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Sequence Number: 10-20-10
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Effective Date: ~~03/31/2011~~

Proposed Rule(s) Filing Form

Proposed rules are submitted pursuant to T.C.A. §4-5-202, 4-5-207 in lieu of a rulemaking hearing. It is the intent of the Agency to promulgate these rules without a rulemaking hearing unless a petition requesting such hearing is filed within sixty (60) days of the first day of the month subsequent to the filing of the proposed rule with the Secretary of State. To be effective, the petition must be filed with the Agency and be signed by twenty-five (25) persons who will be affected by the amendments, or submitted by a municipality which will be affected by the amendments, or an association of twenty-five (25) or more members, or any standing committee of the General Assembly. The agency shall forward such petition to the Secretary of State.

Agency/Board/Commission:	Department of Labor and Workforce Development
Division:	Workers' Compensation
Contact Person:	Landon Lackey
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

Chapter Number	Chapter Title
0800-02-12	Drug Free Workplace Programs
Rule Number	Rule Title
0800-02-12-.03	Definitions
0800-02-12-.07	Testing
0800-02-12-.08	Collection Procedures

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

Proposed Rules
of
Tennessee Department of Labor and Workforce Development

Chapter 0800-02-12
Drug Free Workplace Programs

Amendments

Rule 0800-02-12-.03 Definitions, paragraph (17), subsection (a) is amended by deleting it in its entirety and replacing it with the following:

(17) (a) "Prohibited Levels" for a drug or a drug's metabolites means cut-off levels on screened specimens which are equal to or exceed the following and shall be considered to be presumptively positive;

1. Cut-off levels on initially screened specimens:

Amphetamines	.....500 ng/mL
Marijuana (cannabinoids)	..... 50 ng/mL
Cocaine (benzoyllecgonine)	..... 150 ng/mL
Opiates (codeine, morphine, heroin)	.....2,000 ng/mL
PCP (phencyclidine)	..... 25 ng/mL
6-Acetylmorphine (heroin)	..... 10 ng/mL
MDMA (ecstasy)	.....500 ng/mL

2. Cut-off levels on confirmation specimens:

Amphetamines	.....250 ng/mL
Marijuana (cannabinoids)	..... 15 ng/mL
Cocaine (benzoyllecgonine)	..... 100 ng/mL
Opiates (codeine, morphine, heroin)	.....2,000 ng/mL
PCP (phencyclidine)	..... 25 ng/mL
6-Acetylmorphine (heroin)	..... 10 ng/mL
MDMA (ecstasy)	.....250 ng/mL

Authority: T.C.A. §§50-9-103, 50-9-106, 50-9-109, and 50-9-111.

Rule 0800-02-12-.07 Testing, paragraph (1) is amended by adding two new subsections, which shall read:

- (g) 6-Acetylmorphine (heroin)
- (h) MDMA (ecstasy)

Authority: T.C.A. §§50-9-101(a) and (b), 50-9-104, 50-9-106(a)(1), 50-9-107(a) and (c), 50-9-110, and 50-9-111.

Rule 0800-02-12-.08 Collections Procedures, paragraph (2) is amended by adding the phrase "such is allowed by 49 C.F.R., Part 40 and" in the third sentence, so that it shall read:

- (2) Collection procedures shall be in accordance with procedures compiled at 49 C.F.R., Part 40, and must be collected according to those prescribed procedures using the split sample method. No inference or presumption of intoxication or impairment may be made in a case where a physician prevents a specimen collection based on his or her medical expertise. Where additional drugs are to be included in a drug test other than those listed in Rule 0800-2-12-.07, a separate specimen collection is not required provided that such is allowed by 49 C.F.R., Part 40 and all other collections procedures/protocols are consistent with those compiled at 49 C.F.R., Part 40.

Authority: T.C.A. §§50-9-107(a) and (c) and 50-9-111.

* If a roll-call vote was necessary, the vote by the Agency on these rules was as follows:

Board Member	Aye	No	Abstain	Absent	Signature (if required)

I certify that this is an accurate and complete copy of proposed rules, lawfully promulgated and adopted by the (board/commission/other authority) on 10/12/10 (date as mm/dd/yyyy), and is in compliance with the provisions of TCA 4-5-222. The Secretary of State is hereby instructed that, in the absence of a petition for proposed rules being filed under the conditions set out herein and in the locations described, he is to treat the proposed rules as being placed on file in his office as rules at the expiration of sixty (60) days of the first day of the month subsequent to the filing of the proposed rule with the Secretary of State.

Date: 12 Oct 2010

Signature: James Neeley

Name of Officer: James G. Neeley

Title of Officer: Commissioner of Labor and Workforce Development



Subscribed and sworn to before me on: Oct 12, 2010

Notary Public Signature: Rosemary S. Cole

My commission expires on: 8/18/12

All proposed rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Robert E. Cooper, Jr.
Robert E. Cooper, Jr.
Attorney General and Reporter

10-24-10
Date

Department of State Use Only

Filed with the Department of State on: 10/28/10

Effective on: ~~3/31/11~~

This rule filing will not become effective.

Tre Hargett
Tre Hargett
Secretary of State

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Regulatory Flexibility Addendum

Pursuant to § T.C.A. 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

STATEMENT OF ECONOMIC IMPACT TO SMALL BUSINESSES

1. The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule: The amended rules will affect small employers who have joined or will join the Drug Free Workplace Program, which is a voluntary program. The U.S. Department of Transportation, which has recently amended its regulations to include the additional drug testing estimates that the cost of the MDMA test will be \$0.09 per test and the cost of the 6-Acetylmorphine test will be \$0.26 per test. Employers and their insurance carriers will bear that cost, but will also benefit by promoting a safe workplace and avoiding payment of benefits for claims that resulted from illegal drug use. Employers also receive a five percent (5%) annual premium credit when they join the Drug Free Workplace Program.
2. The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record: The laboratories that conduct this testing are already required to be certified and/or licensed. These laboratories will already be performing identical tests pursuant to the amended federal regulations. As such, the administrative costs of the additional testing should be minimal.
3. A statement of the probable effect on impacted small businesses and consumers: Employers will be better able to detect drug-abusing employees. As a result, workplaces will be safer and employers will benefit by avoiding payment of benefits for claims that resulted from illegal drug use.
4. A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business: There are no less burdensome methods to achieve the purposes and objectives of the amended rule.
5. Comparison of the proposed rule with any federal or state counterparts: No other similar rules exist in this state. The federal regulations on drug testing within the U.S. Department of Transportation have been recently amended and T.C.A. §§ 50-9-103, 50-9-107 and 50-9-111 designate those regulations as an authority for our own rules.
6. Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule: Small businesses are not required to join the Drug Free Workplace Program. For those that do join, any exemption would be more detrimental than beneficial because certified laboratories will already be performing the more extensive test under the amended federal regulations. Allowing a different test would likely lead to confusion and inconsistency for Tennessee employers and laboratories.

Impact on Local Governments

Pursuant to T.C.A. 4-5-220 and 4-5-228 "any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments." (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

Local governments have the option to accept the provisions of the workers' compensation laws pursuant to T.C.A. § 50-6-106(6), but are not required to do so. The Drug Free Workplace Program is a voluntary program for any employer subject to the workers' compensation laws. For those local governments that do accept the provisions of the workers' compensation laws and join the Drug Free Workplace Program, any impact will be minimal because drug testing is already required. The amended rules only require some additional testing, which may decrease costs if claims for benefits are subsequently denied because of a failed drug test.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to TCA 4-5-226(i)(1).

- (A)** A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

The Drug Free Workplace Program is a voluntary program for any employer subject to the workers' compensation laws to join. Pursuant to T.C.A. §§ 50-9-103, 50-9-107 and 50-9-111, the Department of Labor and Workforce Development shall use federal regulations as an authority for drug testing requirements. Through September 30, 2010, the initial testing required by federal regulations detected five drugs (amphetamines, marijuana, cocaine, opiates, and PCP). On October 1, 2010, amended regulations from the United States Department of Transportation went into effect to require testing of MDMA (ecstasy) and 6-acetylmorphine (marker for heroin) in addition to the five drugs already covered. See 49 C.F.R. 40.87 and 75 F.R. 49862. Also, the cut-off levels for amphetamines and cocaine were decreased. Accordingly, these rules will keep Tennessee employers and laboratories consistent with national drug-testing standards.

- (B)** A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

As stated above, T.C.A. §§ 50-9-103, 50-9-107 and 50-9-111 require the Department of Labor and Workforce Development to use federal regulations as an authority for drug testing requirements. Amended regulations from the United States Department of Transportation, which went into effect on October 1, 2010, require testing of MDMA (ecstasy) and 6-acetylmorphine (marker for heroin), as well as decreasing the cut-off levels for amphetamines and cocaine. See 49 C.F.R. 40.87 and 75 F.R. 49862.

- (C)** Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

If participating in the Drug Free Workplace Program, employers, insurers, and injured employees will be affected by this rule. Since these amendments will harmonize Tennessee's rules with federal drug testing rules, the result should be greater consistency and efficiency for such testing. In the absence of these amendments, there would be confusion as to which kind of test to administer to a Tennessee employee. As such, for consistency and efficiency purposes, the groups would likely urge adoption of the amendments.

- (D)** Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

None.

- (E)** An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

State and local governments have the option to accept the provisions of the workers' compensation laws pursuant to T.C.A. § 50-6-106(6), but are not required to do so. The Drug Free Workplace Program is also a voluntary program for any employer subject to the workers' compensation laws. The United States Department of Transportation estimates that the cost of the MDMA test will be \$0.09 per test and the cost of the 6-Acetylmorphine test will be \$0.26 per test. As such, any increases will be minimal and the additional testing may even decrease costs if claims for benefits are properly denied because of a failed drug test. Employers also receive a five percent (5%) annual premium credit when they join the Drug Free Workplace Program.

- (F)** Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

Landon Lackey, attorney for the Division of Workers' Compensation, may be contacted for more information.

- (G)** Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Landon Lackey will explain the rule at a scheduled meeting of the committees.

- (H)** Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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- (I)** Any additional information relevant to the rule proposed for continuation that the committee requests.

None.

**RULES
OF
DEPARTMENT OF LABOR
DIVISION OF WORKERS' COMPENSATION**

**CHAPTER 0800-2-12
DRUG FREE WORKPLACE PROGRAMS**

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0800-2-12-.01 PURPOSE AND SCOPE.

- (1) Purpose: The purpose of these rules is to deter the use of drugs and alcohol in the workplace.
 - (a) Employees who abuse drugs shall face the risk of unemployment and the forfeiture of workers' compensation benefits.
 - (b) These rules shall apply to those employers who voluntarily choose to avail themselves of the remedies provided for in the Workers' Compensation Law regarding drug/alcohol testing in the workplace.
 - (c) Employers who adopt a drug-free workplace program as prescribed herein shall qualify for reduced workers' compensation insurance premiums.
 - (d) If an employer does implement a drug-free workplace program as prescribed herein and a worker injured in the course and scope of employment who is tested pursuant to these rules has a positive confirmation of a drug at a level prescribed herein, a rebuttable presumption is created that the injury was occasioned primarily by the presence of the drug. Such employee may be disciplined, up to and including termination, and forfeits his or her eligibility for workers' compensation medical and indemnity benefits.
- (2) Scope: The provisions of this chapter apply to all employers in the State of Tennessee subject to provisions of the Workers' Compensation Act who qualify for the drug-free workplace program. The application of the provisions of these rules are subject to the provisions of any applicable collective bargaining agreement.

Authority: T.C.A. §§50-6-110(c), 50-9-101 and 50-6-418. *Administrative History:* Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.02 POLICIES.

- (1) Nothing in these rules shall be construed to prohibit an employer from conducting medical screening or other tests required, permitted or not disallowed by any statute, rule or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or tests shall be limited to the specific substances expressly identified in the applicable statute, rule or regulation, unless prior written consent of the employee is obtained for other tests.

(Rule 0800-2-12-.02, continued)

- (2) Nothing in these rules shall be construed to require an employer to test or create a legal obligation upon an employer to request an employee or job applicant to undergo drug or alcohol testing.
- (3) Nothing in these rules shall be construed to prohibit an employer from affording an employee greater protection than provided herein. A covered employer is not barred from conducting more extensive testing provided the employee/job applicant's constitutional rights are not infringed.
- (4) Nothing in these rules shall be construed as authorizing any employer to test any employee or applicant for alcohol or drugs in any manner inconsistent with federal constitutional or statutory requirements, including those imposed by the Americans with Disabilities Act and the National Labor Relations Act.
- (5) Employers who implement a drug-free workplace program pursuant to these rules will begin to accrue the premium discount on a pro rata basis as of the date of certification (the date of approval by the Tennessee Department of Labor, Division of Workers' Compensation). The covered employer's workers' compensation insurance company or self-insured pool program administrator will be notified by the Tennessee Department of Labor when an employer's drug-free workplace program has been certified. The covered employer's workers' compensation insurance company or self-insured pool program administrator must apply to such policy the premium credit granted under this program directly upon receipt of notification from the Tennessee Department of Labor or make payment for such credit effective after the annual final premium audit has been completed. In order to continue to receive the premium discount, an employer must renew annually the application for the Tennessee Drug-Free Workplace Premium Credit Program.
- (6) Future Revisions. In order to ensure the full reliability and accuracy of drug assays, the accurate reporting of test results, and the integrity and efficacy of the drug-free workplace testing programs, the Commissioner of the Department of Labor may make changes to these rules and guidelines to reflect improvements in the available science and technology. These changes will be published in final as a notice in the Tennessee Administrative Register.

Authority: T.C.A. §§50-9-101, 50-9-104 and 50-9-111. *Administrative History:* Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.03 DEFINITIONS.

- (1) "Alcohol" as used in these rules shall have the same meaning as in the federal regulations describing procedures for the testing of alcohol by programs operating pursuant to the authority of the United States Department of Transportation as currently compiled at 49 Code of Federal Regulations (C.F.R.), Part 40. This definition shall be changed to conform to any future revision of the Department of Transportation's regulations.
- (2) "Alcohol test" means an analysis of breath or blood, or any other analysis which determines the presence, absence or level of alcohol as authorized by the relevant regulations of the United States Department of Transportation.
- (3) "Certified laboratory" means any facility equipped to perform the procedures prescribed in this chapter, in accordance with the standards of the United States Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA), or the College of American Pathologists-Forensic Urine Drug Testing (CAP-FUDT).
- (4) "Chain of Custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances and providing accountability at each stage in handling, testing, and storing specimens and reporting test results.

(Rule 0800-2-12-.03, continued)

- (5) **“Confirmation test”, “confirmed test”, or “confirmed drug test” means a second analytical procedure used to identify the presence of a specific drug, or alcohol, or metabolite in a specimen, which test must be different in scientific principle from that of the initial test procedure and must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.**
- (6) **“Covered employer” means a person or entity that employs a person, is covered by the Workers’ Compensation Law, maintains a drug-free workplace pursuant to these rules, and also includes on the posting required by TCA §50-9-105 a specific statement that the policy is being implemented pursuant to the provisions of these rules. These rules shall have no effect on employers who do not meet this definition.**
- (7) **“Drug” means any drug subject to testing pursuant to drug testing regulations adopted by the United States Department of Transportation. A covered employer may test an individual for any or all of such drugs.**
- (8) **“Drug Rehabilitation Program” means a service provider that provides confidential, timely, and expert identification, assessment and resolution of employee drug or alcohol abuse.**
- (9) **“Drug test” or “test” means any chemical, biological, or physical instrumental analysis administered by a certified laboratory for the purpose of determining the presence or absence of a drug or its metabolites or alcohol pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation or such other recognized authority approved by rule by the Commissioner of Labor.**
- (10) **“Employee” means any person who works for a salary, wages, or other remuneration for a covered employer.**
- (11) **“Employee Assistance Program” means an established program capable of providing expert assessment of employee personal concerns; confidential and timely identification services with regard to employee drug or alcohol abuse; referrals of employees for appropriate diagnosis, treatment and assistance; and follow-up services for employees who participate in the program or require monitoring after returning to work. If, in addition to the above activities, an employee assistance program provides diagnostic and treatment services, these services shall in all cases be provided by the program.**
- (12) **“Employer” means a person or entity that employs a person and is covered by the Workers’ Compensation Law.**
- (13) **“Injury” means a harm or damage to an employee, occurring in the workplace or in the scope of employment which must be recorded, in accordance with Occupational Safety and Health Administration (OSHA) reporting guidelines, in the covered employer’s OSHA 200 Log.**
- (14) **“Initial drug test” means a procedure that qualifies as a “screening test” or “initial test” pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation or such other recognized authority approved by rule by the Commissioner of Labor.**
- (15) **“Job Applicant” means a person who has applied for a position with a covered employer and has been offered employment conditioned upon successfully passing a drug or alcohol test, and may have begun work pending the results of the drug or alcohol test.**
- (16) **“Medical Review Officer” or “MRO” means a licensed physician, employed with or contracted with a covered employer, who has knowledge of substance abuse disorders, laboratory testing procedures and chain of custody collection procedures; who verifies positive, confirmed test results; and who has the necessary medical training to interpret and evaluate an employee’s positive test result in relation to the employee’s medical history or any other relevant biomedical information.**

(Rule 0800-2-12-.03, continued)

(17) (a) "Prohibited Levels" for a drug or a drug's metabolites means cut-off levels on screened specimens which are equal to or exceed the following and shall be considered to be presumptively positive:

1. Cut-off levels on initially screened specimens:

Amphetamines	.....	1.0 500 ng/mL
Marijuana (cannabinoids)	.....	50 ng/mL
Cocaine (benzoyllecgonine)	.....	30 150 ng/mL
Opiates (codeine, morphine, heroin)	.....	2,000 ng/mL
PCP (phencyclidine)	.....	25 ng/mL
<u>6-Acetylmorphine (heroin)</u>	.....	<u>10 ng/mL</u>
<u>MDMA (ecstasy)</u>	.....	<u>500 ng/mL</u>

2. Cut-off levels on confirmation specimens:

Amphetamines	.....	50 250 ng/mL
Marijuana (cannabinoids)	.....	15 ng/mL
Cocaine (benzoyllecgonine)	.....	45 100 ng/mL
Opiates (codeine, morphine, heroin)	.....	2,000 ng/mL
PCP (phencyclidine)	.....	25 ng/mL
<u>6-Acetylmorphine (heroin)</u>	.....	<u>10 ng/mL</u>
<u>MDMA (ecstasy)</u>	.....	<u>250 ng/mL</u>

(b) "Prohibited Levels" for alcohol means cut-off levels on screened specimens which are equal to or exceed the following shall be considered to be presumptively positive:

Alcohol...(.08%) by weight blood alcohol concentration for non-safety sensitive positions.

Alcohol...(.04%) by weight blood alcohol concentration for safety sensitive positions.

(18) "Reasonable-Suspicion Drug Testing" means drug testing based on a belief that an employee is using or has used drugs or alcohol in violation of the covered employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

- (a) Observable phenomena while at work, such as 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) Abnormal conduct or erratic behavior while at work 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 his employment with his/her current covered employer;
- (e) Information that an employee has caused, contributed to, or been involved in an accident at work; or
- (f) Evidence that an employee has used, possessed, sold, solicited, or transferred drugs or alcohol while working or while on the covered employer's premises or while operating the covered employer's vehicle, machinery, or equipment.

(Rule 0800-2-12-.03, continued)

- (19) "Safety-Sensitive Position" means a position involving a safety-sensitive function pursuant to regulations governing drug testing adopted by the United States Department of Transportation. For drug-free workplaces, the Commissioner is authorized, with the approval of the Advisory Council on Workers' Compensation, to promulgate rules expanding the scope of safety-sensitive position to cases where impairment may present a clear and present risk to co-workers or other persons. "Safety-sensitive position" means, with respect to a public employer, a position in which a drug impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to carry a firearm, perform life-threatening procedures, work with confidential information or documents pertaining to criminal investigations or work with controlled substances, or a position in which momentary lapse in attention could result in injury or death to another person.
- (20) "Specimen" means tissue, fluid, or a product of the human body capable of revealing the presence of alcohol, drugs or their metabolites.
- (21) "Split Specimen" means the procedure by which each urine specimen is divided in two and put into a primary specimen container and a secondary, or "split", specimen container. Only the primary specimen is opened and used for the initial screening and confirmation test. The split specimen container remains sealed and is stored at the testing laboratory.
- (22) "Threshold Detection Level" means the level at which the presence of a drug or alcohol can be reasonably expected to be detected by an initial and a confirmatory test performed by a certified laboratory. The threshold detection level indicates the level at which a valid conclusion can be drawn that the drug or alcohol is present in the employee or job applicant's sample.

Authority: T.C.A. §§50-9-103, 50-9-106 and 50-9-109, 50-9-111. *Administrative History:* Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.04 NOTICE TO JOB APPLICANTS AND EMPLOYEES.

- (1) It is a requirement of the drug-free workplace program that, prior to testing, the employer give a one-time written policy statement to employees and job applicants which contains:
- (a) A general statement of the covered employer's policy on employee drug and alcohol abuse, which must identify:
1. The types of drug or alcohol testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug or alcohol testing or drug or alcohol testing conducted on any other basis; and
 2. The actions the covered employer may take against an employee or job applicant on the basis of a positive confirmed drug or alcohol test result.
- (b) A statement advising the employee or job applicant of the existence of this rule;
- (c) A general statement concerning confidentiality;
- (d) Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications being tested, but only after the testing process has revealed a positive confirmed result for alcohol or drug use;
- (e) The consequences of refusing to submit to a drug or alcohol test;
- (f) A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug and alcohol rehabilitation programs;

(Rule 0800-2-12-.04, continued)

- (g) A statement that an employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within five (5) working days after receiving written notification of the test result; that if an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall then report the positive test result to the covered employer; and that an employee or job applicant may then contest the drug test result pursuant to Rule 0800-2-12-.10;
 - (h) A statement informing the employee or job applicant of his responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section;
 - (i) A list of all classes of drugs, including alcohol, for which the covered employer will test, described by brand name or common names, as applicable, as well as by chemical name;
 - (j) A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the applicable court; and
 - (k) A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription and nonprescription medicine.
- (2) A statement complying with the requirements of notification under TCA §50-9-101(b) that it is a condition of employment in a drug-free workplace for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in his or her body and if an injured employee refuses to submit to a test for drugs or alcohol, the employee forfeits eligibility for workers' compensation medical and indemnity benefits.
- (3) A covered employer shall ensure that at least sixty (60) days elapse between a general one-time notice to all employees that a drug-free workplace program is being implemented and the effective date of the program. Such notice shall also indicate that on the effective date of the program that TCA §50-6-110(c) will apply to that employer.
- (4) A covered employer shall include notice of drug or alcohol testing on vacancy announcements for positions for which drug or alcohol testing is required. A notice of the covered employer's drug or alcohol testing policy must also be posted in an appropriate and conspicuous location on the covered employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the covered employer during regular business hours in the covered employer's personnel office or other suitable locations.
- (5) Subject to any applicable provisions of a collective bargaining agreement or any applicable labor law, a covered employer may rescind its coverage under these rules by posting a written and dated notice in an appropriate and conspicuous location on its premises. The notice shall state that the policy will no longer be conducted pursuant to these rules. The employer shall also provide sixty days written notice to the employer's workers' compensation insurer of the rescission. As to the employees and job applicants, the rescission shall become effective no earlier than sixty days after the date of the posted notice.

Authority: T.C.A. §50-9-105. **Administrative History:** Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.05 TYPES OF TESTING.

It is a requirement that a covered employer who establishes a drug-free workplace program conduct the following types of drug tests to the extent permitted by law:

- (1) Job applicant drug or alcohol testing. A covered employer must, after a conditional offer of employment, require job applicants to submit to a drug test and may use a refusal to submit to a drug

(Rule 0800-2-12-.05, continued)

test or a positive confirmed drug test as a basis for refusing to hire a job applicant. An employer may, but is not required to, test job applicants for alcohol after a conditional offer of employment. Limited testing of applicants, only if it is based on a reasonable classification basis, is permissible in accordance with the following:

- (a) A temporary, leased, seasonal or former worker who has tested negative for substance abuse within the preceding twelve (12) months from the date employment is to begin will not be required to undergo job applicant testing by the covered employer. Any such worker who has not been tested or has not tested negative must submit to job applicant testing according to Rules 0800-2-12-.07, .08 and .10.
- (2) Reasonable suspicion. A covered employer must require an employee to submit to reasonable suspicion drug or alcohol testing.
 - (a) Employers shall, within seven days after testing based on reasonable suspicion, detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. If drug-testing is conducted based on reasonable suspicion, the covered employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential by the covered employer pursuant to TCA §50-9-109 and shall be retained by the covered employer for at least one (a) year.
 - (3) Routine fitness-for-duty drug or alcohol testing.
 - (a) A covered employer must require an employee to submit to a drug or alcohol test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination where the examinations are required by law or regulation, are part of the covered employer's established policy, or one that is scheduled routinely for all members of an employment classification group.
 - (b) This Rule does not require a drug or alcohol test if a covered employer's current personnel policy does not include a drug or alcohol testing as part of a routine fitness-for-duty medical exam. If such testing is included, it must be done on a nondiscriminatory basis for all employees. Routine fitness-for-duty drug or alcohol testing of employees would not apply to programs mandated by governmental agencies, volunteer employee health screenings, employee wellness programs, or medical surveillance procedures
 - (4) Follow-up drug or alcohol testing. If the employee in the course of employment enters an employee assistance program for drug or alcohol-related problems, or a drug or alcohol rehabilitation program, the covered employer must require the employee to submit to a drug or alcohol test, as appropriate, as a follow-up to such program, unless the employee voluntarily entered the program. In those cases, the covered employer has the option to not require follow-up testing. If follow-up testing is required, it must be conducted at least once a year for a two year period after successful completion of the program. Advance notice of a follow-up testing date must not be given to the employee.
 - (5) Post-accident testing. After an accident which results in an injury, the covered employer shall require the employee to submit to a drug or alcohol test in accordance with these rules:
 - (a) An employee injured at the workplace and required to be tested shall be taken to a medical facility for immediate treatment of injury. Specimens shall be obtained at the treating facility or a designated collection site under the procedures set forth under these rules and transported to an approved testing laboratory.

(Rule 0800-2-12-.05, continued)

- (b) No specimens shall be taken prior to the administration of emergency medical care. Once this condition has been satisfied, an injured employee must submit to testing.
- (c) In the case of non-emergency injuries reported to the covered employer after the fact, the injured employee must submit to testing at the time the injury is entered into the covered employer's OSHA 200 Log or any authorized or required replacement for the OSHA 200 Log.

Authority: T.C.A. §§50-6-101, 50-6-419, 50-9-106, and 50-9-111. *Administrative History:* Original rule filed January 26, 1998; effective April 11, 1998. Amendment filed August 23, 1999; effective December 29, 1999.

0800-2-12-.06 REFUSAL TO TEST.

If an employee or job applicant refuses to submit to a drug or alcohol test, the covered employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. If the injured worker refuses to submit to a drug or alcohol test, it shall be presumed in the absence of a preponderance of the evidence to the contrary that the proximate cause of the injury was the influence of drugs or alcohol as defined in these rules.

Authority: T.C.A. §§50-6-110(c)(2) and 50-9-108(f). *Administrative History:* Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.07 TESTING.

- (1) A covered employer shall be required to test employees and job applicants for the following drugs:
 - (a) Alcohol-Not required for job applicant testing.
 - (b) Amphetamines
 - (c) Cannabinoids. (THC)
 - (d) Cocaine
 - (e) Opiates
 - (f) Phencyclidine
 - (g) 6-Acetylmorphine (heroin)
 - (h) MDMA (ecstasy)
- (2) The initial screen for all drugs, except alcohol, shall use an immunoassay in a certified laboratory.
- (3) All specimens identified as positive on the initial test, excluding tests for alcohol, shall be confirmed using gas chromatography/mass spectrometry (GC/MS).
- (4) Threshold detection levels of these drugs shall be in accordance with Substance Abuse & Mental Health Services Administration (SAMHSA) or (CAP-FUDT) guidelines unless modified according to TCA §50-9-111.
- (5) All specimens must be tested by a certified laboratory.
- (6) All testing for drugs and alcohol shall be in accordance with the procedures compiled at 49 C.F.R., Part 40. However, if a certified laboratory under TCA §50-9-110 is used for testing, no further quality assurance monitoring or proficiency testing is required by the employer under these rules.
- (7) As technology develops faster, more convenient, and more cost effective testing methods, covered employers shall be allowed to use those technologies and devices which have been approved by the Commissioner of Labor and the Substance Abuse & Mental Health Services Administration (SAMHSA) or the College of American Pathologists-Forensic Urine Drug Testing (CAP-FUDT) guidelines, provided that none of the established rules regarding security of the collection site, chain of custody procedures, privacy of the individual, collection control, integrity and identity of the specimen, and transportation of the specimen to the laboratory are compromised. Any modification or

(Rule 0800-2-12-.07, continued)

change to this rule shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in Title 4, Chapter 5.

- (8) These rules and guidelines do not prohibit an employer from conducting any drug or alcohol testing of employees which is otherwise permitted by law.
- (9) Should an employee/job applicant receive a positive confirmed test result for an otherwise legal medication for which he/she does not hold a valid prescription, a covered employer is not barred from discharging the employee or refusing to hire the job applicant. Such an employee/job applicant will also forfeit his/her workers' compensation benefits; provided, that the drug or alcohol test was conducted according to these rules and guidelines. Drug or alcohol tests which are not conducted according to these rules and guidelines shall not be used as a basis to terminate benefits.
- (10) A covered employer may test a job applicant for alcohol or for any drug described in TCA §50-9-103; provided, that for public employees such testing shall be limited to the extent permitted by the Tennessee and Federal constitutions. [A covered employer may test an employee for any drug defined in TCA §50-9-103(6) and at any time set out in TCA §50-9-106.]
- (11) It is intended that any employer required to test its employees pursuant to the requirements of any federal statute or regulation, shall be deemed to be in conformity with these rules and guidelines as to the employees it is required to test by those standards and procedures designated in that federal statute or regulation. All other employees of such employer shall be subject to testing as provided in this chapter in order for such employer to qualify as having a drug-free workplace program.
- (12) An employee who is not in a safety-sensitive position, as defined in TCA §50-9-103(15), may be tested for alcohol only when the test is based upon reasonable suspicion as defined in TCA §50-9-103(14). An employee in a safety-sensitive position may be tested for alcohol use at any occasion described in TCA §50-9-106(a)(2)-(5), inclusive.

Authority: T.C.A. §§50-9-101(a) and (b), 50-9-104, 50-9-106 (a)(1), 50-9-107 (a) and (c), 50-9-110, and 50-9-111.
Administrative History: Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.08 COLLECTION PROCEDURES.

- (1) The employer shall provide the employee or job applicant with a form to provide any information that he/she considers relevant to the test, including the identification of currently or recently used prescription or nonprescription medication or other information. The information provided shall be treated as confidential and reviewed by a medical review officer in interpreting any positive confirmed results.
- (2) Collection procedures shall be in accordance with procedures compiled at 49 C.F.R., Part 40, and must be collected according to those prescribed procedures using the split sample method. No inference or presumption of intoxication or impairment may be made in a case where a physician prevents a specimen collection based on his or her medical expertise. Where additional drugs are to be included in a drug test other than those listed in Rule 0800-2-12-.07, a separate specimen collection is not required provided that such is allowed by 49 C.F.R., Part 40 and all other collections procedures/protocols are consistent with those compiled at 49 C.F.R., Part 40.
- (3) It is a requirement that covered employers must use the chain of custody form approved by the Department of Labor specifically for the Tennessee Drug-Free Workplace Program.
- (4) Security of the collection site, chain of custody procedures, privacy of the individual, collection control, integrity, identity, and retention of the specimen, and transportation of the specimen to the laboratory shall be in accordance with the Substance Abuse & Mental Health Services Administration (SAMHSA) guidelines or United States Department of Transportation regulations (49 C.F.R., Part 40).

(Rule 0800-2-12-.11, continued)

Authority: T.C.A. §50-9-107(a) and (c), 50-9-111. **Administrative History:** Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.09 COST OF TESTING.

- (1) The covered employer shall pay the cost of initial and confirmation testing which it requires of employees and job applicants. The employee or job applicant shall pay the costs of any additional drug or alcohol tests not required by the employer.
- (2) Where re-testing of a split-specimen is requested, the party requesting the re-test (i.e., covered employer or employee/job applicant) shall pay the cost.

Authority: T.C.A. §50-9-107(d) and 50-9-111. **Administrative History:** Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.10 REPORTING AND REVIEW OF RESULTS.

- (1) Except for Rules 0800-2-12-.10(2) and 0800-2-12-.10(3), the procedures for laboratory reporting and MRO review and reporting of specimen test results shall be in accordance with those described in 49 C.F.R., Parts 40.29 and 40.33.
- (2) Any specimens with evidence of dilution, contamination, tampering, or any question normally requiring an MRO opinion shall be reported to the MRO for disposition. The MRO may determine the need to re-test, re-collect, or otherwise modify the collection procedure to ensure adequate and appropriate testing.
- (3) An employee or job applicant who receives a positive confirmed test result upon notification by the MRO may contest or explain the result to the medical review officer within five (5) working days after receiving written notification of the test result from the MRO. If an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the covered employer.

Authority: T.C.A. §§50-9-105(a), 50-9-107(a), and 50-9-111(a)(3). **Administrative History:** Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.11 EMPLOYEE PROTECTION.

- (1) A covered employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer.
- (2) A covered employer shall not discharge, discipline, or discriminate against an employee solely upon the employee's voluntarily seeking treatment, while under the employ of the covered employer, for a drug or alcohol-related problem if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for drug or alcohol related problems, or entered a drug or alcohol rehabilitation program. Unless otherwise provided by a collective bargaining agreement, a covered employer may (but need not) select the employee assistance program or drug or alcohol rehabilitation program if the covered employer pays the cost of the employee's participation in the program.

Authority: T.C.A. §50-9-107(b) and (e). **Administrative History:** Original rule filed January 26, 1998; effective April 11, 1998.

(Rule 0800-2-12-.13, continued)

0800-2-12-.12 EMPLOYER PROTECTION.

- (1) An employee or job applicant whose drug or alcohol test result is confirmed as positive in accordance with these rules shall not, by virtue of the result alone, be deemed to have a "handicap" or "disability" as defined under federal, state, or local handicap and disability discrimination laws.
- (2) A covered employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with these rules is considered to have discharged, disciplined, or refused to hire for cause.
- (3) No physician-patient relationship is created between an employee or job applicant and a covered employer or any person performing or evaluating a drug or alcohol test, solely by the establishment, implementation, or administration of a drug or alcohol-testing program. This rule in no way relieves the person performing the test from responsibility for his or her acts of negligence in performing the tests.
- (4) Nothing in these rules shall be construed to prevent a covered employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs or alcohol, including convictions for drug or alcohol-related offenses, and taking action based upon a violation of any of those rules.

Authority: T.C.A. §50-9-108. *Administrative History:* Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.13 SUBSTANCE ABUSE EDUCATION/AWARENESS.

- (1) **Employee Education/Awareness Required for Certification.**

Each year, covered employers must provide at least one-hour of an education/awareness program for all employees about substance abuse in the workplace.

The Employee Education/Awareness Program may include, but is not limited to, the following information (Employers may choose any of the following suggested topics and/or combine them in order to fulfill this requirement):

- (a) General explanation about the addictive disease of substance abuse; sample topics:
 1. The disease of addiction.
 2. Defining use versus abuse.
 3. The recovering employee in the workplace.
 4. Why people abuse substances.
 5. Avoiding relapse in the workplace.
 6. The role of the family in addressing substance abuse and addiction.
 7. The role of co-workers in addressing substance abuse and addiction.
 8. The role of co-workers in maintaining a drug-free workplace.
 9. Alcoholics Anonymous: History of the AA Program.
- (b) The effects and dangers of the commonly abused substances in the workplace; sample topics:
 1. Stress and the workplace.
 2. Safety and the workplace.
 3. Warning signs.
 4. The most commonly abused drugs in the workplace (e.g.; marijuana, cocaine/crack, inhalants, alcohol, opiates, hallucinogens, or prescription drugs, etc.).
 5. The physical and psychological effects related to the abuse of the above drugs, and others.

(Rule 0800-2-12-.13, continued)

6. The health & medical risks of substance abuse.
7. Avoiding substance abuse through wellness, exercise, diet, etc.

- (c) This program is also a good opportunity to reinforce the employer's policies and procedures regarding workplace substance abuse. Also, the employer should remind employees of their EAP and/or substance abuse treatment options.

(2) **Supervisor Training Required for Certification.**

- (a) In addition to the employee substance abuse education/awareness program (one-hour each year), employers must provide all supervisory personnel with a minimum of two-hours per year of workplace substance abuse recognition training. Training should include: recognizing the signs of substance abuse in the workplace, how to document and collaborate signs of employee substance abuse, and how to refer substance abusing employees to proper providers for treatment. The minimum two-hours of training may be completed on one specific date, or two one-hour training sessions may be held on different dates during the year. (Supervisors should receive a minimum total of three-hours of substance abuse education/awareness & recognition training per year.)

It is recommended that supervisors complete workplace substance abuse recognition training before an employer implements a drug and alcohol testing program that includes testing based on "reasonable suspicion", and/or attempting to refer an employee to an EAP or other provider for substance abuse treatment.

- (b) The Supervisor Training Program should include, but is not limited to, the following information. Employers may choose from these suggested topics and/or combine them in order to fulfill the supervisor training requirement:

1. Legal aspects of "reasonable suspicion" employee testing for drug and alcohol: Building and establishing through observation and measurement.
2. Legal aspects regarding EAP and/or substance abuse treatment referrals: Supervisor referral, voluntary/self referral, last chance agreement.
3. How to recognize signs of employee substance abuse.
4. How to refer substance abusing employees to proper treatment providers.
5. How family problems can affect an employee's performance.
6. How to interview and detect potential workplace substance abusers.
7. When and if to test. When and how to intervene and confront potential workplace substance abusers.
8. Conducting the performance review.
9. Using positive peer pressure and management to gain support for mutual goals.

- (c) Because resources available to employers across the state will vary from community to community, the employee education/awareness and supervisory training component of the drug-free workplace program is meant to be flexible so that employers may be creative in conducting these programs. For example, employers may utilize speakers, workshops, videos, written material, in-house supervisors that have been educated on how to train employees and/or supervisors regarding aspects of workplace substance abuse, any combination of the above, and/or other means of educating employees about the benefits of a drug-free workplace.

Important: Covered employers should keep appropriate records in order to document the completion of the employee education/awareness program and supervisor training requirements.

Authority: T.C.A. §50-9-101. 50-9-111. *Administrative History:* Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.14 CONFIDENTIALITY.

- (1) All information, interviews, reports, statements, memoranda, and drug or alcohol test results, written or otherwise, received by the covered employer through a drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with these rules or in determining compensability under these rules.
- (2) Covered employers, laboratories, medical review officers, employee assistance programs, drug or alcohol rehabilitation programs, and their agents who receive or have access to information concerning drug or alcohol test results shall keep all information confidential. Release of such information under any other circumstances is authorized solely pursuant to a written consent form signed voluntarily by the person tested, unless such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this rule, relevant to a legal claim asserted by the employee or is deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:
 - (a) The name of the person who is authorized to obtain the information;
 - (b) The purpose of the disclosure;
 - (c) The precise information to be disclosed;
 - (d) The duration of the consent; and
 - (e) The signature of the person authorizing the release of the information.
- (3) Information on drug or alcohol test results for tests administered pursuant to these rules shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section is inadmissible as evidence in any such criminal proceeding.
- (4) These rules do not prohibit a covered employer, agent of such employer, or laboratory conducting a drug or alcohol test from having access to employee drug or alcohol test information or using such information when consulting with legal counsel in connection with actions brought under or related to these rules or when the information is relevant to its defense in a civil or administrative matter. Neither are these rules intended to prohibit disclosure among management as is reasonably necessary for making disciplinary decisions relating to violation of drug or alcohol standards of conduct adopted by an employer.

Authority: T.C.A. §50-9-109. **Administrative History:** Original rule filed January 26, 1998; effective April 11, 1998.

0800-2-12-.15 APPLICATION FORM.

- (1) Any employer seeking any benefits conferred by the Drug-Free Workplace Program shall file with the Workers' Compensation Division of the Department of Labor the form promulgated by the Commissioner for that purpose. From the date of receipt, such employer shall be rebuttably presumed to be entitled to all applicable benefits under the Drug-Free Workplace Program.
- (2) Before granting any premium credit to an employer, an insurance carrier or self-insured pool shall obtain a true copy of the form described in subsection (a) from the employer. Upon granting such credit to the employer, the insurer shall notify the Workers' Compensation Division of the Department of Labor of such action by filing the form promulgated by the Commissioner for that purpose.

Authority: T.C.A. §§50-6-418 and 50-9-111. **Administrative History:** Original rule filed January 26, 1998; effective April 11, 1998.