

# State Drug Testing Laws: Common Terms and How They Differ Between States

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## State Drug Testing Laws

- Many states have enacted workplace drug testing laws.
- While many state programs use similar terms, those terms often have different meanings from state to state.
- Applying a definition for a commonly used term universally can result violations of state requirements.
- Being forewarned is critical for industry participants.

# Common Statutory Drug Testing Terms

- Safety-sensitive
- Collector
- Drug(s)
- Initial/screening test
- Confirmation testing or confirmatory test
- Specimen
- Medical Review Officer or Review Officer
- Anonymous
- Positive, Non-negative, Failed result
- Cut-offs

# Term: Drug(s)

**The majority of state programs define drugs in the statute itself or in regulations issued by the agency responsible for program enforcement.**

- **In states with mandatory testing laws, these definitions act to limit the substances for which employers may test.**
- **In states with voluntary worker's compensation programs, an employer may lose the benefits of voluntarily complying with the statute if it tests for substances outside of the "drugs" defined by the state law.**

# Drug(s)

## ■ Alabama – Drug

- Defined as amphetamines, cannabinoids, cocaine, phencyclidine (PCP), methadone, methaqualone, opiates, barbituates, benzodiazepines, propoxyphene, or a metabolite of any of the substances. (§ 25-5-331).

# Drug(s)

## ■ Arkansas

- “Drug” means any controlled substance subject to testing pursuant to drug testing regulations *adopted by the United States Department of Transportation*.
  - A covered employer shall test an individual for all such drugs in accordance with the provisions of this chapter. (11-14-102(8)).
  - The director may add additional drugs by rule.

# Drug(s)

## ■ Florida

- "Drug" means alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of the substances listed herein. (112.0455(5)); (440.102.(1)(C)).
  - Note the synthetic drug inclusion.

# Drug(s)

## ■ Hawaii

- "Drug" means a controlled substance as defined in Hawaii's Uniform Controlled Substances Act. (329B-2).
  - Rather than listing specific substances, several states define "drug" by reference to other statutory compilations or provisions.
  - Chapter 329 provides for four schedules of controlled substances and gives the Administrator of Hawaii's Department of Public Safety authority to add, delete, or reschedule substances, pending confirmation by the legislature, as necessary, i.e., changes in federal law or newly identified synthetics.

# Drug(s)

## ■ Iowa

- “Drug” means a substance considered a controlled substance and included in schedule I, II, III, IV, or V under the Federal Controlled Substances Act, 21 U.S.C. § 801 et seq. (730.5).
- Many states simply incorporate the FCSA.

# Drug(s)

## ■ Utah

- "Drugs" means a substance recognized as a drug in the United States Pharmacopoeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug compendia, or supplement to any of those compendia. (34-38-2(2)); (34-41-101(1)).

# Term: Screening and Confirmation Testing

**Many states use “initial test,” “screening,” and “confirmation test” as defined terms.**

- **The definition of initial testing or screening may dictate whether point of collection testing is permissible.**
- **Many state’s definition of confirmation testing is specific to gas chromatography, making the use of liquid chromatography questionable.**
- **Based on the language of the definition, it may not be permissible to test for substances for which a traditional screening test is not available.**
  - **e.g., where a state requires confirmation test be different scientific principle than screening test.**

# Screening and Confirmation Testing

## ■ Alabama—Statutory definitions

### ■ Initial test or screening test

- A sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens.
- All initial tests shall use an immunoassay procedure or an equivalent procedure or a more accurate scientifically accepted method approved by the National Institute on Drug Abuse as more accurate technology becomes available in a cost-effective form. (Code of Ala. § 25-5-331(8)).

### ■ Confirmation testing or confirmatory test

- A second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen.
- The confirmation test shall be different in scientific principle from that of the initial test procedure. The confirmation method shall be capable of providing requisite specificity, sensitivity, and quantitative accuracy. (§ 25-5-331(3)).

# Initial/Screening and Confirmation Testing

## ■ Alabama—Regulations

### ■ Confirmation test

- Usually gas chromatography/mass spectrometry and confirmation is performed under the supervision of the laboratory's certifying Ph.D. in one of the natural sciences. (r. 480-5-6-.01(2)).

# Initial/Screening and Confirmation Testing

## ■ Arkansas

### ■ Initial test or screening test

- "Initial drug or alcohol test" means a procedure that qualifies as a screening test or initial test pursuant to regulations governing drug or alcohol testing adopted by the Department of Transportation or such other recognized authority approved by rule by the director. (11-14-102(14)).

### ■ Confirmation testing or confirmatory test

- "Confirmation test," "confirmed test," or "confirmed drug or alcohol test" means a second analytical procedure used to identify the presence of a specific drug or alcohol or metabolite in a specimen, which test must be different in scientific principle from that of the initial test procedure and must be capable of providing requisite specificity, sensitivity, and quantitative accuracy. (11-14-102(4)).

# Initial/Screening and Confirmation Testing

## ■ Maine

### ■ Confirmation test

- A second substance abuse test that is used to verify the presence of a substance of abuse indicated by an initial positive screening test result and is a federally recognized substance abuse test or is performed through the use of liquid or gas chromatography-mass spectrometry. (682(7)(B)).

## ■ Kansas

### ■ Screening test

- A test designed to eliminate true negative specimens from further consideration. (K.A.R. § 28-33-12(a)(8)).

### ■ Confirmatory test

- A mass spectrometry analytical procedure used to specifically identify the presence of a drug or drug metabolite. (K.A.R. § 28-33-12(a)(9)).

# Initial/Screening and Confirmation Testing

## ■ Nevada

- "Screening test" means a test of a person's: (a) *Breath or blood to detect the general presence of alcohol*; or (b) Urine to detect the general presence of a controlled substance or any other drug, which could impair that person's ability to perform the duties of employment safely and efficiently. (284.4061(2)).
  - By implication, definition limits substance abuse testing to urine.

## ■ Hawaii

- "Confirmatory test" means a drug or alcohol test that uses a method of analysis determined by the director of health to be reliable in establishing the identity and quantity of alcohol, drugs, or metabolites of drugs detected in an initial screening test.

# Term: Specimen

## ■ Alabama

### ■ Specimen

- Tissue, blood, breath, urine, or other product of the human body capable of revealing the presence of drugs or their metabolites or of alcohol. (25-5-331(14)).

## ■ Iowa

### ■ Sample

- Sample from the human body capable of revealing the presence of alcohol or other drugs, or their metabolites, which shall include only urine, saliva, breath, and blood. However, "sample" does not mean blood except as authorized in specific circumstances. (§ 730.5(1)(k)).

# Specimen

## ■ Florida

### ■ Specimen

- Tissue, hair, or product of the human body capable of revealing the presence of drugs or their metabolites. (112.0455(5)).
- 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. (440.102(1)(q)).

# Specimen

## ■ Utah

### ■ Sample

- "Sample" means urine, blood, breath, saliva, or hair. (34-38-2(9)); (34-41-101(11)).

## ■ Hawaii

### ■ Specimen

- Urine, blood, or any other bodily substance that the department determines to be appropriate for substance abuse testing. (11-113-2).
- The Department of Health has not issued a regulation determining hair or oral fluid specimen are appropriate for substance abuse testing.

# Term: Anonymous

**Anonymous would seem to be a term that should have the same meaning throughout all state programs.**

## ■ **Hawaii**

- “these State governmental entities shall establish chain of custody procedures which require that all specimens be sealed and coded in the presence of the individual being tested and that . . .” (11-113-27).
- In the Hawaiian program, “coded” refers to anonymous.

# **Term: Medical Review Officer**

**The term “Medical Review Officer” is generally recognized by industry participants.**

**However, the definitions of the qualifications and role of a Medical Review Officer vary between states.**

- **Definition may dictate whether Medical Review Officer be a medical doctor or just substance abuse professional.**
- **Definition may require specific credentialing and/or training by specific organizations.**

# Medical Review Officer

## ■ Alabama

- A licensed physician (medical doctor or doctor of osteopathy), certified by either the American College of Occupational and Environmental Medicine or The American Association of Medical Review Officers to include a minimum of twelve hours of continuing medical education annually, responsible for receiving laboratory results generated by an employer's drug testing program. (25-5-331(5)).
- The MRO shall be an agent of the employer.

# Medical Review Officer

## ■ Arkansas

- A licensed physician, pharmacist, pharmacologist, or similarly qualified individual employed with or contracted with a covered employer who:
  - (A) Has knowledge of substance abuse disorders, laboratory testing procedures, and chain of custody collection procedures;
  - (B) Verifies positive, confirmed test results; and
  - (C) 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. (11-14-102(16)).

# Medical Review Officer

## ■ Hawaii

- "Medical Review Officer" means an individual who has knowledge of substance abuse disorders and toxicology as determined by the department, and is appointed by the third party to receive, review, and interpret the results of laboratory tests requested by the third party. (329B-2).
- The Department of Health may specify through rules the qualifications of a medical review officer, and any additional responsibilities that may be required to carry out this chapter.

# Medical Review Officer

## ■ Oklahoma

### ■ Term used is “Review Officer.”

- Person, qualified by the State Board of Health . . . [with] knowledge and training to interpret and evaluate an individual's test results together with the individual's medical history and any other relevant information. (40 Okl. St. § 552(13)).

### ■ Must be

- licensed to practice medicine and surgery or osteopathic medicine or hold an earned doctoral degree from an accredited institution in clinical chemistry, forensic toxicology, or a similar biomedical science; and
- have completed at least twelve (12) hours of training appropriate for Review Officers provided by the Medical Review Officer Certification Council, American Association of Medical Review Officers, or another organization approved by the Commissioner of Health. (310:638-1-9(b)).

# Term: Safety-Sensitive Employees

## ■ Arkansas

- “Safety-sensitive position” means a position involving a safety-sensitive function pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation for drug-free workplaces.
- The director is authorized to promulgate rules expanding the scope of "safety-sensitive position" to cases where impairment may present a clear and present risk to co-workers or other persons.

# Safety-Sensitive Employees

## ■ Arkansas continued

- "Safety-sensitive position" means, with respect to any employer:
  - (A) A position in which a drug or alcohol impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to:
    - (i) carry a firearm;
    - (ii) perform life-threatening procedures;
    - (iii) work with confidential information or documents pertaining to criminal investigations; or
    - (iv) work with controlled substances; or
  - (B) A position in which a momentary lapse in attention could result in injury or death to another person.

# Safety Sensitive Employees

## ■ Connecticut

- The Labor Commissioner of Connecticut maintains a list of safety sensitive/high risk positions that may be subjected to random drug testing. (31-51X(b)).
  - <http://www.ctdol.state.ct.us/wgwkstnd/highrisk.htm>.
  - Connecticut recognizes that ultimately it remains an individualized determination.

## ■ Iowa

- "Safety-sensitive position" means a job wherein an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage, including a job with duties that include immediate supervision of a person in a job that meets the requirement of this paragraph. (730.5).

# Safety Sensitive Employees

## ■ Florida

- For private employer, any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety. (112.0455(5)).
- For 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. (440.102(1)).

# Safety Sensitive Employees

## ■ Arizona

- "Safety-sensitive position" means any job designated by an employer as a safety-sensitive position or any job that includes tasks or duties that the employer in good faith believes could affect the safety or health of the employee performing the task or others, (A.R.S. § 23-493 (9)).
- The definition also includes any of the following
  - Operating a motor vehicle, other vehicle, equipment, machinery or power tools.
  - Repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage.
  - Performing duties in the residential or commercial premises of a customer, supplier or vendor.
  - Preparing or handling food or medicine.
  - Working in any occupation regulated pursuant to title 32.
    - Includes a very large definition of employees.

# Term: Collector

## ■ Florida

- "Collection Site Person" or "Collector" means a person who instructs and assists donors at a collection site and who collects or receives and makes an initial observation of the specimen provided by those donors. (59A-24.003(5)).
  - The laboratory is responsible to ensure that the collector(s) is trained to carry out his or her responsibilities under this rule chapter. (59A-24.003(5)).

## ■ Vermont

- "Collector" means an individual certified by a United States Health and Human Services approved collector certification program for each type of specimen to be collected. A "collector" shall be recertified every three years and may not be an employee of the employer for the purposes of performing a drug test based on probable cause. ((511)(8)).

# Term: Positive, Non-Negative, Failed Result

## ■ Hawaii

- "Positive test result" means a finding through confirmatory testing of the presence of drugs, alcohol, or the metabolites of drugs in the sample tested in the levels *at or above the cut-off levels established by the director.* (329B-2).
  - Hawaii provides its own specific cut-offs. (11-113-18(f)).

## ■ Utah

- "Failed test" means a confirmed drug or alcohol test that indicates that the sample tested is: (a) positive; (b) adulterated; or (c) substituted. (34-38-2(5)).

# Positive, Non-Negative, Failed Result

## ■ Maine

- "Positive test result" means a test result that indicates the presence of a substance of abuse in the tested sample above the cutoff level of the test. (682(5)).
- "Confirmed positive result" means a confirmation test result that indicates the presence of a substance of abuse above the cutoff level in the tested sample. (682(5)(A)).
- "Non-negative result" means a test result that indicates the presence of a substance of abuse in the tested sample above the cutoff level of the test. (10-144-265(5)).

## ■ Minnesota

- "Positive test result" means a finding of the presence of drugs, alcohol, or their metabolites in the sample tested in levels at or above the threshold detection levels contained in the standards of one of the programs listed in section 181.953, subdivision 1. (181.950).

# Term: Testing Cut-Offs or Thresholds

## ■ Kansas

- "Threshold" means a defined drug or metabolite concentration that is established at a level resulting in the following: (A) a concentration at or above this level defines a positive result; and (B) a concentration below this level defines a negative result. (28-33-12.(7)).
  - Screening and confirmatory thresholds for NIDA 5-panel drugs must comply with the HHS guidelines published June 9, 1994. (28-33-12(a)(8), (9)).
- Many states will not designate a specific term and instead will say testing must be done in accordance with DOT standards etc.

# Testing Cut-Offs or Thresholds

## ■ Oklahoma

- Detailed cut-offs for each sample type. (310:638-1-6 & 7).

## ■ Maine

- Detailed cut-offs for each sample type. (265(C)).

# SUMMARY

- **Defined terms may have vastly different meanings between state programs.**
- **The definition of a term may include additional compliance issues for a specific state.**
  - **In addition to definition, may provide additional compliance issues, i.e., specific qualification or procedures.**
- **The definition of a term may by implication preclude certain types of testing or other actions under the statute.**
- **Some states do not define terms at all but have a testing statute.**
  - **Rhode Island**

# QUESTIONS?



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