

**Side-by-Side Comparison of Vermont’s Existing Drug Testing Law and the Senate Committee on Economic Development’s Proposed Amendment to S.241**

February 16, 2016

Damien Leonard, Esq., Office of Legislative Council

**Pre-Employment Testing**

<b>Existing Vermont Drug Testing Law</b>	<b>Proposed Senate Economic Development Committee Amendment to Vermont Drug Testing Law</b>	<b>Comments</b>
<p>21 V.S.A. § 512(b)                      An employer may require an applicant for employment to submit to a drug test only if all of the following conditions are met:                      (1) Conditional offer of employment. The applicant has been given an offer of employment conditioned on the applicant receiving a negative test result.                      (2) Notice. The applicant received written notice of the drug testing procedure and a list of the drugs to be tested. The notice shall also state that therapeutic levels of medically-prescribed drugs tested will not be reported. The notice required under this subdivision may not be waived by the applicant.                      (3) Administration. The drug test is administered in accordance with section 514 of this title.</p>	<p>21 V.S.A. § 512:  <u>(b) An employer that elects to implement a drug-free workplace program pursuant to this subchapter may require an employee or applicant to submit to a drug test permitted pursuant to section 513 of this subchapter. An employer may terminate an employee who refuses to submit to a drug test that is permitted pursuant to section 513 of this subchapter.</u>                      21 V.S.A. § 513:                      (a) Administration of test. <del>The</del> <u>A drug test is administered pursuant to a drug-free workplace program shall be administered in accordance with section 514 of this subchapter and shall comply with all applicable rules adopted by the Department of Health.</u>  <u>(b) An employer may conduct the following types of drug tests as part of a drug-free workplace program:</u>  <u>(1) Job applicant drug testing. An employer may require job applicants to submit to a drug test and may refuse to hire a job applicant because the applicant refuses to submit to a drug test or because his or her drug test returns a positive, confirmed test result.</u>                       21 V.S.A. § 520:                      (a) <u>Prior to drug testing, an employer shall provide all employees and applicants with written notice of the test.</u>                      (b) <u>An employer that adopts a drug-free workplace program pursuant to this subchapter shall provide its employees with 60 days’ notice before it implements the program and commences drug testing.</u>                      (c) <u>An employer shall provide notice of its drug-free workplace program on all announcements of a vacant position for which drug testing is required.</u>                      (d) <u>An employer shall post a notice of the employer’s drug-testing policy in a conspicuous location on the employer’s premises, and copies of the policy shall be made available for inspection by the employees or job applicants of the employer during regular business hours in the employer’s personnel office or other suitable locations.</u></p>	<ul style="list-style-type: none"> <li>• The proposed amendment would permit testing of all applicants for employment, rather than only those applicants that have been given a conditional offer of employment.</li> <li>• Both the existing law and the proposed amendment require drug tests of applicants to be administered in accordance with § 514.</li> <li>• Both the existing law and the proposed amendment permit an employer to refuse to hire an applicant that refuses to take a drug test or that returns a positive test result.</li> <li>• The proposed amendment would require the employer to give an applicant written notice of the test prior to testing, to provide notice of its drug-free workplace program on all job announcements for a position for which drug testing is required, and to make copies of its drug testing policy available for inspection by job applicants.</li> <li>• Under the proposed amendment, an employer is still required to provide notice its drug testing policy and the drugs that will be screened pursuant to § 514(2).</li> </ul>

**Testing of Current Employees**

Existing Vermont Drug Testing Law	Proposed Senate Economic Development Committee Amendment to Vermont Drug Testing Law	Comments
<p>21 V.S.A. § 513:</p> <p>(b) Random or company-wide tests. An employer shall not request, require or conduct random or company-wide drug tests except when such testing is required by federal law or regulation.</p> <p>(c) Notwithstanding the prohibition in subsection (a) of this section, an employer may require an individual employee to submit to a drug test if all the following conditions are met:</p> <p>(1) Probable cause. The employer or an agent of the employer has probable cause to believe the employee is using or is under the influence of a drug on the job.</p> <p>(2) Employee assistance program. The employer has available for the employee tested a bona fide rehabilitation program for alcohol or drug abuse and such program is provided by the employer or is available to the extent provided by a policy of health insurance or under contract by a nonprofit hospital service corporation.</p> <p>(3) Employee may not be terminated. The employee may not be terminated if the test result is positive and the employee agrees to participate in and then successfully completes the employee assistance program; however, the employee may be suspended only for the period of time necessary to complete the program, but in no event longer than three months. The employee may be terminated if, after completion of an employee assistance program, the employer subsequently administers a drug test in compliance with subdivisions (1) and (4) of this subsection and the test result is positive.</p> <p>(4) Administration of test. The drug test is administered in accordance with section 514 of this title.</p>	<p>21 V.S.A. § 512:</p> <p><u>(b) An employer that elects to implement a drug-free workplace program pursuant to this subchapter may require an employee or applicant to submit to a drug test permitted pursuant to section 513 of this subchapter. An employer may terminate an employee who refuses to submit to a drug test that is permitted pursuant to section 513 of this subchapter.</u></p> <p><u>(c) If a drug test of an employee’s specimen that was collected during the employee’s work hours detects the presence of a drug above the threshold detection level or, for a therapeutic drug, at a nontherapeutic level established by the Commissioner of Health pursuant to section 518 of this chapter, the employer may do either of the following:</u></p> <p><u>(1) Discipline the employee pursuant to the employer’s policy, including by terminating the employee.</u></p> <p><u>(2) Refer the employee to a drug rehabilitation program. An employee who agrees to participate in a rehabilitation program may not be terminated while he or she is participating in the program. However, the employee may be suspended for the period of time necessary to complete the program, but in no event for longer than three months.</u></p> <p>21 V.S.A. § 513:</p> <p>(a) Administration of test. <del>The A</del> <u>A drug test is administered pursuant to a drug-free workplace program shall be administered in accordance with section 514 of this title subchapter and shall comply with all applicable rules adopted by the Department of Health.</u></p> <p><u>(b) An employer may conduct the following types of drug tests as part of a drug-free workplace program:</u></p> <p style="text-align: center;">* * *</p> <p><u>(2) Reasonable-suspicion drug testing. An employer may require all employees to submit to reasonable-suspicion drug testing.</u></p> <p><u>(3) Employer-wide drug testing. An employer may require all employees to submit to a scheduled, employer-wide drug test if the test is conducted pursuant to the employer’s policy.</u></p> <p><u>(4) Follow-up drug testing. If an employee in the course of employment with the employer enters a drug rehabilitation program, the employer may require the employee to submit to drug testing as a follow-up to the program at any time within two years after the employee’s completion of the program.</u></p> <p><u>(5) Post-accident testing. If an employee has caused or contributed to an accident during the course of employment, the employer may</u></p>	<ul style="list-style-type: none"> <li>• Both the existing law and the proposed amendment would permit an employer to terminate an employee that refuses to submit to a permitted drug test.</li> <li>• Under the existing law, an employer may not terminate an employee that tests positive if the employee agrees participate in and successfully completes the employee assistance program, unless the employee has a subsequent positive drug test. <ul style="list-style-type: none"> <li>○ Under the proposed amendment, an employer would be permitted to terminate an employee for a positive test without referring the employee to a drug rehabilitation program. Under the proposed amendment, an employee could not be terminated while he or she is participating in a rehabilitation program.</li> </ul> </li> <li>• The existing law permits drug testing if an employer has probable cause to believe an employee is using or under the influence of drugs on the job. <ul style="list-style-type: none"> <li>○ The proposed amendment would permit reasonable suspicion drug testing if an employer has “evidence that an employee is using or has used drugs in violation of an employer’s policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.”</li> <li>○ Probable cause is not defined in Vermont’s existing drug testing law. However, in the context of criminal law, “Probable cause ... exists when the facts and circumstances known to an officer are sufficient to lead a reasonable person to believe that a crime was committed and that the suspect committed it.” <i>State v. Perley</i>.2015 VT 102, ¶ 19 (citing <i>State v. Arrington</i>, 2010 VT 87, ¶ 11).</li> <li>○ In criminal law, “[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.” <i>Alabama v. White</i>, 496 U.S. 325, 330 (1990).</li> </ul> </li> </ul>

	<u>conduct a post-accident drug test of the employee.</u>	<ul style="list-style-type: none"> <li>• The existing law permits random and company-wide drug testing only when it is required pursuant to federal law or regulation. <ul style="list-style-type: none"> <li>○ The proposed amendment would permit company-wide testing if the testing is conducted pursuant to the employer's policy.</li> <li>○ The proposed amendment does not expressly permit random testing, but employees that are subject to federal drug testing requirements that provide for random testing would still be required to undergo random testing.</li> </ul> </li> <li>• The existing law does not permit follow-up or post-accident testing. An employer would be permitted to require both under the proposed amendment.</li> <li>• Both the existing law and the proposed amendment require employee's drug tests to be administered in accordance with § 514.</li> </ul>
21 V.S.A. § 517: This subchapter shall not restrict an employer's authority to prohibit the nonprescribed use of drugs or alcohol during work hours, or restrict an employer's authority to discipline, suspend or dismiss an employee for being under the influence of drugs or alcohol during work hours, except as that authority is restricted under subsection 513(c)(3) of this title in reference to participation in an employee assistance program or suspension.	21 V.S.A. § 517: <u>(a) This subchapter shall not restrict an employer's authority to prohibit the possession, sale, solicitation, or nonprescribed use of drugs or alcohol during work hours, or restrict an employer's authority to discipline, suspend, or dismiss an employee for possessing, selling, or soliciting drugs, or for being under the influence of drugs or alcohol during work hours, except as that authority is restricted under subsection 513(e)(3) of this title subdivision 512(c)(2) of this subchapter in reference to participation in an employee assistance a rehabilitation program or suspension.</u> <u>(b) No physician-patient relationship shall be created between an employee or job applicant and an individual performing or evaluating a drug test that is carried out pursuant to this subchapter.</u>	<ul style="list-style-type: none"> <li>• The proposed amendment adds express permission for an employer to prohibit and discipline, suspend, or dismiss an employee for the possession, selling, or soliciting drugs.</li> <li>• The proposed amendment adds subdivision (b), which provides that a physician-patient relationship is not created as a result of performing or evaluating a drug test pursuant to this subchapter.</li> </ul>
N/A	21 V.S.A. § 520: <u>(a) Prior to drug testing, an employer shall provide all employees and applicants with written notice of the test.</u> <u>(b) An employer that adopts a drug-free workplace program pursuant to this subchapter shall provide its employees with 60 days' notice before it implements the program and commences drug testing.</u> <u>(c) An employer shall provide notice of its drug-free workplace program on all announcements of a vacant position for which drug testing is required.</u> <u>(d) An employer shall post a notice of the employer's drug-testing policy in a conspicuous location on the employer's premises, and copies of the policy shall be made available for inspection by the employees or job applicants of the employer during regular business hours in the employer's personnel office or other suitable locations.</u>	<ul style="list-style-type: none"> <li>• New language requires an employer to provide employees and applicants with specific notice of drug testing.</li> </ul>
N/A	21 V.S.A. § 521:	<ul style="list-style-type: none"> <li>• New language that provides an employee that is discharged pursuant</li> </ul>

	<u>An employee who has been discharged pursuant to this subchapter shall be deemed to have been discharged for gross misconduct and shall be disqualified from unemployment compensation benefits pursuant to subdivision 1344(a)(2)(B) of this title.</u>	to the subchapter will be deemed to have been discharged for gross misconduct and disqualified from unemployment compensation. <ul style="list-style-type: none"> <li>Under 21 V.S.A. § 1344(a)(2)(B), “gross misconduct” means conduct directly related to the employee’s work performance that demonstrates a flagrant, wanton, and intentional disregard of the employer’s business interest, and that has direct and significant impact upon the employer’s business interest, including theft, fraud, intoxication, intentional serious damage to property, intentional infliction of personal injury, any conduct that constitutes a felony, or repeated incidents after written warning of either unprovoked insubordination or public use of profanity.”</li> </ul>
N/A	21 V.S.A. § 649: (a) Compensation shall not be allowed for an injury caused by an employee’s <del>willful</del> <u>willful</u> intention to injure himself, herself, or another or by or during <del>his or her intoxication</del> <u>the employee’s impairment due to alcohol or drug use</u> or by an employee’s failure to use a safety appliance provided for his or her use. (b) <u>An employee who claims to have suffered a work injury but has refused to submit to post-accident testing as required by an employer’s drug-free workplace program established pursuant to chapter 5, subchapter 11 of this title shall not be entitled to compensation under this chapter. The provisions of this subsection shall not apply if the employee’s employer had actual knowledge of and permitted or condoned the use of drugs or alcohol by the employee in the workplace.</u> (c) The burden of proof shall be upon the employer if he or she claims the benefit of the provisions of <u>subsection (a)</u> of this section.	<ul style="list-style-type: none"> <li>The proposed amendment adds a new provision to the workers’ compensation law that requires an employee to submit to post-accident testing required under his or her employer’s drug-free workplace program in order to be eligible for workers’ compensation benefits in relation to a work injury resulting from an accident.</li> </ul>

**Requirements for Drug Testing**

<b>Existing Vermont Drug Testing Law</b>	<b>Proposed Senate Economic Development Committee Amendment to Vermont Drug Testing Law</b>	<b>Comments</b>
21 V.S.A. § 514: An employer may request an applicant for employment or an employee to submit to a drug test pursuant to this subchapter, provided the drug testing is performed in compliance with all the following requirements: (1) Drugs to be tested. The test shall be administered only to detect the presence of alcohol or drugs, as defined in subdivision 511(3) of this title, at nontherapeutic levels. (2) Written policy. The employer shall provide all persons tested with a written policy that identifies the circumstances under which persons may be required to submit to drug tests, the particular test	21 V.S.A. § 514: An employer may request an applicant for employment or an employee to submit to a drug test pursuant to this subchapter, provided the drug testing is performed in compliance with all the following requirements: (1) Drugs to be tested. The test shall be administered only to detect the presence of alcohol or drugs, as defined in subdivision 511(3) of this title, <u>above the threshold detection level, or, for therapeutic drugs,</u> at nontherapeutic levels. (2) Written policy. The employer shall provide all persons tested with a written policy that identifies the circumstances under which	<ul style="list-style-type: none"> <li>The proposed amendment adds new language to subdivision (1) to incorporate the term “threshold detection level.”</li> <li>The proposed amendment requires that an employer’s written policy include information regarding the availability of a drug rehabilitation program, the consequences of refusing to submit to a drug test, and employees’ rights following a positive test result.</li> <li>The remaining provisions of § 514 are unchanged.</li> </ul>

procedures, the drugs that will be screened, a statement that over-the-counter medications and other substances may result in a positive test and the consequences of a positive test result. The employer's policy shall incorporate all provisions of this section.

(3) Blood samples. An employer may not request or require that a blood sample be drawn for the purpose of administering a drug test.

(4) Designated laboratory. The employer shall use only a laboratory designated by the department of health.

(5) Chain of custody. The collector shall establish a chain of custody procedure for both sample collection and testing that will assure the anonymity of the individual being tested and verify the identity of each sample and test result.

(6) Urinalysis procedure. If a urinalysis procedure is used to screen for drugs, the employer shall:

(A) require the laboratory performing the test to confirm any sample that tests positive by testing the sample by gas chromatography with mass spectrometry or an equivalent scientifically accepted method that provides quantitative data about the detected drug or drug metabolites; and

(B) provide the person tested with an opportunity, at his or her request and expense, to have a blood sample drawn at the time the urine sample is provided, and preserved in such a way that it can be tested later for the presence of drugs.

(7) Laboratory reports. A laboratory may report that a urine sample is positive only if both the initial test and confirmation test are positive for the particular drug. Test results shall only be provided by written report in accordance with subdivision (9) of this section.

(8) Negative test results. The detection of a drug at a therapeutic level as defined by the commissioner of health shall be reported as a negative test result. The laboratory's report shall not contain any information indicating the presence of a drug at a therapeutic level as defined by the commissioner.

(9) Information to be supplied. The laboratory shall provide the medical review officer with a written report of the drug test result. The medical review officer shall review the report, and discuss the results and options available with the individual tested. The written report shall include all of the following information:

(A) The unique identifier code of the person tested.

(B) The type of test conducted for both initial screening and confirmation.

(C) The results of each test.

(D) The detection level, meaning the cut-off or measure used to distinguish positive and negative samples, on both the initial screening and confirmation procedures.

persons may be required to submit to drug tests, the particular test procedures, the drugs that will be screened, a statement that over-the-counter medications and other substances may result in a positive test, a statement advising employees of the availability of a drug rehabilitation program, the consequences of refusing to submit to a drug test, the employee's rights following a positive test result, and the consequences of a positive test result. The employer's policy shall incorporate all provisions of this section.

\* \* \*

<p>(E) The name and address of the laboratory.  (F) Any other information provided by the laboratory concerning that person's test.</p> <p>(10) Preservation of samples. The collector shall ensure that a portion of any positive sample is preserved in a condition that will permit accurate retesting for a period of not less than 90 days after the person tested receives the result.</p> <p>(11) Medical review officer. The employer shall contract with or employ a certified medical review officer who shall be a licensed physician with knowledge of the medical use of prescription drugs and the pharmacology and toxicology of illicit drugs. The medical review officer shall review and evaluate all drug test results, assure compliance with this section and sections 515 and 516 of this title, report the results of all tests to the individual tested, and report only confirmed drug test results to the employer.</p> <p>(12) Collector. The employer shall designate a collector to collect specimens from job applicants and employees. The collector may be an employee for the purposes of collecting specimens from job applicants. The collector may not be an employee for the purposes of collecting specimens from employees for drug testing based on probable cause.</p>		
---	--	--

**Enforcement**

<b>Existing Vermont Drug Testing Law</b>	<b>Proposed Senate Economic Development Committee Amendment to Vermont Drug Testing Law</b>	<b>Comments</b>
<p>21 V.S.A. § 519:</p> <p>(a) Private right of action. An applicant or employee aggrieved by a violation of this subchapter may bring a civil action for injunctive relief, damages, court costs and attorney's fees.</p> <p>(b) Burden of proof. In a private right of action alleging that an employer has violated this subchapter, the employer has the burden of proving that the requirements of sections 513, 514 and 516 of this title have been satisfied. In any civil action alleging that a laboratory has violated the reporting or confidentiality sections of this subchapter, the laboratory shall have the burden of proving that the requirements of sections 514 and 516 of this title have been satisfied.</p> <p>(c) State action to obtain civil penalty. A person who violates any provision of this subchapter shall be subject to a civil penalty of not less than \$500.00 nor more than \$2,000.00.</p> <p>(d) State action to obtain criminal penalty. A person who knowingly violates any provision of this subchapter shall be fined not less than \$500.00 nor more than \$1,000.00 or shall be imprisoned not more than</p>	<p>21 V.S.A. § 519:</p> <p><del>(a) Private right of action. An applicant or employee aggrieved by a violation of this subchapter may bring a civil action for injunctive relief, damages, court costs and attorney's fees.</del></p> <p><del>(b) Burden of proof. In a private right of action alleging that an employer has violated this subchapter, the employer has the burden of proving that the requirements of sections 513, 514 and 516 of this title have been satisfied. In any civil action alleging that a laboratory has violated the reporting or confidentiality sections of this subchapter, the laboratory shall have the burden of proving that the requirements of sections 514 and 516 of this title have been satisfied.</del></p> <p><del>(c)</del>(a) State action to obtain civil penalty. A person who violates any provision of this subchapter shall be subject to a civil penalty of not less than \$500.00 nor more than \$2,000.00.</p> <p><del>(d)</del>(b) State action to obtain criminal penalty. A person who knowingly violates any provision of this subchapter shall be fined not less than \$500.00 nor more than \$1,000.00 or shall be imprisoned not more than</p>	<ul style="list-style-type: none"> <li>• The proposed amendment would eliminate an employee or applicant's right to bring a civil action seeking injunctive relief, damages, court costs, and attorney's fees for a violation of the subchapter.</li> <li>• The proposed amendment preserves the State's right to bring an action seeking a civil or criminal penalty for a violation of the subchapter.</li> </ul>

six months, or both.

six months, or both.