

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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HOUSE BILL 12*

Short Title: Drug Testing Regulation.

(Public)

Sponsors: Representatives Fitch; and S. Thompson.

Referred to: Commerce.

January 13, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO REGULATE WORKPLACE DRUG TESTING.

3 The General Assembly of North Carolina enacts:

4 Section 1. Chapter 95 of the General Statutes is amended by adding a new
5 Article 19 to read:

6 "ARTICLE 19.

7 "WORKPLACE DRUG TESTING REGULATION ACT.

8 "§ 95-225. Definitions.

9 As used in this Article, unless the context clearly requires otherwise, the following
10 terms have the meanings specified:

11 (1) 'Drug' means a controlled substance as defined in G.S. 90-87(5) or a
12 metabolite thereof.

13 (2) 'Employer' means a person doing business in the State who has one or more
14 employees within the State.

15 (3) 'Employee' means an individual currently performing services, within the
16 State for compensation for an employer.

17 (4) 'Random test' means a drug test of an employee selected by a method that
18 provides an equal probability that any employee from a group of employees will be
19 selected, and does not give an employer discretion to waive the selection of any
20 employee selected by the selection method.

21 (5) 'Reasonable suspicion drug testing.' Drug testing based on a belief that an
22 employee is using or has used drugs in violation of the employer's policy. This belief
23 shall be based upon specific objective and articulable facts and reasonable inferences.
24 These shall be based upon:

- 1 a. Direct observation of drug use and/or the physical symptoms or
2 manifestations of being under the influence of a drug; or,
3 b. Abnormal conduct or erratic behavior while at work, a pattern of
4 absenteeism, tardiness, or deterioration in work performance; or,
5 c. A report of drug use provided by reliable and credible sources and
6 which has been independently corroborated; or,
7 d. Evidence that an individual has tampered with a drug test, during
8 his/her employ with the current employer; or,
9 e. Information from a reliable and credible source, that an employee has
10 caused, or contributed to an accident at work while under the influence
11 of drugs; or,
12 f. Evidence that an employee is involved in the use, possession, sale,
13 solicitation, or transfer of drugs while working or while on the
14 employer's premises or operating the employer's vehicle, machinery, or
15 equipment.

16 (6) 'Employee assistance program' means a program provided by an employer
17 offering, as a minimum, assessment and referral services to employees.

18 (7) 'Job Applicant' means a person who has completed a written job application
19 provided by the employer for employment within the State.

20 (8) 'High Risk or Safety Sensitive Position' means a position requiring the
21 operation of vehicles, machinery, equipment or the handling of hazardous materials, the
22 mishandling of which may place fellow employees or the general public at risk of
23 serious injury, or the nature of which would create a security risk in the workplace.

24 **"§ 95-226. Authorized drug testing.**

25 (a) No Testing Except As Authorized. An employer may not request or require
26 an employee or a job applicant to undergo drug testing except as authorized in this
27 Article.

28 (b) Reasonable Suspicion Drug Testing. An employer may request or require
29 any employee to submit to reasonable suspicion drug testing.

30 (c) Random Testing. An employer may require a random test of an employee if
31 the employee serves in a high risk or safety sensitive position.

32 (d) Applicant Testing. An employer may require a job applicant to submit to a
33 drug test only if:

34 (1) The job applicant is informed in writing at the time of application of
35 the employer's intent to conduct a drug test; and

36 (2) The test is administered in accordance with the provisions of G.S. 95-
37 227. An employer is not required to provide an employee assistance
38 program to any job applicant with a confirmed positive drug test result.
39 A confirmed positive drug test result may be used by an employer as a
40 basis for denying or limiting employment of a job applicant.

41 (e) Treatment Program Testing. An employer may require drug testing of any
42 employee referred by the employer's employee assistance program to a drug abuse
43 counseling, rehabilitation, or treatment program. An employee may be required to
44 undergo drug testing during the drug abuse counseling, rehabilitation, or treatment

1 program, and for a follow-up period of up to 12 months following successful
2 completion of the program. An employee shall not be discharged based upon a
3 confirmed positive treatment test during the first 30 days after the employee enters an
4 employee assistance program.

5 **§ 95-227. Procedural requirements for the administration of drug tests.**

6 (a) Limitations. An employer who requests or requires a job applicant or
7 employee to submit to a drug test shall comply with all of the following procedural
8 requirements. An employer may take no adverse action against any employee or job
9 applicant based on the results of a drug test unless the employer has complied with all of
10 the following procedural requirements.

11 (b) Written Policy. The employer shall provide all persons tested with a written
12 policy that identifies:

13 (1) The circumstances under which the employee may be required to
14 submit to a test;

15 (2) The test procedures;

16 (3) The classes of drugs that may be tested for;

17 (4) The consequences of a confirmed positive test result;

18 (5) The consequences of a refusal to take a drug test;

19 (6) The right to a second test at the employee's expense of a positive drug
20 test result, to be taken from the original sample;

21 (7) The right of an employee or job applicant to explain a positive test
22 result; and,

23 (8) The right of an employee to be notified in writing of the basis for any
24 drug test based on reasonable suspicion.

25 (c) Collection of Sample. The collection of samples shall be performed under
26 reasonable and sanitary conditions. Individual dignity shall be preserved to the extent
27 practicable. Samples shall be collected in a manner reasonably calculated to prevent
28 substitution of samples and interference with the collection or testing of samples. No
29 employer or his representative may directly observe an employee or job applicant in the
30 process of producing a urine sample unless there is reason to believe there has been
31 tampering with or substitution of samples.

32 (d) Approved Labs. The employer shall use only laboratories approved and
33 certified by the North Carolina Department of Human Resources, or laboratories that
34 have demonstrated satisfactory performance in the proficiency testing programs of the
35 National Institute on Drug Abuse, the College of American Pathology, or the American
36 Association for Clinical Chemistry, to conduct employee and job applicant drug testing.
37 An approved lab shall confirm any sample that tests positive by a second test of the
38 sample utilizing gas chromatography with mass spectrometry or an equivalent
39 scientifically accepted method.

40 (e) Split Samples. A portion of every sample that produces a confirmed positive
41 test result shall be preserved by the laboratory that conducts the confirmatory test for a
42 period of at least 90 days from the time the results of the confirmed positive test are
43 mailed or otherwise delivered to the employer.

1 (f) Test Results. The employer shall provide each employee a copy of his test
2 result, within five work days of employer notice of the test result, regardless of whether
3 the test result is positive or negative. Upon request, the employer shall provide each job
4 applicant a copy, within five working days, of any positive test result.

5 (g) Chain of Custody. The employer or his agent shall establish procedures
6 regarding chain of custody for sample collection and testing to ensure proper record
7 keeping, handling, labeling, and identification of the test samples.

8 (h) Opportunity to Explain Positive Test. The employer shall provide the
9 employee or job applicant tested the opportunity to rebut verbally or explain in writing a
10 confirmed positive drug test result.

11 (i) Opportunity for Retest. An employee may request a retest of the original
12 sample at the employee's own expense after notice of a positive test result. Within five
13 working days after notice of the test result, the employee shall notify the employer in
14 writing of the employee's intention to obtain a retest. Within five working days after
15 receipt of the notice, the employer shall notify the original testing laboratory that the
16 employee has requested the laboratory to conduct the retest or to transfer the sample to
17 another laboratory to conduct the retest. The retest must use the same drug threshold
18 detection levels as used in the original test. If the retest does not confirm the original
19 positive test result, no adverse personnel action based on the original test may be taken
20 against the employee.

21 (j) Confidentiality. An employer or laboratory shall not release to any person
22 any information related to drug test results, except the following:

23 (1) The employee;

24 (2) The job applicant;

25 (3) Employer's medical staff;

26 (4) Direct supervisory personnel;

27 (5) Other personnel as designated by the employer on a need to know
28 basis;

29 (6) Any person or job applicant has expressly in writing granted
30 permission for the employer or laboratory to release information to; or,

31 (7) Employee assistance program personnel designated by the employer
32 on a need to know basis.

33 The employer or laboratory must gain employee permission for each release.

34 (k) Employee Assistance Program. The employer shall provide an employee
35 assistance program for any permanent employees upon his first confirmed positive drug
36 test. The employee assistance program provides the employee with, or refers the
37 employee to, an appropriate drug abuse counseling, rehabilitation or treatment program
38 at the employee's own expense or as part of an employee benefit plan.

39 Employee assistance programs under this act shall be registered with the North
40 Carolina Department of Labor and shall abide by the guidelines established by the
41 Department of Labor.

42 (l) Disciplinary Action. The employee's counseling, rehabilitation or treatment
43 shall be paid for by the employer's health benefit plan or at the employee's expense if no

1 such plan exists. No employee may be discharged based upon a confirmed positive
2 drug test unless:

- 3 (1) The employee has previously participated in an employee assistance
4 program for a drug abuse problem, while employed by his current
5 employer; or,
- 6 (2) The employee has refused to participate in the employer's employee
7 assistance program, or any drug abuse counseling, rehabilitation or
8 treatment program he has been referred to by the employee assistance
9 program; or,
- 10 (3) The employee has failed to successfully complete any employee
11 assistance program, or any drug abuse counseling, rehabilitation or
12 treatment program he has been referred to by the employee assistance
13 program. For purposes of this section, 'failed to successfully
14 complete' means withdrawal from the program before its completion,
15 or a confirmed positive drug test result after completion of the
16 program, as provided for in G.S. 95-226(e).

17 An employee may be:

- 18 (1) Suspended up to three days with or without pay, according to the
19 employer's health leave policy, until he enters an employee assistance
20 program, or,
- 21 (2) Transferred or reassigned for the time necessary to complete the drug
22 abuse counseling, rehabilitation, or treatment program designated by
23 the employee assistance program; or,
- 24 (3) Suspended without pay in accordance with the employer's health leave
25 policy for a period of up to 30 days, when recommended by the
26 employee assistance program for the purpose of drug treatment.

27 (m) Time Limits on Drug Test Records. The employer shall remove any
28 reference to the results of a drug test and subsequent treatment from the personnel
29 records of an employee who received a confirmed positive drug test result if, three years
30 after the successful completion of an employee assistance program, the employee shows
31 no evidence of illegal drug use. This section does not apply to employee medical
32 records.

33 **"§ 95-228. Employer drug test results not to be used in criminal action.**

34 No drug test results from an employer drug testing program or the employee's retest
35 may be used as evidence in a criminal action against the employee, job applicant, or
36 employer. However, a test report accompanied by an affidavit by the analyst or other
37 designated certifying officer of the approved laboratory conducting the test, sworn to
38 and properly executed before an official authorized to administer oaths, shall be
39 admissible without further authentication as **prima facie** evidence in any hearing before
40 the Department of Labor, Employment Security Commission, or other administrative
41 agencies of the State concerned with employer-employee relations. The Department of
42 Human Resources shall develop a form for use by approved laboratories in making this
43 affidavit.

1 If either employer or employee desires that the analyst, or other representative of the
2 approved lab who conducted the test, personally testify at the hearing, he may subpoena
3 and examine that person as though he were an adverse witness.

4 **"§ 95-229. No duty to test.**

5 Nothing in this Article shall be construed to place a duty on employers to conduct
6 drug testing of their employees or job applicants.

7 **"§ 95-230. Administrative Relief.**

8 (a) The Commissioner of Labor is authorized to investigate complaints from
9 employers, employees, or job applicants regarding compliance with this Article. The
10 Commissioner or his representative shall have the power to enter any place of
11 employment and gather such facts as are essential to determine whether or not a
12 violation of this Article has occurred.

13 (b) The Commissioner or his representative shall have the power to hold
14 hearings, administer oaths, examine witnesses, issue subpoenas, compel the attendance
15 of witnesses and the production of papers, books, records, physical evidence and
16 documents, and take depositions and affidavits in any proceeding hereunder.

17 (c) Subject to the requirements of Chapter 150B, the Commissioner is authorized
18 to adopt such rules as are necessary for the purpose of carrying out the provisions of this
19 Article.

20 (d) The Commissioner may order an employer, laboratory or medical facility
21 found to be in violation of this act to provide appropriate relief to the affected employee
22 or employees. Appropriate relief may include back pay, reinstatement to the same or an
23 equivalent job, reinstatement of full employee benefits and seniority rights, and deletion
24 of references from files.

25 (e) Complaints regarding compliance with this Article must be filed within one
26 year following notification to the employee regarding the results of the drug test or
27 within one year of the occurrence of the violation, whichever is later.

28 **"§ 95-231. Remedies.**

29 An employee, job applicant, or the Commissioner of Labor on behalf of such
30 employee or job applicant alleging a violation of this act by an employer, laboratory or
31 other medical facility may bring an action for injunctive relief or damages or both.
32 Relief may include:

33 (1) An injunction to restrain the continued violation of this act;

34 (2) Reinstatement of the employee to the same position held before the unlawful
35 drug testing, disciplinary action or discharge, or to an equivalent position;

36 (3) Reinstatement of full employee benefits and seniority rights;

37 (4) Actual damages, including reasonable attorney's fees.

38 **"§ 95-232. Applicability.**

39 The provisions of this Article shall apply only to cases of employees working within
40 the State and job applicants making application within the State."

41 Sec. 2. This act shall become effective October 1, 1989.