**Technical Amendment**
**October 31, 2022**
**EDUCATION AND LABOR CABINET**
**(Technical Amendment)**

**803 KAR 25:280. Certification of drug-free workplace.**

RELATES TO: KRS 13B.140, 217.900(1), 218A.010(15), 304.13-167, 342.011(9), 342.640, 342.660, 351.010(1)(l)

STATUTORY AUTHORITY: KRS 304.13-167

CERTIFICATION STATEMENT:

NECESSITY, FUNCTION, AND CONFORMITY: KRS 304.13-167(6) requires the Commissioner of the Department of Workers' Claims to promulgate administrative regulations regarding a drug-free workplace program for Kentucky employers to implement. This administrative regulation establishes the requirements for employers to apply and be certified by the Department of Workers' Claims for implementing a drug-free workplace program.

Section 1. Definitions.

(1) "Alcohol" means ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, produced from any source or process.

(2) "Consortium" means an entity, which may involve varied pools of employers and their employees, established to provide cost-effective services to employers to help the employers comply with drug-free workplace program requirements and may provide employer education, supervisor training, and drug and alcohol testing at a reduced cost to the employers who choose to participate.

(3) "Drug" means a controlled substance as defined in KRS 218A.010(15) and as established in 902 KAR Chapter 55, including:

(a) Amphetamines;
(b) Cannabanoids/THC;
(c) Cocaine;
(d) Opiates;
(e) Phencyclidine (PCP);
(f) Benzodiazepines;
(g) Propoxyphene;
(h) Methaqualone;
(i) Methadone;
(j) Barbiturates;
(k) Synthetic narcotics;
(l) Illicit substances; and
(m) Volatile substances as defined by KRS 217.900(1).

(4) "Drug or alcohol rehabilitation program" means a service provider that provides confidential, timely, and expert identification, assessment, treatment, and resolution of employee drug or alcohol abuse.

(5) "Drug test" or "test" means a chemical, biological, or physical instrumental analysis administered by a qualified laboratory, for the purpose of determining the presence or absence of a drug or its metabolites or alcohol pursuant to standards, procedures, and protocols established by the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA), at http://www.workplace.samhsa.gov/.

(6) "Employee" is defined by KRS 342.640.

(7) "Employee Assistance Program" means an established program providing:

(a) Professional assessment of employee personal concerns;
(b) Confidential and timely services to identify employee alcohol or substance abuse;
(c) Referrals of employees with alcohol or substance abuse for appropriate diagnosis, treatment, and assistance; and
(d) Follow-up services for employees who participate in a drug or alcohol rehabilitation program and are recommended for monitoring after returning to work.

(8) "Employer" means a corporation, partnership, sole proprietorship, or other business entity doing business in Kentucky which is required to comply with the provisions of KRS Chapter 342 or voluntarily covers excluded employees pursuant to KRS 342.660.

(9) "Commissioner" is defined by KRS 342.0011(9).

(10) "Illicit substance" is defined by KRS 351.010(1)(l).

(11) "Medical review officer" or "MRO" means a licensed physician with knowledge of substance abuse disorders, laboratory testing, chain of custody, collection procedures, the ability to verify positive, confirmed test results, and the necessary medical training to interpret and evaluate a positive test result in relation to the person's medical history or any other relevant biomedical information.

(12) "Department" is defined by KRS 342.0011(8).

(13) "Qualified laboratory" means a laboratory certified in accordance with the National Laboratory Certification Program (NLCP) by the United States Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA).

(14) "Reasonable suspicion testing" means drug or alcohol testing that meets the requirements in Section 3 of this administrative regulation.

(15) "Serious physical injury" means an injury which has a reasonable potential to cause death.

Section 2. Applicability.

(1) Employer participation in the Drug-Free Workplace Program shall be voluntary.

(2) All drug or alcohol testing shall be conducted:

(a) In accordance with applicable federal and state requirements, as utilized in each part of the testing process; and

(b) As required by this administrative regulation for participants in the Drug-Free Workplace Program.

Section 3. Requirements for a Drug-Free Workplace Program. To obtain certification for a drug-free workplace program, an employer shall comply with all of the following minimum requirements:

(1) The program shall include alcohol and substance abuse education and awareness training for employees and supervisors which:

(a) Provides to all employees written materials explaining the employer's policies and procedures with respect to the drug-free workplace program;

(b) Provides each employee at least one (1) hour of initial, and at least thirty (30) minutes refresher each year thereafter, of alcohol and substance abuse education and awareness training which shall include, at a minimum, information concerning:

1. Alcohol and drug testing;
2. The effects of alcohol and drug use on an individual's health, work, and personal life;
3. The disease of alcohol or drug addiction;
4. Signs and symptoms of an alcohol or drug problem;
5. The role of coworkers and supervisors in addressing alcohol or substance abuse; and
6. Referrals to an employee assistance program; and

(c)

1. Provides all supervisory personnel, in addition to the training specified in paragraph (b) of this subsection, with thirty (30) minutes each year of alcohol and substance abuse education and awareness training.

2. The training shall include, at a minimum, information on:

a. Recognizing the signs of alcohol and substance abuse in the workplace;

b. How to document signs of employee alcohol or substance abuse;

c. How to refer employees to an employee assistance program or other alcohol and substance abuse treatment; and

d. Legal and practical aspects of reasonable suspicion testing for the presence of drugs and alcohol;

(2) Within the program, reasonable suspicion testing shall be based on a belief that an employee is using or has used drugs or alcohol in violation of the employer's policy, drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience, training, or education. The reasonable suspicion testing shall be based upon:

(a) While at work, direct observation of drug or alcohol use or of the physical symptoms or manifestations of being under the influence of a drug or alcohol;

(b) While at work, abnormal conduct, erratic behavior, or a significant deterioration in work performance;

(c) A report of drug or alcohol use provided by a reliable and credible source;

(d) Evidence that an individual has tampered with a drug or alcohol test during employment with the current covered employer;

(e) Information that an employee has caused, contributed to, or been involved in an accident while at work; or

(f) Evidence that an employee has used, possessed, sold, solicited, or transferred illegal or illicit drugs or used alcohol while on the covered employer's premises or while operating the covered employer's vehicle, machinery, or equipment;

(3) The program shall include breath alcohol and urine drug testing to which job applicants or employees shall be required to submit at the following times:

(a) For urine drug testing:

1. After conditional offer of employment;

2. After being selected using a statistically valid, unannounced random method;

3. Upon reasonable suspicion of prohibited drug use;

4. At follow-up testing at least once per quarter for one (1) year after the employee's successful completion of an employee assistance program for drug-related problems, or a drug rehabilitation program, or as recommended by the person administering the drug rehabilitation program; and

5. Following an accident on the premises of the employer or in the course of employment for the employer which requires off-site medical attention be given to a person.

(b) For breath alcohol testing:

1. After conditional offer of employment;

2. Upon reasonable suspicion of prohibited alcohol use;

3. Following an accident on the premises of the employer or in the course of employment for the employer which requires off-site medical attention be given to a person; and

4. Follow-up testing at least once per quarter for one (1) year after the employee's successful completion of an employee assistance program for alcohol-related problems, or an alcohol rehabilitation program, or as recommended by the person administering the alcohol rehabilitation program;

(4) The department may issue a certification for a program that provides for alcohol and drug testing of other fluids or products of the human body capable of revealing the

presence of drugs or alcohol if the testing is as accurate as, and equivalent to, breath alcohol and urine drug testing and complies with this section of this administrative regulation;

(5) The program shall include the minimum testing protocol which shall include:

(a) A maximum acceptance level of breath alcohol concentration, which shall be a concentration of four-hundredths (0.04); and

(b) An eleven (11) panel urine test that shall include testing for the following substances:

1. Amphetamines;
2. Cannabanoids/THC;
3. Cocaine;
4. Opiates;
5. Phencyclidine (PCP);
6. Benzodiazepines;
7. Propoxyphene;
8. Methaqualone;
9. Methadone;
10. Barbiturates; and
11. Synthetic narcotics;

(6) The program shall provide that the collection of samples and administration of drug and alcohol tests shall follow all standards, procedures and protocols set forth by the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Administration (SAMHSA), at http://www.workplace.samhsa.gov/;

(7) The program shall provide that the test results have been performed by a qualified laboratory;

(8) The program shall include medical review of test results as follows:

(a)

1. All test results shall be submitted for medical review by the medical review officer (MRO), who shall consider the medical history of the employee or applicant, as well as other relevant biomedical information.

2. If there is a positive test result, the employee or applicant shall be given an opportunity to report to the MRO the use of any prescription or over-the-counter medication.

(b)

1. If the MRO determines that there is a legitimate medical explanation for a positive test result, the MRO shall certify that the test results do not indicate the unlawful use of alcohol or a controlled substance.

2. If the MRO determines, after appropriate review, that there is not a medical explanation for the positive test result other than the unauthorized use of alcohol or a prohibited drug, the MRO shall refer the individual tested to an employee assistance program or to a personnel or administrative officer for further proceedings in accordance with the employer's drug-free workplace program.

(c) Determinations concerning the use of alcohol or a controlled or illicit substance shall comply with all procedures outlined in the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA) "Medical Review Officer Manual for Federal Agency Workplace Drug Testing Programs";

(9) The program shall include an employee assistance program (EAP) for its employees and supervisory personnel.

(a) The employer shall:

1. Establish the EAP as a part of its internal personnel services; or
2. Contract with an entity that provides EAP services.

(b) The employer's participation in a consortium shall satisfy this requirement; and

(10) The program shall include controlled-access maintenance at the employer's place of business of records including the names and position titles of all employees and supervisory personnel trained under the program, and the names of all persons who presented alcohol and substance abuse training, for review by the office.

Section 4. Confidentiality of records. Records of drug or alcohol test results, written or otherwise, received by the employer shall be confidential communications and shall not be disclosed by the employer to any party unless:

(1) A written release of information is granted and signed by the employee; or

(2) The release is ordered by a court of competent jurisdiction.

Section 5. Application Requirements. Employers who desire a drug-free workplace certification pursuant to KRS 304.13-167 shall submit to the department an initial notarized application, and annually thereafter, in the form of an affidavit executed by the owner or chief executive officer of the business establishing that it provides a drug-free workplace by:

(1) Providing a copy of a statement to each employee and posting the statement in a prominent place at each worksite. The statement shall:

(a) Notify employees that the unlawful manufacture, distribution, dispensation, possession, or use of alcohol or a controlled or illicit substance is prohibited in the workplace;

(b) Identify methods that may be used by the employer to determine if violations by an employee exists; and

(c) Specify the actions that will be taken against employees for violations of the prohibition;

(2) Establishing an alcohol and substance abuse education and awareness training program which complies with the minimum requirements of Section 3 of this administrative regulation to inform employees and supervisory personnel about:

(a) The dangers of drug abuse in the workplace;

(b) The role of co-workers and supervisors in addressing alcohol or drug abuse;

(c) The employer's policy of maintaining a drug-free workplace;

(d) Available drug counseling, rehabilitation, and employee assistance programs; and

(e) The penalties for violations of the drug-free workplace policy;

(3) Establishing a program that includes alcohol and drug testing performed as established in Section 3 of this administrative regulation;

(4) Providing an Employee Assistance Program which shall:

(a) Include:

1. Professional assessment of employee personal concerns;

2. Confidential and timely services to identify employee drug or alcohol abuse;

3. Referrals of employees for appropriate diagnosis, treatment, and assistance with regard to employee alcohol or substance abuse; and

4. Follow-up services for employees who participate in a drug or alcohol rehabilitation program and are recommended for monitoring after returning to work; and

(b) Provide services regardless of race, color, religion, national origin, disability, sex, or age;

(5) Verifying that the frequency and duration of each employee and supervisor training session meets the requirements of Section 3 of this administrative regulation;

(6) Verifying that all employees have participated, or shall participate during the calendar year, in the required alcohol and substance abuse education and awareness training sessions;

(7) Maintaining a drug-free workplace throughout its workers' compensation insurance policy period; and

(8) Maintaining the drug-free workplace program in compliance with all federal and state laws and regulations that apply to that particular business.

Section 6. Required Documentation.

(1) An employer's initial application shall be accompanied by copies of the following documents:

(a) The employer's written drug-free workplace policy;

(b) Documents provided to employees regarding the drug-free workplace program if different from the policy; and

(c) The following, if not included in the drug-free workplace policy:

1. A statement identifying each alcohol and drug test that will be conducted;

2. A statement describing the employer's Employee Assistance Program;

3. A description of the alcohol and substance abuse education and awareness training program for employees and supervisory personnel; and

4. A statement describing the confidentiality of the employer's drug-free workplace program.

(2) Employers shall attach the documents listed in subsection (1) to a renewal application only if a substantive change or amendment has been made to the material filed with the initial application.

Section 7. Certification of Drug-Free Workplace Procedure.

(1)

(a) If the department receives an incomplete application of certification of drug-free workplace, the department shall notify an employer in writing of an incomplete application and shall state the necessary information or documents to provide a complete review of the application;

(b) The employer shall provide the additional information and documents within fifteen (15) days of the notification of an incomplete application; and

(c) If the employer fails to provide the requested information, the application shall be denied.

(2)

(a) Within sixty (60) days of receipt of a complete application, the department shall issue a written statement to the applicant approving or denying the application; and

(b) If the application is denied, the written notification shall specifically state the reasons for the denial.

(3) The notification of approval or denial shall be mailed by certified mail, return receipt requested to the address listed on the application.

(4)

(a) If an employer, who has been certified to have a drug-free workplace program, discontinues or fails to maintain its program in compliance with this administrative regulation, the department shall revoke the employer's certification.

(b) The department office shall submit written notification of the revocation which shall:

1. Include specific reasons for the revocation; and

2. Shall be mailed by certified mail, return receipt requested, to the address listed on the employer's certification.

(5) Service by certified mail shall be complete:

(a) Upon delivery of the notification;

(b) Upon acceptance by any person eighteen (18) years or older at the employer address;

(c) Upon refusal to accept by a person at the employer's address;

(d) Upon the U.S. Postal Service's inability to deliver the notification if properly addressed; or

(e) Upon failure of the applicant to claim the notification prior to its return to the office by the U.S. Postal Service.

(6) The return receipt or envelope shall be proof of acceptance, refusal, inability to deliver, or failure to claim the envelope.

Section 8. Denial or Revocation of Certification.

(1) If an employer's application for certification is denied or revoked, an employer may request, in writing, a hearing before the commissioner on the denial or revocation of certification;

(2) The request for a hearing shall be filed with the office within twenty (20) days from the date of the notice of denial or revocation;

(3) Upon receipt of a request for a hearing, the commissioner shall issue a notice of hearing to be held no sooner than ten (10) days and no later than thirty (30) days after the request unless agreed to by the parties;

(4) No later than thirty (30) days after the hearing is closed, the commissioner shall issue a written order concerning all matters addressed at the hearing; and

(5) The commissioner's final order may be appealed to the Franklin Circuit court in accordance with KRS 13B.140.

Section 9. Incorporation by Reference.

(1) The following material is incorporated by reference:

(a) Form DFW, "Applicant's Affidavit: Drug-Free Workplace Program", (Sept. 2007 edition); and

(b) The "Medical Review Officer Manual for Federal Agency Workplace Drug Testing Programs", issued by the Department of Health and Human Services, November 1, 2004 edition (DHHS Publication No. (Administrative Regulation) 88-1526).

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Department of Workers' Claims, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m.

(803 KAR 025:280. 34 Ky.R. 1597; 2399; eff. 6-6-2008; Crt eff. 3-29-2019; TAm eff. 10-31-2022; Crt to Am 3-5-2026; Recodified to 120 KAR 001:280; eff. 6-29-2026.)

FILED WITH LRC: October 31, 2022