



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-0090/1  
GMM:wlj:rs

DATE

Week of 1/31 - Friday, please

2005 BILL

CP 8, 85

Regen

1 AN ACT to create 16.855 (9m), 66.0901 (10), 84.06 (2) (c) and 103.503 of the  
2 statutes; relating to: drug and alcohol testing of employees who are required  
3 to be paid the prevailing wage rate for work performed on projects of public  
4 works and providing a penalty.

**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 \$38,000 or more for a single-trade public works project or \$186,000 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 requires any person that bids for a contract to perform work on a public works project that is subject to the prevailing wage law (project) to submit with the bid a statement that the person has 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 and a statement from each subcontractor or agent that will be performing work on the project that the subcontractor or agent has in place, or will have in place, such a drug and alcohol testing program. The bill permits a contractor, subcontractor, or agent (employer) to contract with a third-party administrator to administer the employer's drug and alcohol testing program.

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

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project unless the employee has tested negative 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. After an employee begins work on a project, the employer may require the employee to 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, and must require the employee to submit to random testing, which is testing conducted randomly on not less than 20 percent of the employees participating in the random testing program according to objective, neutral, and nondiscriminatory criteria and spread out so that on any given day any given employee has an equal chance of being tested. The bill, however, excludes from testing under the bill any employee who under any other state or federal law is required to submit to testing that is at least as strict as the testing under the bill.

The bill defines a "drug" as amphetamines, cocaine, marijuana, opiates, or phencyclidine, or any other controlled substance, controlled substance analog, prescription drug, or nonprescription drug that the employer determines is subject to testing under the bill; requires, at a minimum, that employees be tested for amphetamines, cocaine, marijuana, opiates, phencyclidine, and alcohol; and specifies the minimum detection levels that constitute a positive test result.

The bill requires an employer or third-party administrator, 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 consequences of a refusal to submit to testing or of a verified positive test result, which is defined in the bill as an initial positive test result that has been confirmed by a second test and 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,

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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 confirmed positive test result to the medical review officer and may request a retest of a specimen that has tested positive by a laboratory chosen by the employee or applicant at the expense of the employee or applicant.

9. A statement that the employee or applicant, both before and after the test, may provide any information that is relevant to the test, including identification of any prescription or nonprescription drugs that the employee or applicant is currently using or has recently used and any other relevant medical information.

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 or third-party administrator must inform an employee or applicant of a verified positive test result, the consequences of the test result, and the options available to the employee or applicant, within one working day after the employer receives the test result; the employee or applicant may, within two working days after receiving that notice, request a retest of a specimen that tested positive by a laboratory chosen by the employee or applicant at the expense of the employee or applicant.

3. An employee or applicant may not be discharged, disciplined, or otherwise discriminated against based solely on an initial positive test result or a confirmed positive test result that has not been verified 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 retesting or additional testing requested by the employee or applicant, but not required by the employer, is at the expense of the employee or applicant, subject to reimbursement by the employer if the result of the retest or additional test is negative. The bill also provides that if the testing is conducted during an employee's regular work hours the employee shall be paid for the time lost from work at the employee's regular rate of pay, plus benefits, and if the testing is conducted outside of those hours the employee shall be paid for the time necessary to take the test at the employee's regular rate of pay, excluding benefits.

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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 employee or applicant who has a verified positive test result is not considered to be an individual with a disability for purposes of the law prohibiting discrimination in employment on the basis of disability.

2. 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.

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

4. An employer that has in place a drug and alcohol testing program that complies with the bill is immune from civil liability for any action taken in good faith based on a verified positive test result; any failure to test an employee or applicant for the presence of drugs or alcohol, for the presence of a specific drug, for any medical condition, or for any mental, emotional, or psychological condition; any failure to detect the presence of alcohol or any specific drug, any medical condition, or any mental, emotional, or psychological condition; or any decision to suspend or terminate a drug or alcohol testing program.

Finally, the bill specifies that an employee or applicant who fails to submit to testing as required under the bill or who is the subject of a verified positive test result may not be permitted to work on a project of public works that is subject to the prevailing wage law until the employee or applicant tests negative for the presence of drugs or alcohol in his or her system and that an employee who is the subject of more than one verified positive test result during the life of a project of public works that is subject to the prevailing wage law may not work on the project for the life of the project. An employer that knowingly permits an employee of the employer to work on a project of public works that is subject to the prevailing wage law in violation of the bill is subject to a fine of \$200 or imprisonment for not more than six months or both for each day of the violation and is subject to debarment from contracting with any state agency or local governmental unit for three years from the date of the violation.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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

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*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:

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1           16.855 (9m) The department shall require a bidder for a contract to perform  
2 construction work on a project of public works that is subject to s. 103.49 to submit  
3 with the bid all of the following:

4           (a) A statement on a form adopted by the department of workforce development  
5 that the bidder has in place, before any work on the project commences, a drug and  
6 alcohol testing program that complies with s. 103.503.

7           (b) A statement on a form adopted by the department of workforce development  
8 from each subcontractor or agent that will be performing work on the project that the  
9 subcontractor or agent has in place, or will have in place before any work on the  
10 project commences, a drug and alcohol testing program that complies with s.  
11 103.503.

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

13           **66.0901 (10) DRUG AND ALCOHOL TESTING REQUIREMENTS.** A municipality shall  
14 require a bidder for a public contract that is subject to s. 66.0903 to submit with the  
15 bid all of the following:

16           (a) A statement on a form adopted by the department of workforce development  
17 that the bidder has in place, or will have in place before any work under the public  
18 contract commences, a drug and alcohol testing program that complies with s.  
19 103.503.

20           (b) A statement on a form adopted by the department of workforce development  
21 a form adopted by the department of workforce development from each subcontractor  
22 or agent that will be performing work on the project that the subcontractor or agent  
23 has in place, or will have in place before any work on the project commences, a drug  
24 and alcohol testing program that complies with s. 103.503.

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

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1           84.06 (2) (c) The department of transportation or an agent under par. (b) shall  
2 require a bidder for a contract to perform construction work on a project of highway  
3 improvements that is subject to s. 103.50 to submit with the bid all of the following:

4           1. A statement on a form adopted by the department of workforce development  
5 that the bidder has in place, or will have in place before any work on the project  
6 commences, a drug and alcohol testing program that complies with s. 103.503.

7           2. A statement on a form adopted by the department of workforce development  
8 from each subcontractor or agent that will be performing work on the project that the  
9 subcontractor or agent has in place, or will have in place before any work on the  
10 project commences, a drug and alcohol testing program that complies with s.  
11 103.503.

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

13           **103.503 Drug-free public works projects. (1) DEFINITIONS.** In this section:

14           (a) “Alcohol” has the meaning given in s. 340.01 (1q).

15           (b) “Applicant” means a person who has applied for and been offered a position  
16 as an employee with an employer conditioned on successfully passing a test for the  
17 presence of drugs or alcohol in the person’s system.

18           (c) “Certified laboratory” means a laboratory that is certified by the substance  
19 abuse and mental health services administration of the federal department of health  
20 and human services to engage in drug testing for federal agencies.

21           (d) “Confirmatory test” means a test by a gas chromatography/mass  
22 spectrometry testing procedure of a urine specimen conducted after an initial  
23 screening test.

24           (e) “Confirmed positive test result” means a finding by a confirmatory test of  
25 the presence in the tested urine of any of the drugs or their metabolites specified in

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1 sub. (6) (a) to (e) at or above the minimum detection level specified in sub. (6) (a) 2.,  
2 (b) 2., (c) 2., (d) 2., or (e) 2.

3 (f) "Drug" means any of the drugs or their metabolites specified in sub. (6) (a)  
4 to (e) or any other controlled substance, as defined in s. 961.01 (4), controlled  
5 substance analog, as defined in s. 961.01 (4m), prescription drug, as defined in s.  
6 450.01 (20), or drug, as defined in s. 450.01 (10), that may be dispensed without a  
7 prescription, for which testing is required by an employer under its drug and alcohol  
8 testing program under this section.

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

12 (h) "Employer" means a contractor, subcontractor, or agent of a contractor or  
13 subcontractor that performs work on a project of public works that is subject to s.  
14 66.0903, 103.49, or 103.50.

15 (i) "Initial positive test result" means a finding by an initial screening test of  
16 the presence in the tested urine of any of the drugs or their metabolites specified in  
17 sub. (6) (a) to (e) at or above the minimum detection level specified in sub. (6) (a) 1.,  
18 (b) 1., (c) 1., (d) 1., or (e) 1.

19 (j) "Initial screening test" means a test by an immunoassay procedure of a urine  
20 specimen.

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

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(n) Working day means each day except Saturdays, Sunday, or a legal holiday under 4089.50200

**SECTION 4**

1 (L) "Third-party administrator" means a person contracted by an employer,  
2 either directly or in cooperation with other employers or organizations, to administer  
3 the drug and alcohol testing program of the employer under this section.

4 (m) "Verified positive test result" means a confirmed positive test result that  
5 has been verified by a medical review officer.

6 (2) TESTING REQUIRED. (a) Any person that bids for a contract to perform work  
7 on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 shall  
8 submit with the bid all of the following:

9 1. A statement on a form adopted by the department that the person has in  
10 place, or will have in place before any work on the project commences, a drug and  
11 alcohol testing program that complies with this section.

12 2. A statement on a form adopted by the department from each subcontractor  
13 or agent that will be performing work on the project that the subcontractor or agent  
14 has in place, or will have in place before any work on the project commences, a drug  
15 and alcohol testing program that complies with this section.

16 (b) An employer may contract with a 3rd-party administrator to administer the  
17 employer's drug and alcohol testing program under this section.

18 (3) NOTICE TO EMPLOYEES AND APPLICANTS. (a) Before an employee or applicant  
19 is tested for the presence of drugs or alcohol, an employer or 3rd-party administrator  
20 shall provide the employee or applicant with a written policy statement that contains  
21 all of the following:

22 1. A general statement of the employer's policy concerning employee drug or  
23 alcohol use, which statement shall include the circumstances under sub. (4) under  
24 which an employee or applicant may be required to submit to testing and the  
25 consequences of a verified positive test result or of a refusal to submit to testing.



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1           2. A statement that the employer is required under sub. (2) to have in place a  
2 drug and alcohol testing program as a condition for performing work on a project of  
3 public works that is subject to s. 66.0903, 103.49, or 103.50.

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

6           4. A description of the procedures specified in sub. (6) under which the testing  
7 is conducted and the employee protections specified in sub. (7).

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

10          6. A statement concerning the confidentiality of information relating to a test  
11 as provided in sub. (9).

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

15          8. A statement that an employee or applicant who receives a confirmed positive  
16 test result may challenge or explain the result to the medical review officer within  
17 2 working days after receiving notification of the test result; that, if the explanation  
18 is unsatisfactory to the medical review officer, the medical review officer will report  
19 the test result to the employer; and that the employee or applicant may, within 2  
20 working days after receiving that notice, request a retest of the specimen that tested  
21 positive by a certified laboratory chosen by the employee or applicant at the expense  
22 of the employee or applicant.

23          9. A statement that the employee or applicant, both before and after testing,  
24 shall be given the opportunity to provide any information that he or she considers  
25 relevant to the test, including identification of any prescription drugs or

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1 nonprescription drugs that he or she is currently using or has recently used or any  
2 other relevant medical information.

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

9 (4) WHEN TESTING REQUIRED. (a) An employer may not permit an employee to  
10 work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 unless  
11 the employee has tested negative for the presence of drugs or alcohol in the  
12 employee's system not more than 12 months preceding the date on which the  
13 employee commences work on the project or unless during those 12 months the  
14 employee has been participating in a random testing program under which not less  
15 than 20 percent of the participants in the program are randomly tested without  
16 warning during each 12-month period, participants are selected for testing  
17 according to objective, neutral, and nondiscriminatory criteria, and testing is spread  
18 out so that on any given day any given participant has an equal chance of being  
19 tested.

20 (b) After an employee begins work on a project of public works that is subject  
21 to s. 66.0903, 103.49, or 103.50, the employer may require the employee to submit  
22 to reasonable-suspicion testing if the employer has a reasonable belief, based on  
23 specific objective and articulable facts and reasonable inferences drawn from those  
24 facts, that the employee is using or has used drugs or alcohol in violation of the  
25 employer's policy. Those facts and inferences may be based on any of the following:

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

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

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

7           4. Evidence that the employee has tampered with a drug test during his or her  
8 employment with the employer or after receiving an offer of employment with the  
9 employer.

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

12          6. Evidence that the employee has used, possessed, attempted to possess,  
13 distributed, or delivered drugs or alcohol while at work, while on the employer's  
14 premises or on the site of the project of public works that is subject to s. 66.0903,  
15 103.49, or 103.50, or while operating the employer's vehicles, machinery, or  
16 equipment.

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

19          (c) After an employee begins work on a project of public works that is subject  
20 to s. 66.0903, 103.49, or 103.50, the employer shall require the employee to submit  
21 to random testing. During the life of the project, employees employed on the project  
22 who are participants in a random testing program described in par. (a) shall be tested  
23 as provided in par. (a). During the life of the project, not less than 20 percent of the  
24 employees employed on the project who are not participants in a random testing  
25 program described in par. (a) shall be randomly tested as provided in this paragraph.

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1 Employees tested under this paragraph shall be selected for random testing  
2 according to objective, neutral, and nondiscriminatory criteria, and the testing shall  
3 be spread out throughout the life of the project so that on any given day any given  
4 employee has an equal chance of being tested. Testing under this paragraph shall  
5 be conducted without prior warning.

6 (5) NONAPPLICABILITY. An employee or applicant who under any other state or  
7 federal law is required to submit to random drug and alcohol testing that is at least  
8 as strict as the testing required under this section is not required to submit to testing  
9 under this section.

10 (6) TESTING PROCEDURE. Testing under this section shall be performed by a  
11 certified laboratory selected by the employer or 3rd-party administrator and shall  
12 be conducted in accordance with scientific and technical guidelines established by  
13 the substance abuse and mental health services administration of the federal  
14 department of health and human services for those certified laboratories. At a  
15 minimum, an employee or applicant shall be tested for all of the following:

16 (a) Amphetamines, with the following minimum detection levels constituting  
17 a positive test result:

18 1. A level of 1,000 nanograms per milliliter constituting an initial positive test  
19 result.

20 2. A level of 500 nanograms per milliliter constituting a confirmed positive test  
21 result.

22 (b) Cocaine metabolites, with the following minimum detection levels  
23 constituting a positive test result:

24 1. A level of 300 nanograms per milliliter constituting an initial positive test  
25 result.

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1           2. A level of 150 nanograms per milliliter constituting a confirmed positive test  
2 result.

3           (c) Marijuana metabolites, with the following minimum detection levels  
4 constituting a positive test result:

5           1. A level of 50 nanograms per milliliter constituting an initial positive test  
6 result.

7           2. A level of 15 nanograms per milliliter constituting a confirmed positive test  
8 result.

9           (d) Opiates, with the following minimum detection levels constituting a  
10 positive test result:

11           1. A level of 2,000 nanograms per milliliter constituting an initial positive test  
12 result.

13           2. A level of 2,000 nanograms per milliliter constituting a confirmed positive  
14 test result.

15           (e) Phencyclidine, with the following minimum detection levels constituting a  
16 positive test result:

17           1. A level of 25 nanograms per milliliter constituting an initial positive test  
18 result.

19           2. A level of 25 nanograms per milliliter constituting a confirmed positive test  
20 result.

21           (f) Alcohol, with an alcohol concentration of the amount specified in s. 885.235  
22 (1g) (d) or more constituting a positive test result, as determined by an analysis of  
23 a breath specimen provided by the employee or applicant.

24           **(7) EMPLOYEE PROTECTION.** (a) Both before and after testing, an employee or  
25 applicant shall be given the opportunity to provide any information that he or she

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1 considers relevant to the test, including identification of any prescription drugs or  
2 nonprescription drugs that he or she is currently using or has recently used or any  
3 other relevant medical information.

4 (b) Within one working day after receipt of a verified positive test result, the  
5 employer or 3rd-party administrator shall inform the employee or applicant in  
6 writing of the test result, the consequences of the test result, and the options  
7 available to the employee or applicant. On request, the 3rd-party administrator or  
8 medical review officer shall provide a copy of the test result to the employee or  
9 applicant.

10 (c) Within 2 working days after receiving a verified positive test result, the  
11 employee or applicant may request a retest of the specimen that tested positive by  
12 a certified laboratory chosen by the employee or applicant. The employee or  
13 applicant shall pay the cost of any retesting requested by the employee or applicant,  
14 but not required by the employer, subject to reimbursement by the employer if the  
15 result of the retest is negative.

16 (d) An employer may not discharge, discipline, refuse to hire, or otherwise  
17 discriminate against an employee or applicant based solely on an initial positive test  
18 result or a confirmed positive test result that has not been verified by a medical  
19 review officer.

20 (e) If testing is conducted based on reasonable suspicion under sub. (4) (b), the  
21 employer shall document in writing the circumstances on which that reasonable  
22 suspicion is based and, on request, shall provide a copy of that documentation to the  
23 employee. The employer shall retain a copy of that documentation for not less than  
24 one year.

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1           (f) Any test of an employee conducted under this section shall occur  
2 immediately before, during, or immediately after the regular work period of the  
3 employee. If the test is conducted during an employee's regular work period, the  
4 employee shall be paid for the time lost from work at the employee's hourly basic rate  
5 of pay, as defined in s. 103.49 (1) (b), plus the hourly contribution for health insurance  
6 benefits, vacation benefits, pension benefits, and any other bona fide economic  
7 benefits payable to the employee. If the test is conducted outside the employee's  
8 regular work period, the employee shall be paid for the time necessary to take the  
9 test, including reasonable travel time, at the employee's hourly basic rate of pay. The  
10 employer shall pay the cost of all testing under this section required by the employer.  
11 The employee or applicant shall pay the cost of any retesting or additional testing  
12 requested by the employee or applicant, but not required by the employer, subject to  
13 reimbursement by the employer if the result of the retest or additional test is  
14 negative.

15           **(8) EMPLOYER PROTECTION.** (a) An employee or applicant who has a verified  
16 positive test result is not considered to be an individual with a disability, as defined  
17 in s. 111.32 (8).

18           (b) This section does not prohibit an employer from establishing and enforcing  
19 reasonable work rules relating to the use, possession, distribution, or delivery of  
20 drugs or alcohol in the workplace.

21           (c) The establishment, implementation, or administration of a testing program  
22 under this section does not create a physician-patient relationship between an  
23 employee or applicant and the employer, a 3rd-party administrator, a medical  
24 review officer, or any other person conducting or evaluating a test under this section.

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1 (d) No cause of action of any nature may arise against and no civil liability may  
2 be imposed upon an employer that has in place a drug and alcohol testing program  
3 that complies with this section for any of the following:

4 1. Any action taken in good faith based on a verified positive test result.

5 2. Any failure to test an employee or applicant for the presence of drugs or  
6 alcohol, for the presence of a specific drug, for any medical condition, or for any  
7 mental, emotional, or psychological condition.

8 3. Any failure to detect the presence of alcohol or any specific drug, any medical  
9 condition, or any mental, emotional, or psychological condition.

10 4. Any decision to suspend or terminate a drug or alcohol testing program.

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

14 1. On the specific written consent of the employee or applicant who is the  
15 subject of the test. That consent shall state the name of the person who is authorized  
16 to obtain the information, the purpose of the disclosure, the precise information to  
17 be disclosed, and the duration of the consent and shall be signed by the person  
18 authorizing the disclosure.

19 2. On the order of a court, hearing examiner, arbitrator, or other decision maker  
20 for purposes of a court proceeding, administrative proceeding, grievance proceeding,  
21 or any other proceeding arising out of an adverse employment action taken as a  
22 result of a test conducted under this section.

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



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

5 (10) COMPLIANCE. (a) When the department finds that an employer is not in  
6 compliance with this section, the department shall notify the employer and the state  
7 agency or local governmental unit authorizing the work of the noncompliance and  
8 shall file the determination with the employer and the state agency or local  
9 governmental unit within 30 days after the date of that notice.

10 (b) Upon completion of a project and before receiving final payment for his or  
11 her work on the project, each agent or subcontractor shall furnish the contractor with  
12 an affidavit stating that the agent or subcontractor has complied fully with the  
13 requirements of this section. A contractor may not authorize final payment until the  
14 affidavit is filed in proper form and order.

15 (c) Upon completion of a project and before receiving final payment for his or  
16 her work on the project, each contractor shall file with the state agency or local  
17 governmental unit authorizing the work an affidavit stating that the contractor has  
18 complied fully with the requirements of this section and that the contractor has  
19 received an affidavit under par. (b) from each of the contractor's agents and  
20 subcontractors. A state agency or local governmental unit may not authorize a final  
21 payment until the affidavit is filed in proper form and order. An employer that  
22 knowingly permits an employee of the employer to work on a project of public works  
23 that is subject to s. 66.0903, 103.49, or 103.50 in violation of this section is subject  
24 to the penalties specified in sub. (12) and to debarment under sub. (13).

**BILL**

1           **(11) RECORDS; INSPECTION; ENFORCEMENT.** (a) Each employer shall keep full and  
2 accurate records documenting the employer's compliance with this section. The  
3 department or a contracting local governmental unit under s. 66.0903 may demand  
4 and examine, and every employer shall keep, and furnish upon request by the  
5 department or local governmental unit, copies of all records and information relating  
6 to the employer's compliance with this section. The department may inspect records  
7 in the manner provided in this chapter, and every employer is subject to the  
8 requirements of this chapter relating to the examination of records.

9           (b) If requested by any employee or representative of an employee, the  
10 department shall inspect the records of any employer to ensure compliance with this  
11 section. A request under this paragraph shall specify the types of records requested.  
12 If the employer subject to the inspection is found to be in compliance and if the person  
13 making the request is an employee, the department shall charge the person making  
14 the request the actual cost of the inspection. If the employer subject to the inspection  
15 is found to be in compliance and if the person making the request is a representative  
16 of an employee, the department shall charge the person making the request \$250 or  
17 the actual cost of the inspection, whichever is greater.

18           **(12) NONCOMPLIANCE; PENALTIES.** (a) An employee or applicant who refuses to  
19 submit to testing as required under this section or who is the subject of a verified  
20 positive test result may not be permitted to work on a project of public works that is  
21 subject to s. 66.0903, 103.49, or 103.50 until the employee or applicant tests negative  
22 for the presence of drugs or alcohol in his or her system. An employee who is the  
23 subject of more than one verified positive test result during the life of a project of  
24 public works that is subject to s. 66.0903, 103.49, or 103.50 may not work on the  
25 project for the life of the project.

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1 (b) Any employer that knowingly permits an employee of the employer to work  
2 on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation  
3 of this section may be fined not more than \$200 or imprisoned for not more than 6  
4 months or both. Each day that a violation continues is a separate offense.

5 (13) DEPARTMENT. (a) Except as provided under pars. (b) and (c), the department  
6 shall distribute to all state agencies a list of all persons whom the department has  
7 found to have knowingly permitted an employee of the person to work on a project  
8 of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation of this  
9 section at any time in the preceding 3 years and shall notify any local governmental  
10 unit applying for a determination under s. 66.0903 (3) or exempted under s. 66.0903  
11 (6) of the names of those persons. The department shall include with any name the  
12 address of the person and shall specify the date of the violation. A state agency or  
13 local governmental unit may not award any contract to the person unless otherwise  
14 recommended by the department or unless 3 years have elapsed from the date on  
15 which the department issued its findings or date of final determination by a court of  
16 competent jurisdiction, whichever is later.

17 (b) The department may not include in a notification under par. (a) the name  
18 of any person on the basis of having let work to a person whom the department has  
19 found to have knowingly permitted an employee of the person to work on a project  
20 of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation of this  
21 section.

22 (c) This subsection does not apply to any employer that in good faith commits  
23 a minor violation of this section, as determined on a case-by-case basis through  
24 administrative hearings with all rights to due process afforded to all parties, or that  
25 has not exhausted or waived all appeals.

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1 (d) Any person submitting a bid on a project that is subject to s. 66.0903, 103.49,  
2 or 103.50 shall, on the date on which the person submits the bid, identify any  
3 construction business in which the person, or a shareholder, officer, or partner of the  
4 person, if the person is a business, owns, or has owned, at least a 25 percent interest  
5 on the date on which the person submits the bid or at any other time within 3 years  
6 preceding the date on which the person submits the bid, if the business has been  
7 found to have knowingly permitted an employee of the business to work on a project  
8 of public works that is subject to s. 66.0903, 103.49, or 103.50 in violation of this  
9 section.

10 (14) LOCAL ORDINANCES; STRICT CONFORMITY REQUIRED. A local governmental  
11 unit may enact an ordinance requiring an employee or applicant to submit to drug  
12 and alcohol testing only if the ordinance strictly conforms to this section.

**SECTION 5. Nonstatutory provisions.**

14 (1) TRANSITIONAL PROVISIONS. An employer that is required under section  
15 103.503 (2) of the statutes, as created by this act, to have, but that does not have, a  
16 drug and alcohol testing program in place on the effective date of this subsection shall  
17 provide notice to all of its employees that a drug and alcohol testing program is being  
18 implemented and may not begin actual drug and alcohol testing until 60 days after  
19 the date of the notice. An employer that has a drug and alcohol testing program in  
20 place on the effective date of this subsection is not required to provide notice under  
21 this subsection.

**SECTION 6. Initial applicability.**

23 (1) COLLECTIVE BARGAINING AGREEMENTS. This act first applies to an employee  
24 who is affected by a collective bargaining agreement that contains provisions

**BILL**

1 inconsistent with this act on the day on which the collective bargaining agreement  
2 expires or is extended, modified, or renewed, whichever occurs first.

3 **SECTION 7. Effective date.**

4 (1) This act takes effect on the first day of the 19th month beginning after  
5 publication.

6 (END)

NOTE

Representative Stone

Working day is defined at several places in the statutes  
as each day except Saturdays, Sundays, or a legal holiday.

See, e.g., 350.095 (1)(c), 1750.35 (1)(c), 1820.075 (1)(d),  
2270.01 (14) and 345.48 (1).

Accordingly, this redraft creates a  
similar definition at 103.503 (1)(n), as created by the draft.

GMM ✓

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

LRB-0090/2dn  
GMM:wlj:jf

February 4, 2005

Representative Stone:

“Working day” is defined at several places in the statutes as each day except Saturday, Sunday, or a legal holiday. See, e.g. ss. 35.095 (1) (c), 175.35 (1) (c), 182.0175 (1) (d), 227.01 (14), and 345.48 (1). Accordingly, this redraft creates a similar definition at s. 103.503 (1) (n), as created by the draft.

Gordon M. Malaise  
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13

7/6/05

Marsha Dake

- Take out coverage of highway projects

- Apply only to state & local public works projects





State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-0090/2

GMM:wlj:ff

500

3  
RMR

2005 BILL

Other than state highway projects

Regenerate

1 AN ACT to create 16.855 (9m), 66.0901 (10), 84.06 (2) (c) and 103.503 of the  
2 statutes; relating to: drug and alcohol testing of employees who are required  
3 to be paid the prevailing wage rate for work performed on projects of public  
4 works and providing a penalty.

Other than a state highway project

**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 \$38,000 or more for a single-trade public works project or \$186,000 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 requires any person that bids for a contract to perform work on a public works project that is subject to the prevailing wage law (project) to submit with the bid a statement that the person has 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 and a statement from each subcontractor or agent that will be performing work on the project that the subcontractor or agent has in place, or will have in place, such a drug and alcohol testing program. The bill permits a contractor, subcontractor, or agent (employer) to contract with a third-party administrator to administer the employer's drug and alcohol testing program.

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



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project unless the employee has tested negative 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. After an employee begins work on a project, the employer may require the employee to 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, and must require the employee to submit to random testing, which is testing conducted randomly on not less than 20 percent of the employees participating in the random testing program according to objective, neutral, and nondiscriminatory criteria and spread out so that on any given day any given employee has an equal chance of being tested. The bill, however, excludes from testing under the bill any employee who under any other state or federal law is required to submit to testing that is at least as strict as the testing under the bill.

The bill defines a "drug" as amphetamines, cocaine, marijuana, opiates, or phencyclidine, or any other controlled substance, controlled substance analog, prescription drug, or nonprescription drug that the employer determines is subject to testing under the bill; requires, at a minimum, that employees be tested for amphetamines, cocaine, marijuana, opiates, phencyclidine, and alcohol; and specifies the minimum detection levels that constitute a positive test result.

The bill requires an employer or third-party administrator, 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 consequences of a refusal to submit to testing or of a verified positive test result, which is defined in the bill as an initial positive test result that has been confirmed by a second test and 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,

**BILL**

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 confirmed positive test result to the medical review officer and may request a retest of a specimen that has tested positive by a laboratory chosen by the employee or applicant at the expense of the employee or applicant.

9. A statement that the employee or applicant, both before and after the test, may provide any information that is relevant to the test, including identification of any prescription or nonprescription drugs that the employee or applicant is currently using or has recently used and any other relevant medical information.

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 or third-party administrator must inform an employee or applicant of a verified positive test result, the consequences of the test result, and the options available to the employee or applicant, within one working day after the employer receives the test result; the employee or applicant may, within two working days after receiving that notice, request a retest of a specimen that tested positive by a laboratory chosen by the employee or applicant at the expense of the employee or applicant.

3. An employee or applicant may not be discharged, disciplined, or otherwise discriminated against based solely on an initial positive test result or a confirmed positive test result that has not been verified 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 retesting or additional testing requested by the employee or applicant, but not required by the employer, is at the expense of the employee or applicant, subject to reimbursement by the employer if the result of the retest or additional test is negative. The bill also provides that if the testing is conducted during an employee's regular work hours the employee shall be paid for the time lost from work at the employee's regular rate of pay, plus benefits, and if the testing is conducted outside of those hours the employee shall be paid for the time necessary to take the test at the employee's regular rate of pay, excluding benefits.

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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 employee or applicant who has a verified positive test result is not considered to be an individual with a disability for purposes of the law prohibiting discrimination in employment on the basis of disability.

2. 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.

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

4. An employer that has in place a drug and alcohol testing program that complies with the bill is immune from civil liability for any action taken in good faith based on a verified positive test result; any failure to test an employee or applicant for the presence of drugs or alcohol, for the presence of a specific drug, for any medical condition, or for any mental, emotional, or psychological condition; any failure to detect the presence of alcohol or any specific drug, any medical condition, or any mental, emotional, or psychological condition; or any decision to suspend or terminate a drug or alcohol testing program.

Finally, the bill specifies that an employee or applicant who fails to submit to testing as required under the bill or who is the subject of a verified positive test result may not be permitted to work on a project ~~of public works that is subject to the prevailing wage law~~ until the employee or applicant tests negative for the presence of drugs or alcohol in his or her system and that an employee who is the subject of more than one verified positive test result during the life of a project ~~of public works that is subject to the prevailing wage law~~ may not work on the project for the life of the project. An employer that knowingly permits an employee of the employer to work on a project ~~of public works that is subject to the prevailing wage law~~ in violation of the bill is subject to a fine of \$200 or imprisonment for not more than six months or both for each day of the violation and is subject to debarment from contracting with any state agency or local governmental unit for three years from the date of the violation.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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

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*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:

**BILL**

1           16.855 (9m) The department shall require a bidder for a contract to perform  
2 construction work on a project of public works that is subject to s. 103.49 to submit  
3 with the bid all of the following:

4           (a) A statement on a form adopted by the department of workforce development  
5 that the bidder has in place, before any work on the project commences, a drug and  
6 alcohol testing program that complies with s. 103.503.

7           (b) A statement on a form adopted by the department of workforce development  
8 from each subcontractor or agent that will be performing work on the project that the  
9 subcontractor or agent has in place, or will have in place before any work on the  
10 project commences, a drug and alcohol testing program that complies with s.  
11 103.503.

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

13           66.0901 (10) DRUG AND ALCOHOL TESTING REQUIREMENTS. A municipality shall  
14 require a bidder for a public contract that is subject to s. 66.0903 to submit with the  
15 bid all of the following:

16           (a) A statement on a form adopted by the department of workforce development  
17 that the bidder has in place, or will have in place before any work under the public  
18 contract commences, a drug and alcohol testing program that complies with s.  
19 103.503.

20           (b) A statement on a form adopted by the department of workforce development  
21 a form adopted by the department of workforce development from each subcontractor  
22 or agent that will be performing work on the project that the subcontractor or agent  
23 has in place, or will have in place before any work on the project commences, a drug  
24 and alcohol testing program that complies with s. 103.503.

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

**BILL****SECTION 3**

1 ~~84.06 (2) (c) The department of transportation or an agent under par. (b) shall~~  
2 ~~require a bidder for a contract to perform construction work on a project of highway~~  
3 ~~improvements that is subject to s. 103.50 to submit with the bid all of the following:~~

4 ~~1. A statement on a form adopted by the department of workforce development~~  
5 ~~that the bidder has in place, or will have in place before any work on the project~~  
6 ~~commences, a drug and alcohol testing program that complies with s. 103.503.~~

7 ~~2. A statement on a form adopted by the department of workforce development~~  
8 ~~from each subcontractor or agent that will be performing work on the project that the~~  
9 ~~subcontractor or agent has in place, or will have in place before any work on the~~  
10 ~~project commences, a drug and alcohol testing program that complies with s.~~

11 ~~103.503.~~

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

13 **103.503 Drug-free public works projects. (1) DEFINITIONS.** In this section:

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

15 (b) "Applicant" means a person who has applied for and been offered a position  
16 as an employee with an employer conditioned on successfully passing a test for the  
17 presence of drugs or alcohol in the person's system.

18 (c) "Certified laboratory" means a laboratory that is certified by the substance  
19 abuse and mental health services administration of the federal department of health  
20 and human services to engage in drug testing for federal agencies.

21 (d) "Confirmatory test" means a test by a gas chromatography/mass  
22 spectrometry testing procedure of a urine specimen conducted after an initial  
23 screening test.

24 (e) "Confirmed positive test result" means a finding by a confirmatory test of  
25 the presence in the tested urine of any of the drugs or their metabolites specified in

**BILL**

1 sub. (6) (a) to (e) at or above the minimum detection level specified in sub. (6) (a) 2.,  
2 (b) 2., (c) 2., (d) 2., or (e) 2.

3 (f) "Drug" means any of the drugs or their metabolites specified in sub. (6) (a)  
4 to (e) or any other controlled substance, as defined in s. 961.01 (4), controlled  
5 substance analog, as defined in s. 961.01 (4m), prescription drug, as defined in s.  
6 450.01 (20), or drug, as defined in s. 450.01 (10), that may be dispensed without a  
7 prescription, for which testing is required by an employer under its drug and alcohol  
8 testing program under this section.

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

12 (h) "Employer" means a contractor, subcontractor, or agent of a contractor or  
13 subcontractor that performs work on a project of public works that is subject to s.  
14 66.0903, 103.49, or 103.50.

15 (i) "Initial positive test result" means a finding by an initial screening test of  
16 the presence in the tested urine of any of the drugs or their metabolites specified in  
17 sub. (6) (a) to (e) at or above the minimum detection level specified in sub. (6) (a) 1.,  
18 (b) 1., (c) 1., (d) 1., or (e) 1.

19 (j) "Initial screening test" means a test by an immunoassay procedure of a urine  
20 specimen.

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

→ (9) (L) project means a project of public works that is  
subject to s. 66.0903 or 103.49

## BILL

1) (M) (L) "Third-party administrator" means a person contracted by an employer,  
2 either directly or in cooperation with other employers or organizations, to administer  
3 the drug and alcohol testing program of the employer under this section.

4) (N) (M) "Verified positive test result" means a confirmed positive test result that  
5 has been verified by a medical review officer.

6) (O) (N) "Working day" means each day except Saturday, Sunday, or a legal holiday  
7 under s. 895.20.

8 (2) TESTING REQUIRED. (a) Any person that bids for a contract to perform work  
9 on a project ~~of public works that is subject to s. 66.0903, 103.49, or 103.50~~ shall  
10 submit with the bid all of the following:

11 1. A statement on a form adopted by the department that the person has in  
12 place, or will have in place before any work on the project commences, a drug and  
13 alcohol testing program that complies with this section.

14 2. A statement on a form adopted by the department from each subcontractor  
15 or agent that will be performing work on the project that the subcontractor or agent  
16 has in place, or will have in place before any work on the project commences, a drug  
17 and alcohol testing program that complies with this section.

18 (b) An employer may contract with a 3rd-party administrator to administer the  
19 employer's drug and alcohol testing program under this section.

20 (3) NOTICE TO EMPLOYEES AND APPLICANTS. (a) Before an employee or applicant  
21 is tested for the presence of drugs or alcohol, an employer or 3rd-party administrator  
22 shall provide the employee or applicant with a written policy statement that contains  
23 all of the following:

24 1. A general statement of the employer's policy concerning employee drug or  
25 alcohol use, which statement shall include the circumstances under sub. (4) under

**BILL**

1 which an employee or applicant may be required to submit to testing and the  
2 consequences of a verified positive test result or of a refusal to submit to testing.

3 2. A statement that the employer is required under sub. (2) to have in place a  
4 drug and alcohol testing program as a condition for performing work on a project of  
5 ~~public works that is subject to s. 66.0903, 103.49, or 103.50.~~ ←

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

8 4. A description of the procedures specified in sub. (6) under which the testing  
9 is conducted and the employee protections specified in sub. (7).

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

12 6. A statement concerning the confidentiality of information relating to a test  
13 as provided in sub. (9).

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

17 8. A statement that an employee or applicant who receives a confirmed positive  
18 test result may challenge or explain the result to the medical review officer within  
19 2 working days after receiving notification of the test result; that, if the explanation  
20 is unsatisfactory to the medical review officer, the medical review officer will report  
21 the test result to the employer; and that the employee or applicant may, within 2  
22 working days after receiving that notice, request a retest of the specimen that tested  
23 positive by a certified laboratory chosen by the employee or applicant at the expense  
24 of the employee or applicant.



**BILL****SECTION 4**

1           9. A statement that the employee or applicant, both before and after testing,  
2 shall be given the opportunity to provide any information that he or she considers  
3 relevant to the test, including identification of any prescription drugs or  
4 nonprescription drugs that he or she is currently using or has recently used or any  
5 other relevant medical information.

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

12           (4) WHEN TESTING REQUIRED. (a) An employer may not permit an employee to  
13 work on a project of public works that is subject to s. 66.0903, 103.49, or 103.50 unless  
14 the employee has tested negative for the presence of drugs or alcohol in the  
15 employee's system not more than 12 months preceding the date on which the  
16 employee commences work on the project or unless during those 12 months the  
17 employee has been participating in a random testing program under which not less  
18 than 20 percent of the participants in the program are randomly tested without  
19 warning during each 12-month period, participants are selected for testing  
20 according to objective, neutral, and nondiscriminatory criteria, and testing is spread  
21 out so that on any given day any given participant has an equal chance of being  
22 tested.

23           (b) After an employee begins work on a project of public works that is subject  
24 to s. 66.0903, 103.49, or 103.50, the employer may require the employee to submit  
25 to reasonable-suspicion testing if the employer has a reasonable belief, based on

**BILL**

1 specific objective and articulable facts and reasonable inferences drawn from those  
2 facts, that the employee is using or has used drugs or alcohol in violation of the  
3 employer's policy. Those facts and inferences may be based on any of the following:

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

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

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

10 4. Evidence that the employee has tampered with a drug test during his or her  
11 employment with the employer or after receiving an offer of employment with the  
12 employer.

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

15 6. Evidence that the employee has used, possessed, attempted to possess,  
16 distributed, or delivered drugs or alcohol while at work, while on the employer's  
17 premises or on the site of the project of public works that is subject to s. 66.0903,

18 ~~103.49, or 103.50,~~ or while operating the employer's vehicles, machinery, or  
19 equipment.

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

22 (c) After an employee begins work on a project of public works that is subject  
23 to s. 66.0903, ~~103.49, or 103.50,~~ the employer shall require the employee to submit  
24 to random testing. During the life of the project, employees employed on the project  
25 who are participants in a random testing program described in par. (a) shall be tested

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1 as provided in par. (a). During the life of the project, not less than 20 percent of the  
2 employees employed on the project who are not participants in a random testing  
3 program described in par. (a) shall be randomly tested as provided in this paragraph.  
4 Employees tested under this paragraph shall be selected for random testing  
5 according to objective, neutral, and nondiscriminatory criteria, and the testing shall  
6 be spread out throughout the life of the project so that on any given day any given  
7 employee has an equal chance of being tested. Testing under this paragraph shall  
8 be conducted without prior warning.

9 (5) NONAPPLICABILITY. An employee or applicant who under any other state or  
10 federal law is required to submit to random drug and alcohol testing that is at least  
11 as strict as the testing required under this section is not required to submit to testing  
12 under this section.

13 (6) TESTING PROCEDURE. Testing under this section shall be performed by a  
14 certified laboratory selected by the employer or 3rd-party administrator and shall  
15 be conducted in accordance with scientific and technical guidelines established by  
16 the substance abuse and mental health services administration of the federal  
17 department of health and human services for those certified laboratories. At a  
18 minimum, an employee or applicant shall be tested for all of the following:

19 (a) Amphetamines, with the following minimum detection levels constituting  
20 a positive test result:

21 1. A level of 1,000 nanograms per milliliter constituting an initial positive test  
22 result.

23 2. A level of 500 nanograms per milliliter constituting a confirmed positive test  
24 result.

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1 (b) Cocaine metabolites, with the following minimum detection levels  
2 constituting a positive test result:

3 1. A level of 300 nanograms per milliliter constituting an initial positive test  
4 result.

5 2. A level of 150 nanograms per milliliter constituting a confirmed positive test  
6 result.

7 (c) Marijuana metabolites, with the following minimum detection levels  
8 constituting a positive test result:

9 1. A level of 50 nanograms per milliliter constituting an initial positive test  
10 result.

11 2. A level of 15 nanograms per milliliter constituting a confirmed positive test  
12 result.

13 (d) Opiates, with the following minimum detection levels constituting a  
14 positive test result:

15 1. A level of 2,000 nanograms per milliliter constituting an initial positive test  
16 result.

17 2. A level of 2,000 nanograms per milliliter constituting a confirmed positive  
18 test result.

19 (e) Phencyclidine, with the following minimum detection levels constituting a  
20 positive test result:

21 1. A level of 25 nanograms per milliliter constituting an initial positive test  
22 result.

23 2. A level of 25 nanograms per milliliter constituting a confirmed positive test  
24 result.

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1 (f) Alcohol, with an alcohol concentration of the amount specified in s. 885.235  
2 (1g) (d) or more constituting a positive test result, as determined by an analysis of  
3 a breath specimen provided by the employee or applicant.

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

9 (b) Within one working day after receipt of a verified positive test result, the  
10 employer or 3rd-party administrator shall inform the employee or applicant in  
11 writing of the test result, the consequences of the test result, and the options  
12 available to the employee or applicant. On request, the 3rd-party administrator or  
13 medical review officer shall provide a copy of the test result to the employee or  
14 applicant.

15 (c) Within 2 working days after receiving a verified positive test result, the  
16 employee or applicant may request a retest of the specimen that tested positive by  
17 a certified laboratory chosen by the employee or applicant. The employee or  
18 applicant shall pay the cost of any retesting requested by the employee or applicant,  
19 but not required by the employer, subject to reimbursement by the employer if the  
20 result of the retest is negative.

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

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1 (e) If testing is conducted based on reasonable suspicion under sub. (4) (b), the  
2 employer shall document in writing the circumstances on which that reasonable  
3 suspicion is based and, on request, shall provide a copy of that documentation to the  
4 employee. The employer shall retain a copy of that documentation for not less than  
5 one year.

6 (f) Any test of an employee conducted under this section shall occur  
7 immediately before, during, or immediately after the regular work period of the  
8 employee. If the test is conducted during an employee's regular work period, the  
9 employee shall be paid for the time lost from work at the employee's hourly basic rate  
10 of pay, as defined in s. 103.49 (1) (b), plus the hourly contribution for health insurance  
11 benefits, vacation benefits, pension benefits, and any other bona fide economic  
12 benefits payable to the employee. If the test is conducted outside the employee's  
13 regular work period, the employee shall be paid for the time necessary to take the  
14 test, including reasonable travel time, at the employee's hourly basic rate of pay. The  
15 employer shall pay the cost of all testing under this section required by the employer.  
16 The employee or applicant shall pay the cost of any retesting or additional testing  
17 requested by the employee or applicant, but not required by the employer, subject to  
18 reimbursement by the employer if the result of the retest or additional test is  
19 negative.

20 **(8) EMPLOYER PROTECTION.** (a) An employee or applicant who has a verified  
21 positive test result is not considered to be an individual with a disability, as defined  
22 in s. 111.32 (8).

23 (b) This section does not prohibit an employer from establishing and enforcing  
24 reasonable work rules relating to the use, possession, distribution, or delivery of  
25 drugs or alcohol in the workplace.

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1 (c) The establishment, implementation, or administration of a testing program  
2 under this section does not create a physician–patient relationship between an  
3 employee or applicant and the employer, a 3rd–party administrator, a medical  
4 review officer, or any other person conducting or evaluating a test under this section.

5 (d) No cause of action of any nature may arise against and no civil liability may  
6 be imposed upon an employer that has in place a drug and alcohol testing program  
7 that complies with this section for any of the following:

8 1. Any action taken in good faith based on a verified positive test result.

9 2. Any failure to test an employee or applicant for the presence of drugs or  
10 alcohol, for the presence of a specific drug, for any medical condition, or for any  
11 mental, emotional, or psychological condition.

12 3. Any failure to detect the presence of alcohol or any specific drug, any medical  
13 condition, or any mental, emotional, or psychological condition.

14 4. Any decision to suspend or terminate a drug or alcohol testing program.

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

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

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

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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 pars. (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 **(10) COMPLIANCE.** (a) When the department finds that an employer is not in  
11 compliance with this section, the department shall notify the employer and the state  
12 agency or local governmental unit authorizing the work of the noncompliance and  
13 shall file the determination with the employer and the state agency or local  
14 governmental unit within 30 days after the date of that notice.

15 (b) Upon completion of a project and before receiving final payment for his or  
16 her work on the project, each agent or subcontractor shall furnish the contractor with  
17 an affidavit stating that the agent or subcontractor has complied fully with the  
18 requirements of this section. A contractor may not authorize final payment until the  
19 affidavit is filed in proper form and order.

20 (c) Upon completion of a project and before receiving final payment for his or  
21 her work on the project, each contractor shall file with the state agency or local  
22 governmental unit authorizing the work an affidavit stating that the contractor has  
23 complied fully with the requirements of this section and that the contractor has  
24 received an affidavit under par. (b) from each of the contractor's agents and  
25 subcontractors. A state agency or local governmental unit may not authorize a final



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1 payment until the affidavit is filed in proper form and order. An employer that  
2 knowingly permits an employee of the employer to work on a project of public works  
3 that is subject to s. 66.0903, 103.49, or 103.50 in violation of this section is subject  
4 to the penalties specified in sub. (12) and to debarment under sub. (13).

5 (11) RECORDS; INSPECTION; ENFORCEMENT. (a) Each employer shall keep full and  
6 accurate records documenting the employer's compliance with this section. The  
7 department or a contracting local governmental unit under s. 66.0903 may demand  
8 and examine, and every employer shall keep, and furnish upon request by the  
9 department or local governmental unit, copies of all records and information relating  
10 to the employer's compliance with this section. The department may inspect records  
11 in the manner provided in this chapter, and every employer is subject to the  
12 requirements of this chapter relating to the examination of records.

13 (b) If requested by any employee or representative of an employee, the  
14 department shall inspect the records of any employer to ensure compliance with this  
15 section. A request under this paragraph shall specify the types of records requested.  
16 If the employer subject to the inspection is found to be in compliance and if the person  
17 making the request is an employee, the department shall charge the person making  
18 the request the actual cost of the inspection. If the employer subject to the inspection  
19 is found to be in compliance and if the person making the request is a representative  
20 of an employee, the department shall charge the person making the request \$250 or  
21 the actual cost of the inspection, whichever is greater.

22 (12) NONCOMPLIANCE; PENALTIES. (a) An employee or applicant who refuses to  
23 submit to testing as required under this section or who is the subject of a verified  
24 positive test result may not be permitted to work on a project of public works that is  
25 subject to s. 66.0903, 103.49, or 103.50 until the employee or applicant tests negative

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1 for the presence of drugs or alcohol in his or her system. An employee who is the  
2 subject of more than one verified positive test result during the life of a project ~~of~~  
3 ~~public works that is subject to s. 66.0903, 103.49, or 103.50~~ may not work on the  
4 project for the life of the project.

5 (b) Any employer that knowingly permits an employee of the employer to work  
6 on a project ~~of public works that is subject to s. 66.0903, 103.49, or 103.50~~ in violation  
7 of this section may be fined not more than \$200 or imprisoned for not more than 6  
8 months or both. Each day that a violation continues is a separate offense.

9 (13) DEPARTMENT. (a) Except as provided under pars. (b) and (c), the department  
10 shall distribute to all state agencies a list of all persons whom the department has  
11 found to have knowingly permitted an employee of the person to work on a project  
12 ~~of public works that is subject to s. 66.0903, 103.49, or 103.50~~ in violation of this  
13 section at any time in the preceding 3 years and shall notify any local governmental  
14 unit applying for a determination under s. 66.0903 (3) or exempted under s. 66.0903  
15 (6) of the names of those persons. The department shall include with any name the  
16 address of the person and shall specify the date of the violation. A state agency or  
17 local governmental unit may not award any contract to the person unless otherwise  
18 recommended by the department or unless 3 years have elapsed from the date on  
19 which the department issued its findings or date of final determination by a court of  
20 competent jurisdiction, whichever is later.

21 (b) The department may not include in a notification under par. (a) the name  
22 of any person on the basis of having let work to a person whom the department has  
23 found to have knowingly permitted an employee of the person to work on a project  
24 ~~of public works that is subject to s. 66.0903, 103.49, or 103.50~~ in violation of this  
25 section.

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1 (c) This subsection does not apply to any employer that in good faith commits  
2 a minor violation of this section, as determined on a case-by-case basis through  
3 administrative hearings with all rights to due process afforded to all parties, or that  
4 has not exhausted or waived all appeals.

5 (d) Any person submitting a bid on a project that is subject to s. ~~66.0903, 103.49,~~<sup>or</sup>  
6 ~~or 103.50~~ shall, on the date on which the person submits the bid, identify any  
7 construction business in which the person, or a shareholder, officer, or partner of the  
8 person, if the person is a business, owns, or has owned, at least a 25 percent interest  
9 on the date on which the person submits the bid or at any other time within 3 years  
10 preceding the date on which the person submits the bid, if the business has been  
11 found to have knowingly permitted an employee of the business to work on a project  
12 ~~of public works that is subject to s. 66.0903, 103.49, or 103.50~~ in violation of this  
13 section.

14 (14) LOCAL ORDINANCES; STRICT CONFORMITY REQUIRED. A local governmental  
15 unit may enact an ordinance requiring an employee or applicant to submit to drug  
16 and alcohol testing only if the ordinance strictly conforms to this section.

17 **SECTION 5. Nonstatutory provisions.**

18 (1) TRANSITIONAL PROVISIONS. An employer that is required under section  
19 103.503 (2) of the statutes, as created by this act, to have, but that does not have, a  
20 drug and alcohol testing program in place on the effective date of this subsection shall  
21 provide notice to all of its employees that a drug and alcohol testing program is being  
22 implemented and may not begin actual drug and alcohol testing until 60 days after  
23 the date of the notice. An employer that has a drug and alcohol testing program in  
24 place on the effective date of this subsection is not required to provide notice under  
25 this subsection.



## Northrop, Lori

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**From:** Dake, Marsha  
**Sent:** Tuesday, September 20, 2005 4:39 PM  
**To:** LRB.Legal  
**Subject:** Draft review: LRB 05-0090/3 Topic: Drug-free construction sites

It has been requested by <Dake, Marsha> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-0090/3 Topic: Drug-free construction sites