

New Jersey Mandates Drug Testing Of Direct Support Staff

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All applicants and employees working in any New Jersey Department of Human Services (“DHS”) funded, licensed or regulated program serving adults with developmental disabilities are subject to mandatory drug testing, effective May 1, 2018. Under the Stephen Komninos’ Law, New Jersey Public Law 2017, Chapter 238, covered employers are required to administer pre-employment, random and reasonable suspicion drug testing. The law does not require alcohol testing.

The law applies to “direct care staff members.” That term is not limited to those employees with direct care job responsibilities; it also is defined to include those “who may come into contact with individuals with developmental disabilities during the course of such employment.” In addition, DHS interprets the law to apply to volunteers as well.

According to guidance provided by DHS, DHS has partnered with Energetix Corp. (the “Vendor”) as the vendor to facilitate all aspects of its drug testing program and to conduct the drug testing. Drug testing will consist of urine screening for controlled dangerous substances including marijuana, cocaine, opiates (heroin, codeine, morphine and prescribed semi-synthetic opioids), amphetamines/methamphetamines and phencyclidine (PCP). **The costs of all drug tests will be covered by DHS.**

The types of drug tests to be conducted are:

1. *Pre-employment*: All applicants must undergo pre-employment drug testing and receive a negative test result. A refusal to test means that the applicant will be removed from consideration for hire. As of June 15, 2018, an applicant or volunteer may not commence employment until the test result is received by the employer. For employees who were hired on or after May 1, 2018 and who were tested through the employer’s own drug testing vendor, the employee must be re-tested using the DHS vendor.
2. *Random*: At least once per year, an employer must randomly drug test one or more current direct care staff members. The law provides that the person who is responsible for the “overall operation of the program, facility or living arrangement” has the discretion to determine the total number of direct care staff members who will be required to undergo random drug testing. However, DHS guidance provides that “it has been determined that 10% of a provider’s direct care employees will be tested annually.” Random samples will be

identified quarterly through the Vendor and employers will need to ensure they update their direct care staff rosters to provide to the Vendor quarterly.

3. *“For Cause” or Reasonable Suspicion:* Reasonable suspicion drug testing must be conducted if the direct care staff member’s immediate supervisor has reasonable suspicion to believe that the staff member is illegally using a controlled dangerous substance. Reasonable suspicion must be “[b]ased on the staff member’s visible impairment or professional misconduct which relates adversely to patient care and safety.” Once a supervisor determines that reasonable suspicion exists, he or she is required to report this information to his or her immediate supervisor “in a form and manner specified by the commissioner, and, if the latter concurs that there is reasonable suspicion to believe that a direct care staff member is illegally using a controlled dangerous substance, that supervisor shall notify the person who is responsible for the overall operation of the program, facility, or living arrangement, and request written approval therefrom to order the direct care staff member to undergo” a drug test. An employee cannot be drug tested “for cause” without the written approval of the person who is responsible for the overall operation of the program, facility, or living arrangement. The employer must maintain documentation for the basis of the test, including the written approval of the person responsible for the overall operation of the program, facility or living arrangement.

Employees who refuse to test must be terminated. If an employee tests positive, the employer has the discretion to terminate the employee or refer the employee for treatment. Treatment services are not the responsibility of DHS.

DHS Guidance provides that before any applicant is denied employment for a positive test, or any employee is terminated for a positive test, the applicant or employee will have an opportunity to speak with the Vendor’s medical review officer to discuss any relevant, legitimate medical explanations for the positive result, such as a current prescription. Applicants and employees will have 24 hours to respond to the medical review officer with their explanation or documentation before they are considered a “non-contact positive.” For employment purposes, the “non-contact positive” is considered a positive result and the employer then will take the applicable employment action.

The New Jersey Office of Licensing will check for documentation that the law was implemented by covered employers.

Employers covered by this law must inform all direct care staff members about the law’s new drug testing requirements. To do so, covered employers should create a written policy or revise existing drug testing policies to ensure that they comply with DHS’s new mandates for drug testing direct care staff, applicants and volunteers. Moreover, covered employers should train all supervisors on how to recognize and report behavior that qualifies as “reasonable suspicion” warranting a “for cause” drug test.

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National Law Review, Volume VIII, Number 214

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