



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Miners Health Safety And Training

TITLE-SERIES: 56-13

RULE TYPE: Interpretive Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: Drug Testing of Mine Inspectors and Mine Safety Inspectors

CITE STATUTORY AUTHORITY: W. Va. Code 22A-1-6, 22A-1-9, 22A-1-12 and 29A-3-1 et seq.

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/21/2023 4:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This interpretive rule describes the procedures whereby certain specifically identified classes of agency employees are drug tested.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

The changes to this rule are for the purpose of making the drug testing practices and procedures applicable to agency employees consistent with those applicable to certified individuals working in the mining industry. Also, the changes incorporate formatting recommendations of the Secretary of State's office.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

None

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

None

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

None

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2023 Increase/Decrease (use "-")	2024 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	-0-	-0-	-0-
Personal Services	-0-	-0-	-0-
Current Expenses	-0-	-0-	-0-
Repairs and Alterations	-0-	-0-	-0-
Assets	-0-	-0-	-0-
Other	-0-	-0-	-0-
2. Estimated Total Revenues	-0-	-0-	-0-

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

N/A

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Garner Marks -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

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~~ rule 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. -- ~~December 1, 2006~~ _____.

1.4. Effective Date. -- ~~December 31, 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, electrical inspectors and others 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 could seriously impair any mine inspectors, surface mine inspectors, mine safety instructors, electrical inspectors or others 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.~~ Unless the context in which a word or phrase appears clearly requires a different meaning, all terms used in this rule that are not defined herein shall have the meanings set forth in W. Va. Code §22A-1-2.

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~~ 3.2. "Controlled substance" means a drug, substance or immediate precursor in Schedule I-V as defined by W. Va. Code §60A-1-101(d) of the West Virginia Code.

~~3-4~~ 3.3. "Director" shall mean ~~means~~ the director of the Office of Miners' Health, Safety and Training.

~~3-5~~ 3.4. "Drug" shall mean ~~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~~ 3.5. "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~~ 3.5. "Electrical inspector" shall mean ~~means~~ an electrical inspector as provided for in W. Va. Code §22A-1-11, section eleven, article 1, chapter 22A of the West Virginia Code.

~~3-8~~ 3.6. "Employee" shall mean ~~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.

~~3-9~~ 3.7. "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.~~

~~3-10~~ 3.7. "Mine inspector" shall mean ~~means~~ a state mine inspector as provided for in W. Va. Code §22A-1-8, section eight, article one, chapter twenty-two a of the West Virginia Code.

~~3-11~~ 3.8. "Mine Safety Instructor" shall mean ~~means~~ a state mine safety instructor as provided for in W. Va. Code §22A-1-9, section nine, article one, chapter twenty-two a of the West Virginia Code.

~~3-12~~ 3.9. "~~Office~~" "OMHST" shall mean ~~means~~ the Office of Miners' Health, Safety and Training.

~~3-13~~ 3.10. "Post-accident drug testing" shall mean a drug test performed pursuant to an accident resulting in bodily injury to the employee or any other individual or damage to state property.

~~3-14~~ 3.11. "Random drug testing" shall mean that each employee subject to testing has a statistically equal chance of being selected for testing at random and at unscheduled times. The selection of employees for random testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with the employee's social security number, payroll identification number, or other comparable identifying number. Twenty-five percent (25%) of all OMHST employees shall be randomly drug tested per year. Random drug testing shall be conducted monthly.

~~3-15~~ 3.12. "Pre-employment drug testing" shall mean a drug test performed on any individual seeking employment with OMHST.

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

3.14. "Reasonable cause drug testing" ~~shall mean~~ means a drug test ordered by ~~the office~~ OMHST for an employee when ~~the office~~ OMHST 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.

~~3.15. "Screening test" means an immunoassay examination to eliminate urine specimens from further analysis.~~

~~3.16~~ 3.15. "Surface mine inspector" ~~shall mean~~ means a surface mine inspector as provided for in W. Va. Code §22A-1-13, ~~section thirteen, article one, chapter twenty-two a of the West Virginia Code.~~

§56-13-4. Prohibited Activities.

4.1. Employees of ~~the office~~ OMHST 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 or present themselves for duty in any state of alcohol induced intoxication;
- e. Refuse to participate in any drug test as directed by the Director; and/or
- f. Possess or submit an adulterated or substituted urine specimen.

§56-13-5. Drug Testing Procedure.

5.1. All employees of ~~the office~~ OMHST as listed in Section ~~5.5~~ 5.6 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~~ OMHST may be directed to submit to reasonable cause drug testing when reasonable cause exists to warrant the testing of such employees.

5.4. Any employee of OMHST may be directed to submit to a post-accident drug test when appropriate.

~~5.4~~ 5.5. The Director ~~may~~ shall cause a randomly selected panel of employees be tested at intervals of his/her choosing. The intent is that equaling up to ten twenty-five percent (25%) of the test pool to of all OMHST employees undergo a random drug test each calendar month annually. Such selection shall be made pursuant to a lottery system.

~~5.5~~ 5.6. 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;
- d. Electrical inspectors; and
- e. Any employee of the Office of Miners' Health, Safety and Training OMHST routinely entrusted with a state vehicle ~~on a day-to-day basis~~.

~~5.6~~ 5.7. ~~Upon arrival at the collection site, the selected employee shall provide positive proof of their identity to the specimen collector prior to the initiation of the collection procedure.~~ All random, pre-employment, post-accident and reasonable suspicion drug tests shall include a ten (10) panel urine test for the following substances:

- a. Amphetamines,
- b. Cannabinoids/THC,
- c. Cocaine,
- d. Opiates,
- e. Phencyclidine (PCP),
- f. Benzodiazepines,
- g. Propoxyphene,
- h. Methadone,
- i. Barbiturates, and
- j. Synthetic narcotics.

5.8. ~~Employees who refuse to cooperate in the administrative documentation of the testing procedure or refuse to undergo a drug test will be deemed to have violated a direct order of the Director and shall be considered to have failed such test.~~ In addition, all random, pre-employment, post-accident and reasonable suspicion drug tests shall include a chemical test of breath for alcohol. No employee's blood alcohol level shall meet or exceed four one hundredths of one percent (.04) concentration at the time of testing.

5.9. ~~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.~~ All random, pre-employment, post-accident and reasonable suspicion drug tests shall be

performed and administered in accordance with the standards and protocols set forth in the United States Department of Transportation's rule found in 49 C.F.R. Part 40, and collected by individuals who are certified as complying with said regulations.

5.10. ~~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.~~ The chemical test of breath shall be an alcohol confirmation test, as provided in 49 C.F.R. Part 40, Subpart M, taken using an evidential breath testing device listed on the National Highway Traffic Safety Administration (NHTSA) most current Conforming Products List and conducted by a breath alcohol technician meeting the training requirements found in 49 C.F.R. Part 40, Subpart J.

~~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 provide a sample, during which time he/she 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.~~

5.11. ~~Specimens shall be sealed, labeled and checked against the identity of the employee prior to delivery to the testing lab.~~ All random, pre-employment, post-accident and reasonable suspicion drug tests shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection.

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 confirmation 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 that an employee may be using drugs or abusing alcohol the office may require the employee to undergo a Reasonable Cause Drug Test.~~

5.16 5.12. 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:

5.12.1. ~~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.

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

~~5.17~~ 5.13. The Director may place the employee on administrative leave, pending disciplinary action, upon being notified of a positive and/or a failed random, reasonable suspicion or post-accident drug test result.

~~5.18~~ 5.14. Employees who are the subject of a positive and/or a failed random, reasonable suspicion or post-accident drug test shall have the right to request that a second confirming drug test be performed on the submitted split sample the split specimen be tested.

~~5.14.1. a. Additional split t~~ Testing of the split specimen beyond the first such test shall 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 an initial positive test result.

~~5.14.2. b. A different SAMHSA accredited laboratory may be used to perform this the test of the split specimen~~ if so requested by the employee.

~~5.14.3. c. The test of the split specimen will be performed within seventy-two hours of immediately upon~~ receipt of the request and the results thereof will be reported to the Director by the MRO as soon as they are available.

~~5.14.4. d. In the event the second drug test results in test of the split specimen is a negative test result, the office OMHST shall reimburse the affected employee all reasonable costs associated with the second drug test of the split specimen.~~

~~5.19~~ 5.15. 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 positive and/or violation of this section ~~failed random, reasonable suspicion or post-accident drug test. As a condition of continuing employment, the~~ 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, which relates solely to the employee's treatment for substance abuse 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~~ 5.16. The Director may initiate disciplinary action against an employee who violates a provision of the this rule even though the affected employee has been afforded an opportunity to seek professional medical and/or psychological treatment.

5.17. For purposes of a positive test for THC, the employee may not rely upon a medical prescription or other type of medical permission for marijuana, including a valid identification card issued under W. Va. Code §16A-5-1 et seq. authorizing the employee to access medical cannabis under the West Virginia Medical Cannabis Act.

5.18. For purposes of a positive test for THC, the employee may not excuse such a positive test based upon the fact that the THC came entirely from a legal CBD product or any other legal product.

5.19. In the event an employee's initial and/or split specimen tests positive and/or the employee fails the drug screening due to having refused to submit a sample or possessing an adulterated sample, and/or the employee submitted a substituted or an adulterated sample, then the Director shall issue an immediate temporary suspension of all certifications held by the employee pending a hearing before the Board of Appeals pursuant to W. Va. Code §22A-1A-2.

~~5.21~~ 5.20. All individual records pertaining to random, pre-employment, post-accident and reasonable suspicion drug tests of 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, and without the express written consent of the employee.

~~5-22~~ 5.21. The Director may immediately terminate any employee who violates ~~these rules~~ this rule where such termination of the employee is deemed by the Director to be in the best interest of the office OMHST or the public in accordance with the requirements set forth in W. Va. Code §22A-1-1 et seq. ~~article one, chapter twenty-two a of the West Virginia code.~~

~~5-23~~ 5.22. All successful applicants for the position of mine inspector, mine safety instructor, surface mine inspector or electrical inspector shall submit to a pre-employment drug screening test, as set forth in this rule and in the same manner as current employees subject to random, post-accident and reasonable suspicion 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~~ 5.23. 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 pre-employment 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.