

§684. Imposition of tests

1. Testing of applicants. An employer may require, request or suggest that an applicant submit to a substance use test only if:

- A. The applicant has been offered employment with the employer; or [PL 1989, c. 536, §§1, 2 (NEW); PL 1989, c. 604, §§2, 3 (AFF).]
- B. The applicant has been offered a position on a roster of eligibility from which applicants will be selected for employment. The number of persons on this roster of eligibility may not exceed the number of applicants hired by that employer in the preceding 6 months. [PL 1989, c. 536, §§1, 2 (NEW); PL 1989, c. 536, §§2, 3 (AFF).]

The offer of employment or offer of a position on a roster of eligibility may be conditioned on the applicant receiving a negative test result.
[PL 2017, c. 407, Pt. A, §108 (AMD).]

2. Probable cause testing of employees. An employer may require, request or suggest that an employee submit to a substance use test if the employer has probable cause to test the employee.

- A. The employee's immediate supervisor, other supervisory personnel, a licensed physician or nurse, or the employer's security personnel must make the determination of probable cause. [PL 2017, c. 407, Pt. A, §108 (AMD).]
- B. The supervisor or other person must state, in writing, the facts upon which the determination made under paragraph A is based and provide a copy of the statement to the employee. [PL 2017, c. 407, Pt. A, §108 (AMD).]

[PL 2017, c. 407, Pt. A, §108 (AMD).]

3. Random or arbitrary testing of employees. In addition to testing employees on a probable cause basis under subsection 2, an employer may require, request or suggest that an employee submit to a substance use test on a random or arbitrary basis if:

- A. The employer and the employee have bargained for provisions in a collective bargaining agreement, either before or after the effective date of this subchapter, that provide for random or arbitrary testing of employees. A random or arbitrary testing program that would result from implementation of an employer's last best offer is not considered a provision bargained for in a collective bargaining agreement for purposes of this section; [PL 2003, c. 547, §2 (AMD).]
- B. The employee works in a position the nature of which would create an unreasonable threat to the health or safety of the public or the employee's coworkers if the employee were under the influence of a substance. It is the intent of the Legislature that the requirements of this paragraph be narrowly construed; or [PL 2017, c. 407, Pt. A, §108 (AMD).]
- C. The employer has established a random or arbitrary testing program under this paragraph that applies to all employees, except as provided in subparagraph (4), regardless of position.

(1) An employer may establish a testing program under this paragraph only if the employer has 50 or more employees who are not covered by a collective bargaining agreement.

(2) The written policy required by section 683, subsection 2 with respect to a testing program under this paragraph must be developed by a committee of at least 10 of the employer's employees. The employer shall appoint members to the committee from a cross-section of employees who are eligible to be tested. The committee must include a medical professional who is trained in procedures for testing for substances. If no such person is employed by the employer, the employer shall obtain the services of such a person to serve as a member of the committee created under this subparagraph.

(3) The written policy developed under subparagraph (2) must also require that selection of employees for testing be performed by a person or entity not subject to the employer's influence, such as a medical review officer. Selection must be made from a list, provided by the employer, of all employees subject to testing under this paragraph. The list may not contain information that would identify the employee to the person or entity making the selection.

(4) Employees who are covered by a collective bargaining agreement are not included in testing programs pursuant to this paragraph unless they agree to be included pursuant to a collective bargaining agreement as described under paragraph A.

(5) Before initiating a testing program under this paragraph, the employer shall obtain from the Department of Labor approval of the policy developed by the employee committee, as required in section 686. If the employer does not approve of the written policy developed by the employee committee, the employer may decide not to submit the policy to the department and not to establish the testing program. The employer may not change the written policy without approval of the employee committee.

(6) The employer may not discharge, suspend, demote, discipline or otherwise discriminate with regard to compensation or working conditions against an employee for participating or refusing to participate in an employee committee created pursuant to this paragraph. [PL 2017, c. 407, Pt. A, §108 (AMD).]

[PL 2017, c. 407, Pt. A, §108 (AMD).]

4. Testing while undergoing rehabilitation or treatment. While the employee is participating in a substance use rehabilitation program either as a result of voluntary contact with or mandatory referral to the employer's employee assistance program or after a confirmed positive result as provided in section 685, subsection 2, paragraphs B and C, substance use testing may be conducted by the rehabilitation or treatment provider as required, requested or suggested by that provider.

A. Substance use testing conducted as part of such a rehabilitation or treatment program is not subject to the provisions of this subchapter regulating substance use testing. [PL 2017, c. 407, Pt. A, §108 (AMD).]

B. An employer may not require, request or suggest that any substance use test be administered to any employee while the employee is undergoing such rehabilitation or treatment, except as provided in subsections 2 and 3. [PL 2017, c. 407, Pt. A, §108 (AMD).]

C. The results of any substance use test administered to an employee as part of such a rehabilitation or treatment program may not be released to the employer. [PL 2017, c. 407, Pt. A, §108 (AMD).]

[PL 2017, c. 407, Pt. A, §108 (AMD).]

5. Testing upon return to work. If an employee who has received a confirmed positive result returns to work with the same employer, whether or not the employee has participated in a rehabilitation program under section 685, subsection 2, the employer may require, request or suggest that the employee submit to a subsequent substance use test anytime between 90 days and one year after the date of the employee's prior test. A test may be administered under this subsection in addition to any tests conducted under subsections 2 and 3. An employer may require, request or suggest that an employee submit to a substance use test during the first 90 days after the date of the employee's prior test only as provided in subsections 2 and 3.

[PL 2017, c. 407, Pt. A, §108 (AMD).]

SECTION HISTORY

PL 1989, c. 536, §§1,2 (NEW). PL 1989, c. 604, §§2,3 (AMD). PL 1989, c. 832, §§10,11 (AMD). PL 2001, c. 706, §1 (AMD). PL 2003, c. 547, §2 (AMD). PL 2017, c. 407, Pt. A, §108 (AMD).

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