

2003 DRAFTING REQUEST

Bill

Received: **01/24/2003**

Received By: **rmarchan**

Wanted: **As time permits**

Identical to LRB:

For: **Daniel Vrakas (608) 266-3007**

By/Representing: **himself**

This file may be shown to any legislator: **NO**

Drafter: **gmalaise**

May Contact:

Addl. Drafters:

Subject: **Employ Priv - health and safety**
Employ Priv - prevailing wage

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Vrakas@legis.state.wi.us**

Carbon copy (CC:) to: **robert.marchant@legis.state.wi.us**

Pre Topic:

No specific pre topic given

Topic:

Drug-free construction sites

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rmarchan 01/31/2003 gmalaise 05/02/2003	kgilfoy 05/05/2003		_____			S&L
/1			jfrantze 05/07/2003	_____	sbasford 05/07/2003		S&L Crime

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/3	gmalaise 09/12/2003	kgilfoy 09/15/2003	rschluet 09/15/2003	_____	lemery 09/15/2003	lnorthro 11/19/2003	

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*Jacket
Rep.
for Stone's
Office per
Melanie
from Vrakas
Office*

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	gmalaise 05/02/2003	1/2 - 9/2/03		_____			
/1	gmalaise	<i>[Signature]</i>	jfrantze 05/07/2003	_____	sbasford 05/07/2003		

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[Handwritten signatures and dates]
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May Contact:

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Subject: **Buildings/Safety - bldg codes**

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Drafter: rmarchan

May Contact: Jeff Berger (414) 543-7622
Brian Mitchell (262) 432-0035

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1?	rmarchan	1-5/5 Kmg	7/5/17	7/6/17 57			

FE Sent For:

<END>

To: Legislative Reference Bureau
From: Representative Dan Vrakas
Date: January 14, 2003
RE: Legislation for Drafting

Please draft the following legislation relating to drug-free construction sites.

Legislation:

To require:

- ✓) Any contractor bidding on a public works project, who is subject to prevailing wage to implement an alcohol and drug-free workplace program. Proof of program should be provided before they are allowed to bid on public works projects.
- ✓) The alcohol and drug-free workplace program to include notice of the standards for drug testing, protections for employees ~~and employers to employees~~ and job applicants, while also maintaining confidentiality.
- ✓) The standards used for alcohol and drug testing follow both the Wisconsin Department of Health and Family Service guidelines and United States Department of Health and Family Service guidelines.
- ✓) Proof of an alcohol or drug test, or proof of participation in a random testing pool should be shown at the start of a project. Thereafter, testing would only be required for reasonable suspicion, after certain work-related incidents, pursuant to random selection, and after their return to work from counseling, rehabilitation or other treatment for substance abuse.
- ✓) Alcohol testing should be done using a Breathalyzer ^(not blood test) with an allowable threshold at a blood alcohol threshold of 0.10 or the then current level used to determine unlawful operation of a motor vehicle.
- ✓) Drug tested shall be conducted using a urine specimen with all positive tests confirmed and then reviewed by a physician. Drug testing should cover both illegal drugs and unlawful use of legal or prescription drugs.
- ✓) The ~~Department of Commerce (Safety & Buildings Division)~~ or the Department of Workforce Development to promulgate administrative rules for the alcohol and drug-free workplace program. Further, require that a technical advisory committee be established to assist in the creation of these rules.

- 8) The ~~Department of Commerce or DWD~~ ² should allow industry-wide opportunities to comply with the alcohol and drug-free workplace program including multi-employer, collectively bargained, union-sponsored, private consortium, and association-sponsored programs.

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Title XXXI

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Chapter 440

WORKERS' COMPENSATION

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440.102 Drug-free workplace program requirements.--The following provisions apply to a drug-free workplace program implemented pursuant to law or to rules adopted by the Agency for Health Care Administration:

(1) DEFINITIONS.--Except where the context otherwise requires, as used in this act:

(a) "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 for accountability at each stage in handling, testing, and storing specimens and reporting test results.

(b) "Confirmation test," "confirmed test," or "confirmed drug test" means a second analytical procedure used to identify the presence of a specific drug 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.

(c) "Drug" means alcohol, including a distilled spirit, wine, a malt beverage, or an intoxicating liquor; an amphetamine; a cannabinoid; cocaine; phencyclidine (PCP); a hallucinogen; methaqualone; an opiate; a barbiturate; a benzodiazepine; a synthetic narcotic; a designer drug; or a metabolite of any of the substances listed in this paragraph. An employer may test an individual for any or all of such drugs.

(d) "Drug rehabilitation program" means a service provider, established pursuant to s. 397.311(27), that provides confidential, timely, and expert identification, assessment, and resolution of employee drug abuse.

(e) "Drug test" or "test" means any chemical, biological, or physical instrumental analysis administered, by a laboratory certified by the United States Department of Health and Human Services or licensed by the Agency for Health Care Administration, for the purpose of determining the presence or absence of a drug or its metabolites.

(f) "Employee" means any person who works for salary, wages, or other remuneration for an employer.

(g) "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 abuse; referrals of employees for appropriate diagnosis, treatment, and assistance; and followup 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 service providers pursuant to s. 397.311(27).

(h) "Employer" means a person or entity that employs a person and that is covered by the Workers' Compensation Law.

(i) "Initial drug test" means a sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens, using an immunoassay procedure or an equivalent, or a more accurate scientifically accepted method approved by the United States Food and Drug Administration or the Agency for Health Care Administration as such more accurate technology becomes available in a cost-effective form.

(j) "Job applicant" means a person who has applied for a position with an employer and has been offered employment conditioned upon successfully passing a drug test, and may have begun work pending the results of the drug test. For a public employer, "job applicant" means only a person who has applied for a special-risk or safety-sensitive position.

(k) "Medical review officer" or "MRO" means a licensed physician, employed with or contracted with an 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.

(l) "Prescription or nonprescription medication" means a drug or medication obtained pursuant to a prescription as defined by s. 893.02 or a medication that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

~~(m)~~ "Public employer" means any agency within state, county, or municipal government that employs individuals for a salary, wages, or other remuneration.

(n) "Reasonable-suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs 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. Among other things, such facts and inferences may be based upon:

1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.

2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

3. A report of drug use, provided by a reliable and credible source.

4. Evidence that an individual has tampered with a drug test during his or her employment with the current employer.

5. Information that an employee has caused, contributed to, or been involved in an accident while at work.

6. Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

~~(o)~~ "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; a position subject to s. 110.1127; or a position in which a momentary lapse in attention could result in injury or death to another person.

~~(p)~~ "Special-risk position" means, with respect to a public employer, a position that is required to be filled by a person who is certified under chapter 633 or chapter 943.

(c) "Specimen" means tissue, hair, or a product of the human body capable of revealing the presence of drugs or their metabolites, as approved by the United States Food and Drug Administration or the Agency for Health Care Administration.

(2) DRUG TESTING.--An employer may test an employee or job applicant for any drug described in paragraph (1)(c). In order to qualify as having established a drug-free workplace program under this section and to qualify for the discounts provided under s. 627.0915 and deny medical and indemnity benefits under this chapter, an employer must implement drug testing that conforms to the standards and procedures established in this section and all applicable rules adopted pursuant to this section as required in subsection (4). However, an employer does not have a legal duty under this section to request an employee or job applicant to undergo drug testing. If an employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in this section and in applicable rules, the employer is ineligible for discounts under s. 627.0915. All employers qualifying for and receiving discounts provided under s. 627.0915 must be reported annually by the insurer to the department.

(3) NOTICE TO EMPLOYEES AND JOB APPLICANTS.--¹prior to his or her receiving workers' compensation payments.

(a) One time only, prior to testing, an employer shall give all employees and job applicants for employment a written policy statement which contains:

1. A general statement of the employer's policy on employee drug use, which must identify:

a. The types of drug testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug testing or drug testing conducted on any other basis.

b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.

2. A statement advising the employee or job applicant of the existence of this section.

3. A general statement concerning confidentiality.

4. Procedures for employees and job applicants to confidentially report to a medical review officer the use of prescription or nonprescription medications to a medical review officer both before and after being tested.

5. A list of the most common medications, by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications as developed by the Agency for Health Care Administration shall be available to employers through the department.

6. The consequences of refusing to submit to a drug test.

7. A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs.

8. 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 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 report a positive test result back to the employer; and that a person may contest the drug test result pursuant to law or to rules adopted by the Agency for Health Care Administration.

9. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section.

~~10.~~ A list of all drugs for which the employer will test, described by brand name or common name, as applicable, as well as by chemical name.

~~11.~~ A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission or applicable court.

~~12.~~ A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication.

Nonstat ~~(b)~~ An employer not having a drug-testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing. An employer having a drug-testing program in place prior to July 1, 1990, is not required to provide a 60-day notice period.

✓ (c) An employer shall include notice of drug testing on vacancy announcements for positions for which drug testing is required. A notice of the employer's drug-testing policy must also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the employer during regular business hours in the employer's personnel office or other suitable locations.

✓ (4) TYPES OF TESTING.--

✓ (a) An employer is required to conduct the following types of drug tests:

~~1.~~ Job applicant drug testing.--An employer must require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusing to hire a job applicant.

✓ ~~2.~~ Reasonable-suspicion drug testing.--An employer must require an employee to submit to reasonable-suspicion drug testing.

~~3.~~ Routine fitness-for-duty drug testing.--An employer must require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.

✓ 4. Followup drug testing.--If the employee in the course of employment enters an employee assistance program for drug-related problems, or a drug rehabilitation program, the employer must require the employee to submit to a drug test as a followup to such program, unless the employee voluntarily entered the program. In those cases, the employer has the option to not require followup testing. If followup testing is required, it must be conducted at least once a year for a 2-year period after completion of the program. Advance notice of a followup testing date must not be given to the employee to be tested.

✓ (b) This subsection does not preclude a private employer from conducting random testing, or any other lawful testing, of employees for drugs.

~~(c)~~ Limited testing of applicants, only if it is based on a reasonable classification basis, is permissible in accordance with law or with rules adopted by the Agency for Health Care Administration.

✓ ~~(5)~~ PROCEDURES AND EMPLOYEE PROTECTION.--All specimen collection and testing for drugs under this section shall be performed in accordance with the following procedures:

✓ ~~(a)~~ A sample shall be collected with due regard to the privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.

(b) Specimen collection must be documented, and the documentation procedures shall include:

1. Labeling of specimen containers so as to reasonably preclude the likelihood of erroneous identification of test results.

2. A form for the employee or job applicant to provide any information he or she considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication or other relevant medical information. The form must provide notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. The providing of information shall not preclude the administration of the drug test, but shall be taken into account in interpreting any positive confirmed test result.

(c) Specimen collection, storage, and transportation to the testing site shall be performed in a manner that reasonably precludes contamination or adulteration of specimens.

(d) Each initial drug test and confirmation test conducted under this section, not including the taking or collecting of a specimen to be tested, shall be conducted by a licensed or certified laboratory as described in subsection (9).

(e) A specimen for a drug test may be taken or collected by any of the following persons:

1. A physician, a physician assistant, a registered professional nurse, a licensed practical nurse, or a nurse practitioner or a certified paramedic who is present at the scene of an accident for the purpose of rendering emergency medical service or treatment.

2. A qualified person employed by a licensed or certified laboratory as described in subsection (9).

(f) A person who collects or takes a specimen for a drug test shall collect an amount sufficient for two drug tests as determined by the Agency for Health Care Administration.

(g) Every specimen that produces a positive, confirmed test result shall be preserved by the licensed or certified laboratory that conducted the confirmation test for a period of at least 210 days after the result of the test was mailed or otherwise delivered to the medical review officer. However, if an employee or job applicant undertakes an administrative or legal challenge to the test result, the employee or job applicant shall notify the laboratory and the sample shall be retained by the laboratory until the case or administrative appeal is settled. During the 180-day period after written notification of a positive test result, the employee or job applicant who has provided the specimen shall be permitted by the employer to have a portion of the specimen retested, at the employee's or job applicant's expense, at another laboratory, licensed and approved by the Agency for Health Care Administration, chosen by the employee or job applicant. The second laboratory must test at equal or greater sensitivity for the drug in question as the first laboratory. The first laboratory that performed the test for the employer is responsible for the transfer of the portion of the specimen to be retested, and for the integrity of the chain of custody during such transfer.

(h) Within 5 working days after receipt of a positive confirmed test result from the medical review officer, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant. The employer shall provide to the employee or job applicant, upon request, a copy of the test results.

(i) Within 5 working days after receiving notice of a positive confirmed test result, an employee or job applicant may submit information to the employer explaining or contesting the test result, and explaining why the result does not constitute a violation of the employer's policy.

(j) The employee's or job applicant's explanation or challenge of the positive test result is

Collection

Employee Protection

unsatisfactory to the employer, a written explanation as to why the employee's or job applicant's explanation is unsatisfactory, along with the report of positive result, shall be provided by the employer to the employee or job applicant; and all such documentation shall be kept confidential by the employer pursuant to subsection (8) and shall be retained by the employer for at least 1 year.

(k) An 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.

(l) An employer that performs drug testing or specimen collection shall use chain-of-custody procedures established by the Agency for Health Care Administration to ensure proper recordkeeping, handling, labeling, and identification of all specimens tested.

(m) An employer shall pay the cost of all drug tests, initial and confirmation, which the employer requires of employees. An employee or job applicant shall pay the costs of any additional drug tests not required by the employer.

(n) An employer shall not discharge, discipline, or discriminate against an employee solely upon the employee's voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered a drug rehabilitation program. Unless otherwise provided by a collective bargaining agreement, an employer may select the employee assistance program or drug rehabilitation program if the employer pays the cost of the employee's participation in the program.

(o) If drug testing is conducted based on reasonable suspicion, the 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 employer pursuant to subsection (8) and shall be retained by the employer for at least 1 year.

(p) All authorized remedial treatment, care, and attendance provided by a health care provider to an injured employee before medical and indemnity benefits are denied under this section must be paid for by the carrier or self-insurer. However, the carrier or self-insurer must have given reasonable notice to all affected health care providers that payment for treatment, care, and attendance provided to the employee after a future date certain will be denied. A health care provider, as defined in s. 440.13(1)(i), that refuses, without good cause, to continue treatment, care, and attendance before the provider receives notice of benefit denial commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(6) CONFIRMATION TESTING.--

(a) If an initial drug test is negative, the employer may in its sole discretion seek a confirmation test.

(b) Only licensed or certified laboratories as described in subsection (9) may conduct confirmation drug tests.

(c) All positive initial tests shall be confirmed using gas chromatography/mass spectrometry (GC/MS) or an equivalent or more accurate scientifically accepted method approved by the Agency for Health Care Administration or the United States Food and Drug Administration as such technology becomes available in a cost-effective form.

(d) If an initial drug test of an employee or job applicant is confirmed as positive, the employer's medical review officer shall provide technical assistance to the employer and to the employee or job applicant for the purpose of interpreting the test result to determine whether the result could have been caused by prescription or nonprescription medication taken by the employee or job applicant.

(7) EMPLOYER PROTECTION.--

(a) An employee or job applicant whose drug test result is confirmed as positive in accordance with this section 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.

(b) An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section is considered to have discharged, disciplined, or refused to hire for cause.

(c) No physician-patient relationship is created between an employee or job applicant and an employer or any person performing or evaluating a drug test, solely by the establishment, implementation, or administration of a drug-testing program.

(d) Nothing in this section shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules.

(e) This section does not operate retroactively, and does not abrogate the right of an employer under state law to conduct drug tests, or implement employee drug-testing programs; however, only those programs that meet the criteria outlined in this section qualify for reduced rates under s. 627.0915.

(f) If an employee or job applicant refuses to submit to a drug test, the employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this paragraph does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in this section.

(g) This section does not 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 testing is 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. Such screening or testing need not be in compliance with the rules adopted by the Agency for Health Care Administration under this chapter or under s. 112.0455. A public employer may, through the use of an unbiased selection procedure, conduct random drug tests of employees occupying safety-sensitive or special-risk positions if the testing is performed in accordance with drug-testing rules adopted by the Agency for Health Care Administration and the department. If applicable, random drug testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before such testing is implemented.

(h) No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug testing.

(8) CONFIDENTIALITY.--

(a) Except as otherwise provided in this subsection, all information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received or produced as a result of a drug-testing program are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section or in determining compensability under this chapter.

(b) Employers, laboratories, medical review officers, employee assistance programs, drug rehabilitation programs, and their agents may not release any information concerning drug test results obtained pursuant to this section without a written consent form signed voluntarily by the person tested, unless such release is compelled by an administrative law judge, a hearing officer,

or a court of competent jurisdiction pursuant to an appeal taken under this section or is deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:

- 1/ The name of the person who is authorized to obtain the information.
- 2/ The purpose of the disclosure.
- 3/ The precise information to be disclosed.
- 4/ The duration of the consent.
- 5/ The signature of the person authorizing release of the information.

~~(c)~~ Information on drug test results shall not be 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.

(d) This subsection does not prohibit an employer, agent of an employer, or laboratory conducting a drug test from having access to employee drug test information or using such information when consulting with legal counsel in connection with actions brought under or related to this section or when the information is relevant to its defense in a civil or administrative matter.

(9) DRUG-TESTING STANDARDS FOR LABORATORIES.--

(a) A laboratory may analyze initial or confirmation test specimens only if:

1. The laboratory is licensed and approved by the Agency for Health Care Administration using criteria established by the United States Department of Health and Human Services as general guidelines for modeling the state drug-testing program pursuant to this section or the laboratory is certified by the United States Department of Health and Human Services.

2. The laboratory has written procedures to ensure the chain of custody.

3. The laboratory follows proper quality control procedures, including, but not limited to:

a. The use of internal quality controls, including the use of samples of known concentrations which are used to check the performance and calibration of testing equipment, and periodic use of blind samples for overall accuracy.

b. An internal review and certification process for drug test results, conducted by a person qualified to perform that function in the testing laboratory.

c. Security measures implemented by the testing laboratory to preclude adulteration of specimens and drug test results.

d. Other necessary and proper actions taken to ensure reliable and accurate drug test results.

(b) A laboratory shall disclose to the medical review officer a written positive confirmed test result report within 7 working days after receipt of the sample. All laboratory reports of a drug test result must, at a minimum, state:

1. The name and address of the laboratory that performed the test and the positive identification of the person tested.

2. Positive results on confirmation tests only, or negative results, as applicable.

3. A list of the drugs for which the drug analyses were conducted.
4. The type of tests conducted for both initial tests and confirmation tests and the minimum cutoff levels of the tests.
5. Any correlation between medication reported by the employee or job applicant pursuant to subparagraph (5)(b)2. and a positive confirmed drug test result.

A report must not disclose the presence or absence of any drug other than a specific drug and its metabolites listed pursuant to this section.

(c) The laboratory shall submit to the Agency for Health Care Administration a monthly report with statistical information regarding the testing of employees and job applicants. The report must include information on the methods of analysis conducted, the drugs tested for, the number of positive and negative results for both initial tests and confirmation tests, and any other information deemed appropriate by the Agency for Health Care Administration. A monthly report must not identify specific employees or job applicants.

(10) RULES.--The Agency for Health Care Administration shall adopt rules pursuant to s. 112.0455 and criteria established by the United States Department of Health and Human Services as general guidelines for modeling the state drug-testing program, concerning, but not limited to:

(a) Standards for licensing drug-testing laboratories and suspension and revocation of such licenses.

(b) Urine, hair, blood, and other body specimens and minimum specimen amounts that are appropriate for drug testing.

~~(c)~~ Methods of analysis and procedures to ensure reliable drug-testing results, including standards for initial tests and confirmation tests.

~~(d)~~ Minimum cutoff detection levels for each drug or metabolites of such drug for the purposes of determining a positive test result.

~~(e)~~ Chain-of-custody procedures to ensure proper identification, labeling, and handling of specimens tested.

~~(f)~~ Retention, storage, and transportation procedures to ensure reliable results on confirmation tests and retests.

(11) PUBLIC EMPLOYEES IN SAFETY-SENSITIVE OR SPECIAL-RISK POSITIONS.--

(a) If an employee who is employed by a public employer in a safety-sensitive position enters an employee assistance program or drug rehabilitation program, the employer must assign the employee to a position other than a safety-sensitive position or, if such position is not available, place the employee on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

(b) An employee who is employed by a public employer in a special-risk position may be discharged or disciplined by a public employer for the first positive confirmed test result if the drug confirmed is an illicit drug under s. 893.03. A special-risk employee who is participating in an employee assistance program or drug rehabilitation program may not be allowed to continue to work in any special-risk or safety-sensitive position of the public employer, but may be assigned to a position other than a safety-sensitive position or placed on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

(12) DENIAL OF BENEFITS.--An employer shall deny an employee medical or indemnity benefits under this chapter, pursuant to this section.

(13) COLLECTIVE BARGAINING RIGHTS.--

(a) This section does not eliminate the bargainable rights as provided in the collective bargaining process if applicable.

(b) Drug-free workplace program requirements pursuant to this section shall be a mandatory topic of negotiations with any certified collective bargaining agent for nonfederal public sector employers that operate under a collective bargaining agreement.

(14) APPLICABILITY.--A drug testing policy or procedure adopted by an employer pursuant to this chapter shall be applied equally to all employee classifications where the employee is subject to workers' compensation coverage.

(15) STATE CONSTRUCTION CONTRACTS.--Each construction contractor regulated under part I of chapter 489, and each electrical contractor and alarm system contractor regulated under part II of chapter 489, who contracts to perform construction work under a state contract for educational facilities governed by ²chapter 1013, for public property or publicly owned buildings governed by chapter 255, or for state correctional facilities governed by chapter 944 shall implement a drug-free workplace program under this section.

History.--s. 13, ch. 90-201; s. 13, ch. 91-1; s. 1, ch. 91-201; s. 4, ch. 91-429; s. 9, ch. 93-415; s. 3, ch. 95-119; s. 3, ch. 96-289; s. 284, ch. 96-406; s. 198, ch. 96-410; s. 1050, ch. 97-103; s. 99, ch. 97-264; s. 3, ch. 99-186; s. 14, ch. 2000-320; s. 1, ch. 2002-14; s. 5, ch. 2002-78; s. 16, ch. 2002-194; s. 8, ch. 2002-196.

¹**Note.**--The words "prior to his or her receiving workers' compensation payments" were added by s. 16, ch. 2002-194, without coding.

²**Note.**--Substituted by the editors for a reference to ch. 235, the predecessor to ch. 1013.

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State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-1714/1
GMM... King

DV 217

WED 5/7

-1714

-1595

Identical

= edit



D-NOTES ARE NOT together the same.

266-4466 • (TDD 267-1143)

Gen. Cat.

- 1 AN ACT /.; relating to: drug and alcohol testing of employees who are required
- 2 to be paid the prevailing wage rate for work performed on projects of public
- 3 works and granting rule-making authority.

Analysis by the Legislative Reference Bureau

Under current law, subject to certain exceptions, all laborers, workers, mechanics, and truck drivers employed on a state or local public works project whose estimated cost of completion is \$37,000 or more for a single-trade public works project or \$180,000 or more for a multiple-trade public works project must be paid at the rate paid for a majority of the hours worked in the person's trade or occupation in the county in which the project is located (prevailing wage law).

This bill prohibits a person from bidding for a contract to perform work on a public works project that is subject to the prevailing wage law (project) unless the person submits with the bid a statement that the person, and all subcontractors and agents that will be performing work on the project, (employer) have in place, or will have in place before any work on the project commences, a drug and alcohol testing program that complies with the bill.

Under the bill, an employer may not permit a laborer, worker, mechanic, or truck driver who is covered under the prevailing wage law (employee) to work on a project unless the employee has been tested for the presence of drugs or alcohol in the employee's system not more than 12 months preceding the date on which the employee commences work on the project or unless during those 12 months the employee has been participating in a random testing program under which the employee was tested at the commencement of the employee's participation in the program. After an employee begins work on a project, the employee must submit to reasonable suspicion testing, which is testing conducted based on a reasonable belief

of the employer that the employee is using or has used drugs or alcohol in violation of the employer's policy, follow-up testing, which is testing conducted as a follow-up to the employee's participation in an employee assistance program for problems relating to drugs or alcohol or a drug or alcohol rehabilitation program as a condition of continued employment, and random testing, which is testing conducted randomly on a percentage of the employer's employees according to objective, neutral, and nondiscriminatory criteria and spread out throughout the year so that on any given day any given employee has an equal chance of being tested. The bill defines a "drug" as any controlled substance, controlled substance analog, prescription drug, or nonprescription drug that the Department of Workforce Development (DWD) determines by rule is subject to testing under the bill. The bill also requires DWD to define by rule the minimum alcohol concentration that is considered to be a positive test result.

The bill requires an employer, before testing an employee or a person who has been offered a position contingent on passing a test (applicant), to provide the employee or applicant with a written policy statement that is required under the bill to include certain information, including all of the following:

1. A general statement of the employer's policy concerning drug or alcohol use, which statement must include the circumstances under which an employee or applicant may be required to submit to testing and the actions that the employer may take with respect to a refusal to submit to testing or a positive, confirmed test result that has been verified by a licensed physician who has knowledge of substance abuse disorders, laboratory testing procedures, and chain-of-custody procedures and who has the necessary medical training to interpret and evaluate a positive test result, a person's medical history, and any other relevant biomedical information (medical review officer).

2. A statement that the testing is required as a condition of performing work on a project.

3. A list of the drugs for which testing is required.

4. A description of the procedures under which the testing is conducted and the employee protections specified in the bill.

5. A list of the most common medications that may alter or affect a test.

6. A statement concerning the confidentiality of information relating to a test as provided in the bill. Specifically, the bill provides that information relating to a test result is confidential and may be disclosed only on the specific written consent of the employee or applicant or on the order of a court, hearing examiner, arbitrator, or other decision maker for purposes of a proceeding arising out of an adverse employment action taken as a result of the test. The bill further provides that information relating to a test result may not be used against an employee or applicant in any criminal or civil proceeding, except by the employer in a proceeding arising out of an adverse employment action taken as a result of the test.

7. The names, addresses, and telephone numbers of employee assistance programs and local drug and alcohol rehabilitation programs at which the employee may voluntarily seek treatment.

8. A statement that the employee or applicant may challenge or explain a positive, confirmed test result to the medical review officer and may provide information to the employer challenging a positive, confirmed test result or explaining why the test result does not constitute a violation of the employer's policy.

9. A statement that the employee or applicant may consult the testing laboratory for technical information regarding any prescription or nonprescription drugs that the employee or applicant may be taking.

The bill affords certain protections to an employee or applicant who is required to be tested under the bill. Specifically, under the bill:

1. An employee or applicant must be given the opportunity to provide, both before and after a test, information that is relevant to the test, including identification of any prescription or nonprescription drugs that the employee or applicant is taking and any other relevant medical information.

2. The employer must inform an employee or applicant of a positive, confirmed test result that has been verified by a medical review officer, the consequences of the test result, and the options available to the employee or applicant, within five working days after the employer receives the test result; the employee or applicant may submit information to the employer challenging the test result or explaining why the test result does not constitute a violation of the employer's policy within five working days after receiving notice of the test result from the employer; and the employer must inform the employee or applicant as to whether the challenge or explanation is satisfactory, and, if unsatisfactory, why the challenge or explanation is unsatisfactory, within 20 working days after the employer receives the challenge or explanation from the employee or applicant.

3. An employee may not be discharged, disciplined, or otherwise discriminated against solely on the basis of voluntarily seeking treatment for a problem relating to drug or alcohol use, if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for problems relating to drug or alcohol use, or entered a drug or alcohol rehabilitation program, and an employee or applicant may not be discharged, disciplined, or otherwise discriminated against based solely on a positive test result that has not been verified by a confirmation test and by a medical review officer.

4. In the case of reasonable-suspicion testing, the employer must provide the employee with documentation of the circumstances on which the reasonable suspicion is based.

5. A test must be conducted immediately before, during, or immediately after work and at the employer's expense, except that any additional testing requested by the employee or applicant, but not required by the employer, is at the expense of the employee or applicant. The bill also provides that testing under the bill is considered to be performed during work time for purposes of determining wages, benefits, and hours of employment.

Similarly, the bill affords certain protections to an employer that is required to conduct drug or alcohol testing under the bill. Specifically, under the bill:

1. An ~~employer~~ or applicant who has a positive, confirmed test result that has been verified by a medical review officer is not considered to be an individual with

employee

a disability for purposes of the law prohibiting discrimination in employment on the basis of disability.

2. An employer that discharges or disciplines an employee, or that refuses to hire an applicant, based on a positive, confirmed test result that has been verified by a medical review officer or based on a refusal of the employee or applicant to be tested is considered to have done so for cause.

3. An employer is not prohibited from establishing and enforcing reasonable work rules relating the use, possession, distribution, or delivery of drugs or alcohol in the workplace.

4. An employer is not prohibited from conducting a medical screen, ^{with} the consent of an employee, to determine the employee's level of exposure to a potentially toxic chemical or substance in the workplace.

5. A physician-patient relationship is not created between an employee or applicant and the employer, a medical review officer, or any other person conducting or evaluating a test under the bill.

Finally, the bill requires DWD to promulgate rules under which the testing required under the bill is to be conducted. The bill requires those rules to include a list of the drugs for which testing is required and, for each of those drugs, the minimum detection level that is considered to be a positive test result; the minimum alcohol concentration that is considered to be a positive test result; protocols governing the testing process from collection of the specimens to be tested to reporting of the results to the employer; chain-of-custody procedures to ensure the integrity of a specimen collected from an employee or applicant and to ensure reliable and accurate test results; and procedures under which an employee or applicant may challenge or explain a positive, confirmed test result to the medical review officer and employer.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 16.855 (9m) of the statutes is created to read:

2 16.855 (9m) (a) The department may not receive a bid for a contract to perform
3 construction work on a project of public works that is subject to s. 103.49 unless the
4 bidder submits with the bid a statement that the bidder, and all subcontractors and
5 agents that will be performing work on the project, have in place, or will have in place
6 before any work on the project commences, a drug and alcohol testing program that
7 complies with s. 103.503 and the rules promulgated under s. 103.503 (9).

1 (b) A statement specified under par. (a) shall be submitted on a form that is
2 adopted and furnished by the department, and shall be filed in the manner and place
3 designated by the department.

4 **SECTION 2.** 66.0901 (10) of the statutes is created to read:

5 **66.0901 (10) DRUG AND ALCOHOL TESTING REQUIREMENTS.** (a) A municipality may
6 not receive a bid for a public contract that is subject to s. 66.0903 unless the bidder
7 submits with the bid a statement that the bidder, and all subcontractors and agents
8 that will be performing work under the public contract, have in place, or will have
9 in place before any work under the public contract commences, a drug and alcohol
10 testing program that complies with s. 103.503 and the rules promulgated under s.
11 103.503 (9).

12 (b) A statement specified under par. (a) shall be submitted on a form that is
13 adopted and furnished by the municipality, and shall be filed in the manner and place
14 designated by the municipality.

15 **SECTION 3.** 84.06 (2) (c) of the statutes is created to read:

16 **84.06 (2) (c) 1.** The department or an agent under par. (b) may not receive a bid
17 for a contract to perform construction work on a project of highway improvements
18 that is subject to s. 103.50 unless the bidder submits with the bid a statement that
19 the bidder, and all subcontractors and agents that will be performing work on the
20 project, have in place, or will have in place before any work on the project commences,
21 a drug and alcohol testing program that complies with s. 103.503 and the rules
22 promulgated under s. 103.503 (9).

23 2. A statement specified under subd. 1. shall be submitted on a form that is
24 adopted and furnished by the department, and shall be filed in the manner and place
25 designated by the department.

1 SECTION 4. 103.503 of the statutes is created to read:

2 103.503 Drug-free public works projects. (1) DEFINITIONS. In this section:

3 (a) "Alcohol" has the meaning given in s. 340.01 (1q).

4 (b) "Applicant" means a person who has applied for and been offered a position
5 as an employee with an employer conditioned on successfully passing a test.

6 (c) "Drug" means any of the following that the department determines by rule
7 promulgated under sub. (9) is subject to testing under this section:

8 1. A controlled substance, as defined in s. 961.01 (4).

9 2. A controlled substance analog, as defined in s. 961.01 (4m).

10 3. A prescription drug, as defined in s. 450.01 (20).

11 4. A drug, as defined in s. 450.01 ~~(19)~~, that may be dispensed without a
12 prescription. (10)

13 (d) "Employee" means a laborer, worker, mechanic, or truck driver who
14 performs the work described in s. 66.0903 (4), 103.49 (2m), or 103.50 (2m) on a project
15 of public works that is subject to s. 66.0903, 103.49, or 103.50.

16 (e) "Employer" means a contractor, subcontractor, or agent of a contractor or
17 subcontractor that performs work on a project of public works that is subject to s.
18 66.0903, ~~103.49~~^{103.49}, or 103.50.

19 (f) "Medical review officer" means a licensed physician who has knowledge of
20 substance abuse disorders, laboratory testing procedures, and chain-of-custody
21 procedures and who has the necessary medical training to interpret and evaluate a
22 positive test result, a person's medical history, and any other relevant biomedical
23 information.

24 (g) "Test" means a chemical, biological, or physical instrumental analysis to
25 determine the presence of drugs or alcohol in an employee's system.

1 (2) TESTING REQUIRED. No person may bid for a contract to perform work on a
2 project of public works that is subject to s. 66.0903, 103.49, or 103.50 unless the
3 person submits with the bid a statement that the person, and all subcontractors and
4 agents that will be performing work on the project, have in place, or will have in place
5 before any work on the project commences, a drug and alcohol testing program that
6 complies with this section and the rules promulgated under sub. (9).

7 (3) NOTICE TO EMPLOYEES AND APPLICANTS. (a) Before testing an employee or
8 applicant for the presence of drugs or alcohol, an employer shall provide the
9 employee or applicant with a written policy statement that contains all of the
10 following:

11 1. A general statement of the employer's policy concerning employee drug or
12 alcohol use, which statement shall include the circumstances under sub. (4) under
13 which an employee or applicant may be required to submit to testing and the actions
14 that the employer may take with respect to an employee or applicant on the basis of
15 a positive, confirmed test result that has been verified by a medical review officer or
16 ^{on the basis of} a refusal to submit to testing.

17 2. A statement that the employer is required under sub. (2) to conduct drug and
18 alcohol testing of its employees as a condition for performing work on a project of
19 public works that is subject to s. 66.0903, 103.49, or 103.50.

20 3. A list of all drugs for which testing is required, by brand name or common
21 name as well as by chemical name.

22 4. A description of the procedures specified in sub. (5) and in the rules
23 promulgated under sub. (9) under which the testing is conducted and the employee
24 protections specified in sub. (6).

1 5. A list of the most common medications, by brand name or common name as
2 well as by chemical name, that may alter or affect a test.

3 6. A statement concerning the confidentiality of information relating to a test
4 as provided in sub. (8).

5 7. The names, addresses, and telephone numbers of employee assistance
6 programs and local drug and alcohol rehabilitation programs at which the employee
7 or applicant may voluntarily seek treatment.

8 8. A statement that an employee or applicant who receives a positive, confirmed
9 test result may challenge or explain the result to the medical review officer within
10 5 working days after receiving notification of the test result; that, if the explanation
11 is unsatisfactory to the medical review officer, the medical review officer will report
12 the test result to the employer; and that an employee or applicant who receives notice
13 from the employer of a positive, confirmed test result that has been verified by the
14 medical review officer may submit information to the employer challenging the test
15 result or explaining why the test result does not constitute a violation of the
16 employer's policy within 5 working days after receiving that notice.

17 9. A statement that the employee or applicant may consult the testing
18 laboratory for technical information regarding any prescription drugs or
19 nonprescription drugs that the employee or applicant may be taking.

20 (b) An employer that requires testing under this section shall include notice of
21 that requirement on all vacancy announcements for positions for which the testing
22 is required, shall post notice of the employer's testing policy in at least one
23 conspicuous and easily accessible place on the site of the project of public works that
24 is subject to s. 66.0903, 103.49, or 103.50, and shall make available a copy of the
25 policy to any employee or applicant on request.

1 (4) WHEN TESTING REQUIRED. (a) An employer may not permit an employee to
2 work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 unless
3 the employee has been tested not more than 12 months preceding the date on which
4 the employee commences work on the project or unless during those 12 months the
5 employee has been participating in a random testing program under which the
6 employee was tested at the commencement of the employee's participation in the
7 program.

8 (b) After an employee begins work on a project of public works that is subject
9 to s. 66.0903, 103.49, or 103.50, the employer shall require the employee to submit
10 to reasonable-suspicion testing under par. (c), follow-up testing under par. (d), and
11 random testing under par. (e).

12 (c) If the employer has a reasonable belief, based on specific objective and
13 articulable facts and reasonable inferences drawn from those facts, that an employee
14 is using or has used drugs or alcohol in violation of the employer's policy, the
15 employer shall require the employee to submit to reasonable-suspicion testing.
16 Those facts and inferences may be based on any of the following:

17 1. Facts or events observed while the employee is at work, such as direct
18 observation of drug or alcohol use or of the physical symptoms or manifestations of
19 being under the influence of drugs or alcohol.

20 2. Abnormal conduct or erratic behavior of the employee while at work or a
21 significant deterioration in the employee's work performance.

22 3. A report of drug or alcohol use provided by a reliable and credible source.

23 4. Evidence that the employee has tampered with a drug test during his or her
24 employment with the employer or after receiving an offer of employment with the
25 employer.

1 5. Information that the employee has caused, contributed to, or been involved
2 in an accident while at work.

3 6. Evidence that the employee has used, possessed, attempted to possess,
4 distributed, or delivered drugs or alcohol while at work, while on the employer's
5 premises or on the site of the project of public works that is subject to s. 66.0903,
6 103.49, or 103.50, or while operating the employer's vehicles, machinery, or
7 equipment.

8 7. Any other fact or event that provides a reasonable belief that the employee
9 is using or has used drugs or alcohol in violation of the employer's policy.

10 (d) If an employee as a condition of continued employment enters an employee
11 assistance program for problems relating to drugs or alcohol or enters a drug or
12 alcohol rehabilitation program, the employer shall require the employee to submit
13 to testing as a follow-up to that program at least once a year for the 2-year period
14 after completion of the program. Testing under this paragraph shall be conducted
15 without prior warning.

16 (e) An employer shall require an employee to submit to random testing. Each
17 year the employer shall randomly test a percentage of the employer's employees. The
18 employer shall select employees for random testing according to objective, neutral,
19 and nondiscriminatory criteria and shall spread out the testing throughout the year
20 so that on any given day any given employee has an equal chance of being tested.
21 Testing under this paragraph shall be conducted without prior warning.

22 (5) TESTING PROCEDURES. Testing for the presence of a drug shall be
23 accomplished through an analysis of a urine specimen provided by the employee.
24 Testing for the presence of alcohol shall be accomplished through an analysis of a
25 breath specimen provided by the employee. Testing under this subsection shall be

1 performed according to procedures prescribed in rules promulgated by the
2 department under sub. (9).

3 (6) EMPLOYEE PROTECTION. (a) Both before and after testing, an employee or
4 applicant shall be given the opportunity to provide any information that he or she
5 considers relevant to the test, including identification of any prescription drugs or
6 nonprescription drugs that he or she is currently using or has recently used or any
7 other relevant medical information.

8 (b) Within 5 working days after receipt of a positive, confirmed test result that
9 has been verified by a medical review officer, the employer shall inform the employee
10 or applicant in writing of the test result, the consequences of the test result, and the
11 options available to the employee or applicant. On request, the employer shall
12 provide a copy of the test result to the employee or applicant.

13 (c) Within 5 working days after receiving notice of a positive, confirmed test
14 result that has been verified by the medical review officer, the employee or applicant
15 may submit information to the employer challenging the test result or explaining
16 why the test result does not constitute a violation of the employer's policy.

17 (d) Within 20 working days after receipt of the information specified in par. (c),
18 the employer shall determine whether the employee's challenge or explanation is
19 satisfactory and shall inform the employee or applicant of that determination. If the
20 challenge or explanation is unsatisfactory, the employer shall provide a written
21 explanation as to why the challenge or explanation is unsatisfactory, together with
22 a copy of the test result, to the employee or applicant.

23 (e) An employer may not discharge, discipline, refuse to hire, or otherwise
24 discriminate against an employee or applicant based solely on a positive test result
25 that has not been verified by a confirmation test and by a medical review officer.

1 (f) An employer may not discharge, discipline, or otherwise discriminate
2 against an employee based solely on the employee voluntarily seeking treatment for
3 a problem relating to drug or alcohol use if the employee has not previously tested
4 positive for drug or alcohol use, entered an employee assistance program for
5 problems relating to drug or alcohol use, or entered a drug or alcohol rehabilitation
6 program.

7 (g) If testing is conducted based on reasonable suspicion under sub. (4) (c), the
8 employer shall document in writing the circumstances on which that reasonable
9 suspicion is based and, on request, shall provide a copy of that documentation to the
10 employee. The employer shall retain a copy of that documentation for not less than
11 one year.

12 (h) Any test of an employee conducted under this section shall occur
13 immediately before, during, or immediately after the regular work period of the
14 employee and shall be considered to be performed during work time for purposes of
15 determining wages, benefits, and hours of labor of the employee. The employer shall
16 pay the cost of all testing under this section required by the employer. The employee
17 shall pay the cost of any additional testing requested by the employee or applicant,
18 but not required by the employer.

19 **(7) EMPLOYER PROTECTION.** (a) An employee or applicant who has a positive,
20 confirmed test result that has been verified by a medical review officer under this
21 section is not considered to be an individual with a disability, as defined in s. 111.32
22 (8).

23 (b) An employer that discharges or disciplines an employee, or that refuses to
24 hire an applicant, based on a positive, confirmed test result that has been verified

1 by a medical review officer or based on a refusal of the employee or applicant to be
2 tested is considered to have done so for cause.

3 (c) This section does not prohibit an employer from establishing and enforcing
4 reasonable work rules relating to the use, possession, distribution, or delivery of
5 drugs or alcohol in the workplace.

6 (d) This section does not prohibit an employer from conducting a medical
7 screening or other test of an employee who provides written and informed consent
8 to the screening or other test for the purposes of determining the employee's level of
9 exposure to a potentially toxic chemical or potentially toxic substance in the
10 workplace. That screening or other testing is limited to the specific chemical or
11 substance for which the employee consents to screening or testing.

12 (e) The establishment, implementation, or administration of a testing program
13 under this section does not create a physician-patient relationship between an
14 employee or applicant and the employer, a medical review officer, or any other person
15 conducting or evaluating a test under this section.

16 (8) CONFIDENTIALITY. (a) Except as required or permitted under this section,
17 any information, written or otherwise, relating to the result of a test conducted under
18 this section shall remain confidential and may be disclosed only as follows:

19 1. On the specific written consent of the employee or applicant who is the
20 subject of the test. That consent shall state the name of the person who is authorized
21 to obtain the information, the purpose of the disclosure, the precise information to
22 be disclosed, and the duration of the consent and shall be signed by the person
23 authorizing the disclosure.

24 2. On the order of a court, hearing examiner, arbitrator, or other decision maker
25 for purposes of a court proceeding, administrative proceeding, grievance proceeding,

1 or any other proceeding arising out of an adverse employment action taken as a
2 result of a test conducted under this section.

3 (b) Except as provided in par. (a) 2. and (c), information relating to the results
4 of a test conducted under this section may not be used against an employee or
5 applicant in any criminal or civil proceeding.

6 (c) An employer may use any information, written or otherwise, relating to the
7 result of a test conducted under this section in a court proceeding, administrative
8 proceeding, grievance proceeding, or any other proceeding arising out of an adverse
9 employment action taken as a result of a test conducted under this section.

10 (9) RULES. The department shall promulgate rules prescribing the procedures
11 under which the drug and alcohol testing required under this section shall be
12 conducted. Those rules shall include all of the following:

13 (a) A list of the drugs for which testing is required under sub. (4) and, for each
14 of those drugs, the minimum detection level that is considered to be a positive test
15 result.

16 (b) The minimum alcohol concentration, as defined in s. 340.01 (1v), that is
17 considered to be a positive test result.

18 (c) Protocols governing the collection of urine and breath specimens from
19 employees and applicants who are subject to testing, the initial testing of those
20 specimens, confirmation testing of positive initial test results, verification by a
21 medical review officer of a positive, confirmed test result, and reporting to the
22 employer of positive, confirmed test results that have been verified by a medical
23 review officer.

24 (d) Chain-of-custody procedures to ensure the integrity of a urine or breath
25 specimen collected from an employee or applicant from the point of collection to final

1 disposal of the specimen. Those procedures shall include procedures governing the
2 identification, labeling, handling, transportation, storage, and retention of
3 specimens so as to ensure reliable and accurate test results.

4 (e) Procedures under which an employee or applicant may challenge or explain
5 to the medical review officer and the employer a positive, confirmed test result.

6 ^{↓ AUTO REF "A"}
SECTION 5. Nonstatutory provisions.

7 ^{↓ AUTO REF "B"}
(1) RULE-MAKING.

8 (a) *Technical advisory committee.* The department of workforce development
9 shall appoint a technical advisory committee under section 227.13 of the statutes to
10 advise the department concerning the rules required to be promulgated under
11 section 103.503 (9) of the statutes, as created by this act. The committee shall
12 include, at a minimum, one member who is a representative of a labor organization
13 that represents employees employed in the building trades, one member who is a
14 representative of a contractor actively engaged in performing work on projects of
15 public works, and one member who is a representative of a laboratory that performs
16 drug and alcohol testing. The department of workforce development may also
17 appoint additional members who have knowledge and expertise in the area of
18 workplace drug and alcohol testing so long as the number of members representing
19 labor organizations and the number of members representing contractors are equal.

20 (b) *Rule-making deadline.* The department of workforce development shall
21 submit in proposed form the rules required under section 103.503 (9) of the statutes,
22 as created by this act, to the legislative council staff under section 227.15 (1) of the
23 statutes no later than the first day of the 6th month beginning after the effective date
24 of this paragraph.

1 (2) TRANSITIONAL PROVISIONS. An employer that is required under section
 2 103.503 (2) of the statutes, as created by this act, to have, but that does not have, a
 3 drug and alcohol testing program in place on the effective date of this subsection shall
 4 provide notice to all of its employees that a drug and alcohol testing program is being
 5 implemented and may not begin actual drug and alcohol testing until 60 days after
 6 the date of the notice. An employer that has a drug and alcohol testing program in
 7 place on the effective date of this subsection is not required to provide notice under
 8 this subsection.

SECTION 6. Initial applicability.

9 (1) COLLECTIVE BARGAINING AGREEMENTS. This act first applies to an employee
 10 who is affected by a collective bargaining agreement that contains provisions
 11 inconsistent with this act on the day on which the collective bargaining agreement
 12 expires or is extended, modified, or renewed, whichever occurs first.

13 **SECTION 7. Effective dates.** This act takes effect on the first day of the 12th
 14 month beginning after publication, except as follows:

(A) TO REF 11A" (A) TO REF 11B" (1)

15 (1) RULE-MAKING. The ~~treatment~~ of SECTION (5) takes effect on the day after
 16 publication.

(END)

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-1714/1dn
GMM.....

Representative Vrakas:

In preparing this draft I relied heavily on a similar Florida law to flesh out the details of the points outlined in the drafting request. See s. 440.102, Fla. Stats., relating to drug-free workplace requirements. If you have any questions about this draft, please do not hesitate to contact me directly at the phone number or e-mail address listed below.

Gordon M. Malaise
Senior Legislative Attorney
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E-mail: gordon.malaise@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1714/1dn
GMM:kmg:jf

May 7, 2003

Representative Vrakas:

In preparing this draft I relied heavily on a similar Florida law to flesh out the details of the points outlined in the drafting request. See s. 440.102, Fla. Stats., relating to drug-free workplace requirements. If you have any questions about this draft, please do not hesitate to contact me directly at the phone number or e-mail address listed below.

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Comments/Questions
LRB 1595/1
Substance Abuse Testing on Prevailing Wage Projects

August 27, 2003

✓ Page 4, Line 1. } Division of State Facilities

DSF indicates that it does not presently have the authority to prevent contractors from submitting a bid but 16.855 does allow DSF the discretion of determining the "lowest qualified responsible bidder" as defined in Adm. 21.02. Adm. 21.02 does not presently include any provision related to substance abuse testing, though Article 11 (Substance Abuse Testing) of DSF's Instructions to Bidders does.

must submit w/bid
may not

✓ Page 5, Line 3. } DWD create form for all - state, muni., DOT

The form referenced by the bill can be a standard form adopted by the State, rather than have each agency and local governmental unit create and adopt its own form.

✓ Page 5, Line 7. } yes "municipality" defined 66.0901(1)(a)

Does "municipality" encompass all local governmental units subject to the State's prevailing wage law - school districts, sewage districts, etc.?

Page 7, Section (3). } employee free to reject job that requires testing

enforcement

An additional item should be included to describe for an employee the consequences of not complying with the law by failing to consent or failing to provide a sample. Failure to do either should not result in a positive test, but will make require the employee ineligible to work on the public sector project site until such time as a required test has been taken and the employee has a negative test result.

may not work on public works site
may work on other jobs

✓ Page 8, Line 20-23.

(b)(a)

Employees will not have a relationship with a testing lab *prior* to testing, so these calls may be seen as a nuisance to the testing lab. Rather, the bill should allow the employee to disclose this information at the time a sample is collected so that the Medical Review Officer, an employee of the testing lab, may use that information to determine whether or not a test is positive. As a practical matter, any such information disclosed by an employee will be confirmed by the MRO anyways, as this is part of the normal exchange of information between an employee and the MRO once a drug screen is positive, but prior to the time the test is actually deemed positive.

✓ Page 9, Section (4). (5) Procedures

The section is silent with regard to the selection of the testing clinic. The selection of a testing clinic is the responsibility of the employer. Such clinics should use the then current DHSS and NIDA testing protocols and guidelines. One of the guidelines is to split samples so that retesting of the original sample may be done. Retests are generally done at the employee's request and expense (reimbursed if results differ from the original test). Retests can be done at the same lab or at a different lab of the employee's choosing. *federal guidelines govern labs not DWD rules (certified)*

✓ Page 9, Section 4 (a).

The intent is not just to have been subject to random testing but that an employee's most recent drug and alcohol test resulted in a negative test.

✓ Page 9, Lines 8-10.

The necessity for the testing program to have required a test at the commencement of the program can be removed.

✓ Page 10, Lines 13-18.

This may go beyond the intent of the bill. The employment relationship is not at issue, only the integrity of the public sector construction site. Employee assistance for drug and alcohol abuse is a covered benefit under Wisconsin health insurance plans. There are free and low-cost public and non-profit programs available. Employees should certainly be made aware of such programs. There is no need to create a separate testing pool for those previously testing positive. The same random testing pool can be used for all employees on the project.

✓ Page 10, Lines 19-20.

The reference to "each year" is unclear. The bill should require testing to go on when there is work being done at a public sector construction site. The reference may be to the bill's allowing an exemption to site-specific testing where an employer has, for the previous twelve months, had its employees participate in a random testing pool that meets the requirements of the bill.

Page 11, Lines 12-16.

✓ Five working days is too long to provide a test result to an employee. "Immediately, but no later than the next working day," is preferred. There are huge liability concerns regarding an employer knowingly keeping an employee with a positive drug test on site for five days. Further, the bill should indicate that the employer "or its agent" shall provide a copy of the test result to the employee or applicant. In most testing programs, the employer is only told that the test is positive or negative, but does not actually receive a copy of the test, to maintain as much confidentiality as possible. The preference would really be toward having the testing lab/MRO or a third-party administrator (agent of the employer) provide actual test results.

☐ Also, it is unclear as to whether the employee can continue to work pending the results of the re-test or appeal. The preference is for a shorter time for appeal, that the employee be removed from the public sector project site, and reassigned by the employer. If the employee were terminated for lack of work and the test were to be returned negative, the employer would reinstate the employee with back wages.

Page 11, Lines 17-20.

Similarly, the decision of the MRO should be final, based on objective data and an interview with the employee. A confirmed, positive test constitutes a violation of the policy and the employer is ill equipped to grant such waivers regarding the efficacy of a test result.

✓ Page 12, Lines 17-23.

Can this be treated as paid, non-working time, not subject to payment of benefits and not subject to overtime provisions of the wage and hour laws? Training and travel pay are treated that way, for instance. *straight time*

✓ Page 13, Line 3-6.

The presumption of "for cause" discharge is already discussed under Unemployment Compensation. *= take out*

✓ Page 13, Lines 10-15.

The intent is unclear. *- separate issue = take out*

✓ Page 13, Lines 16-19.

The intent is unclear. *so cannot place physician-patient confidentiality*

✓ Page 14, Subsection (9).

While it may still be necessary to grant rule-making authority to DWD, much of the basic requirements of the bill can be spelled out. It is not necessary for DWD to contemplate known, accepted standards for drug and alcohol testing. For instance, a 5-panel drug test using urine sampling would be used. Any positive test must be confirmed using GSMS and must be reviewed by an MRO. Alcohol testing would be by breath alcohol analysis.

(5) Existing Procedures

NIDA and DHSS spell much of this out already and should be incorporated, by reference, into the bill.

✓ In addition, it is recommended that the bill spell out the random testing rate as 20 percent for each project and minimally 20 percent for programs meeting the requirements of the bill. Cut-off levels for drugs and alcohol would be determined to established to a confirmed, positive test.

✓ Page 15, Section 5, Subsection (1). = take out

Given the above comment, the necessity to establish a technical advisory committee and to establish a rule-making deadline, may be moot.

✓ Page 16, Lines 13-16. Impairment of k

While it is not the intention of the bill to cause the modification of collective bargaining agreement, inclusion of this provision would put off full implementation of the bill by as much as five years. In practice, collective bargaining agreements either contain substance abuse language or allow employers to adopt such rules as are necessary to meet the demands of their customers. That is, contractors operating under collective bargaining agreements can comply immediately, and many employees working under collective bargaining agreements *without* substance abuse testing language are already being tested.

Enforcement

see prevailing wage

A section on enforcement needs to be included in the bill.

- Employer sanctions for failing to comply. Look to the prevailing wage statute for guidance.
- Employee sanctions for failing to comply. For existing on-site employees, removal from public sector project site. Employee may return to site at such time as they have a confirmed, negative test. A second positive test while on the same project will result in removal from the project for the project's duration. For employees tested pre-hire for the project, access denied.
- Public sector sanctions for failing to comply.
- Enforcement by DWD by complaint and random checks of state and local governmental units.

*e.g. Fines
Debarment*

103.49(5)

(6a)

(7)

Malaise, Gordon

From: Jeff Beiriger [Jeff@pmsmca.com]
Sent: Thursday, August 28, 2003 2:32 PM
To: gordon.malaise@legis.state.wi.us
Subject: Substance Abuse Testing on Public Sector Projects

Gordon,

Thanks for meeting with us yesterday. We really appreciate the work you did on the first draft and your comments on the proposed changes for the second draft.

I promised you I'd send some contact information and the testing levels we use for our program. You'll find both below. In addition, we have one or two other things for your consideration.

The cut-off levels we use for the five-panel drug test are as follows:

	Initial/EMIT	Confirmation/GCMS
Amphetamines	1000 ng/mL	500 ng/mL
Cocaine Metabolites	300 ng/mL	150 ng/mL
Marijuana Metabolites	50 ng/mL	15 ng/mL
Opiates	2000 ng/mL	2000 ng/mL
Phencyclidine	25 ng/mL	25 ng/mL

For your consideration....

If you look at the policy we have in place for our trades, we require that employees who are doing return-to-work tests pay for such tests and do so on their own time. We think the bill draft should say the same, if possible. The reasoning is that marijuana metabolites, in particular, can remain in your system for up to 30 days. If an employee tests positive and then begins to take return-to-work tests at the employer's expense, you could be looking at twenty or thirty tests and hundreds of dollars. The MRO or an employee assistance program will help counsel the employee as to an appropriate time to take a return-to-work test. Of course, the employer could, voluntarily, choose to pay this expense on the employee's behalf, but that decision can be made by each employer. What we want to avoid is an abuse of the return-to-work testing provisions.

Also, we may want to discuss with Representative Vrakas and a few legislators the "two-strikes and you're out" provision - two failed tests and you are removed from the project for its duration. If we get any feedback that wants something either more or less punitive, we'll be in touch as soon as possible.

Any questions, give me a call. Thanks much.

Jeff

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