

## ACT 236

S.B. NO. 2307

A Bill for an Act Relating to Substance Abuse Testing.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER  
SUBSTANCE ABUSE TESTING**

§ -1 **Purpose.** The purpose of this chapter is to ensure that appropriate and uniform substance abuse test procedures are employed throughout the State, to protect the privacy rights of persons tested, and to achieve reliable and accurate results.

§ -2 **Definitions.** As used in this part:

“Confirmatory test” means a drug or alcohol test that uses a method of analysis determined by the director of health to be reliable in establishing the identity and quantity of alcohol, drugs, or metabolites of drugs detected in an initial screening test.

“Department” means the department of health.

“Director” means the director of health.

“Drug” means a controlled substance as defined in chapter 329, Hawaii Revised Statutes.

“Medical review officer” means an individual who has knowledge of substance abuse disorders and toxicology as determined by the department, and is appointed by the third party to receive, review, and interpret the results of laboratory tests requested by the third party. The department may specify through rules the qualifications of a medical review officer, and any additional responsibilities that may be required to carry out this chapter.

“Positive test result” means a finding through confirmatory testing of the presence of drugs, alcohol, or the metabolites of drugs in the sample tested in the levels at or above the cutoff levels established by the director.

“Substance abuse test” means any testing procedure, excluding toxicology tests used in the direct clinical management of patients and tests for alcohol related to chapters 286 and 291, designed to take and analyze body fluids or materials from the body for the purpose of measuring the amount of drugs, alcohol, or the metabolites of drugs in the sample tested.

“Third party” means any person, agency, employer or any other entity who requests substance abuse testing of another person or persons. Unless otherwise specified, the “third party” shall include the party’s designated staff.

§ -3 **Limitations.** No third party shall require, request, or suggest that any individual submit to a substance abuse test that does not meet all the requirements of this chapter except for third parties who are covered by any drug testing regulation promulgated by the Hawaii department of transportation or

the U.S. Department of Transportation or any other federal agencies. All costs, including confirmatory testing costs, shall be paid for by the third party. Nothing in this chapter shall be construed to preclude the department or any laboratory certifying agency approved by the director from examining the records of laboratories licensed for substance abuse testing to ascertain compliance with licensure or certification requirements, or to preclude the administration of breath tests to determine the alcohol content of the tested individual's blood for purposes of this chapter.

**§ -4 Laboratory requirements.** (a) Testing pursuant to subpart c of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (53 FR 11986) is exempt from the provisions of this chapter. All substance abuse testing performed in the State shall be performed by a testing laboratory licensed by the department for that purpose. Testing performed in another state may be performed only by laboratories licensed by that state to conduct substance abuse testing, and whose standards are comparable to those contained in this Act, and approved by the director. No laboratory located outside of the State may be licensed by the department to perform substance abuse testing.

(b) The director shall adopt rules governing:

- (1) Standards for licensure of qualified testing laboratories, and suspension and revocation of a license;
- (2) Qualifications of laboratory personnel;
- (3) Body component samples that are appropriate for substance abuse testing;
- (4) The selection of the medical review officers determined to be qualified by the department, and procedures to be followed by medical review officers in the reception, review and interpretation of the results of laboratory tests requested by the third party;
- (5) Procedures for taking of samples that ensure privacy to the individuals tested and prevent or detect tampering with the sample;
- (6) Methods of analysis and procedures to ensure reliable testing results, including standards for initial screening and confirmatory tests. Confirmatory tests for drugs or the metabolites of drugs shall utilize a gas chromatograph with a mass spectrometer detector or other reliable methods approved by the director;
- (7) Cutoff levels of alcohol, drugs, or the metabolites of drugs;
- (8) Chain of custody procedures to ensure proper identification, labeling, and handling of the samples to be tested;
- (9) Retention and storage procedures and durations to ensure availability of samples for retesting when necessary;
- (10) Establishing fees for licensing of laboratories;
- (11) Retention of substance abuse test information by the laboratory; and
- (12) Procedures to ensure confidentiality of the substance abuse testing procedures and substance abuse test information.

(c) No laboratory may be licensed to perform substance abuse testing in the State unless the laboratory participates in and continues to demonstrate satisfactory performance in drug proficiency testing as determined by the director.

**§ -5 Substance abuse testing procedures and interpretation of laboratory test results.** Prior to the collection of any sample for substance abuse testing, the individual to be tested shall receive a written statement of the specific substances to be tested for and a statement that over-the-counter medications or prescribed

drugs may result in a positive test result. The individual, prior to the collection of any sample for substance abuse testing, shall receive a medication disclosure form, approved by the director, to permit the individual to disclose any over-the-counter medication or prescribed drug that the individual has taken within the previous thirty (30) days. In accordance with this section, the director shall create in administrative rules, regulations pertaining to: (1) the qualifications, responsibilities and licensing of the medical review officer; (2) the use of medication disclosure forms; (3) the method of transmittal of laboratory test results and any interpretations of test results to the third party and the tested individual; and (4) the obtaining, disclosure and confidentiality of substance abuse testing information. No laboratory may test for any substance not included on the written statement containing the specific substances to be tested for.

**§ -6 Test results.** (a) The laboratory report shall include the following information and shall be reported in a timely manner:

- (1) The type of test conducted;
- (2) The test results, which, for each substance tested can be negative due to a negative screening or confirmatory test result, positive due to a positive confirmatory test result, or no result due to an unsatisfactory sample or other reason;
- (3) The cutoff level used to distinguish positive and negative samples on both the initial and confirmatory tests;
- (4) The name and address of the laboratory; and
- (5) Any additional information provided by the laboratory concerning the individual's test.

(b) The indication of a substance below the cut-off level as established by the director shall be recorded as a negative test result. The laboratory's report shall not contain any information indicating the possible presence of a substance below a cut-off level, as so established.

(c) Any information concerning a substance abuse test pursuant to this chapter shall be strictly confidential. Such information shall not be released to anyone without the informed written consent of the individual tested and shall not be released or made public upon subpoena or any other method of discovery, except that information related to a positive test result of an individual shall be disclosed to the individual, the third party, or the decision maker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual tested and arising from positive confirmatory test result. Any person who receives or comes into possession of any information protected under this chapter shall be subject to the same obligation of confidentiality as the party from whom the information was received.

(d) Failure to adopt or adhere to all the procedures contained in this chapter shall invalidate the test result and the result may not be reported or otherwise used for any purpose.

**§ -7 Remedies.** <sup>1</sup>Any person, agency, or entity that wilfully and knowingly violates any provision of this chapter shall be fined not less than \$1,000 but not more than \$10,000 for each violation as set by the department, plus reasonable court costs and attorney's fees as determined by the court, which penalty and costs shall be paid to the aggrieved person. This subsection shall not be construed as limiting the right of any person or persons to recover actual damages.

(b) In addition to any other enforcement mechanism allowed by law, any person, agency, or entity that commits, or proposes to commit, any act in violation of this chapter may be enjoined therefrom by a court of competent

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jurisdiction. An action for injunctive relief under this subsection may be brought by any aggrieved person that will fairly and adequately represent the interests of the protected class.

§ -8 **Rulemaking.** The department may adopt rules under chapter 91 necessary to implement this chapter.”

SECTION 2. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 3. This Act shall take effect on January 1, 1992.

(Approved June 25, 1990.)

### Note

1. So in original.