

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

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OFFICE WEST VIRGINIA
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Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: West Virginia Office of Miners' Health, Safety and Training TITLE NUMBER: 56

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 19

TITLE OF RULE BEING AMENDED: Substance Abuse Screening, Standards and Procedures

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) S.B. 202

SECTION 64-10-3, PASSED ON March 11, 2016

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: May 16, 2016


Authorized Signature

56CSR19

FILED

TITLE 56

LEGISLATIVE RULE

2016 APR 14 P 1:58

OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING

OFFICE WEST VIRGINIA
SECRETARY OF STATE

SERIES 19

SUBSTANCE ABUSE SCREENING,
STANDARDS AND PROCEDURES

§56-19-1. General.

1.1. Scope. -- This rule applies to every employer of "certified persons," as that term is defined in W. Va. Code §22A-1-2(d)(3), and to every employer of employees who as part of their employment are regularly present at a mine and who are employed in a "safety-sensitive position," as that term is defined in W. Va. Code §22A-1A-1(f).

1.2. Authority. -- W. Va. Code §§22A-1A-1 et. seq. and 22A-6-14.

1.3. Filing Date. -- April 14, 2016.

1.4. Effective Date. -- May 16, 2016.

§56-19-2. Purpose.

2.1. Purpose -- The purpose of this rule is to implement the mandate of W. Va. Code §22A-1A-1 et. seq.

§56-19-3. Definitions.

3.1. Unless the context in which a word or phrase appears clearly requires a different meaning, all terms used in this rule that are not defined herein shall have the meanings set forth in W. Va. Code §22A-1-2.

3.2. Adulterated Specimen. The term "adulterated specimen" means a specimen that has been altered as evidenced by test results showing that the specimen contains a substance that is not a normal constituent or containing an endogenous substance at a concentration that is not a normal physiological concentration.

3.3. Agency. The term "agency" means the West Virginia Office of Miners' Health, Safety and Training created by W. Va. Code §22A-1-1.

3.4. Breath test. The term "breath test" means a chemical test of a person's breath to determine the amount of alcohol he/she has consumed.

3.5. Certified Person. The term "certified person" shall have the meaning set forth in W. Va. Code §22A-1-2(d)(3).

3.6. Code. The term "code" means the West Virginia Code of 1931, as amended.

3.7. Director. The term "Director" means the Director of the Office of Miners' Health, Safety and Training, and shall include his authorized representatives where applicable.

56CSR19

3.8. Duly licensed, mental health professional. The term "duly licensed, mental health professional" means a psychiatrist, psychologist, professional counselor or substance abuse counselor in the United States who is licensed by, and in good standing with, the licensing authority of the jurisdiction in which the person practices.

3.9. Employer. The term "employer" means all operators, independent contractors, subcontractors, or otherwise that employ certified persons who work in mines, or employees who as part of their employment are regularly present at a mine and who are employed in a safety-sensitive position.

3.10. Hazard training. The term "hazard training" means information or instructions on the site specific hazards a person could be exposed to while at the mine, as well as applicable emergency procedures.

3.11. Independent contractor. The term "independent contractor" means any firm, corporation, partnership, or individual that contracts to engage in the extraction, production, hauling, loading, processing or preparation activities associated with a mine as defined in section 3.13 of this rule.

3.12. Medical Review Officer. The term "medical review officer" means a licensed physician with knowledge of substance abuse disorders, laboratory testing, chain of custody, collection procedures, and the ability to verify positive, confirmed test results. The medical review officer shall possess the necessary medical training to interpret and evaluate a positive test result in relation to the person's medical history or any other relevant biomedical information.

3.13. Mine. The term "mine" shall have the meaning set forth in W. Va. Code §22A-1-2(a)(6) and shall include any underground coal mine, surface coal mine, coal preparation plant, coal loadout, or river coal loadout.

3.14. Operator. The term "operator" means any firm, corporation, partnership, or individual operating any coal mine or part thereof, as defined in section 3.13 of this rule, or engaged in the construction of any facility associated with a coal mine.

3.15. Pre-employment Testing. The term "pre-employment testing" means the substance abuse testing of any certified person or person to be employed in a safety-sensitive position either prior to hiring or upon hiring by a new operator or new independent contractor, the rehiring of any certified person or person employed in a safety sensitive position by an operator or independent contractor following a termination of the employment relationship, or transferring to a West Virginia mine from an employer's out-of-state mine to the extent that the substance abuse test required by the employer in the other jurisdiction does not comply with the minimum standards for substance abuse testing required by this rule.

3.16. Random Testing. The term "random testing" means that each person subject to testing has a statistically equal chance of being selected for testing at random and at unscheduled times. The selection of persons for random testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with the person's social security number, payroll identification number, or other comparable identifying number. A random test shall be at least twenty-five per cent (25%) of the employees working at a mine or facility annually. Random testing shall be conducted at least four (4) times annually.

3.17. Safety-Sensitive Position. The term "safety-sensitive position" means an employment position where the employee's job responsibilities include duties and activities that involve the personal safety of the employee or others working at the mine.

3.18. Serious Accident. The term "serious accident" means an event at a mine which causes bodily injury to an individual which requires such individual to be admitted to a medical facility overnight for reasons other than strains, sprains or observation as determined by a physician.

3.19. Split Sample. The term "split sample" means a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result. Said testing shall be conducted in accordance

56CSR19

with the standards and procedures of the United States Department of Transportation's rule, 49 CFR Part 40, which may be amended from time to time by the Office of Miners' Health, Safety and Training through legislative rule.

3.20. Substance Abuse Policy and Testing Program. The term "substance abuse policy and testing program" shall include, at a minimum, a chemical test of breath to determine the presence of alcohol and the ten-panel urine test required by W. Va. Code §22A-1A-1(a)(1).

§56-19-4. Certification of Employees in Safety-Sensitive Positions.

4.1. No employee of an employer working in a safety-sensitive position may work or be employed unless he or she possesses a safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training. Any employee who currently possesses a certification issued by the West Virginia Office of Miners' Health, Safety and Training shall not be required to also obtain a safety-sensitive certification.

4.2. Every employer of an employee who works in a safety-sensitive position shall ensure that the employee has obtained the safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training.

4.3. A safety-sensitive certification shall be issued to any person who provides proof that he or she has received the twenty-four (24) hour MSHA training when required by MSHA, completes an application as prescribed by the Director, and shows a valid driver's license, valid passport, or valid state DMV issued photo ID. Any other personnel employed by an operator or independent contractor whose job does not require a miner certification or 24 hour MSHA training shall be eligible to receive a safety-sensitive certification by making application, showing proof that he or she has successfully completed hazard training, and shows a valid driver's license, valid passport, or valid state DMV issued photo ID.

4.4. Safety-sensitive certifications may be obtained at the Office of Miners' Health, Safety and Training's Charleston office or any of its regional offices.

4.5. The application for a safety-sensitive certification requires the following information:

4.5.1. Applicant's name, address, telephone number, social security number, date of birth, and applicant's signature.

4.5.2. Employer's company name, mine name, WV permit number, address, and telephone number.

4.5.3. Employment dates.

4.5.4. A notarized signature of an official of the employer.

4.6. In the event an application for a safety-sensitive certification is denied, the applicant may request a hearing before the Director.

4.7. Any applicant, who is adversely affected by a decision of the Director following a hearing on an application for safety sensitive certification, may petition for judicial review of the Director's decision in the Circuit Court of Kanawha County or in the circuit court of the county in which the applicant resides, pursuant to the provisions of W. Va. Code §29A-5-4.

4.8. The Director may charge a ten dollar (\$10.00) fee for the issuance of a safety-sensitive certification.

4.9. All persons currently having a certification issued by the West Virginia Office of Miners' Health, Safety and Training who desire to receive a safety-sensitive certification may receive such certification by completing the safety-sensitive certification application and paying the \$10.00.

56CSR19

4.10. Every employer shall submit to the Director by the 1st day of January each year a list of all employees occupying safety-sensitive positions. Further, every employer shall keep a current list of all employees occupying safety-sensitive positions available for review by the director or his authorized representative.

4.11. The Director may exempt any person responding to a mine emergency or providing rescue services from the requirement that he or she shall have a safety-sensitive certification prior to performing any mine emergency or rescue services.

§56-19-5. Duties of Employers.

5.1. Every employer shall implement a substance abuse policy and testing program which shall be administered to its certified and safety-sensitive employees.

5.2. Every employer's program shall at a minimum comply with all state mine laws relevant to substance abuse screening, standards and procedures.

5.3. Every employer shall have a pre-employment and random substance abuse policy and testing program which shall, at a minimum, include a ten (10) panel urine test for the following substances:

5.3.1 Amphetamines,

5.3.2. Cannabinoids/THC,

5.3.3. Cocaine,

5.3.4. Opiates,

5.3.5. Phencyclidine (PCP),

5.3.6. Benzodiazepines,

5.3.7. Propoxyphene,

5.3.8. Methadone,

5.3.9. Barbiturates, and

5.3.10. Synthetic narcotics.

5.4. In addition, every employer shall include, as part of its substance abuse screening policy and program, a chemical test of breath for alcohol. No person's blood alcohol level shall meet or exceed four one hundredths of one percent (.04) concentration at the time of testing.

5.5. The chemical test of breath shall be an alcohol confirmation test, as provided in 49 CFR Part 40, Subpart M, taken using an evidential breath testing device listed on the National Highway Traffic Safety Administration (NHTSA) most current Conforming Products List and conducted by a breath alcohol technician meeting the training requirements found in 49 CFR Part 40, Subpart J.

5.6. The substance abuse policy and testing program shall require that the 10 panel urine test be conducted in accordance with the standards and procedures set forth in the United States Department of Transportation's rule found at 49 CFR, Part 40 and collected by

56CSR19

individuals who are certified as complying with standards and procedures set forth in the United States Department of Transportation's rule found at 49 CFR Part 40.

5.7. Initial and split samples shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection and testing.

5.8. In the event a person desires to challenge the results of his or her initial sample test result, that person shall have the right to have the split sample tested by another laboratory certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA). The cost associated with the testing of the split sample shall be the responsibility of the person challenging the initial sample test results.

5.9. Every employer shall review its substance abuse testing program with all persons required to be tested at the time of employment, upon a change in the program, and annually thereafter.

5.10. Every employer shall provide new and current employees with information about the mandatory substance abuse policy and testing program and inform each employee of his or her rights and responsibilities under the program and that refusal to comply with the testing shall constitute grounds for decertification and shall result in the employer notifying the Director of said refusal in accordance with Subsection 5.11 of this Rule. A record of such review shall be maintained at the mine and made available to an authorized representative of the Director upon request.

5.11. Every employer shall notify the Director, on a form prescribed by the Director, within seven (7) days of any of the following:

5.11.a. A positive drug or alcohol test of a certified person, whether it be a pre-employment test, random test, reasonable suspicion test, or post-accident test, however, for purposes of determining whether a drug test is positive the certified employee may not rely on a prescription dated more than one year prior to the date of the drug test result;

5.11.b. The refusal of a certified person to submit a sample;

5.11.c. A certified person possessing a substituted sample or an adulterated sample; or

5.11.d. A certified person submitting a substituted sample or an adulterated sample.

5.12. When the employer submits the completed notification form prescribed by the director, the employer shall also submit a copy of the laboratory test results showing the substances tested for and the results of the test.

5.13. A notice, pursuant to subsection 5.11 of this rule, shall result in the immediate temporary suspension of all certificates held by the certified person who failed the screening, pending a hearing before the board of appeals pursuant to W. Va. Code §22A-1A-2.

5.14. Any employer may develop or maintain a drug and alcohol abuse policy, testing program or substance abuse program that exceeds the minimum requirements set forth in subsections 5.3 of this rule. The provisions of this rule shall not be construed to require an employer to alter, amend, revise or otherwise change, in any respect, a previously established substance abuse screening policy and program that meets or exceeds the minimum requirements set forth in this rule.

5.15. Every employer shall maintain a record of substance abuse testing results for each person tested which shall be kept confidential, except that the records shall be open to inspection by the Director or when compelled by a court of competent jurisdiction. Each employer shall maintain records of verified positive drug or alcohol test results and employee refusals to take mandatory tests for a minimum of five (5) years.

56CSR19

5.16. No part of this rule is intended to prohibit an employer from implementing a policy requiring a certified person or a person in a safety-sensitive position to take a substance abuse test or chemical test of breath for the presence of alcohol if the employer has a reasonable suspicion that the person is under the influence of a controlled substance or alcohol.

5.17. Every employer shall require any person involved in a serious or fatal accident to be drug and alcohol tested immediately after the accident.

5.18. A random test shall be at least twenty-five per cent (25%) of the employees working at a mine or facility annually. Random testing shall be conducted at least four (4) times annually.

§56-19-6. Responsibilities of the Director.

6.1. Upon receipt of a notice as required by subsection 5.11 of this Rule and upon verification that the pre-employment applicant or the employee tested positive by urine test for at least one (1) of the ten (10) substances identified therein or had a blood alcohol level at or in excess of four one hundredths of one percent (.04) concentration at the time of testing, the Director shall issue an immediate temporary suspension of all certifications held by the person pending a hearing before the Board of Appeals pursuant to W. Va. Code §22A-1A-2. The Director shall mail, by certified mail, to the person notice of the temporary suspension and that he or she has the right to pursue one (1) of the following options:

6.1.1. Appeal the suspension to the Board of Appeals within thirty (30) days, or

6.1.2. Notify the Director within thirty (30) days that the temporarily suspended person intends to enter into a Treatment Plan Agreement sanctioned by the Board of Appeals as set forth in section 9 of this Rule. Costs of the evaluation, treatment and drug and alcohol tests shall be the responsibility of the temporarily suspended person.

6.2. The certified mailing shall also inform the individual that failure to file an appeal pursuant to Subsection 6.1.1 or failure to notify the Director of that individual's intent to comply with Subsection 6.1.2 of this rule within thirty (30) days could result in the Board of Appeals revoking all certifications issued to that individual for a period of not less than three (3) years and that the individual shall remain ineligible for any other certification issued by the Office of Miners' Health, Safety and Training during the revocation period.

6.3. The Director shall immediately and temporarily suspend any certification issued by the Office of Miners' Health, Safety and Training or any safety-sensitive certification upon receipt of a suspension or revocation of a certified person's certificate as a miner or other miner specialty in another jurisdiction by the applicable regulatory or licensing authority for substance abuse related matters. The immediate and temporary suspension shall remain in effect until such time as the certified person's certification is reinstated in the other jurisdiction or modified by the Board of Appeals pursuant to W. Va. Code §22A-1A-2.

6.4. The Director shall issue an immediate temporary suspension or notice of revocation of a certified person's West Virginia certification(s), including any safety-sensitive certification, under the following circumstances:

6.4.1. The person tests positive on a urine test for any of the ten (10) substances identified in Subsection 5.3 of this rule and is deemed to have failed the test by the medical review officer.

6.4.2. The person's chemical test of breath shows a blood alcohol level at or in excess of four one hundredths of one percent (.04) concentration at the time of testing.

6.4.3. The person possesses an adulterated specimen or the drug test results demonstrate the submission of an adulterated specimen.

56CSR19

6.4.4. The person possesses a substituted specimen or the drug test results demonstrate the submission of a substituted specimen.

6.4.5. The person refuses to submit to a drug or alcohol test.

6.5. Any person who has his or her certification(s) temporarily suspended or revoked by the Director may file an appeal of the temporary suspension or revocation with the Board of Appeals. The notice of appeal shall be filed with the Board of Appeals within thirty (30) days of issuance of the notice of suspension or revocation.

6.6. No certification may be revoked until such time as the individual has been granted adequate opportunity for a hearing before the Board of Appeals conducted in accordance with W. Va. Code §22A-1A-2. The notice of appeal shall be initiated by the filing of a notice of appeal by the person whose certification was suspended by the Director.

6.7. Upon receipt of a notice as required by subsection 5.11 of this rule of a person having failed a substance abuse test for a second time, the Director shall issue an immediate temporary suspension of all certifications held by the person who failed the substance abuse screening policy and shall immediately initiate proceedings for the permanent revocation of all certifications held by the person pending a hearing before the Board of Appeals pursuant to W. Va. Code §22A-1A-2.

6.8. Records of substance abuse and drug testing, written or otherwise, received by the Office of Miners' Health, Safety and Training, its employees, agents and representatives are confidential communications and exempt from disclosure under W. Va. Code §29B-1-1, except where disclosure is authorized pursuant to §22A-1A-3.

§56-19-7. Drug Testing Standards.

7.1. The employer shall insure that its drug testing vendor complies with the following standards for collection and testing of samples:

7.1.1. The drug testing vendor shall follow all standards, procedures, and protocols set forth by the United States Department of Transportation's rule, 49 CFR Part 40 for the collection of urine samples and chemical test of breath for the presence of alcohol.

7.1.2. Collected samples shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMSHA) for collection and testing.

7.1.3. The drug testing vendor's drug testing protocol shall be a ten (10) panel urine test containing the substances identified in section 5.3 of this Rule.

7.1.4. The drug testing vendor shall provide a medical review officer who shall possess the ability and medical training necessary to verify positive confirmed test results and evaluate those results in relation to a certified person's medical history or other biomedical information and follow all procedures outlined in the SAMSHA medical review officer manual. However, for purposes of determining whether a drug test is positive the certified employee may not rely on a prescription dated more than one year prior to the date of the drug test result.

§56-19-8. Disciplinary process.

8.1. The Board of Appeals shall suspend all certifications possessed by a person who has entered into a treatment plan agreement as specified in subsection 9.1 of this rule or who is found, by a preponderance of the evidence to have failed a random drug or alcohol test; failed a pre-employment drug or alcohol test; failed a recall drug and alcohol test; failed a reasonable suspicion drug or alcohol test; failed a post accident drug or alcohol test; refused to submit to a drug or alcohol test; possessed a substitute sample; submitted a substituted sample; possessed an adulterated sample; or submitted an adulterated sample. In addition, the Board of Appeals shall order

56CSR19

that during the suspension period the person shall complete substance abuse and/or alcohol counseling and treatment; and undergo periodic random drug and alcohol tests. The costs of any substance abuse and alcohol counseling, treatment and random drug and alcohol tests shall be the sole responsibility of the person found to have failed a drug or alcohol test.

8.2. Any person requesting a hearing who intends to challenge the sample collection methods, the laboratory test results, the medical review officer's verification of the laboratory test result or the chemical test of breath, shall notify the Director of his or her intent. The person shall submit the notification in writing, either in person or by mail to the Director, at least fourteen (14) days prior to the hearing date. The notification shall specify, in detail, the challenge the person intends to make.

8.3. If the person requesting the hearing submits notification in writing to the Director that he/she intends to challenge the laboratory test results of the medical review officer's verification of the laboratory test result, that person shall have the split sample tested, at his/her expense, at a SAMSHA certified laboratory and those results verified by a medical review officer. The split sample results and the results of the split sample verification by a medical review officer shall be provided to the Director and the original medical review officer. No other form of evidence shall be admissible to challenge the laboratory test result of the medical review officer's verification of the laboratory test result.

8.4. If a person fails to comply with the notification requirements of this section, then the sample collection methods, the laboratory test results, the medical review officer's verification of the laboratory test result, or the chemical test of breath shall be admissible as though the person and the Director had stipulated to their admissibility.

8.5. No person whose certification is suspended or revoked under this rule may perform any duties under any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals. Furthermore, no person whose certification is suspended or revoked under this rule may apply for or obtain any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals or after his or her certification is revoked.

8.6. The Board of Appeals shall permanently revoke all certifications issued by the West Virginia Office of Miners' Health, Safety and Training when the Board finds, by a preponderance of the evidence, that the person has failed a drug test for the second time.

8.7. Any person adversely affected by a final order or decision issued by the Board of Appeals is entitled to judicial review thereof pursuant to W. Va. Code §29A-5-4.

§56-19-9. Treatment Plan Agreement.

9.1. The Treatment Plan Agreement referred to in subsection 6.1.2 of this rule shall contain, at a minimum, the following:

9.1.1. If the individual tested positive for alcohol or Cannabinoids/THC, that individual shall be required to undergo three (3) months of substance abuse treatment, counseling and after-care under the supervision of a duly licensed, mental health professional and submit to random drug and alcohol screenings at a minimum of one (1) per month during the three (3) month treatment period. Upon completion of the three (3) months of treatment and having passed all random drug and alcohol screenings, the individual may petition the Board of Appeals to re-instate his/her certifications.

9.1.2. If the individual tested positive for any substance referred to in subsection 5.3 of this Rule other than Cannabinoids/THC, that individual shall be required to undergo six (6) months of substance abuse treatment, counseling and after-care under the supervision of a duly licensed, mental health professional and submit to random drug and alcohol screenings at a minimum of one (1) per month during the six (6) month treatment period. Upon completion of the six (6) months of treatment and having passed all random drug and alcohol screenings, the individual may petition the Board of Appeals to re-instate his/her certifications.

9.1.3. If the individual refused a substance abuse or chemical test of breath for the presence of alcohol, that individual shall be required to undergo nine (9) months of substance abuse treatment, counseling and after-care under the supervision of a duly licensed,

56CSR19

mental health professional and submit to random drug and alcohol screenings at a minimum of one (1) per month during the nine (9) month treatment period. Upon completion of the nine (9) months of treatment and having passed all random drug and alcohol screenings, the individual may petition the Board of Appeals to re-instate his/her certifications.

9.1.4. If the individual possessed or submitted an adulterated sample or possessed or submitted a substituted sample, that individual shall be required to undergo nine (9) months of substance abuse treatment, counseling and after-care under the supervision of a duly licensed, mental health professional and submit to random drug and alcohol screenings at a minimum of one (1) per month during the nine (9) month treatment period. Upon completion of the nine (9) months of treatment and having passed all random drug and alcohol screenings, the individual may petition the Board of Appeals to re-instate his/her certifications.

9.1.5. An admission by the individual that he or she has failed or refused a drug and alcohol test for the first time and that a second failure or refusal shall result in the permanent revocation of all mining certifications issued to him or her.

9.2. The Director shall review all Treatment Agreements and shall not approve any Agreement that does not comply with this rule.

9.3. The Director shall insure an individual has satisfied all conditions for reinstatement before reinstating any certificate.