

17 KAR 3:050. Drug testing procedures at Kentucky Department of Veterans Affairs state Veterans nursing homes.

RELATES TO: 41 U.S.C. 701-707

STATUTORY AUTHORITY: KRS 40.325(2)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 40.325 authorizes the Kentucky Department of Veterans Affairs to promulgate any administrative regulations necessary to operate veterans' nursing homes in compliance with applicable state and federal statutes and regulations. This administrative regulation establishes procedures that will ensure state veteran nursing homes comply with KRS 18A.043, 41 U.S.C. 701-707, and 82 Federal Register 7920 (Mandatory Guidelines for Federal Workplace Drug Testing Programs) through drug testing of employees caring for veteran residents in veteran nursing homes.

Section 1. Definitions.

- (1) "Administrator" means the person in charge of a Kentucky Veterans Center, or that person's specific designee.
- (2) "Applicant" means an individual seeking employment in a test-designated position at a facility operated by the department.
- (3) "Appointing authority" means the Commissioner, Kentucky Department of Veterans Affairs, or the Commissioner's designee.
- (4) "Controlled substance" is defined in KRS 218A.010.
- (5) "Confirmatory test" means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test and which uses a different technique and chemical principle from that of the initial test in order to ensure reliability and accuracy.
- (6) "Department" means the Kentucky Department of Veterans Affairs.
- (7) "Donor" means the individual from whom a urine specimen is collected.
- (8) "Drug" is defined in KRS 218A.010.
- (9) "Initial test" or "screening test" means an immunoassay test to eliminate negative urine specimens from further consideration and to identify the presumptively positive specimens that require confirmation or further testing.
- (10) "Kentucky Veterans Center" means a state veterans nursing home operated by the Kentucky Department of Veterans Affairs.
- (11) "On duty" means being engaged in, or on-call to be engaged in, the performance of work responsibilities for the employer.
- (12) "Reasonable suspicion" means the quantity of proof or evidence, based on specific, objective facts and rationally-derived inferences from those facts about the conduct of an individual that would lead a reasonable person, based upon his or her training or life experiences, to suspect that a KDVA employee has been using illegal drugs, controlled substances, prescription or nonprescription medication, or alcohol in violation of this administrative regulation.
- (13) "Refusal to submit to a drug test" means the following:
 - (a) Failing to provide an adequate urine sample without an adequate medical explanation;
 - (b) Engaging in conduct that obstructs the testing process; or
 - (c) Refusing to be tested.
- (14) "Sample" means a representative portion of a urine specimen or quality control sample used for testing.
- (15) "Serious work accident" means any on-duty accident or incident resulting in personal injury or death to any person.
- (16) "Specimen" means the portion of urine that is collected from a donor.

(17) "Support services" means positions that do not provide direct resident or child care and includes employees in the fields of maintenance, dietary services, social services, recreational services, and administrative services.

(18) "Test-designated employee" means an individual employed at a KDVA Veterans Center who provides care, treatment, or support services to a resident of the facility.

Section 2. Applicability.

(1) The Department shall develop and implement test-designated employee drug testing procedures subject to the approval of the appointing authority.

(2) This administrative regulation applies to test-designated position applicants and test-designated position employees.

(3) This administrative regulation applies to drug testing conducted under the authority of KRS 40.325 to carry out the requirements of 18A.043 and 41 U.S.C. 701-707 regarding a drug-free workplace.

(4) Coordination of state and federal administrative regulations. This administrative regulation shall also apply to an employee subject to mandatory federal regulations governing drug testing. However, the employee is subject only to the provision of the federal regulation in any circumstance in which:

(a) It is not possible to comply with both this administrative regulation and the federal regulation; or

(b) Compliance with this administrative regulation is an obstacle to the accomplishment and execution of any requirement of the federal regulation.

Section 3. Prohibited Behavior. The following activities are prohibited while on duty or on KDVA Veteran Center grounds:

(1) The unlawful manufacture, distribution, sale, dispensation, possession, or use of any controlled substance;

(2) Consuming or being under the influence of illegal drugs, drugs illegally obtained, or alcoholic substances;

(3) The use, misuse, or abuse of prescription or non-prescription medication in a quantity sufficient to impair a test-designated employee's ability to perform assigned duties or in any way place patient or fellow employee safety at risk; or

(4) Interfering with any testing procedure or tampering with any test sample.

Section 4. Testing of Test-Designated Employees.

(1) An applicant for a test-designated position, as a condition of continued employment, shall be subject to a drug test as provided in this administrative regulation.

(2) The Department shall establish and have operational the test-designated employee drug testing procedures as provided in this administrative regulation within 120 days of the effective date of this administrative regulation.

(3) Tests authorized. The following tests shall be authorized:

(a) Reasonable suspicion testing. A test-designated employee shall submit to a drug test if there is reasonable suspicion that the employee has violated this administrative regulation.

(b) Pre appointment testing. An applicant being considered for a test-designated position shall submit to and pass a drug test prior to being appointed to the position.

(c) Post accident testing. A test-designated employee shall submit to a drug test if there is evidence that the test-designated employee may have caused or contributed to a serious work accident.

(d) Random drug testing: A test-designated employee shall submit to a drug test if the employee is selected as part of the random drug testing component of the KDVA Drug Testing Program.

1. The appointing authority may direct that up to twenty-five (25) percent of the total number of test-designated employees per each KDVA Veterans Center be selected for drug testing each year.
 2. Selection shall be done on a purely random basis according to drug testing procedures adopted within 120 days of the effective date of this regulation.
 3. Should a test-designated employee be randomly selected more than once per year, that employee shall not be tested if the immediate previous testing of that person took place within sixty (60) days of the new random selection date.
- (e) Follow-up testing. A test-designated employee shall submit to up to three (3) follow-up drug tests per year at the direction of the appointing authority within one (1) year of any of the following occurrences:
1. The employee's voluntary disclosure of drug problems;
 2. Entry into, or completion of a drug rehabilitation program;
 3. Employee failure in a pre-appointment drug test or refusal to take a pre-appointment drug test; or
 4. Any time the employee has been disciplined for violating this regulation.

Section 5. Penalties.

(1) Positive test results.

- (a) A positive test result shall constitute a violation of this administrative regulation and shall constitute just cause for the appointing authority to discipline the donor, up to and including dismissal, according to applicable laws, regulations, and policies.
- (b) The appointing authority shall notify the donor, in writing, of the penalty that may be imposed, including any mandatory penalties, for violating this administrative regulation.
- (c) An appointing authority shall immediately remove a test-designated employee from the employee's duties if the employee tests positive for prohibited drugs or otherwise violates this administrative regulation.

(2) Employees selected for a test-designated position. An employee selected for a test-designated position is prohibited from serving in the test-designated position until the employee has submitted to and passed a pre-appointment drug test. If the employee fails or refuses to submit to the drug test, interferes with a test procedure, or tampers with a test sample, the following shall occur:

- (a) An applicant not presently employed by the Commonwealth shall not be appointed to the test-designated position;
- (b) An applicant who is employed by the Commonwealth, but is being considered for promotion to or otherwise appointment to the test-designated position, shall not be promoted or otherwise appointed to that position; or
- (c) An applicant who is employed by the Department, who fails or refuses to submit to the drug test, shall be subject to disciplinary actions for the failure or refusal.

(3) Self-reporting. A test-designated employee who voluntarily discloses to the appointing authority a problem with drug abuse (controlled substances, illegal substances, or alcohol abuse) shall not be disciplined for the disclosure if it occurs prior to submitting to a drug test authorized by Section 4(3)(a) through (d) of this administrative regulation (pre appointment, reasonable suspicion, post-accident, or random), but shall be provided an opportunity to take leave to enter a drug rehabilitation program.

- (a) If a test-designated employee self-reports drug abuse as stated in this subsection, the appointing authority may remove the employee from the care of residents and of children upon receiving the report from the employee.
- (b) A test-designated employee may self-report and avoid disciplinary action only once during his or her employment.

- (c) A self-reporting employee remains subject to all drug testing requirements and other requirements outlined in this regulation.
- (4) Federal drug testing programs. Nothing in this administrative regulation shall preclude the appointing authority from implementing a drug-testing program required by federal law.

Section 6. Drugs Included.

- (1) When a drug test is administered, the department shall, at a minimum, test for:
 - (a) Marijuana;
 - (b) Cocaine;
 - (c) Opiates;
 - (d) Amphetamines;
 - (e) Phencyclidine;
 - (f) Morphine;
 - (g) MDMA (Ecstasy);
 - (h) Methadone;
 - (i) Benzodiazepines;
 - (j) Barbiturates; and
 - (k) Oxycodone.
- (2) If conducting reasonable suspicion or post-accident drug testing, the department may test for any drug listed in Schedule 1 or 2 as defined in KRS Chapter 218A.
- (3) Before the department tests for other drugs, it shall first obtain approval from the appointing authority.
- (4) The department or contract agency requesting approval for the testing of other drugs shall submit to the appointing authority the agency's proposed initial test methods, testing levels, and proposed performance test program.
- (5) This administrative regulation shall not limit an agency that is specifically authorized by law to include additional categories of drugs in the drug testing of its own employees.
- (6) Initial and confirmatory drug testing conducted pursuant to this administrative regulation shall utilize cutoff levels as specified in the federal "Mandatory Guidelines for Federal Workplace Drug Testing Programs," cited as 82 Federal Register 7920.
- (7) Drug test specimens that meet or exceed the cutoff levels as specified in subsection (6) of this section shall be reported as a positive test result and shall constitute a failed drug test.
- (8) Drug test specimens that test below the cutoff levels as specified in subsection (6) of this section shall be reported as a negative test result and shall constitute a passed drug test. No further testing of a negative specimen for drugs shall be permitted, and the negative specimen shall be discarded or pooled for use in a laboratory's internal quality control program.

Section 7. Test-Designated Employee Drug Testing Procedures.

- (1) The test-designated employee drug-testing program developed pursuant to Section 2 of this administrative regulation shall be implemented in accordance with nationally recognized standards as specified in the federal "Mandatory Guidelines for Federal Workplace Drug Testing Programs."
- (2) All costs associated with implementing the test-designated employee drug-testing program developed pursuant to Section 2 of this administrative regulation shall be borne by the Office of the Kentucky Veterans Center.
- (3) The appointing authority shall maintain records concerning all Veterans Center employee drug testing in a secure manner, so that disclosure of information to unauthorized persons does not occur.
- (4) Except as required by law or expressly authorized or required in this section, the appointing authority or anyone with knowledge shall not release employee information

that is contained in the records maintained pursuant to this administrative regulation.

(5) An employee subject to testing shall be entitled, upon written request, to obtain copies of any records pertaining to the employee's drug tests. The appointing authority shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(6) The appointing authority may disclose information required to be maintained under this administrative regulation pertaining to an employee to that employee or to the decision-maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug test administered under the requirements of this administrative regulation or from the appointing authority's determination that the employee engaged in prohibited conduct (including a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(7) The appointing authority shall release information regarding an employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of this information shall be in accordance with the terms of the employee's consent.

Section 8. Test-Designated Employee Notification.

(1) New employees shall receive information and training concerning this administrative regulation as part of the employee's initial orientation training.

(2) Current employees shall receive information and training concerning this administrative regulation within the first three (3) months following the effective date of this administrative regulation.

(3) Information and training provided pursuant to subsection (2) of this section shall include information regarding the type and nature of services and supports available through the Kentucky Employee Assistance Program, as well as how to access these services and supports.

(4) The Personnel Office within each Veterans Center shall maintain documentation that all employees have received information and training concerning this administrative regulation and shall provide a copy of that documentation to the Administrative Branch Manager, Office of Kentucky Veterans Center, who shall coordinate with the Personnel Administrator of the Office of the Commissioner, Frankfort, Kentucky.

(5) All test-designated employees shall sign a document certifying:

- (a) Receipt of information and training concerning this administrative regulation;
- (b) An understanding of the requirements, limitations, and restrictions on employee conduct contained in this administrative regulation; and
- (c) An understanding of the potential consequences, up to and including dismissal, for violation of this administrative regulation.

Section 9. Employee Duty to Report Convictions. A test-designated employee shall report to the KDVA headquarters through his or her immediate supervisor any criminal drug statute for which he or she was convicted within five (5) working days of the conviction.

Section 10. Prescription and Nonprescription Medications.

(1) A test-designated employee taking a prescription or nonprescription medication prior to or during the work shift shall immediately inform his or her supervisor of this fact if:

- (a) The medication's indications and contraindications give the employee reason to believe that the medication may in some way impair work performance; or
- (b) Having once taken the medication, the employee begins to experience an unexpected, typical, or adverse reaction to the medication, which impairs work performance.

(2) An employee who fails to comply with subsection (1) of this section shall be subject to disciplinary action up to and including termination of employment.

(3) Having been notified by an employee pursuant to subsection (1) of this section the employee's supervisor shall closely monitor the employee's work performance throughout the employee's work shift. If the supervisor determines that there is a sufficient perceived impairment of the employee's work performance so as to raise concerns related to employee, resident, or child safety, the supervisor shall notify the administrator concerning the employee's impaired work performance. The administrator shall then conduct an assessment and make a determination regarding the employee's impaired work performance.

(4) If the results of an assessment conducted pursuant to subsection (3) of this section indicate that the employee's work performance is impaired so as to raise concerns related to employee, resident or child safety, the administrator shall:

(a) Transfer or temporarily assign the employee away from resident care or child care, and to a job function unrelated to such care, provided that the transfer or temporary reassignment does not place the employee or other employees at risk of injury or otherwise jeopardize the orderly operation of the Veterans Center; or

(b) Allow the employee to depart the workplace and use available leave time, taking care to assist the employee if the impairment jeopardizes the safety of the employee or other employees.

(5) The employee shall be allowed to return to regular work duties if the results of an assessment conducted pursuant to subsection (3) of this section indicate that the employee's work performance is not impaired.

(47 Ky.R. 598, 1188; eff. 3-2-2021.)