

010.14-400 Medical Examinations and Drug Tests

A. Purpose.

The purpose of this rule is to provide for the enforcement and administration of Ark. Code Ann. § 11-3-203. In general, the statute provides that it is unlawful for any person, partnership, association or corporation, either for himself or herself or in a representative or fiduciary capacity, to require any employee or applicant for employment, as a condition of employment or continued employment, to submit or take a physical, medical examination, or drug test unless the examination is provided at no cost to the employee or applicant and a copy of the examiner's report is provided free of charge to the applicant or employee upon written request.

The statute further provides that notwithstanding the general prohibition, if an employee tests positive for an illegal drug as defined by rule of the Department of Labor, the employer and employee may agree in writing who will bear the cost of future drug tests or screens required as a condition of continued employment.

It is not the purpose of this rule to mandate the manner or type of drug testing procedures utilized by an employer.

B. General Requirements.

1. The employer shall provide the Department of Labor upon request a copy of any written agreement which would require an employee to bear the cost of future drug tests or screens following a positive test. Such an agreement shall be maintained for a period of three (3) years following termination of employment.

2. Under no circumstances may the cost to the employee exceed the actual cost of the drug test. If the cost of the test is withheld from the employee's pay or otherwise reimbursed to the employer by the employee, the employer shall maintain records of the actual cost of the test along with records of the corresponding withholdings or reimbursements and provide these to the Department of Labor upon request. Such records shall be maintained for a period of three (3) years.

3. A physical, medical examination, or drug test must be provided at no cost to the employee or applicant even if the reason the employer requires such an examination or test is because it is mandated by a state or federal law that regulates the safe manner in which the employee performs his/her job. An examination or test is not required "as a condition of employment or continued employment" within the meaning of Ark. Code Ann. § 11-3-203 if the examination or test is required to determine eligibility for an employment benefit, such as a leave of absence, or an accommodation.

4. If an employee requests that a sample be re-tested or re-screened following a positive drug test, the employer may require such re-test to be conducted at the employee's cost.

C. Definitions. As used in this rule and Ark. Code Ann. § 11-3-203:

1. "Illegal drug" means any controlled substance which is unlawful for a particular employee or applicant to possess or use. This includes prescription medication for which an employee or applicant does not have a current or valid prescription for use. This also includes marijuana. Alcohol shall be considered "illegal" for the purposes of this regulation if at the time of the test, the employer had a written policy which:

- a. prohibited alcohol use in the circumstances at issue;
- b. established an alcohol testing procedure; and
- c. established the concentration of alcohol which would be considered a "positive" test;

3. "tests positive" means that there has been a positive test result on a confirmatory drug test as opposed to a screening test.

D. Enforcement.

1. Notice of assessment or claim

In the event the Labor Standards Division determines that there has been a violation of Ark. Code Ann. §11-3-203 or this rule, following an investigation of the matter, notice to the employer shall be given in the same manner as notice for minimum wage and overtime violations, Rule 010.14-111, or by a Preliminary Wage Determination Order in the case of an individual wage claim pursuant to Ark. Code Ann. § 11-4-303.

2. Contesting an assessment or claim

a. An employer may contest an assessment or Preliminary Wage Determination order by filing a written request for a hearing with the Director of Labor, 10421 West Markham, Little Rock, AR 72205. The written request must be made within fifteen (15) days after the employer's receipt of the Notice of Assessment or Preliminary Wage Determination Order or the assessment or order will become final.

b. A written request for a hearing shall be referred to a hearing officer designated by the Director and shall be handled as an adjudicative matter pursuant to Rule 010.14-007.

3. Penalties

a. Each violation of Ark. Code Ann. § 11-3-203(a) shall constitute a misdemeanor offense, punishable by a fine not to exceed \$100.

b. The Department of Labor may demand payment and seek recovery of any charges, fees, wage deductions , or other payments made by employees as a result of an employer's violation of Ark. Code Ann. § 11-3-203 or this rule.

c. In the event that any charge fee, wage deduction or other payment made by an employee results in a wage payment to that employee of less than the applicable state minimum wage, it is a violation of the Arkansas Minimum Wage and Overtime Act, Ark. Code Ann. §§ 11-4-210 and -211 and may result in the assessment of a civil money penalty or liquidated damages pursuant to Rule 010.14-111.

E. Effective Date

The effective date of this rule is August 1, 2010.