

OFFICE OF MANAGEMENT AND BUDGET

DIVISION OF FACILITIES MANAGEMENT

Statutory Authority: 29 Delaware Code, Section 6908(a)(6) (29 Del.C. §6908(a)(6))

FINAL

ORDER

4104 Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects

NATURE OF THE PROCEEDINGS:

The Office of Management and Budget (OMB) initiated proceedings to adopt the Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects. The OMB proceedings to adopt regulations were initiated pursuant to 29 Del.C. Chapter 101 and authority as prescribed by 29 Del.C. Ch. 69, §6908(a)(6).

On January 1, 2015 (Volume 18, Issue 7), OMB published in the Delaware *Register of Regulations* its notice of proposed regulations, pursuant to 29 Del.C. §10115. It was requested that written materials and suggestions from the public concerning the proposed regulations be delivered to OMB by March 6, 2015 or be presented at a public hearing on February 11, 2015, after which time OMB would review information, factual evidence and public comment to the said proposed regulations.

Written comments were received during the public comment period and evaluated. The results of that evaluation are summarized in the accompanying "Summary of Evidence." This is OMB's "conclusion" and "order" as required by 29 Del.C. §10118(b).

SUMMARY OF EVIDENCE

In accordance with Delaware Law, public notices regarding proposed Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects were published in the *Delaware State News*, the *News Journal* and the *Delaware Register of Regulations*.

Written and verbal comments were received on the proposed regulations during the public comment period (January 1, 2015 through March 6, 2015). Individuals offering comments included:

- Dr. Brian Shinkle, DO, CIME.
- Mr. James Maravelias, President, Delaware Building & Construction Trades Council.

Public comments and the OMB (Agency) responses are as follows:

Brian Shinkle, DO, CIME

Comment: Studies show that blood/breath alcohol level directly correlates with impairment, but urine alcohol level has no correlation with impairment. Urine alcohol only reasonably shows that someone has used alcohol within the last few days, which is not illegal. You also cannot tell how much alcohol someone used via a urine alcohol test, due to variable urine dilution rates. A better model is to follow the DOT protocol which is to perform breath alcohol testing (which does correlate directly with blood alcohol level and impairment) and to perform this type of alcohol testing in one or all of the following scenarios: post-accident, random or reasonable suspicion.

Agency response: Thank you for your comment. This comment refers to Section 4.3 of the proposed regulation that reads as follows:

4.3 Employees subject to drug testing shall be tested using at a minimum a seven-panel protocol testing plus urine alcohol screening for the following:

Substance	Common Name	Cutoff
Marijuana metabolite		50 ng/ml
Cocaine metabolite		150 ng/ml
Opiate metabolite		2000 ng/ml
Acetylmorphine	Heroin metabolite	10 ng/ml
Phencyclidine	PCP	25 ng/ml
Amphetamines (including Methamphetamines)	Meth	500 ng/ml
MDMA	Ecstasy	250 ng/ml

Urine Alcohol		0.04% BAC
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Inasmuch as the state has included testing for alcohol as a means to gauge impairment, OMB is in agreement that a urine alcohol test should not be specified. The specification has been changed to a more generic "alcohol test".

James Maravelias, President, Delaware Building & Construction Trades Council

Comment: The seven panel test specified in Section 4.3 of the regulation is insufficient and should be changed to require a ten panel test. Keeping in mind that the goal is to provide the safest workplace for employees, protect the general public and instill Delawareans confidence that those individuals working on state funded projects are working safely, the ten-panel protocol is necessary to capture drugs that are highly abused, extremely addictive and can cause a deadly and unsafe work environment for all those around.

Agency response: Thank you for your comment. This comment refers to Section 4.3 of the proposed regulation that reads as follows:

4.3 Employees subject to drug testing shall be tested using at a minimum a seven-panel protocol testing plus urine alcohol screening for the following:

Substance	Common Name	Cutoff
Marijuana metabolite		50 ng/ml
Cocaine metabolite		150 ng/ml
Opiate metabolite		2000 ng/ml
Acetylmorphine	Heroin metabolite	10 ng/ml
Phencyclidine	PCP	25 ng/ml
Amphetamines (including Methamphetamines)	Meth	500 ng/ml
MDMA	Ecstasy	250 ng/ml
Urine Alcohol		0.04% BAC

There are no universal standards for the optimal number of panels that must be tested in an employee drug testing program. In fact, Federal DOT standards from which much of this regulation was modeled, requires a five panel testing regimen. The proposed regulation was constructed with a measure of flexibility by mandating "...a minimum of seven-panel protocol testing....", therefore allowing for additional panels to be tested. Accordingly the proposed regulation will not be further amended.

FINDINGS OF FACT:

The Department finds that the proposed regulation as set forth in the January 2015 *Register of Regulations* with the one insubstantial change noted in section 4.3 should be adopted. While the Office of Management and Budget appreciates the other suggestions brought forth, it is felt the existing content of the regulation as published in the January 2015 *Register of Regulations* represents a fair balance to protect management, labor and members of the public.

NOW THEREFORE, under the statutory authority and for the reasons set forth above, the Director of the Delaware Office of Management and Budget does hereby ORDER that the Regulation be, and that it hereby is, adopted and promulgated. The effective date of this Order is for all large public works projects advertised for bid on or after January 1, 2016.

Ann Shepard Visalli, Director
Office of Management and Budget

4104 Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects

1.0 Purpose

The Office of Management and Budget ("Office"), has developed these regulations that require Contractors and Subcontractors to implement a program of mandatory drug testing for Employees who work on Large Public Works Contracts funded all or in part with public funds pursuant to 29 Del.C. §6908(a)(6). The regulations establish the mechanism, standards and requirements of a Mandatory Drug Testing Program that will be incorporated by reference into all Large Public Works Contracts awarded pursuant to 29 Del.C. §6962.

2.0 Definitions

- “Contractor”** means an entity such as, but not limited to, an individual, firm, partnership or corporation that has a contractual obligation to perform work for contracts awarded pursuant to 29 **Del.C.** §6962.
- “Division of Facilities Management” and “DFM”** means the Division of Facilities Management within the Office of Management and Budget.
- “Drug Testing Firm”** is an entity engaged in the business of providing drug testing services for businesses, individuals, governments or any entity that requires drug testing of Employees, applicants, licensees, etc., in compliance with these requirements.
- “Employee”** means an individual employed by a Contractor or Subcontractor who works on the Jobsite of a Large Public Works Contract but does not fulfill a clerical or administrative function. For the purpose of this definition, clerical or administrative functions shall refer to job responsibilities that do not generally require an employee to work outside of the Contractor’s Jobsite office, home office or other employer-provided office. For the purposes of this regulation, the term “Employee” shall also include supervisors and foremen working on the Jobsite. The term “Employee” shall also include delivery personnel employed by a Contractor or Subcontractor working on or delivering materials and equipment to and from a Jobsite.
- “Impairment” or “Impaired”** means symptoms that an Employee while working may be under the influence of drugs or alcohol that may decrease or lessen the Employee's performance of the duties or tasks of the Employee's job position, including symptoms of the Employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the Employee or others, or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.
- “Jobsite”** means the site or area directly or indirectly owned, operated or controlled by the Owner in which the Contractor or Subcontractor performs work or delivers services to the Owner. For the purpose of this definition, “Jobsite” does not mean a remote work site not under the direct or indirect control of the Owner in which work is performed to fulfill the Contractor’s or Subcontractor’s obligations.
- “Large Public Works Contract”** means a contract for a public works construction awarded pursuant to 29 **Del.C.** §6962.
- “Mandatory Drug Testing Program” and “Program”** means a defined set of basic procedures, requirements and rules that must be used by a Contractor or Subcontractor to test Employees for drugs in compliance with these requirements.
- “Owner”** is the state agency, school district or entity that awards a Large Public Works Contract to a Contractor pursuant to 29 **Del.C.** §6962.
- “Positive Test Result” and “Fail a Drug Test”** means the result reported by a Health and Human Services certified laboratory when a specimen contains a drug or drug metabolite equal to or greater than the cutoff concentration. For purposes of these regulations, an Employee shall not be considered to have a Positive Test Result nor shall an Employee be considered to “Fail a Drug Test” if:
- The Employee is a Registered Qualifying Patient and;
 - The drug detected was marijuana, a component of marijuana, or marijuana metabolites.
- “Random Drug Testing”** means that an Employee is chosen at random for testing without advance notice, from a pool of Employees working on the Jobsite. Specific requirements for random drug testing conducted under these regulations are described in Section 5.0.
- “Registered Qualifying Patient”** means a person (1) validly issued and in possession of an unexpired Registry Identification Card as defined by 16 **Del.C.** §4902A (14), and (2) subject to confirmation through a "verification system" as set forth at 16 **Del.C.** §4902A(17).
- “Subcontractor”** means an entity such as, but not limited to, an individual, firm, partnership or corporation that has a contractual obligation to perform work for, or supply services to a Contractor as defined in section 2.1.
- “Testing Result Forms”** means a form summarizing drug testing completed monthly by the Contractor and Subcontractor and submitted to the Owner in accordance with requirements contained in the bid solicitation.

3.0 Employee drug testing documentation requirements.

3.1 The following documentation requirements apply:

- 3.1.1** At bid submission - A solicitation for a Large Public Works Contract must require each Contractor that submits a bid for the work to submit with the bid signed individual affidavit(s) for the Contractor and each listed Subcontractor certifying that the Contractor and Subcontractor has in place or will implement during the entire term of the contract a Mandatory Drug Testing Program for their Employees that complies with this regulation.

- 3.1.2 Two business days prior to contract execution – The awarded Contractor shall provide to the Owner copies of the Employee Drug Testing Program for the Contractor and for all listed Subcontractors.
- 3.1.3 During contract execution – Contractors that employ additional Subcontractors on the jobsite may do so only after submitting a copy of the Subcontractor’s Employee Drug Testing Program. A Contractor or Subcontractor shall not commence work until the Owner has concluded the Employee Drug Testing Program complies with this Regulation as per Section 3.2.
- 3.1.4 In the event of an emergency a Contractor may employ additional Subcontractors on the jobsite prior to submitting the Subcontractor’s Employee Drug Testing Program provided that said Program is submitted to the Owner as soon as practicable.
- 3.2 A Contractor or Subcontractor shall be treated as having a Mandatory Drug Testing Program that complies with this regulation if the Program includes the following:
 - 3.2.1 The Program meets the minimum standards in section 4.0 of this regulation.
 - 3.2.2 The Program provides for the frequency of testing of Employees as per section 5.0 of this regulation:
 - 3.2.3 The Program imposes disciplinary measures on an Employee who fails a drug test as per section 6.0 of this regulation.
- 3.3 Prequalified Contractors and Subcontractors – A Contractor or Subcontractor may meet the provisions of Section 3.1 if they are Prequalified through the DFM Prequalification and if the DFM Prequalification includes provisions requiring an Employee Mandatory Drug Testing Program that meet the requirements of Sections 4.0, 5.0 and 6.0 of this Regulation
- 3.4 The State shall not be obligated to pay, and the Contractor or Subcontractor shall expressly agree that, any portion of work performed by a Contractor or Subcontractor commenced before that Contractor or Subcontractor has complied with Sections 3.1 and 3.2, provided however that emergency work as referenced in 3.1.4 may not be subject to this provision.

4.0 Minimum Standards for a Mandatory Drug Testing Program

- 4.1 Testing for the presence of drugs in an Employee’s system and the handling of test specimens shall be conducted in accordance with guidelines for the collection, chain-of-custody procedures, laboratory testing, and Medical Officer Review procedures contained within the Mandatory Guidelines for Federal Workplace Drug Testing Programs published by the Substance Abuse and Mental Health Services Administration (SAMHSA). http://workplace.samhsa.gov/DrugTesting/Level_1_Pages/mandatory_guidelines5_1_10.html All tests must be processed by a federal Health and Human Services certified laboratory. Contractors must provide documentation detailing the procedures used in the collection, testing and reporting of drug tests sufficient to show conformance with SAMHSA guidelines.
- 4.2 Contractors and Subcontractors subject to these regulations may procure the services of an appropriate Drug Testing Firm to administer their program. A Contractor or Subcontractor may also implement a Mandatory Drug Testing Program using in-house personnel and resources. However a Contractor or Subcontractor doing so shall have to demonstrate that the program meets or exceeds the requirements specified herein to the satisfaction of the Owner.
- 4.3 Employees subject to drug testing shall be tested using at a minimum a seven-panel protocol testing plus **[urine]** alcohol screening for the following:

<u>Substance</u>	<u>Common Name</u>	<u>Cutoff</u>
<u>Marijuana metabolite</u>		<u>50 ng/ml</u>
<u>Cocaine metabolite</u>		<u>150 ng/ml</u>
<u>Opiate metabolite</u>		<u>2000 ng/ml</u>
<u>Acetylmorphine</u>	<u>Heroin metabolite</u>	<u>10 ng/ml</u>
<u>Phencyclidine</u>	<u>PCP</u>	<u>25 ng/ml</u>
<u>Amphetamines (including Methamphetamines)</u>	<u>Meth</u>	<u>500 ng/ml</u>
<u>MDMA</u>	<u>Ecstasy</u>	<u>250 ng/ml</u>
<u>[Urine] Alcohol</u>		<u>0.04% BAC</u>

- 4.4 The frequency of Random Drug Testing and the methodology for selecting Employees to be screened are defined in section 5.0 and shall be incorporated into Contractor and Subcontractor mandatory testing procedures. A Contractor or Subcontractor may incorporate rules or requirements that exceed the requirements defined herein.

5.0 Drug Testing Requirements – Frequency for the Testing of Employees

- 5.1 Initial Drug Testing - Employees commencing work on a Jobsite must be tested with the exception that an Employee who has passed a random or scheduled drug test within the past 60 days from the date of commencing work shall be permitted to work at the Jobsite without further testing; however, the Employee is still subject to random testing.
- 5.2 Random Drug Testing - During the course of a project, each Contractor and Subcontractor with Employees on the Jobsite shall implement Random Drug Testing according to the following requirements.

 - 5.2.1 All Employees will be subject to random, unannounced testing.
 - 5.2.2 The selection of Employees shall be made by a scientifically valid method of randomly generating an Employee identifier from a Contractor or Sub-contractor's pool of Employees.
 - 5.2.3 No less than 10% of a Contractor's or Subcontractor's anticipated workforce based on construction schedules validated by certified payrolls shall be randomly selected each month for testing. Contractors or Subcontractors with less than 10 Employees shall test at least one of their Employees, selected randomly per month. Each Employee shall have an equal chance of selection each time the selection is made. Because the selection process is random, some Employees may not be tested within a year, while others may be tested more than once.
 - 5.2.4 Employees notified that they have been selected must report within four hours for testing to a site specified. Employees so notified must have been given such notification at least four hours before the scheduled closing time of the testing facility. Any failure to report for random testing, or to cooperate with the testing procedure shall be considered a positive result.
 - 5.2.5 Purposely impeding or delaying an Employee's fulfillment of the testing requirements herein by a Contractor or Subcontractor may subject the Contractor or Subcontractor to sanctions listed in Section 8.
- 5.3 Reasonable Suspicion Testing – An Employee will be required to take a drug test at any time his or her employing Contractor, Subcontractor or the Owner reasonably believes that he or she has an Impairment caused by drugs and/or alcohol. Further, an Employee may be required to take a drug test at any time his or her employing Contractor, Subcontractor or the Owner finds drug paraphernalia and/or open alcohol containers on the Jobsite.
- 5.4 Return to Duty Testing – As required in Section 6.0.
- 5.5 Accident Triggered Testing – An Employee will be required to take a drug test and may be subject to an onsite alcohol breathalyzer test at any time there is a Jobsite accident involving loss or significant property damage, injury or death to an Employee of the Contractor, Subcontractor, or Owner or member of the public.

 - 5.5.1 As soon as practicable following an accident, the Contractor will notify the Employee(s) whose performance could have contributed to the accident of the need for the test.
 - 5.5.2 The appropriate Contractor shall ensure that an Employee, required to be tested under this section, is tested as soon as practicable, but no longer than 4 hours after the accident. Employees so notified must have been given such notification at least four hours before the scheduled closing time of the testing facility. If the drug test is not conducted within 4 hours, attempts to conduct the test must cease and the reasons for the failure to test documented.
 - 5.5.3 An Employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying a supervisor of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed to have refused to submit to testing.
 - 5.5.4 If an Employee fails or refuses to be tested, he/she must be removed from the Jobsite.
 - 5.5.5 Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident, or to prohibit an Employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.
- 5.6 All testing required by this section shall be administered according to the standards outlined in Section 4.0.

6.0 Consequences of a Positive Test Result

- 6.1 The disciplinary measures contained within a Contractor's or Subcontractor's drug testing program for an employee who tests positive to a mandatory drug test must include at a minimum, all of the following:

 - 6.1.1 The Employee is subject to an immediate suspension from any public works Jobsite.
 - 6.1.2 The Employee is not eligible for reinstatement by the Contractor or Subcontractor to any public works Jobsite until 30 days after the Employee tests negative on a seven drug panel plus alcohol test certified by a medical review officer.

- 6.1.3 The Employee is subject to unscheduled monthly random testing for at least one (1) year after reinstatement, or during the term of the Large Public Works Contract, whichever is less.
- 6.1.4 An Employee who has tested positive for more than one drug test within a three year period shall be permanently banned from working at public works Jobsites.
- 6.1.5 An Employee who has tested positive for marijuana, a component of marijuana, or marijuana metabolites and is a Registered Qualifying Patient shall be exempted from the disciplinary actions contained in this section unless:
 - 6.1.5.1 The Employee was Impaired by marijuana at the Jobsite
 - 6.1.5.2 Employment of the Registered Qualifying Patient would cause the Owner to lose monetary or licensing-related benefits under Federal law.
- 6.2 A Contractor or Subcontractor shall report the Positive Test Result to the Employee's professional licensing board, if applicable.

7.0 Contractor and Subcontractor Certification of Compliance with Regulations

- 7.1 During the term of the contract:
 - 7.1.1 During the term of the contract, Contractors and Subcontractors shall submit Testing Report Forms to the Owner as set forth herein:
 - 7.1.1.1 The Testing Report Forms shall be submitted to the Owner no less than quarterly.
 - 7.1.1.2 An Owner may require monthly submissions of the Testing Report Forms.
 - 7.1.1.3 A Contractor or Subcontractor that is employed on the Jobsite for less than 30 days shall not be subject to the reporting requirements contained in Sections 7.1.1 and 7.1.2 of this regulation, unless the Owner specifies that such reporting is required in the Invitation to Bid or Specifications relating to the work to be performed.
 - 7.1.2 The forms shall at a minimum contain the following information:
 - 7.1.2.1 The number of Employees who worked on the Jobsite during the previous month.
 - 7.1.2.2 The number of Employees subjected to random testing during the previous month.
 - 7.1.2.3 The number of negative results and the number of positive results.
 - 7.1.2.4 Action taken by the Contractor or Subcontractor on an Employee who failed or tested positive to a random test.
 - 7.1.3 Testing Result Forms may be submitted electronically to an Owner.
 - 7.1.4 Any Positive Test Result including the Employee name and action taken in response by a Contractor or Subcontractor must be reported by the Contractor or Subcontractor to the Owner within 24 hours of the Contractor or Subcontractor receiving the test results. A Positive Test Result must be submitted to the Owner in writing.
 - 7.1.5 The Owner shall have the right to periodically audit all Contractor and Subcontractor test results at the Contractor or Subcontractor's offices.
 - 7.1.6 The failure to comply with these reporting requirements shall be considered a material breach of any agreement relating to the performance of work by the Contractor or Subcontractor.

8.0 Penalties

- 8.1 A Contractor or Subcontractor on a Large Public Works contract that fails to implement a Mandatory Drug Testing Program in accordance with this regulation or falsifies testing results shall be subject to the following sanctions:
 - 8.1.1 Written warning (1st offense).
 - 8.1.2 Prohibition from bidding on new public works jobs for a period not to exceed three months (2nd offense) and one year (3rd offense).
 - 8.1.3 For subsequent offenses, debarment or bond revocation.
- 8.2 Notwithstanding any other provision of this regulation, if any failure to comply with the requirements of this regulation are particularly flagrant or egregious, the Owner may seek a termination for cause, a temporary suspension, a determination that the Contractor or Subcontractor **[are is]** not responsible, debarment or bond revocation, and any other statutory, common law, or equitable remedy.