

## NOTICE OF INTENT

### Department of Revenue Policy Services Division

#### Drug Free Workplace and Drug Testing (LAC 61:I.101)

In accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq., and in accordance with Executive Orders KBB 2005-08 and 2005-11 and R.S. 49:1001 et seq., the Department of Revenue, Policy Services Division, proposes to amend LAC 61:I.101, which governs drug testing in the workplace.

The amended Rule provides additional definitions, detailed explanations, and the consequences of violating this regulation. The department has incorporated an alcohol-free workplace in conjunction with the already established drug-free workplace, clarified the actions that shall take place in the event that an employee violates the regulation, provided an exception from pre-employment drug testing for employees transferring from one executive agency to another without a lapse in service, and updated the list of positions that are classified as safety-sensitive or security-sensitive.

#### Title 61

#### REVENUE AND TAXATION

#### Part I. Taxes Collected and Administered by the Secretary of Revenue

#### Chapter 1. Office of the Secretary

#### §101. Drug Free Workplace and Drug Testing

##### A. Introduction and Purpose

1. The employees of the Department of Revenue are among the state's most valuable resources, and the physical and mental well-being of our employees is necessary for them to properly carry out their responsibilities. Substance abuse causes serious adverse consequences to users, affecting their productivity, health and safety, dependents, and co-workers, as well as the general public.

2. The state of Louisiana and the Department of Revenue have a long-standing commitment to working toward a drug-free, alcohol-free workplace. In order to curb the use of illegal drugs by employees of the state of Louisiana, the Louisiana Legislature enacted laws that provide for the creation and implementation of drug testing programs for state employees. Further, the Governor of the State of Louisiana issued Executive Orders KBB 2005-08 and 2005-11 providing for the promulgation by executive agencies of written policies mandating drug testing of employees, appointees, prospective employees and prospective appointees, pursuant to R.S. 49:1001 et seq.

##### B. Applicability

1. This regulation applies to all Department of Revenue employees including appointees and all other persons having an employment relationship with this agency.

##### C. Definitions

*Controlled Substances*—a drug, chemical substance or immediate precursor in Schedules I through V of R.S. 40:964 or Section 202 of the Controlled Substances Act (21 U.S.C. 812).

*Designer (Synthetic) Drugs*—those chemical substances that are made in clandestine laboratories where the molecular structure of both legal and illegal drugs is altered to create a drug that is not explicitly banned by federal law.

*Employee*—unclassified, classified, and student employees, student interns, and any other person having an employment relationship with this agency, regardless of the appointment type (e.g., full time, part time, temporary, restricted, detailed, job appointment, etc.).

*Illegal Drug*—any drug that is not legally obtainable or that has not been legally obtained, to include prescribed drugs not legally obtained and prescribed drugs not being used for prescribed purposes or being used by one other than the person for whom prescribed. For purposes of this regulation, alcohol consumption at or above the initial testing levels and confirmatory testing levels as established in the contract between the state of Louisiana and the official provider of drug testing services will classify alcohol as an illegal drug.

*Public Vehicle*—any motor vehicle, water craft, air craft or rail vehicle owned or controlled by the state of Louisiana.

*Random Testing*—testing randomly performed on employees holding a safety-sensitive or security-sensitive position. The secretary shall periodically call for a sample of such employees, selected at random by a computer generated random selection process.

*Reasonable Suspicion*—belief based upon reliable, objective and articulable facts derived from direct observation of specific physical, behavioral, odorous presence, or performance indicators and being of sufficient import and quantity to lead a prudent person to suspect that an employee is in violation of this regulation.

*Safety-Sensitive or Security-Sensitive Position*—a position determined by the secretary to contain duties of such nature that the compelling state interest to keep the incumbent drug-free and alcohol-free outweighs the employee's privacy interests. Positions considered as *safety-sensitive* or *security-sensitive* are listed in §101.J. These positions were determined with consideration of statutory law, jurisprudence, and the practices of this agency. Examples of *safety-sensitive* and *security-sensitive positions* are as follows:

- a. positions with duties that are required or are authorized to carry a firearm;
- b. positions with duties that require operation or maintenance of any heavy equipment or machinery, or the supervision of such an employee;
- c. positions with duties that require the operation or maintenance of a public vehicle, or the supervision of such an employee.

*Secretary*—Secretary of the Department of Revenue.

*Testing with Cause*—testing performed on employees on the basis of reasonable suspicion, post accident, rehabilitation monitoring, or possession of illegal drugs or drug paraphernalia while in the workplace.

*Under the Influence*—for the purposes of this regulation, a drug, chemical substance, or the combination of a drug or chemical substance that affects an employee in any detectable manner. The symptoms or influence are not confined to that consistent with misbehavior, nor to obvious impairment of physical or mental ability, such as slurred speech, or difficulty in maintaining balance. A determination of influence can be established by a professional opinion or a scientifically valid test.

*Workplace*—any location on agency property including all property, offices, and facilities, including all vehicles and equipment, whether owned, leased, or otherwise used by the agency or by an employee on behalf of the agency in the

conduct of its business in addition to any location from which an individual conducts agency business while such business is being conducted.

#### D. Drug-Free Workplace Policy

1. It shall be the policy of the Department of Revenue to maintain a drug-free workplace and a workforce free of substance abuse.

2. Employees are prohibited from reporting to work or performing work with the presence in their bodies of illegal drugs, controlled substances, designer (synthetic) drugs, or alcohol at or above the initial testing levels and confirmatory testing levels as established in the contract between the state of Louisiana and the official provider of drug testing services.

3. Employees are further prohibited from the illegal use, possession, dispensation, distribution, manufacture, or sale of controlled substances, designer (synthetic) drugs, illegal drugs, and alcohol at the work site and while on official state business, on duty or on call for duty.

E. Conditions Requiring Drug Tests. Drug and alcohol testing shall be required under the following conditions.

1. Reasonable Suspicion. Any employee shall be required to submit to a drug and alcohol test if there is reasonable suspicion, as defined in §101.C.*Reasonable Suspicion*, that the employee is using illegal drugs or is under the influence of alcohol while on duty.

2. Post Accident. Each employee involved in an accident that occurs during the course and scope of employment shall be required to submit to a drug and alcohol test if the accident:

- a. involves circumstances leading to a reasonable suspicion of the employee's drug or alcohol use; or
- b. results in a fatality.

3. Rehabilitation Monitoring. Any employee who is participating in a substance abuse after-treatment program or who has a rehabilitation agreement with the agency following an incident involving substance abuse shall be required to submit to periodic drug testing.

4. Pre-Employment. Each prospective employee shall be required to submit to drug screening at the time and place designated by the Director of the Human Resources following a job offer contingent upon a negative drug-testing result. A prospective employee who tests positive for the presence of drugs in the initial screening or who fails to submit to drug testing shall be eliminated from consideration for employment. Employees transferring to the department from other state agencies without a break in service are exempt from pre-employment testing.

#### 5. Safety-Sensitive and Security-Sensitive Positions

a. Appointments and Promotions. Each employee who is offered a safety-sensitive or security-sensitive position as defined in §101.J shall be required to pass a drug test before being placed in such position, whether through appointment or promotion. All such testing shall, if applicable, occur during the selected employee's work schedule.

b. Random Testing. Every employee in a safety-sensitive or security-sensitive position shall be required to submit to drug testing as required by the secretary, who shall periodically call for a sample of such employees, selected at random by a computer-generated random selection process, and require them to report for testing. All such testing shall, if applicable, occur during the selected employee's work schedule.

6. Employees in Possession of Illegal Drugs. Any employee previously found in possession of suspected illegal drugs or drug paraphernalia in the workplace shall be required to submit to subsequent random drug tests.

#### F. Drug and Alcohol Testing Procedure

1. Drug testing pursuant to this regulation shall be conducted for the presence of any illegal drugs, including, cannabinoids (marijuana metabolites), cocaine metabolites, opiate metabolites, phencyclidine, and amphetamines in accordance with the provisions of R.S. 49:1001 et seq. The Department of Revenue reserves the right to test its employees for the presence of alcohol, any other illegal drugs, or controlled substances when there is reasonable suspicion to do so. For purposes of this regulation, alcohol consumption at or above the initial testing levels and confirmatory testing levels as established in the contract between the state of Louisiana and the official provider of drug testing services will classify alcohol as an illegal drug.

2. The Director of Human Resources and the secretary shall be involved in any determination that one of the above-named conditions requiring drug and alcohol testing exists. All recommendations for drug testing must be approved by the secretary. Upon final determination by the responsible officials, the Director of the Human Resources shall notify the supervisor of the employee to be tested, and the supervisor shall immediately notify the employee where and when to report for the testing.

3. Testing services shall be performed by a provider chosen by the Office of State Purchasing, Division of Administration, pursuant to applicable bid laws. At a minimum, the testing service shall assure the following.

a. All specimen collections will be performed in accordance with applicable federal and state regulations and guidelines to ensure the integrity of the specimen and the privacy of the donor. The Director of Human Resources shall review and concur in advance with any decision by a collection site person to obtain a specimen under direct supervision. All direct observation shall be conducted by a person of the same-sex at the collection site.

b. Chain of custody forms must be provided to ensure the integrity of each urine specimen by tracking its handling and storage from point of collection to final disposition.

c. Testing shall be performed by a Substance Abuse Mental Services Health Administration (SAMSHA) certified laboratory.

d. The laboratory shall use a cut-off of 50 ng/ml for a positive finding in testing for cannabinoids.

e. The laboratory shall use a concentration cut-off of 0.08 or more for the initial positive finding in testing for alcohol.

f. All positives reported by the laboratory must be confirmed by gas chromatography/mass spectrometry.

4. All confirmed positive results of alcohol and drug testing shall be reported by the laboratory to a qualified medical review officer.

#### G. Confidentiality

1. All information, interviews, reports, statements, memoranda, or test results received through this drug testing program are confidential communications, pursuant to R.S. 49:1012, and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in an administrative or disciplinary

proceeding or hearing, or civil litigation where drug use by the tested individual is relevant.

2. All records regarding this policy shall be maintained by the Director of Human Resources in a secured, confidential file.

#### H. Responsibilities

1. The secretary is responsible for the overall compliance with this regulation and shall submit to the Office of the Governor, through the Commissioner of Administration, a report on this regulation and drug testing program, describing progress, the number of employees affected, the categories of testing being conducted, the associated costs for testing, and the effectiveness of the program by November 1 of each year.

2. The Director of the Human Resources is responsible for administering the drug and alcohol testing program; recommending to the secretary when drug testing is appropriate; receiving, acting on, and holding confidential all information received from the testing services provider and from the medical review officer; collecting appropriate information necessary to agency defense in the event of legal challenge; and providing the secretary with the data necessary to submit a detailed report to the Office of the Governor as described above.

3. All supervisory personnel are responsible for reporting to the Director of Human Resources any employee they suspect may be under the influence of any illegal drug, alcohol, or chemical substance. Supervisory personnel are also responsible for assuring that each employee under their supervision understands or is given the opportunity to understand and have questions answered about this regulation's contents.

#### I. Violation of the Regulation

1. All initial screening tests with positive results must be confirmed by a second test with the results reviewed by a medical review officer.

a. A breath test resulting in 0.08 or greater alcohol concentration level will be considered an initial positive result.

b. If a positive test result occurs, the confirmation test will be performed within 30 minutes, but not less than 15 minutes, of completion of the initial screening test.

c. Urine samples will be tested using the split sample method, with a confirmation test performed on the second half of the sample in the event that a positive test result occurs.

2. If the confirmation test produces positive results, the medical review officer will contact the employee/applicant prior to posting the results of the test as positive.

a. The employee/applicant will have the opportunity to verify the legitimacy of the result, i.e., producing a valid prescription in his/her name.

b. If the employee applicant is able to successfully verify the legitimacy of the positive results, the medical review officer will confirm the result as negative and report the results to the department.

c. If the employee is unable to successfully verify the legitimacy of the positive results, the employee shall be subject to disciplinary action up to and including possible termination of employment, as determined by the secretary.

3. Each violation and alleged violation of this regulation will be handled individually, taking into account

all data, including the risk to self, fellow employees, and the general public.

4. Any employee whose drug test is confirmed positive may make a written request for access to records relating to his drug tests and any records relating to the results of any relevant certification, review, or suspension/revocation-of-certification proceedings within seven working days.

5. The secretary may, but shall not be required to, allow an employee whose drug test is certified positive by the medical review officer the opportunity to undergo rehabilitation without termination of employment, subject to the employee complying with the following conditions.

a. The employee must meet with an approved chemical abuse counselor for a substance abuse evaluation.

b. The employee must release the substance abuse evaluation before returning to work.

c. The employee shall be screened on a periodic basis for not less than 12 months nor more than 60 months.

d. The employee will be responsible for costs associated with follow-up testing, return to duty testing, counseling and any other recommended treatment.

6. Positive post accident or return to duty tests will result in the employee's immediate dismissal.

7. Any employee who refuses to submit to a urine test for the presence of illegal drugs or a breath test for the presence of alcohol shall be subject to the consequences of a positive test.

8. In the event that a current or prospective employee receives a confirmed positive test result, the employee may challenge the test results within 72 hours of actual notification.

a. The employee's challenge will not prevent the employee from being placed on suspension pending the investigation until the challenge is resolved.

b. The employee may submit a written explanation of the reason for the positive test result to the medical review officer.

c. Employees who are on legally prescribed and obtained medication for a documented illness, injury or ailment will be eligible for continued employment upon receiving clearance from the medical review officer.

9. In the event that a current or prospective employee remains unable to provide a sufficient urine specimen or amount of breath, the collector or Breath Alcohol Technician (BAT) must discontinue testing and notify the Director of Human Resources of their actions.

a. In both instances, whether the discrepancy is an insufficient urine specimen or amount of breath, the Director of Human Resources shall promptly inform the secretary.

b. The secretary shall then direct the employees to have a medical evaluation, at the expense of the Department of Revenue, by a licensed physician who possesses expertise in the medical issue surrounding the failure to provide a sufficient specimen.

c. This medical evaluation must be performed within five working days after the secretary is notified of the employee's inability to provide a sufficient specimen.

d. The physician shall provide the secretary with a report of his/her conclusions as to whether the employee's inability to provide a sufficient urine specimen or amount of breath is genuine.

e. If the physician determines that the employee's inability to provide a sufficient urine specimen or amount of

breath is not genuine, the employees will be subject to the consequences of a positive test.

J. Safety-Sensitive or Security-Sensitive Positions to be Randomly Drug Tested

1. All candidates for the following positions are required to pass a drug test before being placed in the position, whether through appointment or promotion and employees who occupy these positions are subject to random drug/alcohol testing:

- a. Alcohol Beverage Control Investigator Supervisor
- b. Alcohol Beverage Control Investigator
- c. Alcohol Beverage Control Manager
- d. Alcohol Beverage Control Staff Officer
- e. Alcohol Beverage Control Special Investigator
- f. Alcohol and Tobacco Control Agent 1-6
- g. Alcohol and Tobacco Control Commissioner
- h. Alcohol and Tobacco Control Deputy Commissioner
- i. Alcohol and Tobacco Control Financial Investigator 1-2
- j. Alcohol and Tobacco Control Special Investigator 1-2
- k. Alcohol and Tobacco Control Specialist
- l. Special Investigation Division—Assistant Director
- m. Special Investigations Division—Director
- n. Special Investigations Division—Revenue Agent

3

AUTHORITY NOTE: Promulgated in accordance with Executive Orders KBB 2005-08 and 2005-11 and R.S. 49:1015 et seq.

HISTORICAL NOTE: Promulgated by the Department of Revenue, Office of the Secretary, LR 25:1523 (August 1999); amended LR 34:

**Family Impact Statement**

This Family Impact Statement is provided as required by Act 1183 of the 1999 Regular Session of the Louisiana Legislature.

- 1. Implementation of this proposed Rule will have no effect on the stability of the family.
- 2. Implementation of this proposed Rule will have no effect on the authority and rights of parents regarding the education and supervision of their children.
- 3. Implementation of this proposed Rule will have no effect on the functioning of the family.
- 4. Implementation of this proposed Rule will have no effect on the behavior and personal responsibility of children.
- 5. Implementation of this proposed Rule will have no effect on the behavior and personal responsibility of children.
- 6. Implementation of this proposed Rule will have no effect on the ability of the family or a local government to perform this function.

Interested persons may submit data, views, or arguments, in writing to Erica N. Jefferson, Attorney, Policy Services Division, Department of Revenue, P.O. Box 44098, Baton Rouge, LA 70804-4098 or by fax to (225) 219-2759. All comments must be submitted by Wednesday, January 30, 2008. A public hearing will be held on Thursday January 31, 2008 at 9 a.m. in the River Room on the Seventh Floor of the LaSalle Building at 617 North Third Street, Baton Rouge, LA 70802-5428.

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**FISCAL AND ECONOMIC IMPACT STATEMENT  
FOR ADMINISTRATIVE RULES  
RULE TITLE: Drug Free Workplace and Drug Testing**

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENT UNITS (Summary)

These proposed amendments to LAC 61:I.101 provides additional definitions, detailed explanations, and the consequences of violating this regulation. The department has incorporated an alcohol-free workplace in conjunction with the already established drug-free workplace. The amended rule also clarifies the actions that shall take place in the event that an employee violates the regulation, and provides an exception from pre-employment drug testing for employees transferring from one executive agency to another without a lapse in service. Finally, the list of positions that are classified as safety-sensitive and security-sensitive has been updated.

Implementation of these proposed amendments should result in fewer random drug tests for employees in safety-sensitive positions, which will have minimal impact on the agency's costs and no effect on local governmental units.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

Implementation of these proposed amendments will have no impact on the revenue collections of state and local governmental units.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NONGOVERNMENTAL GROUPS (Summary)

These proposed amendments will have negligible effect on the costs or economic benefits of agency employees or drug test providers.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

These proposed amendments should have no effect on competition or employment.

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