

1 Drug Testing Law Tech. & Prac. § 3:22

Drug Testing Law, Technology and Practice  
Database updated November 2014  
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Chapter 3. Private Employment and Common Law  
III. State Worker’s Compensation

§ 3:22. State by state review—**Workers’ compensation** discounts—Compliance with state **drug-free** workplace programs

A number of states provide a workers’ compensation insurance premium discount or other incentives for companies that implement drug and/or alcohol-free workplaces. States may also place drug and or alcohol-free workplace requirements on companies that have workers’ compensation insurance. As examples, see the below states.

**Alabama.** Alabama has a voluntary employment drug testing law that can be used to reduce **workers’ compensation** costs by 5% if the insured has been certified by the Department of Industrial Relations as having a **drug-free** workplace program which complies with the requirements of the law.<sup>1</sup>

**Arkansas.** The state has a voluntary employment drug-testing law. If an employer implements a **drug-free** workplace program in accordance with the law that includes notice, education, and procedural requirements for testing for drugs and alcohol pursuant to rules developed by the Workers’ Health and Safety Division of the **Workers’ Compensation** Commission, the covered employer may require the employee to submit to a test for the presence of drugs or alcohol, and if a drug or alcohol is found to be present in the employee’s system at a level prescribed by statute or by rule adopted pursuant to this law as excessive, the employee may be terminated and may be precluded from **workers’ compensation** medical and indemnity benefits. However, a **drug-free** workplace program must require the covered employer to notify all employees that it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in the employee’s body, and if an injured employee refuses to submit to a test for drugs or alcohol, the employee may be precluded from **workers’ compensation** medical and indemnity benefits. In the event of termination, an employee shall be entitled to contest the test results before the department of labor.<sup>2</sup>

**Florida.** The state provides a 5% discount in workers’ compensation insurance premiums if an employer implements a drug-testing program under the state drug-testing law. The **workers’ compensation** drug-testing law provides for a **drug-free** workplace program that includes notice, education, and testing for drugs and alcohol pursuant to rules developed by the state health department. Employers must give employees written notice of the antidrug policy and testing procedures and afford employees an opportunity to contest the results. The law allows four types of testing: job applicant testing, reasonable-suspicion testing, routine fitness-for-duty testing, and follow-up testing. There are testing and confirmation procedures that the employer must comply with. All drug tests must be performed by state certified laboratories. If an employee’s injury was primarily caused by the intoxication of an employee or by the employee’s drug use, an employer may require the employee to submit to a drug or alcohol test. For private employers who do not wish to come under the law, there is no restriction on when or how they can test because the above laws are voluntary.<sup>3</sup>

**Georgia.** Georgia law allowed a 5% reduction in the insurance premium for **workers’ compensation** if the employer establishes a **drug-free** workplace program in compliance with the law. The discount is applied to the company’s policy, pro rata, as of the date of certification and may continue for eight years. There is a process for certification of self-insured employer or employer member of group self-insurance fund.<sup>4</sup>

**Idaho.** For each policy of **workers’ compensation** insurance issued or renewed in the state on or after July 1, 1999, a reduction in the premium for the policy may be granted if the insurer determines the insured has established and maintains an alcohol and **drug-free** workplace program that complies with the requirements of the state law.<sup>5</sup>

**Louisiana.** There is an emergency rule providing for drug-testing of employees involved in accidents.<sup>6</sup> There is a final rule providing scientific and technical guidelines for accident-related alcohol and drug-testing, including specimen collection, chain of custody, and laboratory analysis.<sup>7</sup>

**Mississippi.** The state has a **workers’ compensation** insurance premium reduction plan where employers qualify for a 5% **workers’ compensation** premium discount if they implement a **drug-free** workplace program. Each program must contain a written policy statement and must utilize the testing procedures provided in an existing drug-free workplace

program previously enacted law. Notice of rehabilitation resources must be provided. Supervisors must be trained and employees educated as to substance abuse and confidentiality must be protected.<sup>8</sup>

**Ohio.** Employers with a **drug-free** workplace program may be eligible for a discount on their **workers’ compensation** premiums. The state has developed a tiered program. Depending on the employer’s level of program involvement, discounts can be up to 20%. However, companies who have had an existing substance abuse program in place for four or more years are not eligible. There is a similar program for small employers. The administrator of the drug-free workplace services program shall plan for, implement, administer, coordinate, and evaluate Ohio’s drug-free workplace policy, including any testing and education programs developed for state employees, and shall administer and coordinate Ohio’s compliance with provisions of the federal Drug-Free Workplace Act of 1988, the Omnibus Transportation Employee Testing Act of 1991, and any other federal or state laws or regulations requiring substance abuse testing.<sup>9</sup>

**South Carolina.** **Workers’ compensation** insurance carriers must now offer a premium discount of at least 5% for employers who implement a **drug-free** workplace program. The department of insurance is responsible for creating guidelines for the program. South Carolina also has a law on drug prevention in the workplace and confidentiality of information concerning test results under this law. Employers must provide: (1) a substance abuse policy statement that balances the employer’s respect for individuals with the need to maintain a safe, productive, and drug-free environment. The intent of the policy shall be to help those who need it while sending a clear message that the illegal use of nonprescription controlled substances or the abuse of alcoholic beverages is incompatible with employment at the specified workplace; and (2) notification to all employees of the drug prevention program and its policies at the time the program is established by the employer or at the time of hiring the employee, whichever is earlier.

All information, interviews, reports, statements, memoranda, and test results, written or otherwise, received by the employer through a substance abuse testing program are confidential communications but may be used or received in evidence, obtained in discovery, or disclosed in any civil or administrative proceeding.

Employers, laboratories, medical review officers, insurers, drug or alcohol rehabilitation programs, and employer drug prevention programs, and their agents who receive or have access to information concerning test results shall keep all information confidential. Release of such information under any other circumstance shall be solely pursuant to a written consent form signed voluntarily by the employee tested or his designee unless the release is completed through disclosure by an agency of the state in a civil or administrative proceeding, order of a court of competent jurisdiction, or determination of a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain at a minimum:

- 1.1. the name of the person who is authorized to obtain the information;
- 2.2. the purpose of the disclosure;
- 3.3. the precise information to be disclosed;
- 4.4. the duration of the consent; and
- 5.5. the signature of the person authorizing release of the information. Information on test results shall not be released for or used or admissible in any criminal proceeding against the employee.

Under state guidelines, employers must provide a policy statement expressing the intent of the program that illegal use of drugs or alcohol abuse is a violation of the workplace policy and that counseling is available for employees who need assistance in overcoming substance abuse problems. The program includes random testing, written notice of positive test results within 24 hours of the employer’s receipt of the result, maintenance of test records for one year, and confidentiality protections.<sup>10</sup>

**Tennessee.** If an employer implements a **drug-free** workplace program in accordance with the law that includes notice, education and procedural requirements for testing for drugs and alcohol the employer is eligible for certain benefits such as **workers’ compensation** premium discounts,<sup>11</sup> a shift in the burden of proof,<sup>12</sup> or denial of **workers’ compensation** medical and indemnity benefits. Employers may require employees to submit to a test for the presence of drugs or alcohol and, if a drug or alcohol is found to be present in the employee’s system at a level prescribed by the law, the employee may be terminated and forfeit eligibility for workers’ compensation medical and indemnity benefits.

A **drug-free** workplace program must notify all employees that it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in the employee’s body, and if an injured employee refuses to submit to a test for drugs or alcohol, the employee forfeits eligibility for **workers’ compensation** medical and indemnity benefits. One time only, prior to testing, a covered employer shall give all employees and job applicants for employment a written policy statement. An employer who establishes a drug-free workplace is required to conduct the following types of drug or alcohol tests: job applicant, reasonable-suspicion, routine fitness-for-duty, follow-up drug-testing, and postaccident testing. All specimen collection and testing for drugs and alcohol under the law shall be performed in accordance with the procedures provided for by the U.S. Department of Transportation rules for

workplace drug and alcohol testing.<sup>13</sup> Confidentiality of records is protected. Licensed laboratories are required.<sup>14</sup>

**Texas.** Each employer with 15 or more employees who has workers’ compensation insurance coverage shall adopt a policy designed to eliminate drug abuse and its effects in the workplace. There are regulations that were implemented for a prior similar statute. They may still be in force. The regulations require that a written policy must be given to an employee on or before the first day of employment or within 30 days of the adoption of a policy. A copy of the policy must be supplied to the state Worker’s Compensation Commission for review. Failure to comply with the regulations may incur a fine of up to \$500. The required elements of a drug abuse policy under the regulations are:

- 1.1. A statement of the purpose and scope of the policy;
- 2.2. The policy must include alcohol and illegal drugs. It may include prescription drugs;
- 3.3. The consequences employees may suffer for violating the policy;
- 4.4. A description of available treatment including how it may be provided by the employer;
- 5.5. Availability and requirements for drug and alcohol abuse education; and
- 6.6. A description of any drug-testing program the employer has in force.<sup>15</sup>

**Virginia.** The state has a law providing for a 5% **workers’ compensation** premium discount for employers who implement a **drug-free** workplace program. The law leaves the criteria for the programs up to the insurance carriers.<sup>16</sup>

**Practice Tips:**

Attorneys should consult state laws to see if workers compensation discounts can be obtained and for guidelines on how to create policies to permit it.

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Footnotes

<sup>a0</sup> Mr. Evans’s law practice concentrates on assisting business, government, and laboratories in implementing drug and alcohol testing and drug-free workplace programs.

His litigation experience has included cases on the federal and state levels. He has written two model drug testing statutes in the areas of employment and criminal justice that were used as areas of providing discounts on **workers’ compensation** premiums for employers who implement **drug-free** workplace programs and the licensing of treatment professionals.

He has written two previous books on the legal aspects of substance abuse. He is the author of *Designing an Effective Drug-Free Workplace Compliance Program* (part of the Corporate Compliance Series), which discusses how to establish corporate drug testing and employee assistance programs. He is also the author of “Employee Medical Leave, Benefits and Disabilities Laws,” published by Thomson Reuters.

In recent years, Mr. Evans has testified on drug testing before the United States Senate judiciary Committee. He was selected by the American Association for clinical Chemistry as an “Outstanding Speaker of the Year” for his presentation on the legal aspects of drug testing.

Mr. Evans has served as a legal consultant to a number of drug and alcohol test manufacturers, third-party administrators, and medical review officers. He is the legal advisor to the National Drugs Don’t Work Partnership.

Mr. Evans practices in Pittstown, New Jersey.

<sup>1</sup> Ala. Code § 25-5-330.

<sup>2</sup> Ark. Code Ann. § 11-14-101.

<sup>3</sup> Fla. Stat. Ann. §§ 440.101, 440.102(3), (4), (5) to (9), (5)(d), 440.109(7)(a). in a Florida case, there was no evidence that employer operated, or represented that it operated, a **drug-free** workplace within meaning of **workers’ compensation** statute governing **drug-free** workplace program requirements, and, thus, employee, who was terminated for testing positive for cocaine use and violating employer’s **drug-free** workplace program, could not maintain her wrongful discharge action based on violation of the statute; employee’s subjective belief that the employer implemented its policy pursuant to statute was irrelevant. Fla. Stat. Ann. § 440.102. *Laguerre v. Palm Beach Newspapers, Inc.*, 20 So. 3d 392 (Fla. 4th DCA 2009).

<sup>4</sup> Ga. Code Ann. §§ 33-9-40.2, 34-9-410; 34-9-412.1.

<sup>5</sup> Idaho Code §§ 72-1712 to 72-17157.

<sup>6</sup> 16 La. Reg., p. 2 (Feb. 20, 1990) Rule of Dept. of Employment & Training Office of Worker’s Compensation.

<sup>7</sup> 16 La. Reg., p. 10 (Oct. 20, 1990) Rule of Dept. of Employment & Training Office of Worker’s Compensation.

8 Miss. Code Ann. §§ 71-7-1 to 71-7-33; 1997 Miss. Laws 455.

9 Ohio Admin. Code §§ 4123-17-58, 4123-17-58.1, 4123:1-76-02.  
In an Ohio case, a **workers’ compensation** regulation setting forth the testing procedures for the **drug-free** workplace discount program, which required that a breath or saliva test for alcohol consumption be followed by a confirmatory evidential breath test, did not manifest a clear public policy requiring a confirmatory breath test before an at-will employee could be discharged for alcohol consumption, and thus employee’s termination after only an initial positive breath test did not give rise to a claim for wrongful termination; primary purpose of regulation was to promote workplace safety and reduce the number of **workers’ compensation** claims, not to ensure the integrity of drug testing. Ohio Admin. Code § 4123-17-58(E)(4)(d). Hout v. Jess Howard Elec. Co., 2008-Ohio-5061, 28 I.E.R. Cas. (BNA) 1524, 156 Lab. Cas. (CCH) P 60680, 2008 WL 4416654 (Ohio Ct. App. 10th Dist. Franklin County 2008).

10 S.C. Code Ann. § 38-73-500 (See Appendix H-41), § 41-1-15; S.C. Insurance Bulletin, 3-97.

11 Tenn. Code Ann. § 50-6-418.

12 Tenn. Code Ann. § 50-6-110.

13 See 49 C.F.R. Pt. 40.

14 Tenn. Code Ann. §§ 50-9-101 et seq., 50-9-105, 50-9-106, 50-9-107, 50-9-109, 50-9-110.

15 Tex. Lab. Code Ann. §§ 411.091, 411.092; Tex. Admin. Code tit. 28, § 169.1-2; Tex. Admin. Code tit. 28, § 169.1-2.

16 Va. Code Ann. § 65.2-813.2.