

**WORKPLACE DRUG AND ALCOHOL TESTING**

2010 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Trisha S. Beck**

Senate Sponsor: Karen Mayne

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**LONG TITLE**

**General Description:**

This bill modifies provisions related to an employer testing for drugs and alcohol.

**Highlighted Provisions:**

This bill:

- ▶ modifies terminology;
- ▶ clarifies effect of complying with the chapter;
- ▶ requires certain confirmation testing to be done by a certified laboratory;
- ▶ addresses grounds for employer action;
- ▶ addresses presumptions in applying employer protections from liability; and
- ▶ makes technical and conforming amendments.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**34-38-1**, as enacted by Laws of Utah 1987, Chapter 234

**34-38-2**, as enacted by Laws of Utah 1987, Chapter 234

**34-38-3**, as last amended by Laws of Utah 2001, Chapter 107

**34-38-6**, as enacted by Laws of Utah 1987, Chapter 234

**34-38-8**, as enacted by Laws of Utah 1987, Chapter 234

**34-38-10**, as enacted by Laws of Utah 1987, Chapter 234

30 34-38-11, as enacted by Laws of Utah 1987, Chapter 234

31 34-38-14, as last amended by Laws of Utah 2001, Chapter 73



33 *Be it enacted by the Legislature of the state of Utah:*

34 Section 1. Section 34-38-1 is amended to read:

35 **34-38-1. Legislative findings -- Purpose and intent of chapter.**

36 (1) The Legislature finds that a healthy and productive work force, safe working  
37 conditions free from the effects of drugs and alcohol, and maintenance of the quality of  
38 products produced and services rendered in this state, are important to employers, employees,  
39 and the general public. The Legislature further finds that the abuse of drugs and alcohol  
40 creates a variety of workplace problems, including increased injuries on the job, increased  
41 absenteeism, increased financial burden on health and benefit programs, increased workplace  
42 theft, decreased employee morale, decreased productivity, and a decline in the quality of  
43 products and services.

44 [~~Therefore, in balancing the interests of employers, employees, and the welfare of the~~  
45 ~~general public, the Legislature finds that fair and equitable testing for drugs and alcohol in the~~  
46 ~~workplace, in accordance with this chapter, is in the best interest of all parties.]~~

47 (2) The Legislature does not intend to prohibit ~~[any] an~~ employee from seeking  
48 damages or job reinstatement, if action ~~[was] is~~ taken by ~~[his] the~~ employer ~~[based on a false~~  
49 ~~drug or alcohol] on the basis of an inaccurate~~ test result.

50 Section 2. Section 34-38-2 is amended to read:

51 **34-38-2. Definitions.**

52 For purposes of this chapter:

53 (1) "Alcohol" means ethyl alcohol or ethanol.

54 (2) "Drugs" means ~~[any] a~~ substance recognized as a drug in the United States  
55 Pharmacopoeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug  
56 compendia, or supplement to any of those compendia.

57 (3) (a) "Employer" means ~~[any] a person[, firm, or corporation],~~ including ~~[any] a~~

58 public utility or transit district, ~~[which]~~ that has one or more workers or operators employed in  
59 the same business, or in or about the same establishment, under any contract of hire, express  
60 or implied, oral or written.

61 (b) "Employer" does not include the federal or state government, or other local  
62 political subdivisions.

63 (4) "Employee" means ~~[any person]~~ an individual in the service of an employer~~[-as~~  
64 ~~defined by Subsection (3);]~~ for compensation.

65 (5) "Failed test" means a confirmed drug or alcohol test that indicates that the sample  
66 tested is:

67 (a) positive;

68 (b) adulterated; or

69 (c) substituted.

70 (6) "Inaccurate test result" means a test result that is treated as a positive test result,  
71 when the sample should not have resulted in a positive test result.

72 (7) "Licensed physician" means an individual who is licensed:

73 (a) as a doctor of medicine under Title 58, Chapter 67, Utah Medical Practice Act, or  
74 similar law of another state; or

75 (b) as an osteopathic physician or surgeon under Title 58, Chapter 68, Utah  
76 Osteopathic Medical Practice Act, or similar law of another state.

77 ~~[(5)]~~ (8) "Prospective employee" means ~~[any person who has made application]~~ an  
78 individual who applies to an employer, ~~[whether written or oral]~~ either in writing or orally, to  
79 become ~~[his]~~ the employer's employee.

80 ~~[(6)]~~ (9) "Sample" means urine, blood, breath, saliva, or hair.

81 Section 3. Section **34-38-3** is amended to read:

82 **34-38-3. Testing for drugs or alcohol.**

83 (1) ~~[It is not unlawful for an]~~ If an employer ~~[to test employees or prospective~~  
84 ~~employees]~~ tests an employee or prospective employee for the presence of drugs or alcohol~~[-in~~  
85 ~~accordance with the provisions of this chapter;]~~ as a condition of hiring or continued

86 employment, the employer is protected from liability as provided in this chapter if the  
87 employer complies with this chapter. However, employers and management in general shall  
88 submit to the testing themselves on a periodic basis.

89 (2) (a) [~~Any~~] An organization [which is operating] that operates a storage facility or  
90 transfer facility or [~~which~~] that is engaged in the transportation of high-level nuclear waste or  
91 greater than class C radioactive waste within the exterior boundaries of the state shall establish  
92 a mandatory drug testing program regarding drugs and alcohol for prospective and existing  
93 employees as a condition of hiring any employee or the continued employment of any  
94 employee. As a part of the program, employers and management in general shall submit to the  
95 testing themselves on a periodic basis. The program shall implement testing standards and  
96 procedures established under Subsection (2)(b).

97 (b) The executive director of the Department of Environmental Quality, in  
98 consultation with the Labor Commission under Section 34A-1-103, shall by rule establish  
99 standards for timing of testing and dosage for impairment for the drug and alcohol testing  
100 program under this Subsection (2). The standards shall address the protection of the safety,  
101 health, and welfare of the public.

102 Section 4. Section ~~34-38-6~~ is amended to read:

103 **34-38-6. Requirements for collection and testing.**

104 [~~All sample~~] (1) The collection and testing of a sample for drugs and alcohol under  
105 this chapter shall be performed in accordance with [~~the following conditions:~~] this chapter.

106 [~~(1) the~~] (2) The collection of [samples] a sample shall be performed under reasonable  
107 and sanitary conditions[;].

108 [~~(2) samples~~] (3) A sample shall be collected and tested:

109 (a) with due regard to the privacy of the individual being tested[;]; and

110 (b) in a manner reasonably calculated to prevent substitutions or interference with the  
111 collection or testing of a reliable [samples;] sample.

112 [~~(3) sample~~] (4) The sample collection shall be documented[~~, and the~~]. The  
113 documentation procedures [~~shall~~] required by this Subsection (4) include:

114 (a) labeling of ~~[samples]~~ a sample so as reasonably to preclude the probability of  
115 erroneous identification of test results; and

116 (b) an opportunity for the employee or prospective employee to provide notification of  
117 any information ~~[which he]~~ that the employee or prospective employee considers relevant to  
118 the test, including:

119 (i) identification of currently or recently used prescription or nonprescription drugs~~;~~;

120 or

121 (ii) other relevant medical information.

122 ~~[(4) sample]~~ (5) Sample collection, storage, and transportation to the place of testing  
123 shall be performed so as reasonably to preclude the probability of sample contamination or  
124 adulteration~~;~~ and].

125 ~~[(5) sample testing]~~ (6) (a) Testing of a sample shall conform to scientifically  
126 accepted analytical methods and procedures. ~~[Testing]~~

127 (b) Before a test of a sample may be considered a failed test and used as a basis for an  
128 action by an employer under Section 34-38-8, testing of the sample shall include [verification  
129 or] a confirmation [of any positive test result] test:

130 (i) by gas chromatography, gas chromatography-mass spectroscopy, or other  
131 comparably reliable analytical method~~;~~ before the result of any test may be used as a basis for  
132 any action by an employer under Section 34-38-8~~;~~ and

133 (ii) if the sample used for a test is a urine sample, by a laboratory that is certified by  
134 the United States Department of Health and Human Services under the National Laboratory  
135 Certification Program.

136 Section 5. Section **34-38-8** is amended to read:

137 **34-38-8. Employer's disciplinary or rehabilitative actions.**

138 ~~[Upon receipt of a verified or confirmed positive drug or alcohol test result which]~~

139 (1) An employer may take an action described in Subsection (2) if:

140 (a) the employer receives a test result that:

141 (i) indicates a failed test;

142 (ii) is confirmed as required by Subsection 34-38-6(6); and  
 143 (iii) indicates a violation of the employer's written policy[;]; or [upon the refusal of]  
 144 (b) an employee or prospective employee refuses to provide a sample[;an].

145 (2) An employer may use [that] a test result or a refusal described in Subsection (1) as  
 146 the basis for disciplinary or rehabilitative actions, which may include the following:

147 ~~[(1)]~~ (a) a requirement that the employee enroll in an employer-approved  
 148 rehabilitation, treatment, or counseling program, which may include additional drug or alcohol  
 149 testing, as a condition of continued employment;

150 ~~[(2)]~~ (b) suspension of the employee with or without pay for a period of time;

151 ~~[(3)]~~ (c) termination of employment;

152 ~~[(4)]~~ (d) refusal to hire a prospective employee; or

153 ~~[(5)]~~ (e) other disciplinary measures in conformance with the employer's usual  
 154 procedures, including [any] a collective bargaining agreement.

155 Section 6. Section **34-38-10** is amended to read:

156 **34-38-10. A cause of action does not arise against employer unless inaccurate**  
 157 **test result -- Presumption and limitation of damages in claim against employer.**

158 (1) ~~[No]~~ A cause of action [arises] may not arise in favor of [any] a person against an  
 159 employer who [has established] establishes a program of drug or alcohol testing in accordance  
 160 with this chapter, and who [has taken any] takes an action under Section 34-38-8, unless the  
 161 [employer's action was based on a false test result] employer takes the action on the basis of an  
 162 inaccurate test result.

163 (2) ~~[In any claim]~~ If a person bringing a claim, including a claim under Section  
 164 34-38-11, [where it is alleged] alleges that an employer's action [was] is based on [a false] an  
 165 inaccurate test result:

166 (a) there is a rebuttable presumption that the test result [was] is valid if the employer  
 167 [complied with the provisions of] complies with Section 34-38-6; and

168 (b) the employer is not liable for monetary damages if [his] the employer's reliance on  
 169 [a false] an inaccurate test result [was] is reasonable and in good faith.

170 (3) (a) There is a rebuttable presumption that the employer complies with Section  
171 34-38-6 if as part of the employer's drug and alcohol testing program a licensed physician who  
172 is trained in the interpretation of drug and alcohol test results:

- 173 (i) provides medical assessment of a result that indicates a failed test;
- 174 (ii) requests re-analysis of a test result if necessary; and
- 175 (iii) makes a determination whether or not alcohol or other drug use has occurred.

176 (b) A court may find that an employer complies with Section 34-38-6 notwithstanding  
177 that the employer's drug and alcohol testing program does not include an action described in  
178 Subsection (3)(a).

179 Section 7. Section **34-38-11** is amended to read:

180 **34-38-11. Bases for cause of action for defamation, libel, slander, or damage to**  
181 **reputation.**

182 No cause of action for defamation of character, libel, slander, or damage to reputation  
183 arises in favor of any person against an employer who has established a program of drug or  
184 alcohol testing in accordance with this chapter, unless:

- 185 (1) the results of that test were disclosed to any person other than the employer, an  
186 authorized employee or agent of the employer, the tested employee, or the tested prospective  
187 employee;
- 188 (2) the information disclosed [~~was~~] is based on [~~a false~~] an inaccurate test result;
- 189 (3) [~~the false~~] an inaccurate test result [~~was~~] is disclosed with malice; and
- 190 (4) all elements of an action for defamation of character, libel, slander, or damage to  
191 reputation as established by statute or common law, are satisfied.

192 Section 8. Section **34-38-14** is amended to read:

193 **34-38-14. Employee not "disabled."**

194 An employee or prospective employee whose drug or alcohol test [~~results are verified~~  
195 ~~or~~] result is confirmed as positive in accordance with [~~the provisions of~~] this chapter may not,  
196 because of those results alone, be defined as a person with a "disability" for purposes of Title  
197 34A, Chapter 5, Utah Antidiscrimination Act.

