug screening test, as set forth in this rule and in the same manner as current employees subject to random drug screening tests, and shall successfully pass such drug screening test before assuming the responsibilities and duties of the applicant's respective job.

5.24. In the event a successful applicant for the position of mine inspector, mine safety instructor, surface mine inspector or electrical inspector, and who has not assumed the responsibilities and duties of his or her job, fails the drug screening test, including any subsequent drug screening test utilized to verify the results of the first failed drug screening test, such failure will constitute cause to immediately dismiss the applicant.