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Federally Mandated Drug Testing

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Reference Number: CTAS-1075

Federal regulations found at 49 C.F.R. Part 40, require drug and alcohol testing for persons who are required by law to have a commercial driver's license (CDL) in connection with their employment. These regulations are administered by the United States Department of Transportation through the Federal Highway Administration. Although the regulations originally applied only to interstate truck drivers, they were amended in 1994 to include state and local government employees. *These are the only county employees who are required by law to be drug tested.*

The employees who must be tested are those who drive:

1. Vehicles over 26,000 pounds GVWR;
2. Trailers over 10,000 pounds GVWR if the gross combination weight rating is more than 26,000 pounds;
3. Vehicles designed to carry 16 or more passengers (including the driver); and
4. Any size vehicle used to transport hazardous materials (required to have a placard).

The definition of "driver" under the regulations includes regular employees of the county, as well as part-time and occasional drivers, leased drivers and independent contractors. Drivers of emergency vehicles are exempt. The only other exemptions are farmers, military personnel, recreational vehicles and vehicles leased to transport personal possessions for non-business purposes (rental household moving vans).

There are six types of testing that must be performed. Those are:

1. Pre-employment testing – job offers to CDL drivers must be conditioned on the results of the test; also transfers to CDL driver positions;
2. Random testing – unannounced testing on a random basis (the required rates of random testing are determined by the Federal Motor Carrier Safety Administration);
3. Reasonable suspicion testing – supervisors must receive training on what constitutes reasonable suspicion - at least one hour each for drugs and alcohol;
4. Post-Accident Testing – after any accident involving loss of human life, or when the driver receives a citation for a moving traffic violation arising from the accident;
5. Return-to-Duty Testing – for employees who have failed a previous test or who have otherwise engaged in prohibited conduct and are being returned to a safety-sensitive position after having been through counseling and evaluation;
6. Follow-up testing – unannounced testing (at least six in the first 12 months) after a driver has been returned to a safety-sensitive position.

Prior to beginning the testing program, there must be written policies and procedures in place, and drivers must be given educational materials explaining the requirements of the drug and alcohol testing regulations and your policies and procedures. These materials must be given to the drivers *before* the testing program begins. So that supervisors will be able to recognize when reasonable suspicion testing is appropriate, each supervisor must complete one hour of training on reasonable suspicion for drugs and one hour of training for reasonable suspicion of alcohol each year.

Testing for controlled substances (drugs) is done by urine test. All urine samples are analyzed for five drugs:

1. Marijuana
2. Cocaine
3. Amphetamines
4. Opiates (including heroin)
5. PCP

Split sample testing is required for all drug testing. This means that each urine sample is divided into two parts. If the first sample tests positive, the other portion of the sample can be tested to confirm the results. The analysis must be done by a laboratory that is certified by the U.S. Department of Health and Human Services.

Testing for alcohol is done by breath test. An approved evidential breath testing (EBT) device must be

used, and the test must be performed by a breath alcohol technician (BAT). Two breath tests are required for a positive result. If the first test is below 0.02, it is considered negative. If it is 0.02 or greater, a second test must be performed. A result of 0.04 or higher constitutes a positive result. The confirmation test must be done on a machine that prints out the results, date and time.

Employers are required to keep detailed records of all aspects of the testing program, and these records must be kept for specified periods of time. Test results and records must be kept confidential. The records cannot be released to others without the consent of the driver.

This is an overview of the requirements of the federal regulations. Additional information may be found on the Federal Motor Carrier Safety Administration and U.S. Department of Transportation's drug and alcohol testing website.

It is important to keep in mind that when a government employer tests its employees for drugs and alcohol, it constitutes a "search" within the meaning of the 4th Amendment to the United States Constitution. The Supreme Court has held that this kind of testing is permissible only when the testing is done in accordance with established rules and procedures and when the testing is done in the proper manner by qualified personnel. Otherwise, an employee's constitutional rights may be violated. See "Governmental Employee Drug Testing-The Constitutional Issues" for more information.

There are many companies that can be retained to handle drug testing programs. This is the best course of action in most cases, since many counties may not have the personnel available to implement the testing program properly. Be aware, though, that contracting with someone else will not relieve the county of liability. The county employer must be careful in selecting the company to handle the testing program and should find a company that has worked with governmental employers and understands the constitutional issues that apply. Make sure that it has the proper knowledge and expertise, and that certified professionals are used. Be sure the company has adequate liability insurance and that the contract contains provisions to indemnify the county against any liability or other losses in the event that the testing is not done properly and in accordance with all applicable statutes and regulations. Make sure the county attorney reviews any contract before it is signed.

Before choosing a company to handle a testing program, the county should obtain proposals from several companies and compare services and price. Look for a company that can handle all aspects of the testing program, including assistance in developing policies and procedures, selection of names for random testing, collection of samples, laboratory testing, training of supervisors and other personnel, recordkeeping and all other requirements for the federally-mandated testing program.

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