

222.215 Purpose -- Administrative regulations to implement employer-facilitated substance use disorder treatment program -- Duties of cabinet and Office of Drug Control Policy -- Eligibility to participate in program -- Employer's permitted activities -- Effect of employer's compliance with program requirements -- No private right of action granted -- Affirmative defense.

- (1) For the purposes of this section only:
 - (a) "Employee" means a person who has failed a drug screen related to employment; and
 - (b) "Employer" means an employer who elects to employ a person who has failed a drug screen related to employment.
- (2) The purpose of this section is to foster economic opportunities for individuals with histories of substance use disorder and to encourage employer participation in substance use disorder treatment programs.
- (3) The Cabinet for Health and Family Services shall, in conjunction with the Office of Drug Control Policy, promulgate any administrative regulations necessary to implement an employer-facilitated substance use disorder treatment program for employees who have failed an employment-related drug screen. The administrative regulations, at a minimum, shall include provisions:
 - (a) Enumerating elements necessary in an employer's drug policy if the employer elects to participate in an employer-facilitated substance use disorder treatment program;
 - (b) Mandating an initial clinical assessment of the employee by a qualified health professional and creation of a written treatment plan;
 - (c) Containing referral information for clinical assessments of employees, education, and treatment options;
 - (d) Requiring the employee provide its employer with proof of the employee's active participation in a licensed drug education and substance use disorder treatment program and demonstrated successful compliance with the recommendations of the initial clinical assessment; and
 - (e) Establishing follow-up drug testing for the employee.
- (4) The Cabinet for Health and Family Services in conjunction with the Office of Drug Control Policy shall:
 - (a) Promote voluntary participation for all employers regardless of the number of employees; and
 - (b) Develop and deliver resources and training for employers including the following information:
 1. The definition of substance use disorder as defined in the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders;
 2. Signs and symptoms of a substance use disorder;
 3. A list of licensed treatment options for substance use disorder;

4. Information about acceptable use of treatment records covered by the federal Health Insurance Portability and Accountability Act;
 5. Information about substance use disorder treatment, return to use, and supportive work environments for treatment and recovery; and
 6. A list of qualified health professionals that an employer may use to provide onsite drug abuse prevention education and substance use disorder treatment services for employees.
- (5) To participate in a treatment program the employee shall:
- (a) Provide the employer with a signed consent authorizing the employer to provide and receive documentation confirming the employee's participation and completion of substance use treatment services;
 - (b) Comply with the employer's drug policy; and
 - (c) Comply with the administrative regulations promulgated by the Cabinet for Health and Family Services in conjunction with the Office of Drug Control Policy.
- (6) To participate in the program an employer shall:
- (a) Develop and distribute to persons it employs a written drug policy, procedure, or protocol including, without limit, a test or series of tests to objectively measure substances that can create substance use disorders, that is in compliance with state and federal law;
 - (b) Require an employee to participate in recommended drug education and licensed substance use disorder treatment services as a condition of employment;
 - (c) Have the right to discipline or terminate an employee who does not comply with the agreed treatment services or the employer's drug policy;
 - (d) Comply with the administrative regulations promulgated by the Cabinet for Health and Family Services, and the Office of Drug Control Policy; and
 - (e) Secure all records and information concerning an employee's drug test results, treatment assessments, and treatment reports in a confidential manner and shall maintain this information separately from the employee's personnel file. The employer shall share this information:
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 - a. Internally only with those in the employee's chain-of-authority who need the information to perform responsibilities related to supervision or support of the employee; and
 - b. Externally only when the employee has provided specific written authorization to disclose specific facts to specific parties for a specific purpose; or
 2. As ordered by the court.
- (7) An employer may:
- (a) Pay for all or part of the employee's substance use disorder education and treatment services; and

- (b) Accept a voluntary wage assignment from the employee to pay for part of the employee's substance use disorder treatment. The wage assignment shall not reduce the employee's remaining net compensation below the federal minimum wage during any pay period.
- (8) If an employer complies with the requirements of this section:
- (a) The employer shall not be liable for a civil action alleging negligent hiring, negligent retention, or negligent supervision for a negligent act by the employee as a result of the employee's substance use disorder unless it can be shown that the employer violated subsection (6) of this section, or knew or should have known that the employee had a recurrence of his or her substance use disorder and was acting under the influence of the substance at the time of the alleged negligent act;
 - (b) The employer's participation or nonparticipation in a drug education and substance use disorder treatment program shall not be admissible as evidence in an action against the employer, the employer's agent, or the employer's employee except that it may be admitted as evidence of the participating employer's liability limitation, mitigation of damages, or as evidence of a participating employer's noncompliance with subsection (6) of this section; and
 - (c) Referral and treatment for drug education and substance use disorder treatment by the employer shall not be sufficient to constitute compliance with this section unless the employee has complied with all other requirements of this statute and associated administrative regulations.
- (9) This section shall not form the basis of any individual private right of action and subsection (8)(a) of this section shall operate as an affirmative defense for which an employer bears the burden of proving compliance. However, nothing in this section shall bar a plaintiff from commencing a cause of action for any common law claim for any injury to person or property or for wrongful death in any civil action alleging negligent hiring, negligent retention, or negligent supervision, against an employer.

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