

Overview of State Drug Testing Laws

Every state differs from its neighboring states when it comes to drug testing laws. There are no two states with identical laws. Some states have statutes while others have no laws on the books. Many states, even those without a statute, have case law that defines how drug testing can be conducted and under what circumstances. Some states have “voluntary” laws that only apply to employers that wish to qualify for certain benefits, such as workers’ compensation premium discounts.

It is important to know that you must comply with all state laws where your business operates. This means that if your company is headquartered in Oklahoma, but you also have operations in Minnesota and Montana, you must comply with the laws of all three states. The Minnesota law would only apply to your business operations in Minnesota and Oklahoma to Oklahoma and Montana to business in Montana.

Your drug testing policy will be the cornerstone of your program. When developing a drug testing policy, it is best to develop a “general” policy that will apply to the majority of your business operations, and then include amendments to the policy for each state whose law differs from your general policy. For employers states who, for example, wish to conduct random testing or take advantage of alternative testing technologies (i.e., on-site oral fluid testing, etc.), it would not be unusual to have 10 or more amendments to the basic policy.

Drug testing laws typically touch on three main areas: 1) who can be tested and under what circumstances (pre-employment, random, etc.), 2) how testing is to be conducted (in a lab, via on-site devices, etc.), and 3) the procedures to be observed by the testing entity. For the employer, using a reputable service provider, such as a third-party administrator, the third category of laws will typically require little attention. However, the first two categories are of significant concern. Today, very few legal challenges attack the analytical process or science of drug testing. Most lawsuits deal with employers’ drug testing policies and whether they have complied fully with applicable laws. For this reason, understanding state laws and incorporating them into your policy is critical to the success and cost-effectiveness of any drug testing program.

Summary of Select State Laws

This summary highlights the key points for each state and is not intended to be a comprehensive explanation of a particular state’s drug testing law. Use this summary for general information purposes only.

- **California** – No statute. Suspicion-less testing, such as random testing, is restricted by case law. Employers must justify all testing based on suspicion of drug use and a belief that an employee is incapable of properly performing his job due to that drug use. A legitimate business necessity could be concern for the safety and health of the work force and/or general public.
- **San Francisco, CA** – Many restrictions apply to employers with operations within the city limits. For example, although random testing of safety-sensitive workers is permitted in California, in San Francisco random testing is prohibited.)
- **Berkley, CA** – This city’s ordinance is much more stringent than in other parts of the state.
- **Boulder, CO** – This city has one of the most restrictive drug testing laws in the country. Employers in Colorado are only bound by Boulder’s city ordinance for their employees who work in the city.
- **Connecticut** – Statute. Notification for pre-employment testing is required; random testing is limited to workers in safety-sensitive positions; state law specifically defines safety-sensitive positions; post-accident testing is allowed if there is reasonable suspicion of drug use; reasonable suspicion testing

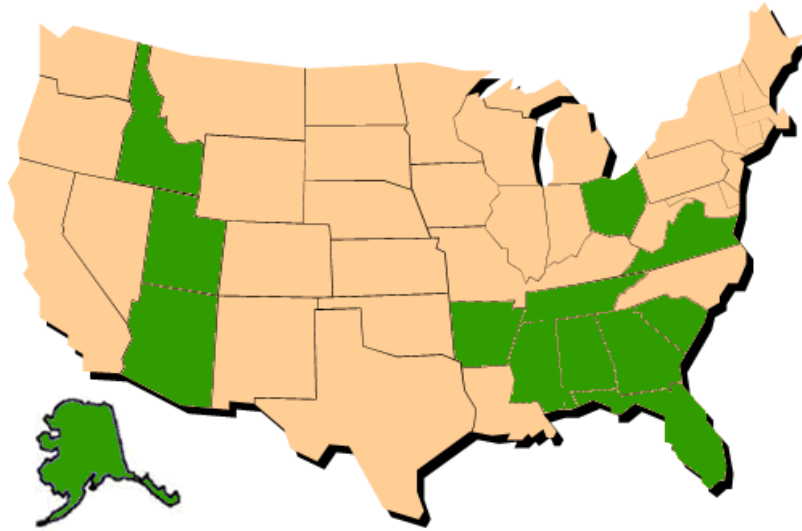


can only be conducted if it is believed that the worker is incapable of properly performing his job as a result of the suspected drug use; prospective employees must be given a copy of the company's policy.

- **Delaware** – Statute. Random testing for safety-sensitive positions only.
- **Iowa** – Statute. Requires an EAP or notice of the availability of such services; allows up to 7 days for confirmatory retest at the employee's request and expense; requires employee and supervisor training; reasonable suspicion testing only when impairment from drug use is also suspected; post-accident testing can only be conducted when an injury occurs that requires an injury report or record, or results in property damage in excess of \$1,000; many procedural regulations are imposed which should be administered by your drug testing provider.
- **Maine** – Statute. Policy must be approved by the state's DOL; employers may not require employees to sign *consent forms*; an EAP is required; random testing should be limited to workers in safety-sensitive positions; reasonable suspicion testing requires written notice; random testing is limited to safety-sensitive positions or per union contract.
- **Massachusetts** – No statute. Pre-employment as post-offer only; random limited to safety-sensitive or business interest only; post-accident limited to business interest, also.
- **Minnesota** – Statute. No termination on first-time positives; pre-employment as post-offer only; pre-employment positive screens must be confirmed before an offer can be withdrawn; 8 days allowed for confirmatory retest; post-accident testing must involve an injury or must have occurred while the individual was operating or helping to operate work-related machinery, equipment or vehicles; random limited to safety-sensitive only.
- **Montana** – Statute. Provides a very specific "definitions" section; most testing is tightly regulated, tied to safety, fiduciary or security-sensitive positions only; random testing is limited to employees whose supervisors/managers are also subject to random testing as well as other conditions; reasonable suspicion testing can only be required by a supervisor/manager who has been trained according to the DOT guidelines; post-accident testing must involve a death, personal injury or property damage in excess of \$1500.
- **Nebraska** – Statute. Requires an employee option of requesting a blood test to confirm a positive alcohol screen.
- **New Jersey** – No statute. All testing, except pre-employment, should be based on a business necessity such as concern for safety; random testing should be limited to workers in safety-sensitive positions.
- **New York** – No statute. Random testing should be limited to workers in safety-sensitive positions.
- **Oklahoma** – Statute. An EAP is required; pre-employment as post-offer only; post-accident testing is allowed if there is reasonable suspicion of drug use.
- **Rhode Island** – Statute. Availability of rehabilitation services is required; pre-employment as post-offer only; post-accident testing is allowed if there is reasonable suspicion of drug use.
- **Vermont** – Statute. Many restrictions are imposed on employers; pre-employment as post-offer only, *with a minimum of 10 days notice*, and only as part of a physical exam; reasonable suspicion/post-accident only if it is believed the employee *is* under the influence and with the availability of an EAP; random testing is prohibited; termination a first-time positive allowed only when individual refuses treatment; consent forms *are* required.
- **West Virginia** – No statute. Random testing should be limited to safety-sensitive positions only.



Voluntary State Laws



The following states have *voluntary* laws that qualify a compliant employer for either a discount on its workers' compensation premiums (WC) and/or a legal shield (L) against laws suits related to drug testing when such testing is conducted in accordance with the law. Compliance with a voluntary law may require observance with a variety of restrictions, some of which are not covered in this review.

- Alabama (WC 5%)
- Alaska (L)
- Arizona (L)
- Arkansas (WC 5%)
- Florida (WC 5%)
- Georgia (WC 7.5%)
- Idaho (L) (WC 5%)
- Mississippi (WC 5%)
- Ohio (WC 10-20%)
- South Carolina (WC 5%)
- Tennessee (WC 5%)
- Utah (L)
- Virginia (WC 5%, at the discretion of the employer's insurance provider)

Conclusion

Even if a state does not have a drug testing law employers still need to be aware of related state laws such as laboratory regulations, privacy laws, workers' compensation and employment compensation laws... not to mention, of course, court rulings. For example, Texas does not have a state drug testing law, per se. But it does allow employers to move to deny workers' compensation benefits if the employer can prove that the injured worker was under the influence of drugs and/or alcohol at the time of the accident. A positive drug test result can serve as proof in an employer's motion to deny benefits. And there are many other states with similar laws. They may not regulate whether or not drug testing can take place, or how it is conducted, but it is certainly in the employer's best interest to know the law and have a drug testing policy in place written to that law.

Thank you for the opportunity to provide this memo and we hope you find the information in it useful. It only begins to scratch the surface when it comes to state drug testing laws, case law, and voluntary laws. As such we remain available to answer your questions and to provide further assistance as needed.