RULE 099.36 A VOLUNTARY PROGRAM FOR DRUG-FREE WORKPLACES
#099.36

Table of Contents

Section

I. PURPOSE AND SCOPE

A. Purpose. The purpose of this rule is to promote voluntary drug-free workplaces in accordance with Act 1552 of 1999, in order that employers in this state may be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace and reach their desired levels of success without experiencing the costs, delays and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees. It is also the purpose of this rule that drug or alcohol abuse be discouraged and that employees who choose to engage in drug or alcohol abuse face the risk of unemployment and being precluded from receiving workers' compensation medical and indemnity benefits.

B. If an employer implements a drug-free workplace program which includes;

1. Notice,

2. Education, and

3. Procedural requirements for testing for drugs and alcohol, in accordance with this rule, then the Rule 36 employer may require the employee or job applicant to submit to a test for the presence of drugs or alcohol.

C. If a drug or alcohol is found to be present in the employee's system at a level prescribed by this rule, or if an employee refuses to submit to a test for drugs or alcohol, the employee may be terminated and be precluded from receiving workers' compensation medical and indemnity benefits.

D. If a drug or alcohol is found to be present in the job applicant's system at a level prescribed by this rule, or if a job applicant refuses to submit to a test for drugs or alcohol, the Rule 36 employer may refuse to hire the applicant.

E. Employers who adopt a drug-free workplace program as prescribed herein, and are annually accepted by the Division as having such a program, shall qualify for a workers' compensation premium credit as described in Section XV of this rule.

F. Scope: The provisions of this rule apply to all employers in the State of Arkansas subject to provisions of the workers' compensation laws who qualify for the drug-free workplace program.

G. The application of the provisions of this rule is subject to the provisions of any applicable collective bargaining agreement.

II. POLICIES

A. It is intended that any employer required to test its employees pursuant to the requirements of any federal statute or regulation shall be deemed to be in conformity with this section as to the

employees it is required to test by those standards and procedures designated in that federal statute or regulation. All other employees of such employer shall be subject to testing as provided in this rule in order for such employer to qualify as having a drug-free workplace.

B. Nothing in this rule is intended to authorize any employer to test any applicant or employee for alcohol or drugs in any manner inconsistent with federal constitutional or statutory requirements, including those imposed by the Americans with Disabilities Act and the National Labor Relations Act.

C. Nothing in this rule shall be construed to require an employer to test, or create a legal obligation upon an employer to request an employee or job applicant to undergo drug or alcohol testing.

D. Nothing in this rule shall be construed to prohibit an employer from affording an employee greater protection than provided herein.

E. A Rule 36 employer is not barred from conducting more extensive testing (including random testing) provided the employee/job applicant's constitutional rights are not infringed.

F. No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug or alcohol testing.

G. Nothing in this rule shall be construed to amend or affect the employment-at-will doctrine.

III. DEFINITIONS

A. "Alcohol" as used in this rule shall have the same meaning as in the federal regulations describing procedures for the testing of alcohol by programs operating pursuant to the authority of the United States Department of Transportation as currently compiled in 49 Code of Federal Regulations (C.F.R.) Part 40.

B. "Alcohol test" means an analysis of breath or blood, or any other analysis which determines the presence and level or absence of alcohol as authorized by the United States Department of Transportation in its rules and guidelines concerning alcohol testing and drug testing.

C. "Certified laboratory" means a laboratory licensed and approved as outlined in this rule (Section VII).

D. "Chain of custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances, and providing for accountability at each stage in handling, testing, and storing specimens and reporting test results.

E. “Confirmation test”, “confirmed test,” or “confirmed drug or alcohol test” means a second analytical procedure used to identify the presence of a specific drug or alcohol or metabolite in a specimen, which test must be different in scientific principle from that of the initial test procedure and must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.

F. “Rule 36 employer” means a person or entity that employs a person, is covered by the workers’ compensation laws and maintains a drug-free workplace pursuant to this rule. This rule shall have no effect on employers who do not meet this definition.

G. “Director” means the director of the Health and Safety Division of the Workers’ Compensation Commission.

H. “Division” means the Health and Safety Division of the Workers’ Compensation Commission.

I. “Drug” means any controlled substance subject to testing pursuant to drug testing regulations adopted by the United States Department of Transportation. A Rule 36 employer shall test an individual for all such drugs in accordance with the provisions of this rule.

J. “Drug or alcohol rehabilitation program” means a service provider that provides confidential, timely, and expert identification, assessment and resolution of employee drug or alcohol abuse.

K. “Drug test” or “test” means any chemical, biological, or physical instrumental analysis administered by a certified laboratory for the purpose of determining the presence or absence of a drug or its metabolites or alcohol pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation.

L. “Employee” means any person who works for a salary, wage, or other remuneration for a covered employer.

M. “Employee assistance program (EAP)” means an established program of Substance Abuse Professional (SAP) capable of providing:

1. Expert assessment of employee personal concerns;

2. Confidential and timely identification services with regard to employee drug or alcohol abuse;

3. Referrals of employees for appropriate diagnosis, treatment and assistance; and

4. Follow-up services for employees who participate in the program or require monitoring after returning to work.

If, in addition to the above activities, an employee assistance program provides diagnostic and treatment services, these services shall in all cases be provided by the program.

N. "Employer" means a person or entity that employs a person and is covered by the workers' compensation laws.

O. "First aid treatment" means treatment as defined by U.S. Department of Labor, Occupational Safety and Health Administration in 29 CFR 1904.

P. "Initial drug or alcohol test" means a procedure that qualifies as a "screening test" or "initial test" pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation.

Q. "Injury" means any work-related accident requiring more than first-aid treatment.

R. "Job applicant" means a person who has applied for a position with a Rule 36 employer and has been offered employment conditioned upon successfully passing a drug or alcohol test, and may have begun work pending the results of the drug or alcohol test.

S. "Medical Review Officer" or "MRO" means a licensed physician, pharmacist, pharmacologist or similarly qualified individual, employed with or contracted with a Rule 36 employer, who has knowledge of substance abuse disorders, laboratory testing procedures and chain of custody collection procedures; who verifies positive, confirmed test results; and who has the necessary medical training to interpret and evaluate an employee's positive test result in relation to the employee's medical history or any other relevant biomedical information.

T. "Presence of drugs or alcohol" means levels of drugs, alcohol or metabolites in the body at or above the cutoff levels established by Department of Transportation (DOT) as published in 49 CFR Part 40 and elsewhere.

U. "Reasonable suspicion drug testing" means drug or alcohol testing based on a belief that an employee is using or has used drugs or alcohol in violation of the Rule 36 employers' policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.

V. "Safety-sensitive position" means a position involving a safety-sensitive function pursuant to regulations governing drug and alcohol testing adopted by the United States Department of Transportation. "Safety-sensitive position" means, with respect to any employer, a position in which a drug or alcohol impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to carry a firearm, perform life-threatening

procedures, work with confidential information or documents pertaining to criminal investigations or work with controlled substances, or in a position in which momentary lapse in attention could result in injury or death to another person.

W. "Specimen" means tissue, fluid, or a product of the human body capable of revealing the presence of alcohol, drugs or their metabolites.

X. "49 CFR Part 40" means the most current version of 49 CFR Part 40.

IV. WRITTEN POLICY STATEMENT: NOTICE TO JOB APPLICANTS AND EMPLOYEES

A. It is a requirement of the drug-free workplace program that, prior to testing, the employer give a one-time written policy statement to all employees and job applicants. A model notice and policy may be obtained from the Division. This model notice and policy may be modified by the employer. However, any such notice must contain:

1. A general statement of the Rule 36 employer's policy on employee drug and alcohol abuse, which must identify:

a. That it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in the employee's body;

b. The types of drug or alcohol testing an employee or job applicant may be required to submit to; and

c. The actions the Rule 36 employer may take against an employee or job applicant on the basis of a positive, confirmed, verified drug or alcohol test result;

2. A statement advising the employee or job applicant of the existence of this rule;

3. A statement explaining the protections available to employees under this rule as outlined in Section IX;

4. A general statement concerning confidentiality;

5. The consequences of refusing to submit to a drug or alcohol test;

6. A representative sampling of names, addresses, and telephone numbers of employee assistance programs and/or local drug and alcohol rehabilitation programs;

7. A statement informing the employee or job applicant of his responsibility to notify the laboratory of any administrative or civil action brought pursuant to this rule;

8. A list of all classes of drugs for which the Rule 36 employer may test;

9. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the applicable court;

10. That this notice complies with the requirements for notice under Section I.

B. A Rule 36 employer shall ensure that at least sixty (60) days elapse between a general one-time notice to all employees that a drug-free workplace program is being implemented and the effective date of the program.

C. A Rule 36 employer shall include notice of drug and/or alcohol testing on vacancy announcements for positions for which drug and/or alcohol testing is required. A notice of the Rule 36 employer's drug and alcohol testing policy must also be posted in an appropriate and conspicuous location on the Rule 36 employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the Rule 36 employer during regular business hours in the Rule 36 employer's personnel office or other suitable locations.

D. A Rule 36 employer may rescind its coverage under this rule by posting a written and dated notice in an appropriate and conspicuous location on its premises.

1. The notice shall state that the policy will no longer be conducted pursuant to this rule;

2. The employer shall provide sixty (60) days written notice of the rescission to the employer's workers' compensation insurer and the Division. Such notice shall be sent by certified mail;

3. The rescission shall become effective no earlier than sixty (60) days after the date of the posted notice.

V. TYPES OF TESTING

A. This rule does not preclude an employer from conducting any lawful testing, including random testing, of employees for drugs or alcohol that is in addition to the minimum testing required under this rule.

B. An employee who is not in a safety-sensitive position may be tested for alcohol only when the test is based upon reasonable suspicion.

C. An employee in a safety-sensitive position may be tested for alcohol use at any occasion as described in this section.

D. To the extent permitted by law, a Rule 36 employer who voluntarily establishes a drug-free workplace is required to conduct the following types of drug and alcohol tests.

1. Job applicant drug and/or alcohol testing:

After a conditional offer of employment, a Rule 36 employer:

a. Must require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive, confirmed, verified drug test as a basis for refusing to hire a job applicant;

b. May conduct limited testing of applicants, but only if it is based on a reasonable classification basis, in accordance with this rule;

c. May, but is not required to, test job applicants for alcohol;

d. May test an employee for any drug as set out in Section VII and at any time set out in Section V of this rule;

e. Shall limit such testing for public employees to the extent permitted by the Arkansas and federal constitutions.

2. Reasonable suspicion drug or alcohol testing:

A Rule 36 employer must require an employee to submit to reasonable suspicion drug or alcohol testing.

a. Specimen collection for reasonable suspicion testing must be done within a reasonable time after the precipitating incident; for alcohol, it must be done within eight (8) hours of the incident and, for drugs, it must be done within thirty-two (32) hours of the incident.

b. Among other things, reasonable suspicion shall include such facts and inferences as may be based upon:

(1) Observable phenomena while at work, such as direct observation of drug or alcohol use or of the physical symptoms or manifestations of being under the influence of a drug or alcohol;

(2) Abnormal conduct or erratic behavior while at work, or a significant deterioration in work performance.

(3) A report of drug or alcohol use, provided by a reliable and credible source;

(4) Evidence that an individual has tampered with a drug or alcohol test during employment with the current Rule 36 employer;

(5) Information that an employee has caused, contributed to or been involved in an accident while at work; or

(6) Evidence that an employee has used, possessed, sold, solicited or transferred drugs or used alcohol while working or while on the Rule 36 employer's premises or while operating the Rule 36 employer's vehicle, machinery or equipment.

c. Within twenty-four (24) hours of the observed behavior or before the results of the test are released, whichever is earlier, the Rule 36 employer must make a written record of the observations leading to a controlled substance or alcohol reasonable suspicion test. A copy of this documentation shall be given to the employee upon request, and the original documentation shall be kept confidential by the Rule 36 employer pursuant to Section XII and shall be retained by the Rule 36 employer for at least one (1) years.

3. Routine fitness-for-duty drug or alcohol testing.

a. A Rule 36 employer must require an employee to submit to a drug or alcohol test if, as a part of the employer's written policy, the test is conducted as a routine part of a routinely scheduled employee fitness-for-duty medical examination, or is scheduled routinely for all members of an employment classification or group.

b. A public employer may require scheduled, periodic testing only of employees who:

(1) Are police or peace officers;

(2) Have drug interdiction responsibilities;

(3) Are authorized to carry firearms;

(4) Are engaged in activities which directly affect the safety of others;

(5) Work in direct contact with inmates in the custody of the Department of Correction; or

(6) Work in direct contact with minors who have been adjudicated delinquent or who are in need of supervision in the custody of the Department of Human Services.

c. This rule does not require a drug or alcohol test if a Rule 36 employer's current personnel policy on July 1, 2000, does not include drug or alcohol testing as a part of a routine

fitness-for-duty medical exam. If such testing is included, it must be done on a nondiscriminatory manner.

d. Routine fitness-for-duty drug or alcohol testing of employees does not apply to volunteer employee health screenings, employee wellness programs, programs mandated by governmental agencies, or medical surveillance procedures that involve limited examinations targeted to a particular body part or function.

4. Follow-up drug testing. If the employee in the course of employment enters an employee assistance program for drug or alcohol-related problems, or a drug or alcohol rehabilitation program, the Rule 36 employer must require the employee to submit to a drug or alcohol test, as appropriate, as a follow-up to such program, unless the employee voluntarily entered the program. In those cases, the Rule 36 employer has the option to not require follow-up testing. If follow-up testing is required, it must be conducted at least once a year for a two-year period after successful completion of the program. Advance notice of a follow-up testing date must not be given to the employee to be tested.

5. Post-accident testing. After an accident which results in an injury, the Rule 36 employer shall require the employee to submit to a drug or alcohol test in accordance with this rule. Post accident specimen collection for alcohol testing shall be done within eight (8) hours of the accident. Post accident specimen collection for drugs shall be done within thirty-two (32) hours of the accident.

VI. REFUSAL TO TEST

A. If an employee or job applicant refuses to submit to a drug or alcohol test, the Rule 36 employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this section does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in this rule.

B. Attempting to defraud a drug test (substitution, adulteration, dilution, etc.) is a Class B misdemeanor under Arkansas law punishable by up to 90 days in jail and/or $500 file.

VII. TESTING PROCEDURES AND LABORATORY REQUIREMENTS

A. Pursuant to 49 CFR Part 40, a Rule 36 employer shall test as specified in this rule for:

1. Amphetamines;

2. Marijuana (cannabinoids);

3. Cocaine (benzolylecgonine);

4. Opiates (codeine, morphine, heroin);

5. PCP (phencyclidine) ; and

6. Alcohol.

B. The cutoffs established by the United States Department of Transportation and published in 49 CFR Part 40 or elsewhere shall be used for determination of presumptively positive tests and confirmation tests.

C. The following shall be performed in accordance with the procedures provided for by the United States Department of Transportation rules for workplace drug and alcohol testing compiled in 49 CFR Part 40, Subpart B and Subpart C for drugs and alcohol, respectively:

1. Split-sample method of collection;

2. Security of the collection site;

3. Privacy of the individual;

4. Collection control;

5. Chain of custody procedures, which include integrity, identity and retention of the specimen;

6. Transportation of the specimen;

7. Testing; and

8. Reporting.

D. Except for Sub-Section VII (E.) (of this rule) and Sub-Section IX (B.) (of this rule), the procedures for laboratory reporting and medical review officer and reporting of specimen test results shall be in accordance with those described in 49 CFR, Parts 40.29 and 40.33.

E. Any specimens with evidence of dilution, contamination, tampering, or any question normally requiring a medical review officer opinion shall be reported to the medical review officer for disposition. The medical review officer may determine the need to re-test, re-collect, order more extensive testing, or otherwise modify the collection or testing procedure to ensure adequate and appropriate testing.

F. A laboratory may not analyze initial test specimens unless:

1. The laboratory is licensed and approved by the Arkansas Department of Health, using criteria established by the United States Department of Health and Human Services as guidelines for modeling the state drug free testing program pursuant to this section, or the laboratory is certified by the United States Department of Health and Human Services or the College of American Pathologists; and

2. The laboratory complies with the procedures established by the United States Department of Transportation for a workplace drug test program or such other recognized authority approved by the Director.

G. Confirmation test may only be conducted by a laboratory that meets the requirements of subsection (F) and is certified by either the Substance Abuse and Mental Health Services Administration or the College of American Pathologists forensic urine testing programs.

H. The Arkansas Department of Health may license and approve any new laboratory to analyze initial or confirmation test specimens under the provisions of this rule and may charge a fee, not to exceed two thousand dollars ($2,000), for the license and approval of the new laboratory. The fees set forth in this section shall be cash funds of the Arkansas Department of Health and shall be deposited as provided in Ark. Code Ann. §19-4-801 through §19-4-816.

VIII. COST OF TESTING

A Rule 36 employer shall pay the cost of all drug and alcohol tests, initial and confirmation, which the Rule 36 employer requires of employees. An employee or job applicant shall pay the costs of any additional drug or alcohol tests not required by the Rule 36 employer.

IX. EMPLOYEE PROTECTION

A. The employer shall provide procedures for the employee or job applicant to confidentially report to the medical review officer the use of prescription or nonprescription medications after being tested, but only if the testing process has revealed a positive result for presence of drugs or alcohol.

B. An employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within five (5) working days after receiving written notification of the test result. If an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall then report the positive test result to the Rule 36 employer. An employee may then contest the drug test result pursuant to Sub-Section IX (F.) of this rule.

C. Employees and job applicants must be given a reasonable opportunity to consult with a medical review officer for technical information regarding prescription and nonprescription medicine.

D. A Rule 36 employer may not discharge, discipline, refuse to hire, discriminate against or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been confirmed and verified by a medical review officer.

E. A Rule 36 employer shall not discharge, discipline or discriminate against an employee solely upon the employee's voluntarily seeking treatment, while employed by the Rule 36 employer, for a drug-related or alcohol-related problems if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for drug-related or alcohol-related problems or entered a drug or alcohol rehabilitation program. A Rule 36 employer may select the employee assistance program or drug or alcohol rehabilitation program if the Rule 36 employer pays the cost of the employee's participation in the program. However, nothing in this rule is intended to require any employer to permit or provide such a rehabilitation program.

F. Within 30 days of termination, an employee shall be entitled to contest the test results before the Arkansas Department of Labor by filing written notice with the Arkansas Department of Labor.

X. EMPLOYER PROTECTION

A. An employee or job applicant whose drug or alcohol test result is confirmed as positive in accordance with this rule shall not, by virtue of the result alone, be deemed to have a "handicap" or "disability" as defined under federal, state or local handicap and disability discrimination laws.

B. A Rule 36 employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this rule is considered to have discharged, disciplined or refused to hire for cause. Nothing in this rule shall be construed to amend or affect the employment-at-will doctrine.

C. No physician-patient relationship is created between an employee or job applicant and a Rule 36 employer or any person performing or evaluating a drug or alcohol test, solely by the establishment, implementation or administration of a drug or alcohol testing program. This section in no way relieves the person performing the test from responsibility for acts of negligence in performing the tests.

D. Nothing in this rule shall be construed to prevent a Rule 36 employer from establishing reasonable work rules related to employee possession, use, sale or solicitation of drugs or alcohol, including convictions for offenses relating to drugs or alcohol, and taking action based upon a violation of any of those rules.

E. This rule does not operate retroactively, and does not abrogate the right of an employer under state law to lawfully conduct drug or alcohol tests, or implement lawful employee drug-

testing programs. The provisions of this rule shall not prohibit an employer from conducting any drug or alcohol testing of employees which is otherwise permitted by law.

F. If an employee or job applicant refuses to submit to a drug or alcohol test, the Rule 36 employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this subsection does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in this rule.

G. This rule does not prohibit an employer from conducting medical screening or other tests required, permitted or not disallowed by any statute, rule or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or testing is limited to the specific substances expressly identified in the applicable statute, rule or regulation, unless prior written consent of the employee is obtained for other tests. Such screening or testing need not be in compliance with this rule. If applicable, such drug or alcohol testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before such testing is implemented.

XI. SUBSTANCE ABUSE EDUCATION/AWARENESS

A. Employee Education/Awareness Required for Certification.

1. Rule 36 employers are required to provide to all employees educational materials which explain the requirements of this section and the employer's policies and procedures with respect to these requirements.

a. The employer shall ensure that a copy of this material is distributed to each employee prior to the start of the drug-free workplace program, and to each employee hired or transferred into locations covered by the drug-free workplace program.

b. Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

2. Required content. The materials to be made available to employees shall include detailed discussion of at least the following:

a. The identity of the person designated by the employer to answer employee questions about the materials;

b. Sufficient information about safety-sensitive functions performed by employees to make clear what period of the work day the employee is required to be in compliance with this rule;

c. Specific information concerning employee conduct that is prohibited by this rule;

d. The circumstances under which an employee will be tested for alcohol and/or drugs under this part;

e. The procedures that will be used to test for the presence of alcohol and drugs, protect the employee and the integrity of the testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee, including post-accident information, procedures and instructions required by this part.

f. The requirement that an employee submit to alcohol and drug tests administered in accordance with this rule;

g. An explanation of what constitutes a refusal to submit to an alcohol or drug test and the attendant consequences;

h. The consequences for employees found to have violated the employer's drug-free workplace program, including the requirement that the employee be removed immediately from safety-sensitive functions.

i. The consequences for employees in safety-sensitive positions found to have an alcohol concentration above the cut-off limits defined by this rule.

j. Information concerning the effects of alcohol and drug use on an individual's health, work, and personal life; signs and symptoms of an alcohol or drug problem (the employee or a co-worker); and available methods of intervening when an alcohol or drug problem is suspected, including confrontation, referral to an employee assistance program and/or referral to management.

3. Optional provision. The materials supplied to employees may also include information on additional employer policies with respect to the use of alcohol or drugs, including any consequences for an employee found to have a specified alcohol or drug level, that are based on the employer's authority independent of this rule. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

4. Certificate of receipt. Each employer shall ensure that each employee is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the employee.

B. Training for Supervisors

1. Each Rule 36 employer shall ensure that all persons designated to supervise employees receive at least sixty (60) minutes of training on alcohol misuse and receive at least an additional sixty (60) minutes of training on drug use.

2. The training will be used by the supervisor to determine whether reasonable suspicion exists to require an employee to undergo testing under Section V. of this rule.

3. The training shall include the physical, behavioral, speech, and performance indicators of probably alcohol misuse and use of drugs.

XII. CONFIDENTIALITY

A. All information, interviews, reports, statements, memoranda and drug or alcohol test results, written or otherwise, received by the Rule 36 employer through a drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section of in determining compensability under Ark. Ann. Code §11-14-109 or Ark. Ann. Code §11-9-409

B. Employers shall furnish the following information to both the Commission and their insurance carrier upon request: the name of the testing laboratory, third party administrator and MRO being used (including contact information); and summary reports indicating the total number, types and results of test conducted during a specific period. The testing laboratory is authorized to verify these reports to the Commission and insurer.

C. Rule 36 employers, laboratories, medical review officers, employee assistance programs, drug or alcohol rehabilitation programs, and their agents who receive or have access to information concerning drug or alcohol test results shall keep all information confidential. Release of such information under any other circumstance is authorized solely pursuant to written consent form signed voluntarily by the person tested, unless:

1. Such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section;

2. Relevant to a legal claim asserted by the employee; or

3. Is deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding.

D. The consent form must contain, at a minimum:

1. The name of the person who is authorized to obtain the information;

2. The purpose of the disclosure;

3. The precise information to be disclosed;

4. The duration of the consent; and

5. The signature of the person authorizing release of the information.

E. Information on drug or alcohol test results for tests administered pursuant to this rule shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section is inadmissible as evidence in any such criminal proceeding.

F. This rule does not prohibit a Rule 36 employer, agent of such employer or laboratory conducting a drug or alcohol test from having access to employee drug or alcohol test information or using such information when consulting with legal counsel in connection with actions brought under or related to this section, or when the information is relevant to its defense in a civil or administrative matter. Neither is this section intended to prohibit disclosure among management as is reasonable necessary for making disciplinary decisions relating to violations of drug or alcohol standards of conduct adopted by an employer.

G. A person who discloses confidential medical records of an employee, except as provided in this rule, shall be deemed guilty of a Class C misdemeanor, as provided by Act 1552 of 1999.

XIII. DRUG FREE PROGRAM APPROVAL PROCESS

A. It is the sole responsibility of the employers applying for Commission review of their drug-free workplace programs to submit accurate applications. Neither the Commission nor the insurer is responsible for validating compliance with the program other than to assess whether the program components as submitted comply with Rule 36. However, both the Commission and the insurer have the right to assess actual compliance with the program.

B. Any employer wishing to acknowledge compliance with the provisions of this rule shall annually complete and submit an application (on a form approved by the Director) to the Division. After review of the completed form, the Division will notify the employer of acceptance or any deficiencies that must be corrected.

C. Substantial compliance in completing and filing the form with the Director shall create a rebuttable presumption that the employer has established a drug-free workplace program and is emitted to the protection and benefit of Ark. Code Ann §11-14-104-112.

D. Prior to receiving any premium credit from an insurer pursuant to Ark. Code Ann. §11-14-104-112, all employers requesting premium credits shall provide the Commission acceptance form to their insurer.

E. If a Rule 36 employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in this rule, the Rule 36 employer shall not be eligible for premium credits as specified in Section XV.

F. All Rule 36 employers qualifying for and receiving premium credits provided under this rule must be reported annually by the insurer to the Director on a form approved by the Director.

XIV. APPEAL PROCESS

A. Each employer submitting a drug-free workplace program to the Division for review but which program is not accepted by the Division may obtain a review of the Division staff's findings by the Director.

B. Each insurance company receiving notice that a client company has obtained acceptance of its drug-free workplace program by the Division may obtain a review of the findings made by the Director of the Division.

C. The Director of the Division shall cause a record to be made of all submissions by the party or parties, and findings made by the Director.

D. An employer or insurance company may request a review by the Chief Executive Officer (C.E.O.) of the Commission of the findings made by the Director.

E. An employer or insurance company may request a review by the Full Commission of the findings made by the C.E.O.

F. A request for review by the Director of the Division, the C.E.O. or the Full Commission shall be in writing, setting out the grounds for the review. A request for review of a decision of the Director of the Division, the C.E.O. or the Full Commission shall be filed with the Clerk of the Commission within fifteen (15) days of receipt of such decision. The Director of the Division, C.E.O. or the Full Commission, as applicable shall decide the issues within fifteen (15) days of receipt of the request for review, based on the written record made with the Director.

G. The Arkansas Insurance Department will be promptly notified by the Clerk of the Commission of requests for review by the Full Commission. The results of Full Commission reviews will be forwarded to the Arkansas Insurance Department for review and any appropriate action.

XV. RATING PLANS

The Insurance commissioner shall approve rating plans for workers' compensation insurance that give a premium credit to employers that implement a drug-free workplace program pursuant to this rule. The plans must take effect January 1, 2000, must be actuarially sound, and must state the savings anticipated to result from such drug testing. The credit shall be at least five percent (5%) unless the Insurance Commissioner determines that five percent (5%) is actuarially unsound. This premium credit shall not be available to employers who do not maintain their drug-free workplace program for the entire workers' compensation insurance policy period.

XVI. SEVERABILITY

If any provision of this rule or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this rule which can be given effect without the invalid provision or application, and to this end the provisions of this rule are declared to be severable.

XVII. EFFECTIVE DATE

(This rule shall become effective November 1, 1999; revised effective September 20, 2001; revised October 5, 2007; effective January 1, 2008 .)