

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1287 Session of
1989

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LASHINGER, BURD, O'BRIEN, LANGTRY, BATTISTO, F. TAYLOR AND
NOYE, APRIL 24, 1989

REFERRED TO COMMITTEE ON JUDICIARY, APRIL 24, 1989

AN ACT

1 Providing for substance-abuse testing; providing for a cause of
2 action; providing penalties; and conferring powers and duties
3 on the Department of Health.

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6 The General Assembly of the Commonwealth of Pennsylvania
7 hereby enacts as follows:

8 Section 1. Short title.

9 This act shall be known and may be cited as the Substance-
10 Abuse Testing Act.

11 Section 2. Definitions.

12 The following words and phrases when used in this act shall
13 have the meanings given to them in this section unless the
14 context clearly indicates otherwise:

15 "Alcohol." Ethyl alcohol of any degree of proof originally
16 produced by the distillation of fermented liquid, whether
17 rectified or diluted and regardless of origin; liquor; or malt
18 or brewed beverages.

19 "Applicant." An individual applying for employment or an
20 employee applying for a new position with a current employer.

21 "Compelling interest." An interest that justifies the
22 administration of a drug test for the protection of the health
23 and safety of the public, another employee or the employee
24 affected by drug use.

25 "Confirmation test." A second analysis, by an alternate
26 chemical method, to substantiate the presence of alcohol, drugs
27 or drug metabolites in a sample. The term includes a gas
28 chromatography/mass spectrometry test, high pressure liquid
29 chromatography, gas chromatography, high performance thin layer
30 chromatography, and equal or more reliable methods.

1 "Department." The Department of Health of the Commonwealth.

2 "Drug." A substance, other than alcohol, that has known
3 mind-altering or function-altering effects on a human being. The
4 term includes a controlled substance as defined in section
5 102(6) of the Federal Food, Drug and Cosmetic Act (52 Stat.
6 1040, 21 U.S.C. § 802(6)); a substance listed in 21 CFR Part
7 1308 (relating to schedules of controlled substances); and a
8 controlled substance analog or volatile substance which produces
9 the psychological and physiological effects of a controlled
10 substance through deliberate inhalation, ingestion or injection.

11 "Employee." An individual engaged in service to an employer.

12 "Employer." A public employer or a private employer.

13 "Initial screening test." An initial analysis designed to
14 determine presumptively those samples which may contain alcohol,
15 drugs or drug metabolites at or above a certain minimum
16 concentration.

17 "Liquor." Alcoholic, spirituous, vinous, fermented or other
18 alcoholic beverage, or combination of liquors and mixed liquor,
19 a part of which is spirituous, vinous, fermented or otherwise
20 alcoholic. The term includes drinks or drinkable liquids,
21 preparations or mixtures and reused, recovered or redistilled
22 denatured alcohol usable or taxable for beverage purposes which
23 contain more than 0.5% of alcohol by volume, except pure ethyl
24 alcohol and malt or brewed beverages.

25 "Malt or brewed beverages." Beer, lager beer, ale, porter or
26 similar fermented malt beverage containing 0.5% or more of
27 alcohol by volume, by whatever name the beverage is called.

28 "Prescription or nonprescription medication." A drug
29 prescribed for use by a physician or other medical practitioner
30 licensed to issue prescriptions or a drug that is authorized for

1 general distribution and use in the treatment of human diseases,
2 ailments or injuries under the Federal Food, Drug, and Cosmetic
3 Act (52 Stat. 1040, 21 U.S.C. § 301 et seq.).

4 "Private employer." An individual, firm, partnership,
5 association or corporation doing business in this Commonwealth.
6 The term includes agents or officers.

7 "Public employer." The Commonwealth; a political
8 subdivision; and a board, commission, agency or instrumentality
9 of either. The term includes agents or officers.

10 "Reasonable suspicion." Opinion based on specific
11 articulable facts and reasonable inferences drawn from those
12 facts in light of experience.

13 "Sample." A human body part or product medically or
14 chemically capable of revealing the presence of a drug or
15 alcohol.

16 "Substance-abuse test." A test administered for the purpose
17 of determining the presence or absence of drugs or alcohol
18 within a person's body.

19 Section 3. Private employment.

20 (a) Applicant testing.--A private employer may, as a
21 condition of hiring, require an applicant to submit to a
22 substance-abuse test:

23 (1) A private employer who engages in applicant
24 substance-abuse testing shall notify the applicant, in
25 writing, prior to the collection of a sample for a substance-
26 abuse test, that the sample will be tested for the presence
27 of drugs or alcohol. A private employer may request an
28 applicant to sign a statement indicating that the applicant
29 understands that the sample will be tested for the presence
30 of drugs or alcohol and that the applicant voluntarily

1 consents to the substance-abuse test.

2 (2) A substance-abuse test administered upon an
3 applicant shall be in conformity with the standards
4 established in this act.

5 (b) Employee testing.--A private employer may, as a
6 condition of continued employment, require an employee to submit
7 to a substance-abuse test under any of the following
8 circumstances:

9 (1) The private employer has reasonable suspicion that
10 the employee is under the influence of or affected by drugs
11 or alcohol.

12 (2) The employee is involved in a work-related accident
13 where human error may be a factor.

14 (3) The employee has tested positively for the presence
15 of drugs or alcohol within the prior 12-month period.

16 (4) The test is conducted as part of an employee medical
17 examination which is part of the employer's established
18 policy and which is scheduled routinely for all members of an
19 employment classification or is administered as part of an
20 employer-paid rehabilitation program.

21 (c) Rebuttable presumptions.--There is created a rebuttable
22 presumption that the employer had reasonable suspicion to test
23 for drugs or alcohol if a sample provided by the employee tests
24 positive for drugs or alcohol on an initial screening
25 administered by the employer.

26 (d) Random tests.--A private employer may not require an
27 employee to submit to random or routine testing unless the
28 employee serves in an occupation for which the employer has a
29 compelling interest to administer a substance-abuse test.

30 Section 4. Public employment.

1 (a) Applicant testing.--A public employer may, as a
2 condition of hiring, require an applicant to submit to a
3 substance-abuse test.

4 (1) A public employer who engages in applicant
5 substance-abuse testing shall notify the applicant, in
6 writing, prior to the collection of a sample for a substance-
7 abuse test, that the sample will be tested for the presence
8 of drugs or alcohol. A public employer may request an
9 applicant to sign a statement indicating that the applicant
10 understands that the sample will be tested for the presence
11 of drugs or alcohol and that the applicant voluntarily
12 consents to the substance-abuse test.

13 (2) A substance-abuse test administered upon an
14 applicant shall be in conformity with the standards
15 established in this act.

16 (b) Employee testing.--A public employer may, as a condition
17 of continued employment, require an employee to submit to a
18 substance-abuse test under any of the following circumstances:

19 (1) The public employer has reasonable suspicion that
20 the employee is under the influence of drugs or alcohol.

21 (2) The employee is involved in a work-related accident
22 where human error may be a factor.

23 (3) The employee has tested positively for the presence
24 of drugs or alcohol within the prior 12-month period.

25 (4) The test is conducted as part of an employee medical
26 examination which is part of the employer's established
27 policy and which is scheduled routinely for all members of an
28 employment classification.

29 (c) Rebuttable presumptions.--There is created a rebuttable
30 presumption that the employer had reasonable suspicion to test

1 for drugs and alcohol if a sample provided by the employee tests
2 positive for drugs or alcohol on an initial screening
3 administered by the employer.

4 (d) Random tests.--A public employer may not require an
5 employee to submit to random or routine testing unless the
6 employee serves in an occupation for which the employer has a
7 compelling interest to administer a substance-abuse test.

8 Section 5. Standards.

9 (a) Written policy.--

10 (1) A substance-abuse test may only be conducted in
11 accordance with a written substance-abuse testing policy,
12 which is established by the employer, posted in a conspicuous
13 location within the workplace and made available to employees
14 and applicants. The applicant policy shall be in accordance
15 with section 3(a)(1) or 4(a)(1). The employee policy shall
16 contain, but not be limited to:

17 (i) A general statement describing the employer's
18 policy on employee substance use and identifying both the
19 grounds on which an employee may be required to submit to
20 a substance-abuse test and the actions the employer may
21 take against an employee on the basis of a positive test
22 result.

23 (ii) An explanation of the guarantees of
24 confidentiality provided by this act and the employer's
25 policy.

26 (iii) An instruction to the employee about the
27 reporting opportunities for the employee's use of
28 prescription or nonprescription medications.

29 (iv) An explanation of the consequences of refusing
30 to submit to the substance-abuse test.

1 (2) An employee required to submit to a drug test may be
2 requested by the private employer to sign a statement
3 indicating that the employee has read and understands the
4 employer's substance-abuse testing policy. An employee's
5 refusal to sign a statement shall not invalidate the
6 objective results of a test or bar the employer from
7 administering the test or taking disciplinary action
8 consistent with the terms of an applicable collective
9 bargaining agreement and consistent with the employer's
10 substance-abuse policy.

11 (b) Opportunity to document use of prescription or
12 nonprescription medication.--The employer shall provide the
13 employee to be tested with the opportunity to submit medical
14 documentation that may verify the employee's use of a
15 prescription or nonprescription medication. Verification shall
16 not preclude the administration of the substance-abuse test.

17 (c) Documented chain of custody.--Samples produced for
18 substance-abuse testing shall be handled in a way which
19 documents that the integrity and identity of the sample have not
20 been violated.

21 (d) Confirmation tests.--An initial screening test
22 indicating a positive result must be verified by a confirmation
23 test.

24 (e) Confidentiality of test results.--

25 (1) Information obtained by the employer through a
26 substance-abuse test administered upon an applicant or
27 employee may not be released to a person other than the
28 applicant or employee, medical personnel or other personnel
29 of the employer as designated by the employer on a need-to-
30 know basis, unless one of the following applies:

1 (i) The applicant or employee has expressly granted
2 permission for the employer to release the information.

3 (ii) The information is released as material
4 evidence upon a showing of good cause in a filed action
5 or is released in compliance with Federal and
6 Commonwealth statutes and regulations as part of the
7 employer's defense in a grievance proceeding, arbitration
8 or administrative hearing, Federal or Commonwealth
9 investigation or employer's internal grievance
10 investigation of a complaint.

11 (2) The employer shall expunge from the employee's
12 records a record of the drug testing incident if, upon
13 confirmation, an employee's sample produces a negative
14 result.

15 (f) Notification of results.--The employer shall notify the
16 applicant or employee, in writing, of the results of a
17 substance-abuse test results performed on a sample produced by
18 the applicant or employee within five working days of the
19 employer's receipt of the substance-abuse test results from the
20 licensed laboratory which conducted the test.

21 (g) Retest.--Every sample which produces a positive result
22 on a confirmation test shall be preserved by the licensed
23 laboratory which conducts the confirmation test for a period of
24 60 days from the time results of the confirmation tests are
25 mailed to the employer. During this period, the employee who
26 provided the sample shall be permitted by the employer to have a
27 portion of a sample retested at the employee's expense at a
28 licensed laboratory chosen by the employee or a representative,
29 if the employee's chosen medical facility assumes responsibility
30 for the transfer of the portion of the sample and for the

1 integrity of the chain of custody under subsection (c) during
2 the transfer.

3 (h) Licensed laboratories.--Substance-abuse tests shall only
4 be conducted through laboratories licensed by the department
5 under the act of September 26, 1951 (P.L.1539, No.389), known as
6 The Clinical Laboratory Act, or licensed under the Clinical
7 Laboratories Improvement Act (Public Law 90-174, 42 U.S.C. §
8 263a), and approved by the department.

9 (i) Admissibility of laboratory reports.--A written report
10 specifying the methodology and results of a drug test which is
11 certified by a laboratory which has been certified by the
12 department under the authority of The Clinical Laboratory Act
13 shall be admissible as prima facie evidence in any court or
14 administrative proceeding.

15 Section 6. Disciplinary action.

16 (a) Initial screening.--An employer shall not take
17 disciplinary action against an employee solely based on the
18 results of an initial screening test.

19 (b) Confirmation test.--An employer may take disciplinary
20 action or discharge an employee who either refuses to submit to
21 a drug test or tests positive for drugs or alcohol on a
22 confirmation test. An employer who discharges an employee on the
23 basis of a positive result on a confirmed test shall be
24 considered to have discharged the employee for cause.

25 (c) Exceptions.--This section shall not prevent an employer
26 from doing one of the following:

27 (1) Temporarily reassigning the employee to another
28 position, pending the completion of a confirmation test.

29 (2) Temporarily suspending the employee pending
30 completion of a confirmation test. After a suspension under

1 this paragraph, the employee shall be reinstated with full
2 pay, benefits and rights for the period of suspension or
3 reassessment if the employee's sample, upon confirmation,
4 produces a negative result.

5 (3) Taking disciplinary action against an employee as a
6 result of the employee's conduct, without regard to the
7 results of the drug test.

8 Section 7. Unemployment compensation.

9 An employee discharged on the basis of a drug or alcohol
10 confirmation test shall be considered to have been discharged
11 for willful misconduct under the act of December 5, 1936 (2nd
12 Sp.Sess., 1937 P.L.2897, No.1), known as the Unemployment
13 Compensation Law.

14 Section 8. Civil action.

15 Upon a violation, except de minimis violations, of the
16 provisions of this act and the exhaustion of any employer-
17 employee internal administrative remedies that may be available,
18 an aggrieved employee or former employee may institute a civil
19 action in a court of competent jurisdiction, within six months
20 of the alleged violation or the exhaustion of internal
21 administrative remedies available to the employees, for the
22 following relief:

23 (1) An injunction to restrain continued violation of
24 this act.

25 (2) The reinstatement of the employee to the same
26 position held before the unlawful disciplinary action or to
27 an equivalent position.

28 (3) The reinstatement of full fringe benefits and
29 seniority rights.

30 (4) The compensation for lost wages, benefits and other

1 remuneration.

2 Section 9. Penalties.

3 A person who administers a substance-abuse test which, in its
4 methodologies or procedures, violates the regulations of the
5 department under section 10 shall be assessed a civil penalty of
6 not less than \$500 nor more than \$1,000. For purposes of this
7 section, a failure to use approved test methods or procedures on
8 a single sample shall constitute a separate offense.

9 Section 10. Regulations.

10 (a) Authority.--The department shall promulgate, within 180
11 days of enactment of this act, regulations to do all of the
12 following:

13 (1) Establish procedural and methodological standards
14 for technical aspects of substance-abuse tests, including,
15 but not limited to, procedural guidelines to ensure the
16 integrity of the chain of custody, methodological and
17 technical standards for initial screening tests and
18 confirmation tests, acceptability standards for the margins
19 of error associated with particular substance-abuse tests and
20 concentration or volume thresholds at which a substance-abuse
21 test result may be deemed a positive test result for a
22 specific drug or alcohol.

23 (2) Monitor the performance of laboratories and
24 personnel to assure compliance with this act and regulations
25 promulgated under this section.

26 (b) Regulations.--Regulations issued by the department under
27 this section, with regard to those drugs covered under 49 CFR
28 Part 40 for which standards have been established for margins of
29 error and for concentration or volume thresholds at which a
30 substance-abuse test result may be deemed a positive test

1 result, shall not be more stringent than the scientific and
2 technical standards established in 49 CFR Part 40.

3 Section 11. Local ordinances preempted.

4 No municipality shall adopt any ordinance that conflicts, in
5 whole or in part, with the provisions of this act.

6 Section 12. Severability.

7 The provisions of this act are severable. If any provision of
8 this act or its application to any person or circumstance is
9 held invalid, the invalidity shall not affect other provisions
10 or applications of this act which can be given effect without
11 the invalid provision or application.

12 Section 13. Effective date.

13 This act shall take effect as follows:

14 (1) Section 10 of this act shall take effect
15 immediately.

16 (2) The remainder of this act shall take effect in 240
17 days.