

CHAPTER 329B
SUBSTANCE ABUSE TESTING

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Cross References

Diversion program for chemically dependent nurses, see chapter 334D.

" **[§329B-1] Purpose.** The purpose of this chapter is to ensure that appropriate and uniform substance abuse test procedures are employed throughout the State, to protect the privacy rights of persons tested, and to achieve reliable and accurate results. [L 1990, c 236, pt of §1]

" **§329B-2 Definitions.** As used in this [chapter]:

"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.

"Department" means the department of health.

"Director" means the director of health.

"Drug" means a controlled substance as defined in chapter 329.

"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. The department may specify through rules the qualifications of a medical review officer, and any additional responsibilities that may be required to carry out this chapter.

"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 cutoff levels established by the director.

"Substance abuse on-site screening test" means a portable substance abuse test that meets the requirements of the United States Food and Drug Administration for commercial distribution or is manufactured by a facility that is minimally certified as meeting the ISO 13485 standard established by the International Organization for Standardization and which may be used by an employer in the workplace.

"Substance abuse test" means any testing procedure designed to take and analyze body fluids or materials from the body for the purpose of measuring the amount of drugs, alcohol, or the metabolites of drugs in the sample tested.

"Third party" means any person, agency, employer or any other entity who requests substance abuse testing of another person or persons. Unless otherwise specified, the "third

party" shall include the party's designated staff. [L 1990, c 236, pt of §1; am L 1992, c 201, §2; am L 1993, c 158, §2; am L 1999, c 206, §2; am L 2007, c 179, §1]

" **[§329B-2.5] Exemptions.** This chapter does not apply to:

- (1) Toxicology tests used in the direct clinical management of patients;
- (2) Tests for alcohol under chapter 286 or chapter 291;
- (3) Tests made pursuant to subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (53 Federal Register 11986); and
- (4) Substance abuse testing of individuals under the supervision or custody of the judiciary, the department of public safety, the Hawaii paroling authority, and the office of youth services. However, 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 the individual shall sign an approved form acknowledging that the specimen has been sealed and coded in the individual's presence. The procedure shall include a tracking form documenting the handling and storage of the specimen from collection to final disposition of the specimen. The individual also shall be afforded the option of a confirmatory test by a licensed, certified laboratory. The cost of the confirmatory test shall be paid for by the State; provided that in those instances where a positive test result is confirmed, the individual shall be charged with the cost of the confirmation test. Test results shall not require review by a medical review officer. Positive test results of substance abuse testing and the availability of a confirmatory test shall be provided to the individual in writing. A positive test result from a substance abuse test that fails to meet the requirements of this section shall not be reported or recorded. [L 1993, c 158, §1]

" **§329B-3 Limitations.** No third party shall require, request, or suggest that any individual submit to a substance abuse test that does not meet all the requirements of this chapter except for third parties who are covered by a drug testing regulation adopted by the department of transportation or the United States Department of Transportation or any other federal agencies. All costs, including confirmatory testing costs, shall be paid for by the third party. Nothing in this

chapter shall be construed to preclude the department or any laboratory certifying agency approved by the director from examining the records of laboratories, including substance abuse on-site screening locations, licensed for substance abuse testing to ascertain compliance with licensure or certification requirements, or to preclude the administration of breath tests to determine the alcohol content of the tested individual's blood for purposes of this chapter. [L 1990, c 236, pt of §1; am L 1999, c 206, §3]

" **§329B-4 Laboratory requirements.** (a) All substance abuse testing performed in the State shall be performed by a testing laboratory licensed by the department for that purpose, or certified for substance abuse testing by the Substance Abuse and Mental Health Services Administration of the United States Department of Health and Human Services, and approved by the director, except as provided in section 329B-5.5.

(b) Testing of samples from this State performed in another state shall be performed only by laboratories certified for substance abuse testing by the Substance Abuse and Mental Health Services Administration of the United States Department of Health and Human Services, and approved by the director. No laboratory located outside of the State shall be licensed by the department to perform substance abuse testing.

(c) The director shall adopt rules governing:

- (1) Standards for approval and licensure of qualified testing laboratories, and suspension and revocation of a license;
- (2) Qualifications of laboratory personnel;
- (3) Body component samples that are appropriate for substance abuse testing;
- (4) Selection of medical review officers determined to be qualified by the department, and procedures to be followed by medical review officers in the reception, review, and interpretation of the results of laboratory tests requested by a third party;
- (5) Procedures for taking samples that ensure privacy to the individuals tested and prevent or detect tampering with the sample;
- (6) Methods of analysis and procedures to ensure reliable testing results, including standards for initial screening and confirmatory tests; provided that confirmatory tests for drugs or metabolites of drugs shall utilize a gas chromatograph with a mass spectrometer detector or other reliable methods approved by the director;

- (7) Cutoff levels of alcohol, drugs, or the metabolites of drugs;
- (8) Chain of custody procedures to ensure proper identification, labeling, and handling of the samples to be tested;
- (9) Retention and storage procedures and durations to ensure availability of samples for retesting when necessary;
- (10) Establishing fees for licensing of laboratories;
- (11) Retention of substance abuse test information by the laboratory; and
- (12) Procedures to ensure confidentiality of the substance abuse testing procedures and substance abuse test information.

(d) No laboratory shall be licensed to perform substance abuse testing in the State unless the laboratory participates in and continues to demonstrate satisfactory performance in drug proficiency testing as determined by the director. [L 1990, c 236, pt of §1; am L 1993, c 139, §1 and c 158, §3; am L 1999, c 206, §4]

Revision Note

Subsections redesignated.

" §329B-5 Substance abuse testing procedures and interpretation of test results. (a) Prior to the collection of any sample for substance abuse testing, the individual to be tested shall receive a written statement of the specific substances to be tested for and a statement that over-the-counter medications or prescribed drugs may result in a positive test result.

(b) In accordance with this section, the director shall adopt rules pertaining to:

- (1) The qualifications, responsibilities, and licensing of the medical review officer;
- (2) The method of transmittal of laboratory test results and any interpretations of test results to the third party and the tested individual; and
- (3) The obtaining, disclosure, and confidentiality of substance abuse testing information.

(c) No laboratory, including a substance abuse on-site screening location, may test for any substance not included on the written statement containing the specific substances to be tested for.

(d) As used in this section, "test results" means laboratory test results or the results of substance abuse on-

site screening tests. [L 1990, c 236, pt of §1; am L 1999, c 206, §5; am L 2001, c 53, §1]

" **§329B-5.5 Substance abuse on-site screening tests, testing procedures, and confidentiality.** The substance abuse on-site screening test shall be administered according to the instructions of the manufacturer and this section:

- (1) Every employer using a substance abuse on-site screening test shall administer the test according to the package insert that accompanies the substance abuse on-site screening test;
- (2) Any indication of the presence of drugs, alcohol, or the metabolites of drugs by the substance abuse on-site screening test shall not be used to deny or deprive a person of employment or any benefit, or result in any adverse action against the employee or prospective employee, unless a substance abuse test is conducted according to section 329B-5 and the requirements of paragraph (3) are met;
- (3) Upon the indication of the presence of drugs, alcohol, or the metabolites of drugs by the substance abuse on-site screening test, the employer shall have the employee or prospective employee report within four hours to a laboratory licensed by the department under section 329B-4 and be tested under section 329B-5. The employer shall bear the cost of the laboratory referral. An employee or prospective employee who fails to report for the substance abuse test may be denied or deprived of employment or any benefit, or have adverse action taken against the employee or prospective employee for refusing or failing to report for the substance abuse test; provided that the employer has provided to the employee or prospective employee written notice stating that:
 - (A) At the time of the substance abuse on-site screening test, the employer followed the procedures under section 329B-5.5;
 - (B) The employee or prospective employee was informed that the employee or prospective employee may refuse to submit to the substance abuse test; and
 - (C) If the employee or prospective employee refuses or fails to submit to the substance abuse test, the employer may take adverse employment action against the employee or prospective employee;
- (4) The operator who administers the substance abuse on-site screening test shall have been trained in the use and administering of the on-site screening test by the

manufacturer of the on-site screening test or the manufacturer's designee; and

- (5) Any information concerning the substance abuse on-site screening test shall be strictly confidential. Such information shall not be released to anyone without the informed written consent of the individual tested and shall not be released or made public upon subpoena or any other method of discovery, except that information relating to a positive on-site screening test result of an individual shall be disclosed to the individual, a third party, the laboratory to which the individual is referred, and the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual tested and arising from the positive on-site screening test result. [L 1999, c 206, §1; am L 2007, c 179, §2]

" **§329B-6 Test results.** (a) The laboratory report shall include the following information and shall be reported in a timely manner:

- (1) The type of test conducted;
- (2) The test results, which, for each substance tested can be negative due to a negative screening or confirmatory test result, positive due to a positive confirmatory test result, or no result due to an unsatisfactory sample or other reason;
- (3) The cutoff level used to distinguish positive and negative samples on both the initial and confirmatory tests;
- (4) The name and address of the laboratory; and
- (5) Any additional information provided by the laboratory concerning the individual's test.

(b) The indication of a substance below the cutoff level as established by the director shall be recorded as a negative test result. The laboratory's report shall not contain any information indicating the possible presence of a substance below a cut-off level, as so established.

(c) Any information concerning a substance abuse test pursuant to this chapter shall be strictly confidential. Such information shall not be released to anyone without the informed written consent of the individual tested and shall not be released or made public upon subpoena or any other method of discovery, except that information related to a positive test result of an individual shall be disclosed to the individual, the third party, or the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual tested and arising from positive confirmatory test result. Any

person who receives or comes into possession of any information protected under this chapter shall be subject to the same obligation of confidentiality as the party from whom the information was received.

(d) Failure to adopt or adhere to all the procedures contained in this chapter shall invalidate the test result and the result may not be reported or otherwise used for any purpose. [L 1990, c 236, pt of §1]

" **[\$329B-7] Remedies.** [(a)] Any person, agency, or entity that wilfully and knowingly violates any provision of this chapter shall be fined not less than \$1,000 but not more than \$10,000 for each violation as set by the department, plus reasonable court costs and attorney's fees as determined by the court, which penalty and costs shall be paid to the aggrieved person. This subsection shall not be construed as limiting the right of any person or persons to recover actual damages.

(b) In addition to any other enforcement mechanism allowed by law, any person, agency, or entity that commits, or proposes to commit, any act in violation of this chapter may be enjoined therefrom by a court of competent jurisdiction. An action for injunctive relief under this subsection may be brought by any aggrieved person that will fairly and adequately represent the interests of the protected class. [L 1990, c 236, pt of §1]

" **[\$329B-8] Rulemaking.** The department may adopt rules under chapter 91 necessary to implement this chapter. [L 1990, c 236, pt of §1]