

INFORMATION MEMO

Drug and Alcohol Testing Toolkit for the City Workplace

Learn options for testing employees for drug and alcohol use under Minnesota law, including the Medical Cannabis Act, and about required testing under federal Department of Transportation regulations. Discusses what to do about use, possession, and impaired employee performance in the workplace while avoiding employment discrimination prohibitions.

The League thanks the law firm of Nilan Johnson Lewis PA for its review of this memo, sample policies, and associated test results letters



This toolbox icon marks the link to a downloadable tool.

RELEVANT LINKS:

[Minn. Stat. § 152.32, subd. 3.](#)

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I. Suspicion of city employee drug use

If a city suspects an employee is under the influence or otherwise impaired on the job by alcohol, illegal drugs, prescription medications, and/or other substances – including legal marijuana and other lawful cannabis products – (collectively “drugs or alcohol”), often the first question is whether the city should test the employee. The answer to such a question depends on whether testing is legally permitted in that situation as well as consideration of other factors.

Minnesota and federal drug testing laws are discussed in detail below. Briefly, it is important to know Minnesota’s 1987 Drug and Alcohol Testing in the Workplace Act (DATWA) does not require drug and alcohol and cannabis testing, but for cities choosing to test, the law governs drug and alcohol and cannabis testing of employees in the workplace. A separate law, linked to the left, governs most aspects of employees legally using medical cannabis. In contrast, Federal 1994 Department of Transportation (DOT) Federal Highway Administration regulations require employee drug testing in certain circumstances, such as for commercial drivers who operate commercial motor vehicles having a gross vehicle weight of 26,001 or more pounds. For purposes of federal law “drug testing” includes cannabis testing, and unlike under Minnesota law, there are no separate federal rules or restrictions for cannabis testing.

If a city suspects an employee is under the influence or impaired on the job, the city should work closely with its city attorney to determine how to respond. Specifically, in consultation with its city attorney, the city should consider and determine whether it should:

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

RELEVANT LINKS:

- test the employee
- obtain medical information and/or require a medical exam
- investigate, discipline, terminate, and/or take other employment actions; and/or
- pursue criminal proceedings.

Oftentimes, the city may have several alternative courses of action, some of which may be pursued simultaneously or sequentially. In determining how to proceed, the city will need to consider the advantages and disadvantages of various approaches as well as applicable laws, city policies, and best practices.

II. Testing considerations

Even if a city is legally permitted to test an employee for drugs or alcohol, the city should weigh the advantages and disadvantages of testing in a particular situation. One primary consideration is whether testing will provide meaningful information. For instance, if a city learns that several days before, an employee engaged in behavior that evidenced reasonable suspicion of drug or alcohol use or impairment, a test may not be able to determine the presence of drugs or alcohol because of the time lapse. Further, testing may not be permitted because of such a time lapse. For instance, under federal regulations for DOT-covered employees, the reasonable suspicion observations must be made just before, during, or just after performing safety-sensitive duties.

In other circumstances, test results may show the presence of a drug, but may not be able to identify when the drug was consumed, thus making it difficult to determine if an employee was under the influence or impaired at work. This is particularly true for substances that remain in a person's system for a longer period of time, such as marijuana – including medical cannabis and other cannabis products derived from hemp, including those lawfully present in edibles and beverage products – and some prescription drugs. In such circumstances, the city will want to work closely with its city attorney in determining whether to proceed with testing and how to otherwise address suspected employee impairment. This is particularly important as Minnesota has legalized the lawful sale and use of marijuana and other cannabis products and has limited the ability for cities to test and discipline employees for marijuana and cannabis use. Further, the City may want to consult with a testing company and/or administrators of its employee assistance program regarding DATWA testing or consult with its designated employer representative (often specified within the City's DOT drug and alcohol testing policy) regarding DOT testing.

See Section VII-B-1,
*Designated employer
representative*

RELEVANT LINKS:

For information on discipline and termination of employees generally, see [HR Reference Manual, Chapter 3](#).

For disciplinary restrictions under drug and alcohol testing laws see Section VIII, *Employment actions*.

See Section V-B-4, *Reasonable suspicion testing (DATWA)*, and Section VII-E-3, *Reasonable suspicion testing (DOT)*.

[42 U.S.C. § 12102](#).
[Minn. Stat. ch. 363A](#).

In situations involving misconduct arising from suspected impairment (above and beyond misconduct solely for being impaired at work), the city may choose to focus and act on such misconduct, regardless of whether drug or alcohol use/impairment caused or contributed to the misconduct.

While the law places restrictions on an employer disciplining, terminating, or taking other employment action against an employee because of a positive test result, generally, a city is not restricted from taking employment action for other reasons, such as misconduct, even if the misconduct is related to drug or alcohol use. But again, the City will want to ensure compliance with the DATWA and DOT testing provisions, such provisions addressing accidents.

III. Medical information and reasonable accommodation considerations

If a city suspects an employee is impaired by drugs or alcohol at work, often times the city may want additional information. For instance, if it appears the employee is impaired because of a legal medication (including medical cannabis) the city may want to inquire about the underlying medical condition as well as the purpose, side effects, and physician's instructions regarding the medication. Note that under DOT-covered reasonable suspicion testing, the supervisor's role is to identify the specific observations of employee behavior or appearance, confront the employee concerning the requirement to undergo reasonable suspicion testing, and fully explain the consequences of the employee's refusal to comply, versus inquiring about any underlying medical condition at the time of testing.

Medical information and accommodations within the scope of drug and alcohol and cannabis testing is an area where the city will want to act cautiously and work with its city attorney. Many laws govern a city's ability to require an employee to provide medical information and/or submit to a medical exam, including the federal Americans with Disabilities Act (ADA), the federal Genetic Information Nondiscrimination Act (GINA), the Minnesota Human Rights Act (MHRA), DATWA, and the Minnesota Medical Cannabis Act.

Under the ADA and MHRA, an employer may require a current employee to undergo a medical exam and may inquire about the existence, nature, and severity of a disability so long as the exam or inquiry is "job-related" and "consistent with business necessity." The MHRA also requires an employee consent to the medical exam or inquiry.

RELEVANT LINKS:

[42 U.S.C. § 12112.](#)

[Minn. Stat. ch. 363A.](#)

[42 U.S.C. § 12111\(5\).](#)

[Minn. Stat. § 152.32, subd. 3.](#)

[Nielsen v. Moroni Feed Co.,
162 F.3d 604, 611, n. 12
\(10th Cir. 1998\).](#)

[42 U.S.C. § 12102.
Minn. Stat. ch. 363A. Minn.
Stat. § 152.22, subd. 14.](#)

A medical exam or inquiry is generally job-related and consistent with business necessity if its purpose is to:

- determine whether an employee can perform the essential functions of a job,
- identify potential reasonable accommodations that will allow the employee to perform the job, and
- determine whether an employee poses a direct threat to the health and safety of himself or herself, coworkers, and others.

In addition to governing when an employer may require an employee to provide medical documentation and/or submit to a medical exam, both the ADA and MHRA prohibit city employers from discriminating against any qualified individual with a disability because of that disability. Additionally, cities with 15 or more employees must reasonably accommodate the physical or mental impairments of qualified individuals with a disability if the individual can perform the essential functions of his or her job with reasonable accommodation, unless the employer can show that providing the accommodation would create an undue hardship. Similarly, DATWA limits how an employer may use medical information obtained from an employee. GINA significantly restricts an employer from inquiring about or otherwise obtaining family medical history and other genetic information – information that is sometimes reflected on forms for drug and alcohol dependency treatment programs. The Minnesota Medical Cannabis Act prohibits discrimination on the basis of an employee's:

- status as a patient enrolled in the registry program; or
- positive drug test for cannabis components or metabolites, unless the employee used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.

For purposes of the ADA and MHRA, most medical conditions – including alcoholism and past illegal drug use – are considered covered disabilities, although neither law provides any protections related to current illegal drug use or addiction. For reference, the misuse of prescription drugs is considered to be illegal drug use under the ADA. However, in cases of medical cannabis use, it is important to remember that the underlying condition for which medical cannabis treatment is being used could be a qualifying disability. This may include, if reasonable, adjusting an employee's work hours, providing medical leave, or modifying tasks and duties. Recall that under the ADA and MHRA, a disability is a physical or mental impairment that substantially (or materially) limits one or more major life activities. Most if not all of the conditions listed in the medical cannabis law fall under this broad definition.

RELEVANT LINKS:

[Minn. Stat. §§ 181.950-181.957.](#)

[Minn. Stat. § 181.951 subd. 7.](#)

[Minn. Stat. § 152.22.](#)
[Minn. Stat. § 151.72.](#)

[Minn. Stat. §§ 152.22 - 37.](#)

See Section VI, *Minnesota law – Medical Cannabis Act.*

Thus, in many situations involving an employee's use of alcohol, cannabis (both medical and recreational), or prescription drugs, a city will need to assess its obligations under the ADA and MHRA, including its obligations to discuss potential accommodations with an employee and/or provide reasonable accommodations to the employee.

For instance, if an employee contends that he or she was impaired on the job from a prescribed medication because his or her physician was in the process of determining the appropriate dosage and the impairment was an unintended consequence, the city may need to consider its obligations to provide a reasonable accommodation, including a leave of absence.

In addition, cities may require periodic medical examinations and/or medical documentation – including information about an employee's medications – for employees in safety-sensitive positions, such as police officers and firefighters.

To the extent it appears the city is permitted to obtain medical information or require a medical exam under one or more laws but not others or there is otherwise a conflict between laws, the city should work with its attorney to determine the best course of action. Typically, the best practice is to follow a course of action that ensures compliance with all of the applicable laws, beginning with the most restrictive one.

IV. Overview of federal and state drug testing laws

Minnesota's 1987 Drug and Alcohol Testing in the Workplace Act (DATWA) applies to all employers, including cities, with one or more employee. DATWA does not require drug and alcohol and cannabis testing, but for cities choosing to test, the law governs drug and alcohol and cannabis testing of employees in the workplace, outlining specifically when, where, and under what circumstances an employer can test non-DOT employees for alcohol or drugs or cannabis. A city choosing to conduct drug and alcohol and cannabis testing on non-DOT employees will follow the procedures outlined in state law.

The Minnesota Medical Cannabis Act legalizes the manufacture, sale, and use of *medical* cannabis under certain controlled conditions. Likewise, Minnesota has legalized the sale and personal use of cannabis products, including recreational marijuana.

These laws create some issues for cities as employers. The Minnesota Medical Cannabis Act contains some broad and important legal protections for those who are approved by the state to use medical cannabis.

RELEVANT LINKS:

Minn. Stat. § 181.938, subd.
2. Minn. Stat. §§ 181.951,
subds. 8, 9.

Likewise, in legalizing the use of cannabis, including recreational marijuana, the Minnesota legislature has placed restrictions upon a city's ability to test and/or discipline employees and job applicants for the use of legal cannabis. Specifically, cities are prohibited from testing job applicants for the presence of cannabis as part of the cities' pre-employment screening for most positions. Likewise, the cities are not permitted to conduct random testing for cannabis on current employees for most positions. Note: cities are not prohibited from conducting reasonable suspicion testing on current employees, but they are encouraged to work closely with their city attorney before conducting any such testing due to the legal restrictions of cannabis testing and the difficulties in determining the time in which the cannabis was consumed by the employee.

Under Minnesota law, cities may test for cannabis for the following classifications of positions, regardless of the kind of testing involved (i.e., despite the prohibitions described above, applicants for these kinds of positions may be subject to pre-employment and random testing for cannabis):

- Safety-sensitive positions;
- Peace officers;
- Firefighters;
- Positions requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or healthcare patients;
- Positions requiring a commercial driver's license;
- Positions funded by federal grants; or
- Positions which federal or state law requires testing to be done to job applicants or employees for cannabis.

Cities are encouraged to consult with their city attorney before any testing is done to ensure the employee's position is not excluded from testing.

In addition, cities must also be aware of the limitations on disciplining employees for cannabis use. Unlike cannabis testing, which may be done for the classes of positions listed above, Minnesota law now prohibits cities from disciplining or discharging any employee, regardless of position, if the employee has used lawful cannabis off work premises and outside of working hours.

Employees may be disciplined and/or discharged if they use cannabis on city property or are under the influence of cannabis at work, under the following circumstances:

RELEVANT LINKS:

Memorandum from Attorney Gen. Jefferson B. Sessions, III on Marijuana Enforcement to all United States Attorneys (Jan. 4, 2018).

[49 C.F.R. § 382.](#)

[49 C.F.R. § 40.](#)

U.S. Dep't of Transp.: [Drug and Alcohol Testing program.](#)

[49 C.F.R. § 40.13 \(a\).](#)

[49 C.F.R. § 40.47.](#)

- If, as a result of consumption, the employee lacks the “clearness of intellect and control of self” than the employee otherwise would have if no consumption had occurred;
- If cannabis testing verifies the presence of cannabis, following a confirmatory test;
- If in violation of the employer’s written policy; or
- As otherwise authorized or required by federal or state law or regulations, or if failure to do so would violate federal or state law or would result in the loss of monetary or licensing benefits under federal law or regulation.

Employers choosing to perform drug and alcohol and cannabis testing must be aware of the limitations on cannabis testing and legal complexities of positive test results for cannabis and should consult with their city attorney before taking any adverse action against an applicant or employee.

Despite these laws, use of any form of cannabis remains illegal under *federal* law. In the past, the Federal Department of Justice has stated that it does not view enforcement of federal drug statutes against cannabis users to be a priority in states that have enacted a stringent regulatory framework for cannabis use. However, the discretion to prosecute such cases remains with the U.S. Attorney for each state.

It is important to note Federal directives for enforcement can be changed at any time.

As a result, city employers should follow the requirements of state law, while keeping an eye on continuing developments at the federal level.

As seen above, numerous conflicts exist and the interaction between state and federal law remains confusing. As a new legal standard, we are very likely to see court cases involving employees and lawful cannabis use – including both medicinal and recreational use – in the near future. As a result, it is very important a city work closely with its legal and HR professionals when cannabis issues arise in the workplace.

Federal 1994 Department of Transportation (DOT) Federal Highway Administration regulations require employee drug testing in certain circumstances, such as for commercial drivers who operate commercial motor vehicles having a gross vehicle weight over 26,001 pounds. A city with DOT-covered employees should follow DOT testing regulations for those employees only.

It is important that a city distinguishes between federal Department of Transportation (DOT) drug and alcohol testing and non-DOT drug and alcohol and cannabis testing, since it is crucial for DOT tests to be completely separate from non-DOT tests in all respects.

RELEVANT LINKS:

See Section V-B-4, *Reasonable suspicion testing (DATWA)*, and Section VII-E-3, *Reasonable suspicion testing (DOT)*.

Minn. Stat. § 181.951 subd. 1(b).
Minn. Stat. § 181.951 subd. 2.

Minn. Stat. § 181.952 subd. 2.

Minn. Stat. § 181.953 subd. 6(a).

This is especially important for compliance with federally mandated random DOT drug and alcohol testing rates for employers. There are also specifically mandated Custody and Control Forms for all DOT drug and alcohol specimen collections that must be used, and which are unique from non-DOT collection forms. Further, state law, including state law restricting cannabis testing, does not apply to DOT drug and alcohol tests.

If a city suspects an employee is under the influence or impaired by drugs or alcohol, in almost all circumstances, the city would be testing under the “reasonable suspicion” provision. While many individuals believe they are qualified because of life experiences to identify what constitutes reasonable suspicion of drug or alcohol use/impairment, cities should be cautious. The law – particularly for DOT-covered employees – includes specific requirements for conducting “reasonable suspicion” testing.

V. Minnesota law - DATWA

A. Policy required for testing under DATWA

If a city chooses to conduct drug and alcohol and cannabis testing for non-DOT employees and applicants, DATWA requires:

- The city has a written policy in place meeting all the statutory requirements. The written policy must be provided to all affected employees; to previously non-affected employees who, upon transfer, begin working in an affected position; and to applicants.
- A notice must be posted in an “appropriate and conspicuous” location at the workplace, such as a city bulletin board, stating the policy exists and that employees can inspect the policy during regular business hours in the human resources (HR) department or another suitable location.
 - ✓ While there are likely several posting companies from which a city could purchase the notice, if a city wished to create its own, the following wording could be considered:
The city of [Name] has adopted a Drug and Alcohol and Cannabis Testing policy in accordance with MN. Stat. § 181.950 - §181.954 for job applicants and employees. Copies of the policy are available for inspection by job applicants or employees during regular business hours in the city’s [list location] office.
- Prior to being asked to undergo a test, an employee or applicant must be provided with a form acknowledging receipt of the city’s drug and alcohol and cannabis testing policy.

RELEVANT LINKS:



[Non-DOT Drug and Alcohol Testing and Drug-Free Workplace Act, LMC model policy.](#)

[Minn. Stat. § 181.952.](#)

[Law Enforcement Labor Services, Inc., Local 158 v. Sherburne County](#), 695 N.W.2d 630 (Minn. Ct. App. 2005).

[Star Tribune](#), 295 N.L.R.B. 63 (1989).

Cities should explain the importance of a drug and alcohol and cannabis testing policy in a meeting with employees to promote a better understanding of the rationale for adopting such a policy. It can be extremely helpful to also offer training to all employees, supervisors included, on the signs and symptoms associated with drug and alcohol use at this meeting.

At a minimum, cities need to address the following in their non-DOT drug and alcohol and cannabis testing policies:

- The employees and/or job applicants subject to testing under the policy.
- The circumstances under which drug, alcohol and cannabis testing may be requested or required.
- The right of an employee or job applicant to refuse testing and the consequences of such refusal.
- The disciplinary consequences that may occur based on a confirmatory positive test result.
- The right of an employee or job applicant to explain a positive test result on a confirmatory test, and the option to request and pay for a confirmatory retest.

Any other appeal procedures available.

Employers do not have a duty to bargain over the establishment of drug and alcohol and cannabis testing policies; they do, however, have a duty to bargain over the implementation of such policies.

The Minnesota Court of Appeals clarified that the decision whether to establish or amend a random testing policy for employees is an inherent managerial right and, thus, is not subject to mandatory bargaining. In addition, the decision to test some categories of employees, such as those in safety-sensitive positions, is inseparable from the establishment of the policy and, therefore, is also not subject to bargaining.

But the implementation of the policy (for example, amending a policy that previously allowed only for-cause testing to include random testing) is subject to bargaining.

An employer is generally not required to bargain over the terms and conditions of pre-employment testing.

When drafting a non-DOT drug and alcohol and cannabis testing policy, the city should appoint an individual such as the HR director or the city administrator to serve as the testing program administrator.

RELEVANT LINKS:

[Minn. Stat. § 181.951 subds. 1-6.](#)

[Minn. Stat. § 181.951 subd.1\(c\).](#)

[Minn. Stat. § 181.951, subd. 8.](#)

[Minn. Stat. § 181.953 subds. 4, 9.](#)

[Minn. Stat. § 181.951 subd. 2.](#) [Minn. Stat. § 181.951, subd. 8.](#)

B. Who can be tested and when

DATWA authorizes only five types of testing for non-DOT employees and job applicants: job applicant testing, routine physical examination testing, random testing, reasonable suspicion testing and treatment program testing. For all five types of testing, Minnesota statute prohibits arbitrary or capricious testing, and each of the five testing situations has its own special rules that a city must follow, as discussed below. As noted above, the testing for cannabis for non-DOT employees is significantly limited under Minnesota law. As such, cities should not engage in job applicant testing or routine physical examination testing for cannabis for most positions.

A city is not required to conduct all five types of testing but cannot test beyond these categories for non-DOT employees.

For example, a city could choose to establish a policy of conducting job applicant testing, reasonable suspicion testing, and treatment program testing for all non-DOT employees, but opt not to include routine physical examination and random testing within the policy.

State statute limits an employer's ability to charge an employee or job applicant for the cost of drug and alcohol and cannabis testing. Specifically, state law provides that employees and job applicants may be required to pay for the cost of a confirmatory retest only (the testing requested by a job applicant or employee following an initial positive confirmatory test); all other types of testing must be paid for by the employer.

1. Job applicant testing under DATWA

The guidance in this section does not apply to cannabis testing for most positions. As noted above, cannabis testing for job applicants is permitted only for applicants for the following categories of positions:

- Safety-sensitive positions;
- Peace officers;
- Firefighters;
- Positions requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or healthcare patients;
- Positions requiring a commercial driver's license;
- Positions funded by federal grants; or
- Positions which federal or state law requires testing to be done to job applicants or employees for cannabis.

RELEVANT LINKS:

[Minn. Stat. § 181.953 subd. 11.](#)

[Minn. Stat. § 181.951 subd. 2.](#)

[U.S. Equal Employment Opportunity Commission Notice 915.002, Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations. Oct. 10, 1995.](#)

[Minn. Stat. § 181.954, subd. 2.](#)

Under Minnesota law, a city may conduct controlled substance tests on job applicants only after the applicant has received a conditional offer of employment from the city. The special rules the city must meet to test job applicants include:

- The same test must be given to all applicants offered conditional employment for the same job. A city cannot select only certain applicants for testing, based on educational experience, appearance, or any other characteristic.
- A detailed written policy must be developed and notice of rights under the policy given to all applicants.
- The city must obtain consent before testing. Thus, it is recommended that before the testing, cities have an applicant sign an acknowledgement stating he or she has read the policy and understands that passing the test is a requirement of the job.
- Use (1) an approved laboratory and follow proper chain-of-custody procedures or (2) an oral fluid test.
- Follow requirements with regard to notifying applicants of the test results.
- Perform a confirmatory test on positive test results.
- Pay the cost of the testing and maintain test results confidentially.

If all of the requirements have been met, and an applicant tests positive, the city may withdraw its conditional job offer based on a confirmatory positive test result but must inform the applicant of the reason for the withdrawn offer.

Employers may not give pre-employment alcohol tests to job applicants to determine whether and how much alcohol an individual has consumed. Therefore, cities should not require applicants to submit to non-DOT pre-employment alcohol testing.

a. Minors and pre-employment testing

From time to time, cities will ask if they need parental permission for a post-offer pre-employment for minors who are potential employees.

Minnesota law does not specifically require parental consent for a test; instead what the applicant or employee is signing is a merely a pre-test acknowledgement that he/she has seen the employer's drug and alcohol and cannabis testing policy. Thus, the short answer is there is nothing preventing public employers from requesting parental consent to a drug or alcohol test, but at the same time there is nothing requiring it either, and there are cautions to explore with your City Attorney.

RELEVANT LINKS:

[Minn. Stat. § 13.04, subd. 3.](#)

[Minn. Stat. § 181.951 subd. 3.](#)
[Minn. Stat. § 181.951, subd. 8.](#)

Within the DATWA statute there is a confidentiality provision stating test results and other information acquired in the drug or alcohol and cannabis testing process are, with respect to public sector employees and job applicants, "private data on individuals" as that phrase is defined in the Minnesota Government Data Practices Act (MGDPA), and generally may not be disclosed by an employer or to a third-party.

For purposes of the MGDPA, an "individual" includes the parents of a minor, unless the public employer determines that releasing the information to the parent is not in the minor's best interest. In other words, under Minn. Stat. § 13.04, subd. 3 (addressing the access rights of data subjects), the parent has the same right to access the test results as the child does, and so the public employer can generally release that information to the parent. However, there are several cautions with this; the first is the employer would need to assess what's in the minor's best interest before releasing the results to the parent.

The second is that, under Minnesota law, "minor" means an un-emancipated individual who has not attained 18 years of age. So if a city were to mistakenly release test results to the parent of an emancipated individual, it would be a violation of both DATWA's confidentiality provision and the MGDPA. Thus, requiring parental consent does create some risk a city could unintentionally back into a violation of DATWA's and the MGDPA's confidentiality requirements, but those risks are arguably not great, and could be managed with guardrails around best-interest assessments and emancipated children, so please consult with your city attorney.

2. Routine physical examination testing under DATWA

The guidance in this section does not apply to cannabis testing for most positions. As noted above, cannabis testing in the context of routine physical exams is permitted only for employees in the following categories of positions:

- Safety-sensitive positions;
- Peace officers;
- Firefighters;
- Positions requiring face-to-face care, training, education, supervision, counseling, consultation, or medical assistance to children, vulnerable adults, or healthcare patients;
- Positions requiring a commercial driver's license;
- Positions funded by federal grants; or
- Positions which federal or state law requires testing to be done to job applicants or employees for cannabis.

RELEVANT LINKS:

Minn. Stat. § 181.951 subd.
4.
Minn. Stat. § 181.950 subd.
13.

Minn. Stat. § 181.950 subd.
11.

Minn. Stat. § 181.951 subd.
5.

Minn. Stat. § 181.951 subd.
5.

A city may require an employee to undergo drug and alcohol testing as part of a routine physical examination offered and paid by the city, as long as the examination takes place no more than once per year.

In accordance with statutory requirements, the city must provide the employee with at least two weeks' written notice that the testing may be requested or required as part of the examination.

3. Random testing under DATWA

a. Safety sensitive positions

A city may require employees to submit to random testing, including cannabis testing, only if the employee is employed in a safety-sensitive position.

A “safety-sensitive position” is defined in the statute as a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person. Police officers and firefighters are examples of positions that would meet the definition of “safety sensitive,” and thus could be subject to random testing.

b. Random selection basis

“Random selection basis” is defined within the statute as a mechanism for selection of the employees that:

(1) results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected, and (2) does not give an employer discretion to waive the selection of any employee selected under the mechanism.

If a city elects to conduct random testing for non-DOT safety-sensitive employees, a procedure for implementing random selections throughout the year should also be developed. While using a third-party vendor is not required under statute, some cities find it helpful to contract with a third-party vendor for generating random selection pulls because it helps avoid any appearance of tampering with who is chosen or when.

4. Reasonable suspicion testing under DATWA

A city may require an employee to take a test, including a cannabis test, if the employer has a “reasonable suspicion” that the employee:

- Is under the influence of drugs, cannabis, or alcohol based on specific facts and reasonable inferences drawn from those facts.

RELEVANT LINKS:

Minnesota Workers' Compensation Act- Minn. Stat. § 176.011 subd. 16.



Reasonable Suspicion Record of Observed Behavior, LMC Model Form.

See, e.g., *Lewis v. Ashland, Inc.*, 813 F.Supp.2d 1113, 1117-1118 (D. Minn. 2011). (Odor of marijuana on employee as well as giggling and disruptive behavior supported employer's reasonable suspicion of marijuana use).

Minn. Stat. § 181.951 subd. 6.

- Has violated the employer's written work rules prohibiting the use, possession, impairment, sale, or transfer of drugs or alcohol or cannabis while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, if the work rules are in writing and contained in the employer's written drug and alcohol and cannabis testing policy.
- Has sustained a personal injury as defined in the Minnesota Workers' Compensation Act or caused another employee to sustain a personal injury.
- Has caused a work-related accident, or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.
- Has caused a work-related accident, or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

It is important cities consult with their City Attorney when working through reasonable suspicion drug and alcohol and cannabis testing, especially in light of recent state law amendments regarding testing for cannabis.

Other than the above guidance, the statute does not specify what constitutes reasonable suspicion or provide other details. In interpreting DATWA, courts consider various factors on a case-by-case basis in determining whether reasonable suspicion exists. As a best practices tip, many employers ensure their Non-DOT supervisors are trained in reasonable suspicion drug and alcohol recognition.

5. Treatment program testing under DATWA

A city may require an employee to undergo this type of testing, including cannabis testing, if the employee has been referred by the city for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan. In such cases, the employee may be required to undergo drug and alcohol and cannabis testing, without prior notice, during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency treatment program.

6. Special consideration in routine physical, random, and treatment program alcohol testing under DATWA

Under Department of Transportation regulations, breathalyzer testing with specific equipment is permitted to measure alcohol in an individual.

RELEVANT LINKS:

Devices used to conduct alcohol screening for DOT tests- DOT Rules, [49 C.F.R. § 40.229](#).

[Minn. Stat. § 181.953, subd. 3.](#)

[Minn. Stat. § 181.953, subds. 1, 5a.](#)

[Minn. Stat. § 181.953 subds. 3, 5.](#)

[Minn. Stat. § 181.953 subd. 3.](#)

[Minn. Stat. § 181.953 subd. 5.](#)

However, for non-DOT employment testing, breathalyzer testing does not appear to meet statutory obligations.

Specifically, Minnesota law requires a laboratory to perform a confirmatory test (second test) of any sample that produces a positive result on the initial test. Breathalyzer screening does not provide for a second test. Thus, for non-DOT testing, the city should require urine and/or blood screening rather than using a breathalyzer.

C. Testing laboratories, Oral fluid tests, and DATWA

DATWA requires employers, when requiring an employee or job applicant to undergo drug, alcohol, or cannabis testing, to either (1) use the services of a testing laboratory that has been accredited, certified, or licensed by certain entities and that follows certain protocols or (2) comply with oral fluid test procedures.

1. Testing Laboratories

If a laboratory is not certified by the National Institute on Drug Abuse (which imposes certain chain-of-custody procedures), then it is required to follow chain-of-custody requirements outlined in the statute. “Chain of custody” generally refers to the requirement that the sample is accounted for at all times, so there is no opportunity, for example, for an unknown person to tamper with the sample while it is unattended.

The laboratory must also conduct a confirmatory test on all samples which produced a positive test on an initial screening test and must disclose to the employer a written test result report for each sample tested within three working days following the test result. The laboratory is required to retain samples that produced a positive test result for at least six months. A city must establish its own reliable chain-of-custody procedures. The procedures must include all of the following:

- Possession of the sample must be traceable to the employee from whom the sample is collected, from the time the sample is collected through the time the sample is delivered to the laboratory.
- The sample must be accompanied by a written chain-of-custody record.
- The sample must always be in the possession of, must always be in view of, or must be placed in a secured area by a person authorized to handle the sample.
- Individuals relinquishing or accepting possession of the sample must record the time the possession of the sample was transferred and must sign and date the chain-of-custody record at the time of transfer.

RELEVANT LINKS:

Minn. Stat. § 181.953 subds. 5a, 7, 8.



Negative Non-DOT Alcohol or Controlled Substances Test Results Notice, LMC Model Form.

Minn. Stat. § 181.953 subds. 5a, 7.



Positive Non-DOT Alcohol or Controlled Substances Test Results Notice, LMC Model Form.

Minn. Laws ch. 311, S.F. No. 2470.
Minn. Stat. §§ 152.22-152.37.

In other words, the city must be able to account for and document who handled a sample and where it was at all times between when it was collected and when it was turned over to the laboratory.

2. Oral fluid testing

As an alternate to using the services of a testing laboratory, a city may request an employee or job applicant to undergo oral fluid testing.

The chain-of-custody procedures that apply to laboratory testing do not apply to oral fluid testing.

D. Notification of test results under DATWA

1. Negative test results

Laboratory testing: Within three working days after the city receives the laboratory's negative test report, the city must inform the employee or applicant in writing of a negative test result and his or her right to request and receive a copy of the test result report.

Oral fluid testing: The city must inform the employee or applicant of their results at the time the employee takes their test.

2. Positive test results

Laboratory testing: Within three working days after the city receives the laboratory's confirmatory positive test report, the city must inform the employee or applicant in writing of (1) the positive test result, (2) the right to request and receive from the city a copy of the test result report, and (3) the employee's rights to (a) explain the positive test, (b) request a confirmatory retest at the employee's or applicant's expense, and (c) the employer's rights regarding discharge, discipline, or withdrawal of a job offer.

Oral fluid testing: If the test results are positive, inclusive, or invalid, the employee or applicant has 48 hours to request testing using the services of a testing laboratory, at no cost to the employee or applicant. The city must then follow the laboratory testing standards. If the laboratory test results indicates a positive result, the employee or applicant can request a confirmatory retest, and can be conducted at the employee's or applicant's own expense.

In May 2014, Governor Mark Dayton signed the Medical Cannabis Therapeutic Research Act (the "Medical Marijuana Act") into Minnesota law, which legalizes medical cannabis in liquid, pill, oil or vaporizing form for specific illnesses beginning on July 1, 2015. In May 2023, the Minnesota legislature legalized the use of recreational cannabis, including marijuana, which takes effect on August 1, 2023 ("Legal Cannabis Act").

RELEVANT LINKS:

[Minn. Stat. § 152.32, subd. 3;](#)
[Minn. Stat. § 181.951, subd. 8.](#)

[Minn. Stat. § 181.951, subds. 8, 9.](#)

[Minn. Stat. § 181.953, Subd. 10.](#)

[Minn. Stat. § 181.953 subd. 7.](#)

[Minn. Stat. § 181.954, subd. 1.](#)

[Minn. Stat. § 181.953, subds. 6 & 8.](#)

[U.S. Equal Employment Opportunity Commission Notice 915.002, Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations. Oct. 10, 1995.](#)

[Minn. Stat. § 13.04 subd. 2.](#)
[Minn. Stat. § 181.954, subd. 2.](#)

Within the Medical Marijuana Act, there is a provision providing that a registered employee cannot be disciplined for testing positive for cannabis unless the employee used, possessed, or was impaired by cannabis on the premises of employment or during the hours of employment. Likewise, the Legal Cannabis Act has expanded on this, and prohibits the ability for cities to test and/or discipline job applicants and employees for their use of cannabis outside of the workplace during non-working hours.

Accordingly, while a positive test for cannabis can be used as evidence of impairment during employment hours, an employee's positive test for cannabis alone, without reference to when the positive test occurs in relation to the employee's work schedule, should not result in termination.

The city will still need to comply with DATWA's requirements for a first positive confirmed test result, including providing the employee the opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency.

a. Initial and confirmatory tests were positive

The city must notify the person that he or she tested positive on both the initial test and the confirmatory test. A laboratory that has conducted a test on a sample may tell the city only whether the sample contains evidence of drugs or alcohol or cannabis but cannot disclose other information learned during testing (such as the presence of any evidence of illness).

b. Right to receive test results report and explanation

The city must tell the individual he or she has the right to request and receive from the city a copy of the test result report, and the right to explain the positive result, within three working days after being notified of the positive test result.

The city may then request the employee or job applicant to indicate any medications he or she is currently taking or has recently taken, and any other information that might affect the reliability of the result. Acceptable questions following a positive test result could include:

“What medications have you taken that might have resulted in the positive test result?” or “Are you taking this medication under a lawful prescription?”

It is a good practice for the city to also issue a Tennessen Advisory to the employee before requesting information regarding any medications taken.

RELEVANT LINKS:

[Minn. Stat. § 181.953, subds. 5a,9.](#)

[Minn. Stat. § 181.954.](#)

c. Right to a confirmatory retest

Oral fluid testing: If the individual's initial test was an oral fluid test, the individual can request a laboratory test within 48 hours at the city's expense. If the individual's lab test comes out positive, any subsequent confirmatory retest, if requested by the individual, must be conducted following the laboratory retest procedures.

Laboratory testing: The city must tell the individual that he or she has the right to a confirmatory retest of the sample at the individual's own expense. Within five working days after notice of the confirmatory test result, the individual may notify the employer in writing of his or her intention to obtain a confirmatory retest.

Within three working days after receipt of the notice, the city must notify the original testing laboratory that the individual has requested the laboratory to conduct the confirmatory retest or transfer the sample to another properly licensed laboratory.

Chain-of-custody procedures must be followed if the sample is transferred between laboratories, and the threshold for detection must be the same—in other words, if the original laboratory looks for a reading of five on a particular measurement in order to call the test "positive," then the retesting laboratory must look for a reading of five as well.

3. Test result reports

Test result reports and other information acquired in the drug and alcohol and cannabis testing process for employees and job applicants are classified as private data and cannot be disclosed without the written consent of the applicant or employee tested.

There are exceptions to the privacy disclosure limitation. A positive confirmatory test may be:

- (1) Used in an arbitration proceeding pursuant to a collective bargaining agreement, an administrative hearing under chapter 43A or other applicable state or local law, or a judicial proceeding, provided that information is relevant to the hearing or proceeding.
- (2) Disclosed to any federal agency or other unit of the United States government as required under federal law, regulation, or order, or in accordance with compliance requirements of a federal government contract.
- (3) Disclosed to a substance abuse treatment facility for the purpose of evaluation or treatment of the employee.

RELEVANT LINKS:

[Minn. Stat. § 181.954, subd. 4.](#)

[Minn. Stat. § 152.32.](#)

[Minn. Stat. § 152.22, subd 6.](#)
But, see cautions about status under federal law in Section IV, *Overview of federal and state drug testing laws*.

[Medical Cannabis Information for Public Safety Professionals](#), MN Dep't of Health. [A Review of Medical Cannabis Studies Relating to Chemical Compositions and Dosages Qualifying for Medical Conditions](#), MN Dep't of Health., Office of Medical cannabis, July 2016.

[Minn. Stat. § 152.22, subd 14.](#)

MN Dep't of Health,
[Intractable Pain](#).

Positive test results from an employer drug and alcohol and cannabis testing program are not admissible in any criminal proceeding against the employee or applicant.

VI. Minnesota law – Medical Cannabis Act

The Minnesota Medical Cannabis Act provides certain employment protections to employees who have followed the multi-step process to register and obtain regulated medical cannabis.

These protections apply whether or not the city chooses to implement drug or alcohol or cannabis testing under DATWA. However, the employer's responsibility for addressing workplace safety concerns and the employee's ability to safely perform essential functions still exist.

A. Allowed uses

Under the Minnesota Medical Cannabis Act, recreational use of cannabis is not authorized. However, Minnesota has also legalized the recreational use and sale of cannabis products, including marijuana.

Minnesota's medical cannabis program is one of the most tightly regulated in the nation, and also the most clinical. Cannabis can be sold in pills, oils, liquids, vaporizers, or in smokable form (dried raw cannabis).

Medical cannabis is approved for treating the following conditions:

- Cancer (but only if the condition or treatment produces one or more of the following: severe or chronic pain, nausea or severe vomiting, or cachexia or severe wasting).
- HIV/AIDS.
- Tourette syndrome.
- ALS (amyotrophic lateral sclerosis).
- Seizures, including those that are characteristic of epilepsy.
- Severe and persistent muscle spasms, including those characteristic of multiple sclerosis.
- Inflammatory bowel disease, including Crohn's disease.
- Glaucoma.
- Terminal illness, with probable life expectancy of under one year, which produces one or more of the following: severe or chronic pain, nausea or severe vomiting, or cachexia or severe wasting.
- Intractable pain

RELEVANT LINKS:

MN Dep't of Health,
[PTSD](#).

[Minn. Stat. § 152.125.](#)

[Minn. Stat. § 152.22, subd. 4.](#)

MN Dep't of Health, [Medical cannabis registration process](#).

[Minn. Stat. § 152.32.](#)

- Chronic pain
- Certified Post-Traumatic Stress Disorder (PTSD)
- Autism Spectrum Disorder (must meet DSM-5)
- Obstructive sleep apnea
- Alzheimer's disease
- Sickle cell disease
- Chronic motor or vocal tic disorder

Intractable pain is further defined as “a pain state in which the cause of the pain cannot be removed or otherwise treated with the consent of the patient and in which, in the generally accepted course of medical practice, no relief or cure of the cause of the pain is possible, or none has been found after reasonable efforts.”

B. Who may use

To obtain medical cannabis, a person must have a qualifying condition and have a health care practitioner enroll them on the state's Medical Cannabis Registry. After a person is enrolled, he or she may only obtain medical cannabis at a licensed Medical Cannabis Patient Center. Currently, only a few such centers exist in Minnesota.

C. Employment protections

1. Discrimination prohibited

An employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:

- The person's status as a patient enrolled in the registry program.
- A patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.

Because of the state law protections, it is a best practice to not require applicants or current employees to disclose their status on the registry. If the city becomes aware of an employee's enrollment on the registry inadvertently, the city should avoid subjecting the employee to extra scrutiny. For example, closer supervision or higher frequency of drug testing may be construed as discrimination.

RELEVANT LINKS:

[Minn. Stat. § 152.32, subd. 2 \(j\).](#)

[Minn. Stat. § 152.32, subd. 3 \(2\)\(d\).](#)

[Minn. Stat. § 152.32, subd. 1.](#)

[Minn. Stat. §§ 181.950-.957.](#)
See section V-B-(4)
Reasonable suspicion testing under DATWA.

It is important to note that the law specifically provides that “possession of a registry verification or application for enrollment in the program by a person entitled to possess or apply for enrollment in the registry program does not constitute probable cause or reasonable suspicion, nor shall it be used to support a search of the person or property of the person possessing or applying for the registry verification, or otherwise subject the person or property of the person to inspection by any governmental agency.”

If an employee becomes subject to drug testing or random screening (for example, under Minn. Stat. § 183.953), they may provide proof of their enrollment on the registry as an explanation of a positive drug test.

2. Illicit use while on registry

Enrollment on the registry provides an employee with a presumption that they are using medical cannabis for appropriate purposes to relieve physical symptoms.

However, this presumption can be overcome by evidence of illicit use of recreational or non-medical versions of cannabis. If an employee is combining illicit use with medical use, they may still be subject to employment and/or criminal sanctions. The recent legalization of recreational cannabis products, including marijuana, complicates the analysis of whether use is illicit. Cities should consult with their City Attorney before taking any adverse action based upon non-medical use.

3. Use on premises or during hours of employment

Nothing in state law allows an employee to use, possess, or be impaired by medical cannabis while on duty. All use of medical cannabis must occur during non-working hours and in such a manner that it does not result in impairment at a future time on the job.

a. Impaired behavior

Dealing with impaired behavior on the job site may be difficult. If an employer observes troubling behavior and suspects impairment, normally the employer would follow the requirements of the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA) and conduct a “reasonable suspicion” drug and cannabis and alcohol test. However, as discussed above, a positive test will only indicate use of cannabis, which can be explained by the registry or lawful recreational use.

As a result, cities will need to carefully identify and document impairment for disciplinary purposes and then obtain assistance from their city attorney, the League, or both to determine next steps.

RELEVANT LINKS:

National Institute on Drug Abuse, Easy-to-Read Drug Facts: [Signs of Marijuana Use](#).

[Minn. Stat. § 152.23\(a\)\(1\)](#).

Negligence, [Black's Law Dictionary](#).

[Minn. Stat. § 152.23\(a\)\(1\)-\(a\)\(2\)](#).

The city should objectively record observed behavior. For example, “employee appeared drowsy and disoriented.”

According to the National Institutes of Health, the side effects of someone using marijuana include but are not limited to:

- Dizziness.
- Laughing for no reason.
- Red, bloodshot eyes.
- Forgetting things that just happened.

Some cities find it beneficial to ensure their Non-DOT supervisors are trained in reasonable suspicion drug and alcohol recognition.

b. Express prohibitions on impaired behavior

The Minnesota Medical Cannabis Act specifically notes that nothing in the law allows a person to undertake any task under the influence of medical cannabis that would constitute “negligence or professional malpractice.” Negligence is defined as: “The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. Or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances.”

Professional malpractice usually occurs when negligence has happened in a licensed and regulated professional setting (for example, law, medicine, or engineering). As a result, special care should be exercised when impairment is suspected in positions carrying the possibility of serious injuries (for example, near or around heavy equipment, busy roads, etc.).

In addition, the law prohibits a person from:

- Possessing or engaging in the use of medical cannabis on a school bus or van, on the grounds of any preschool or primary or secondary school, in any correctional facility, or on the grounds of any child care facility or home day care.
- Vaporizing medical cannabis on any form of public transportation where the vapor would be inhaled by a non-patient minor child; or in any public place, including any indoor or outdoor area used by or open to the general public or a place of employment.
- Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, train, or motorboat, or working on transportation property, equipment, or facilities while under the influence of medical cannabis.

RELEVANT LINKS:

[Minn. Stat. § 181.938, subd. 2\(b\).](#)

[Minn. Stat. § 152.32, subd. 3 \(2\)\(d\).](#)

[41 U.S.C. § 8102.](#) Drug-free workplace requirements for Federal contractors.



[Non-DOT Drug and Alcohol Testing and Drug-Free Workplace Act, LMC Model Policy.](#)

[41 U.S.C. § 8102.](#) Drug-free workplace requirements for Federal contractors.

[U.S. Dep't of Transp., Medical marijuana notice.](#)

Additionally, Minnesota's Legal Cannabis Act expressly permits employers to establish work rules prohibiting the use, possession, impairment, sale, or transfer of cannabis while an employee is working, or while an employee is on work premises or is using an employer's vehicle, machinery, or equipment.

D. Exceptions to employment protection

While the scope of the law is very broad, there are some important exceptions to the protections it offers to medical cannabis users.

1. Loss of federal benefits

An employer is exempt from the act if compliance would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations.

Some cities may be subject to the Federal Drug-Free Workplace Act of 1988. The Drug-Free Workplace Act applies to workplaces performing contractor work or receiving grants from the federal government. Affected city employers must certify that they will provide a drug-free workplace by prohibiting the unlawful manufacture, distribution, dispensation, possession, or use of a federally controlled substance in the workplace. The law doesn't require alcohol or drug testing, but testing is implicitly authorized as a means to maintain a drug-free workplace.

Because employees who legally use medical or recreational cannabis under Minnesota's state laws are generally not protected if they are under the influence or use of medical cannabis at work, conflicts between the Drug-Free Workplace Act and the Medical Cannabis Act should be minimal.

However, ensuring that all employees know about the city's Drug-Free Workplace policy is still required, and the city may want to clarify in its policy that nothing in state law allows an employee to use, possess, or be impaired by medical cannabis while on duty.

If a covered employer does not comply with the requirements of the Drug-Free Workplace Act, it can suffer stiff penalties, including suspension of payments for a contract or grant, or termination or suspension of a contract or grant. Violators may also be prohibited from receiving another contract or grant for a specified period.

2. Federal Department of Transportation standards

Cities may have positions requiring the employee to hold a commercial driver's license (CDL). CDLs are regulated by federal law and regulation and are supervised by the Federal Department of Transportation (DOT).

RELEVANT LINKS:

[Minn. Stat. § 181.951, subd. 9.](#)

See Section IV, *Overview of federal and state drug testing laws*.

[18 U.S.C. § 922\(g\)\(3\).](#)
[21 C.F.R. § 1308.11\(g\).](#)

U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives.
[Open Letter to all federal firearms licensees.](#) (Sept. 21, 2011). [18 U.S.C. § 922\(d\)\(3\).](#)

Federal law pre-empts state law related to medical and recreational cannabis. The Minnesota legislature has expressly excluded positions requiring CDLs from Minnesota's limitations on cannabis testing.

The DOT issued guidance that made it clear that it will enforce drug and drug-testing standards (which include a prohibition on cannabis use) against all CDL holders, regardless of state law protections.

As a result, cities should continue to follow their drug-testing procedures related to CDL holders and may enforce prohibitions against any use of medical or recreational cannabis for CDL holders in accordance with their policy. Occasionally, cities will be asked by their DOT drivers how CBD oil may impact DOT drug testing results. Drug-testing panels cover THC only, not CBD. Generally speaking, CBD oil typically has very low residual amounts of THC, but enough CBD use could lead to a positive test for THC.

THC concentration in CBD is dependent upon the manufacturing process and how much oil the individual is using. Use of THC is absolutely forbidden for a regulated driver, no matter the source, and since THC is absolutely prohibited under DOT drug testing, a medical review officer (MRO) must not take medicinal use of a CBD oil into consideration as he or she determines a drug test result, even if that use is permitted under state law. As a result, many employers will inform DOT drivers that they use CBD at their own risk, because its use could lead to a positive THC test, and the fact that the THC may be from CBD oil will be no excuse. It is always recommended that a city consult with its city attorney to review all of the facts of the situation prior to taking action as a result of a positive drug test due to medical cannabis use.

3. Public safety and firearms

Public safety employees who carry a firearm cannot lawfully use medical cannabis under federal law. In addition, federal law prohibits cities from providing firearms or ammunition to employees it knows or has reason to know are using medical cannabis.

The Bureau of Alcohol, Tobacco & Firearms has indicated that these laws and regulations will be enforced regardless of state laws authorizing cannabis use (either for recreation or medically).

Public safety employees, however, are still entitled to the anti-discrimination provisions of the Minnesota Medical Cannabis Act—they are protected from termination and/or discipline based on their use of medical cannabis.

Thus, while an employee may not be able to carry a firearm, the city needs to avoid treating the employee in a discriminatory manner. Examples of evidence tending to prove discrimination might include:

RELEVANT LINKS:

[Minn. Stat. § 152.32, subd. 2\(f\).](#)

See Section III, *Americans with Disabilities Act* and *Minnesota Human Rights Act* considerations.
[49 C.F.R. § 40.](#)

[Minn. Stat. § 151.72.](#)

- Showing the city treated the officer less favorably than other officers who in the past had been unable to carry a firearm or perform the full spectrum of patrol duties.
- Showing that the employer opted for termination in the face of less severe alternatives for addressing the situation.

For example, if the city has a history of allowing officers several weeks of light duty following a surgery, then denying a medical marijuana user a similar period of light duty might support an inference of discrimination. In addition, other laws may entitle public safety employees to additional protections, such as under the Americans with Disabilities Act, as discussed below.

E. City policy impact

Many cities have personnel policies in place requiring employees to disclose use of medications whose side effects may impair work performance. Because of the privacy protections in the law, it is a best practice to not revise these policies to include requiring employee disclosure of enrollment on the registry. If an employee voluntarily discloses this information to the city, this information should be treated as private-confidential information on the employee. In addition, it is a good practice to inform an employee who self-discloses that the city abides by the requirements of the law, but that the law does not permit use or impairment at work. Remember also that some employees, - for example, those holding a commercial driver's license – may be subject to drug testing under federal law.

Information on medical or recreational cannabis use should be included in your city's regular respectful workplace training; i.e., legal use of medical cannabis is protected under state law.

Regardless of whether your city has an employee on the Medical Cannabis Registry, supervisors should be trained on how to spot drug and alcohol abuse and impairment on the worksite and on how to address possible use without violating employment protections under state and federal laws.

VII. Minnesota Legalization of Cannabis

The Minnesota legislature amended its laws relating to the sale and recreational use of certain cannabis products derived from hemp in 2022.

Under the new law, it is lawful to sell and use cannabis products, including edibles and beverages, containing tetrahydrocannabinol (THC) that is derived from hemp to individuals at least 21 years of age so long as the levels of THC in the product do not exceed certain levels. Notably, the new law does not purport to amend DATWA or Minnesota's Medical Marijuana Act in any way.

RELEVANT LINKS:

[49 C.F.R. § 40.](#)

Federal Motor Carrier Safety Administration: [Overview of drug and alcohol rules.](#)

Likewise, in 2023, the Minnesota legislature legalized the recreational use of cannabis, including marijuana, for individuals at least 21 years of age. This enactment has resulted in significant changes to DATWA, which are described in detail above.

This legalization creates pitfalls for employers, as it will likely increase the risk of employees being under the influence while performing their duties. Likewise, due to the fact that THC can remain in a user's system for days or weeks after ingestion, cannabis testing revealing positive results for THC for individuals without prescriptions for medical marijuana will be difficult to decipher, as positive results will not be able to differentiate between legal and illicit use. This poses particular issues with “reasonable suspicion” testing for non-DOT employees, as it may not be possible, based on test results, to determine whether an employee is impaired while at work.

It is expected that further amendments will continue to be made over the coming years as the issues and realities of legal recreational use of cannabis become more clear. Employers would be advised to continue to monitor the Minnesota legislature for any changes to the law. In the meantime, employers would be advised to train supervisors, managers, and HR to appropriately identify and document incidents in which an employee is believed to be impaired and work closely with their City Attorney before any adverse actions are taken.

VIII. Federal Law – Department of Transportation Regulations

Federal 1994 DOT Highway Administration regulations require drug testing in certain circumstances for certain employees who perform “safety-sensitive” functions in conjunction with a commercial driver’s license, which will be covered in this memo.

Forty-nine C.F.R. Part 40, often referred to as the “Part 40” rules, are DOT-wide regulations addressing who can perform these tests, how they are to be collected, and what procedures to follow when returning an employee to safety-sensitive duties following a DOT drug and/or alcohol violation. While Part 40 applies to all DOT-required testing, there are also DOT agency-specific rules applicable to employees performing safety-sensitive functions for various industries.

Of primary importance to municipalities are the rules of the Federal Motor Carrier Safety Administration (FMCSA), since the FMCSA is the agency responsible for providing guidance for drivers who hold commercial driver’s licenses (CDL), which are generally the only city employees covered by the DOT rules and regulations. FMCSA regulations apply to CDL holders who perform “safety-sensitive functions” on commercial motor vehicles that meet any of the following criteria:

RELEVANT LINKS:

[49 C.F.R. § 382.](#)

[49 C.F.R. § 383.3.](#)

[Minn. Stat. § 169.011, subd. 3.](#)

[Federal Register, Vol. 60, Issue 90 – FHWA CDL Waivers.](#)

[U.S. Dep't of Transp.: Best Practices for DOT Random Drug and Alcohol Testing- see page 2.](#)

- Have a gross combination weight rating or gross combination weight of 26,001 pounds or more, whichever is greater, inclusive of a towed unit(s) with a gross vehicle weight rating or gross vehicle weight of more than 10,000 pounds, whichever is greater.
- Have a gross vehicle weight rating or gross vehicle weight of 26,001 or more pounds whichever is greater.
- Are designed to transport 16 or more passengers, including the driver.
- Are of any size and are used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act (49 U.S.C. 5103(b)) and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 C.F.R. part 172, subpart F).

A city with DOT-covered employees should follow DOT testing regulations for those employees only, as state law (DATWA) has different standards for testing outside of the DOT context.

Under DOT rules, the following functions are considered safety-sensitive:

- All time waiting to be dispatched to drive a commercial motor vehicle.
- All time inspecting, servicing, or conditioning a commercial motor vehicle.
- All time driving at the controls of the commercial motor vehicle.
- All other time in or upon a commercial motor vehicle (except time spent resting in a sleeper berth).
- All time loading or unloading a commercial motor vehicle, attending the same, giving or receiving receipts for shipments being loaded or unloaded, or remaining in readiness to operate the vehicle.
- All time repairing, obtaining assistance, or attending to a disabled commercial motor vehicle.

Minnesota state law exempts a vehicle of the fire department from CDL requirements, and therefore fire service personnel are exempt from the requirements of the FMCSA and DOT regulations, even if a city requires those personnel to possess a valid CDL. For fire service personnel in Minnesota, state testing laws (DATWA) apply, as well as relevant provisions of applicable collective bargaining agreements.

As discussed later in this memo, drug and alcohol testing is required under FMCSA and DOT regulations for persons performing safety-sensitive functions.

These requirements apply if the person performs these functions full-time, part-time, on a casual, intermittent, or occasional basis, or is applying to perform these functions (for the pre-employment testing process).

RELEVANT LINKS:

[49 C.F.R. § 382.601.](#)
U.S. Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#)- see page 9.



[DOT Drug and Alcohol Testing for Commercial Drivers](#), LMC Model Policy.



[Informed Consent and Notice for Drug and Alcohol Screening of City Employees and Applicants](#), LMC Model Form.

[49 C.F.R. § 382.601 \(b\).](#)

These requirements apply if the person performs these functions full-time, part-time, on a casual, intermittent, or occasional basis, or is applying to perform these functions (for the pre-employment testing process). Determining who is included in a random testing pool is based on an employee's safety-sensitive job functions as defined above, rather than by job title.

To reiterate, a city's DOT drug and alcohol tests must be completely separate from non-DOT drug and alcohol testing.

A. Policy required for DOT testing

DOT regulations require employers to develop a written policy on controlled substances use and alcohol misuse in the workplace. This policy must be distributed to every employee performing DOT safety-sensitive duties before the testing program begins, and to each new hire. In addition to having a written policy in place, cities must also have each of those employees sign a certification that they received a copy.

The city is responsible for retaining that original signed certification.

1. DOT Policy basics

At a minimum, cities need to address the following in their DOT controlled substance and alcohol testing policy:

- A refusal to submit to any required alcohol or controlled substance test;
- An employer's report of actual knowledge (meaning actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer's direct observation, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances, or an employee's admission of alcohol or controlled substance abuse except as provided in § 382.121) of:
 - On duty alcohol use pursuant to § 382.205;
 - Pre-duty alcohol use pursuant to § 382.207;
 - Alcohol use following an accident pursuant to § 382.209; and
 - Controlled substance use pursuant to § 382.213;
- A SAP's report of the successful completion of the return-to-duty process;

RELEVANT LINKS:

United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms, 74 F.3d 169, 175 (9th Cir. 1995) (citing 53 Fed. Reg. 47,148 (November 21, 1988)).

49 C.F.R. § 382.603.
Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 14.

49 C.F.R. § 40 subp. 40.3.

- A negative return-to-duty test; and
- An employer's report of completion of follow-up testing.

Employers do not have a duty to bargain over the establishment of drug and alcohol testing policies; they do, however, have a duty to bargain over the implementation of such policies.

As the DOT explained when issuing the regulations, “[i]ssues such as termination, reassignment, hiring of temporary drivers to fill a position or policies regarding a driver’s absence from a position are . . . issues that appropriately are the subject of labor-management negotiations and are not issues to be addressed in this rulemaking action.”

2. DOT training for supervisors

Supervisors of DOT employees are required to participate in at least 120 minutes of mandatory training (at least 60 minutes on alcohol misuse and an additional 60 minutes on controlled substances use).

This training is required for implementing any reasonable suspicion testing, and must include training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

While ongoing training is not specifically mandated, the DOT recommends recurring training of supervisors as a best practice.

It can also be a best practice to offer training to all employees on the signs and symptoms associated with drug and alcohol use as well as the requirements of the city’s DOT policy, rather than just the federally mandated training to supervisors.

B. Important people in your DOT drug and alcohol testing process

1. Designated Employer Representative (DER)

DOT regulations require a city to name a designated employer representative (DER). The DER serves an important role in the testing process by receiving test results and other communications for the city, being authorized to take immediate action(s) to remove employees from safety-sensitive duties and making required decisions in the testing and evaluation process.

RELEVANT LINKS:

Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 9.

[49 C.F.R. Part 40 § 40.35.](#)

[49 C.F.R. § 40.15.](#)

See this section (VII), B-5,
Third party Administrators.

Dep't of Transp.: [MRO Overview](#). Dep't of Transp.: [Subpart G – MROs and the Verification Process.](#)

Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 50.

Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 50.

Dep't of Transp.: [Overview on SAPS.](#)

Since the DER is responsible for receiving test results from the medical review officer (MRO) and breath alcohol technician (BAT), and taking immediate action to remove employees from their safety-sensitive duties in the event of, for example, a positive test result or refusal to test, some organizations choose to appoint more than one DER to ensure adequate coverage for all shifts and locations. If a city chooses to appoint more than one DER, then it can be helpful to also have a drug and alcohol program manager, for example, to assure consistency among all the DERs.

In smaller organizations, the DER may very well also serve as the drug and alcohol program manager; and thus, will coordinate the drug and alcohol testing program, receive test results, answer questions about the program, and take immediate action to remove employees from safety-sensitive duties in the event a covered employee violates drug and alcohol testing rules.

A city must provide the DER's contact information to any collection personnel (whether the collection site is a clinic or collection staff) in the event any problems or issues arise in the testing process.

It's important to note the regulations specify that only an organization's employee can serve as the DER. In the event a city contracts with a consortium or third-party administrator (TPA) for assistance with DOT drug and alcohol services (the TPA cannot also perform the role of the DER).

2. Medical Review Officer (MRO)

An MRO is a licensed physician responsible for receiving and reviewing laboratory results generated by the city's drug testing program and evaluating medical explanations for certain drug test results. The MRO serves as an impartial overall "gatekeeper" for the city's drug testing program and provides quality assurance review of the drug testing process for the specimens under his or her purview.

An MRO determines if there is a legitimate medical explanation for laboratory confirmed positive, adulterated, substituted, or invalid drug test results; ensures the timely flow of test results and other information to employers; and protects the confidentiality of the drug testing information.

The DOT suggests that employers with, for example, spanish speaking employees consider contracting with a bilingual MRO or a bilingual person on the MRO's staff to facilitate communication with employees.

3. Substance Abuse Professional (SAP)

A SAP is a person who evaluates employees who have violated a DOT drug and alcohol program regulation, and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

RELEVANT LINKS:

Dep't of Transp.: [What Employees Need to Know about DOT Drug and Alcohol Testing](#) – see page 12.

Dep't of Transp.: [SAP Guidelines](#).

U.S. Dep't of Transp. Office of the Secretary, [What Employers need to know about DOT Drug and Alcohol Testing](#) (information found on page 24).

Dep't of Transp., [HIPAA Statement](#).

SAPs are required to have certain background and credentials, which include clinical experience in the diagnosis and treatment of substance abuse-related disorders.

The SAP advocates for neither the employer nor the employee, but represents the major decision point an employer may have in choosing whether or not to return an employee to a DOT covered safety-sensitive position following a DOT drug and alcohol program violation.

The SAP does not make the decision regarding whether the employee returns to work; that decision is the responsibility of the employer. But the evaluation of the SAP is critical in this decision-making process.

The SAP makes a face-to-face assessment and clinical evaluation with the employee to determine what assistance the employee needs to resolve problems with drug use and alcohol misuse. Next, the SAP refers the employee to an appropriate program for education or treatment, or both. Following that, the SAP conducts another face-to-face evaluation (known as the follow-up evaluation) to determine if the employee actively participated in the program and demonstrated successful compliance with the initial assessment and evaluation recommendations.

The DOT authorizes employers and service agents (like SAPs) to confer about the employee's DOT testing without the employee's permission. Even if drug and alcohol testing information is viewed as protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) rules, it is not necessary to obtain employee written authorization where DOT requires the use or disclosure of otherwise protected health information under 49 CFR Part 40 or the other DOT Agency & USCG drug and alcohol testing regulations.

Consequently, an employer or service agent in the DOT program may disclose the information without the written authorization from the employee under many circumstances. For example:

- Employers need no written authorizations from employees to conduct DOT tests.
- Collectors need no written authorizations from employees to perform DOT urine collections, to distribute Federal Drug Testing Custody and Control Forms, or to send specimens to laboratories.
- Screening Test Technicians and Breath Alcohol Technicians need no written authorizations from employees to perform DOT saliva or breath alcohol tests (as appropriate), or to report alcohol test results to employers.
- Laboratories need no written authorizations from employees to perform DOT drug and validity testing, or to report test results to Medical Review Officers (MROs).

RELEVANT LINKS:

Dep't of Transp.: [Urine Collectors Overview](#).

Dep't of Transp.: [BAT & STT Overview Information](#).

Dep't of Transp.: [MRO and the verification process](#).

Dep't of Transp.: [Employer responsibilities](#).

Dep't of Transp.: [Employer Record Keeping Requirements for Drug & Alcohol Testing Information](#).

- MROs need no written authorizations from employees to verify drug test results, to discuss alternative medical explanations with prescribing physicians and issuing pharmacists, to report results to employers, to confer with Substance Abuse Professionals (SAPs) and evaluating physicians, or to report other medical information (see §40.327).
- SAPs need no written authorizations from employees to conduct SAP evaluations, to confer with employers, to confer with MROs, to confer with appropriate education and treatment providers, or to provide SAP reports to employers.
- Consortia/Third Party Administrators need no written authorizations from employees to bill employers for service agent functions that they perform for employers or contract on behalf of employers.
- Evaluating physicians need no written authorizations from employees to report evaluation information and results to MROs or to employers, as appropriate.
- Employers and service agents need no written authorizations from employees to release information to requesting Federal, state, or local safety agencies with regulatory authority over them or employees.

4. Specimen collection personnel

DOT regulations address minimum training and required testing procedures for authorized personnel when collecting urine for drug testing and saliva or breath specimens for alcohol testing.

A collector is a person who instructs and assists employees at a collection site, receives and makes an initial inspection of the urine specimen provided by those employees, and initiates and completes the required Federal Drug Testing Custody and Control Form (CCF).

The breath alcohol technician (BAT) and/or screening test technician (STT) is a person who instructs and assists employees in the alcohol testing process, completes the appropriate custody and control form, and operates an evidential breath testing or alcohol screening device.

5. Third-party administrators (TPAs)

While not required, some cities choose to outsource their DOT drug and alcohol testing program functions to a vendor, known as a consortium or a “third-party administrator.” For cities interested in a list of some DOT TPAs, contact the HR & Benefits Department at the LMC. Since employers can be held responsible for TPA errors and resulting civil penalty actions for non-compliance, cities should ensure any of the agents used in the DOT testing process, from the MRO to collectors, meet federal regulations.

RELEVANT LINKS:

Dep't of Transp.: [Part 40 DOT 5-Panel Notice](#).

49 C.F.R. § 40.87.
[What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 15.

U.S. Dep't of Transportation: [DOT 5 Panel Notice](#).

49 C.F.R. § 40.45.
49 C.F.R. § 40.45 Q & A.
Dep't of Transp.: [Federal Drug Testing CCF Suppliers](#).

Dep't of Labor: [Workplace Drug Testing](#).

Dep't of Transp.: [What Employees Need to Know about DOT Drug and Alcohol Testing](#) – see page 21.

To that end, a best practice is to require service agents (from collectors to MROs) to provide documentation showing they meet federal requirements and keep a copy of the documentation on file.

C. DOT drug testing and the types of drugs tested

DOT drug tests are conducted using urine specimens and are analyzed for the following five classes of drugs:

- Marijuana metabolites/THC
- Cocaine metabolites
- Amphetamines (including methamphetamine and MDMA)
- Opiates (including codeine, heroine, and morphine)
- Phencyclidine (PCP)

In January 2018 this five-panel test was expanded to include synthetic opioids (Hydrocodone, Oxycodone, etc.)

The employer **cannot** test for any other drug or use the urine sample for any other purpose such as for a DNA test. Results of a urine test will show the presence or absence of drug metabolites in a person's urine. Metabolites are drug residues remaining in the body for some time after the effects of a controlled substance have worn off.

A specific Federal Drug Testing Custody and Control Form must be used to document every urine collection required by the DOT drug test program. The form links an individual to his or her sample and is written proof of all that happens to the specimen while at the collection site and the laboratory.

The DOT's alcohol and drug-testing regulations require all tests be performed using a "split sample" collection process. A split sample is created when an initial urine sample is split into two separate bottles, the primary specimen (bottle A) and the split specimen (bottle B).

Both bottles are sent to the laboratory and one sample is used for the initial screen and, if positive, the second sample is used for a confirmation test. (The split sample process is an independent way to determine if the primary test results were accurate). If there is a positive result, the individual being tested may request that the confirmation test be completed at a different laboratory.

Since testing of the split sample is a right of the employee, the cost for this testing can be the responsibility of the employee. If the city wants the employee to pay for this testing, it should negotiate that requirement with any applicable labor representative, include notice of such a requirement in its policy, and/or get such an agreement in writing from the employee. Confusion about who is responsible to pay for such testing should not interfere with or delay any required testing.

RELEVANT LINKS:

[Minn. Stat. § 181.79.](#)

[Dep't of Transp.: What Employees Need to Know about DOT Drug and Alcohol Testing – see page 7.](#)

[49 C.F.R. § 40, subp. C, D & E.](#)
[49 C.F.R. § 40, subp. F.](#)
[49 C.F.R. § 40, subp. G.](#)

[Minn. Stat. §§ 152.21-.22, .32; Minn. Stat. § 151.72.](#)

[Dep't of Transp.: What Employees Need to Know about DOT Drug and Alcohol Testing – see page 4.](#)

[Dep't of Transp.: What Employers Need to Know about DOT Drug and Alcohol Testing – see page 15.](#)

[Dep't of Transp.: DOT approved evidential breath testing devices.](#)

[Dep't of Transp.: Approved Alcohol Screening Devices.](#)

[49 C.F.R. § 40.229.](#)

[49 C.F.R. § 40.241.](#)

[49 C.F.R. § 40.251.](#)

[49 C.F.R. § 40.225.](#)
[Dep't of Transp Federal Drug Testing ATF Suppliers.](#)

The DOT advises that employers may deduct such costs from an employee's paycheck; however, Minnesota law requires any deductions in pay are consented to by the employee in writing.

The DOT drug testing process always consists of three parts:

- The collection (49 C.F.R. Part 40, Subparts C, D, E).
- Testing at the laboratory (49 C.F.R. Part 40, Subpart F).
- Review by the MRO (49 C.F.R. Part 40, Subpart G).

Minnesota law legalizes medical cannabis in liquid, pill, oil, or vaporizing form for specific illnesses and also permits recreational use of cannabis products, including marijuana.

State law does not apply to DOT drug and alcohol tests. It is important for cities to note federal DOT laws do not recognize any legitimate medical or recreational use of marijuana. Even if marijuana is legally prescribed in a state, DOT regulations treat its use like that of any other illicit drug.

D. DOT alcohol testing

DOT alcohol screening tests are conducted using either breath or saliva with only specific alcohol screening devices. DOT alcohol confirmation tests must be conducted using Evidential Breath Testing Devices analyzing breath. A list of approved alcohol screening devices can be found in the links to the left.

A breath-alcohol test is the most common test for finding out how much alcohol is currently in the blood. The person being tested blows into a breath-alcohol device, and the results are given as a number, known as the blood alcohol concentration (BAC), which shows the level of alcohol in the blood at the time the test was taken.

An initial test, or screen, is conducted by the BAT and is an analytical procedure to determine whether an employee may have a prohibited concentration of alcohol in his or her system. When the initial screen shows an alcohol result of 0.02 or greater, then a second test, followed 15 minutes later, is conducted and known as the confirmatory test.

A specific Federal Drug Testing Custody and Control Form must be used for every DOT alcohol test.

RELEVANT LINKS:

Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 16.

Follow up testing is discussed in Section VIII-B-4, *Return to duty and follow-up testing*.

49 C.F.R. § 382.301.
FMCSA: [Implementation Guidelines for Alcohol and Drug Regulations. What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 16.

49 C.F.R. § 382.301.

Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 16.

E. When are DOT drug and alcohol tests conducted?

DOT rules require the following types of tests:

- Pre-employment
- Random
- Reasonable suspicion
- Post-accident
- Return-to-duty
- Follow-up

1. DOT pre-employment testing

A new hire for a DOT safety-sensitive position or a current employee transferring from a non-safety-sensitive position into a safety-sensitive position for the same employer, is required to submit to a pre-employment drug and, in some situations, alcohol test.

Only in the case of an alcohol test must the employer make an offer of employment prior to testing, contingent on passing the test. (For other requirements regarding alcohol testing, see below.) This requirement differs from non-DOT testing under Minnesota law, whereby a city must give a conditional offer of employment prior to conducting either a drug or alcohol test on a job applicant. Again, DOT and non-DOT testing are governed by separate legal regimes.

a. Pre-employment DOT drug testing

A city will need to have an applicant or employee:

- (1) Submit to a pre-employment drug test.
- (2) Possibly submit to a pre-employment alcohol test, but only if it is required for all applicants and transfers (see discussion below).
- (3) Receive a negative test result on the pre-employment drug test prior to the new hire or transfer working in a safety-sensitive position for the first time. The notification of negative drug test results must come from the MRO.
- (4) The city will need to complete a three-year drug and alcohol records check for drivers of previous CDL employers.

RELEVANT LINKS:

[49 C.F.R. § 382.301.](#)
FMCSA: [Part 382.301.](#)

[State of Minnesota](#)
[Department of Public Safety](#)
[CDL Manual](#)- see page 6.

FMCSA: [Pre-Employment Testing.](#)

[49 C.F.R. § 382.301.](#)
Dep't of Transp.
[What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 15.

[49 C.F.R. § 40.25.](#)
Dep't of Transp.:
[What Employers Need to Know about DOT Drug and Alcohol Testing](#) – see page 24 & 56.

There is an exception to -pre-employment testing under the regulations in very specific situations, including when the driver (i) has participated in a controlled substance testing program within the past 30 days and, while participating in that program, either underwent controlled substance testing within the last six months or participated in a random controlled substance testing program for the previous 12 months and (ii) the city ensures that no prior employer of the driver has records of a violation within the past six months.

To use this exception, specific documentation must be obtained and retained that can, in some circumstances, be challenging to obtain. Due to these challenges, many employers opt to simply undertake pre-employment testing and three-year drug and alcohol records check for driver candidates.

Minnesota law contains an exemption for cities with a population of 3,000 or less to employ backup snowplow operators who do not need to meet the requirements of the CDL and are therefore exempt from the DOT drug and alcohol testing requirements. This exemption is also recognized under federal law. Cities are encouraged to contact their city attorney before applying this exemption, since its application is intended for emergencies and exceptional circumstances only.

The Federal Motor Carrier Safety Administration requires that if a driver has been removed from the random pool for more than 30 days, the city must give the driver a pre-employment test, and a negative test result must be received, before the driver may operate a commercial motor vehicle.

If less than 30 days has passed since the driver was under the DOT random testing program, the city may re-employ the driver without a pre-employment drug test, but this situation only applies to employment with the same city.

b. Pre-employment DOT alcohol testing

Alcohol pre-employment testing may be conducted only if it is required for all applicants and transfers (i.e., not just some applicants) and the alcohol testing is conducted on a conditional-offer basis. This requirement is the same as state law governing drug and alcohol testing; however, the tests for DOT and non-DOT positions must still remain separate.

c. Pre-employment check on a person's DOT drug and alcohol testing history

Before a city hires or transfers a person into a safety-sensitive position, and in addition to conducting DOT pre-employment testing as noted above, the city must conduct a three-year record check for the candidate.

RELEVANT LINKS:

[49 C.F.R. § 40.25 form letter.](#)

[49 C.F.R. § 40.25.](#)

[FMCSA: Drug and Alcohol Clearinghouse Frequently Asked Questions.](#)

[FMCSA: Drug and Alcohol Clearinghouse Frequently Asked Questions.](#)

As an aside, the DOT's "look back" two-year period for checking an applicant's prior drug and alcohol testing results with a prior employer is the baseline unless other, more-specific agency regulations apply. The FMCSA's more-specific regulations apply when commercial driver's license (CDL) holders perform safety-sensitive functions on commercial motor vehicles. With the exception of fire service personnel (for whom Minnesota state law does not require a CDL), that means the FMCSA regulations, and their three-year look back period, generally cover city DOT employees. The city must obtain the candidate's written consent to receive the information from other employers.

The candidate must list all previous and current employers within the last three years, and if the candidate refuses to sign or doesn't complete the form, the city cannot allow the person to perform safety-sensitive functions.

A model consent/release form is available at the link to the left. It is important to note the consent cannot be a "blanket" release; instead it must be employee, employer, and time-period specific.

Nor can the consent be part of another background check requirement, such as a motor vehicle check or criminal background check.

The DOT consent needs to be an original signed form signed for each identified DOT regulated employer needing to provide the city with testing information.

When requesting the applicant's previous DOT drug and alcohol test results, the inquiry can be made through a variety of means, including mail (certified mail is not required), fax, telephone, or email. Regardless of whichever method is used, the city must provide the former employer with the applicant's signed release form.

(1) Required Commercial Driver's License Drug and Alcohol Clearinghouse Checks for new and existing CDL drivers

Beginning in 2020, employers of CDL drivers subject to the DOT drug and alcohol testing rules will be required to query the agency's Commercial Driver's License (CDL) Drug and Alcohol Clearinghouse ("Clearinghouse") before hiring new drivers. This database contains information pertaining to violations of the DOT drug and alcohol testing program for holders of CDLs. In addition, at least once a year, employers will be required to query the Clearinghouse for current drivers determine whether current employees have incurred drug or alcohol violations while working for another employer.

A prospective employer must conduct a full pre-employment query of the Clearinghouse prior to employing a driver to perform a safety-sensitive function.

RELEVANT LINKS:

[49 C.F.R. § 391.23\(e\)\(4\)\(B\)\).](#)

[FMCSA: Drug and Alcohol Clearinghouse Frequently Asked Questions.](#)

[FMCSA: Drug and Alcohol Clearinghouse Frequently Asked Questions.](#)

[FMCSA: Drug and Alcohol Clearing house FAQ learn more.](#)

[FMCSA: 49 C.F.R. § 391.23.](#)

[FMCSA: Drug and Alcohol Clearinghouse Frequently Asked Questions.](#)
[FMCSA: 49 C.F.R. § 382.701\(b\).](#)

Keep in mind, employers must continue to request information from previous employers if the employee was subject to DOT drug and alcohol testing required by a DOT agency other than FMCSA (as required by § 391.23(e)(4)(B)), since that information will not be reported to the Clearinghouse. The difference between full and limited queries is discussed below.

A full query requires the driver's specific consent to the release of information in the Clearinghouse to a specific individual or organization at a particular point in time.

A limited query allows an employer to determine if any information about an individual driver exists in the Clearinghouse but does not provide for the release of any specific violation information in the driver's Clearinghouse record. Limited queries require only a general driver consent, but employers may obtain a multi-year general consent from the driver for annual query requirement.

Initially, employers will be required to conduct both electronic queries in the Clearinghouse and manual inquiries with previous employers to meet the required three-year look-back for pre-employment driver investigations, as required per § 391.23(e). On January 6, 2023, once three years of violation data is stored in the Clearinghouse, prospective employers will no longer be required to conduct manual inquiries with a CDL driver's previous employers; and, thus, will satisfy the drug and alcohol background check requirement by querying the Clearinghouse. However, motor carrier employers are still subject to all other background requirements of section 391.23 (e.g., motor vehicle record, safety performance history).

As referenced earlier in this section, if a prospective employee was subject to drug and alcohol testing by a DOT agency other than FMCSA, employers must continue to request background information from the relevant DOT-regulated employers, since that information will not be reported to the Clearinghouse.

An employer will be required to conduct a query of the Clearinghouse for each currently employed CDL-driver at least once a year. The queries must be conducted at least once every 365-day period but may be based on either hire date or another 12-month period, as determined by the employer. This annual query may be either full or limited.

The annual query is a minimum requirement, and employers may conduct queries more often, as long as they obtain the employee's consent. If the limited query shows that violation information exists in the database, the employer is required to obtain the driver's specific consent and conduct a full query within 24 hours. FMCSA will then verify that the driver consented to the full query before releasing the information to the employer.

RELEVANT LINKS:

[49 C.F.R. § 40.25.](#)

[49 C.F.R. § 40.25.](#)

See Section VII-E-5, *Return to Duty Process*, and Section VIII-B-4, *Return to duty and follow up testing*.

[49 C.F.R. § 382.305.](#)

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#)- see pages 3 & 4.

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#)- see page 17.

Absent the employee's consent, the employer may not permit a driver to perform safety-sensitive functions, such as the operation of a CMV.

If possible, a city must obtain and review the testing history before the employee first performs safety-sensitive functions for the city. If this is not feasible, the city must obtain and review the information as soon as possible. DOT regulations state an employer must not permit an employee to continue to perform safety-sensitive functions after 30 days have passed from the date when the employee first performs safety-sensitive functions unless the city has obtained or made and documented a good faith effort to obtain, the information from previous employers.

If the information the city receives shows the applicant violated DOT drug or alcohol rules, the city must ensure the employee has successfully completed the DOT return-to-duty process before permitting the person to perform safety-sensitive duties.

In the event there is no proof the return-to-duty process was successfully completed by the applicant, then a new return-to-duty process must occur before the person can perform safety-sensitive functions for the city.

2. DOT random testing

DOT rules require random testing for DOT safety-sensitive positions. Random selections must be performed at least quarterly, and each time all covered employees have an equal chance to be selected and tested.

The percentage of the workforce that must be tested is determined by the applicable agency, which in the case of most cities means the FMCSA.

The DOT recommends employers spread testing dates reasonably throughout the year in a non-predictable pattern and throughout the start, middle, or end of each shift. As DOT guidance notes, in a truly random selection process, a high probability exists that some employees will be selected several times while others may never be selected.

This is attributable to the fact that after each selection, an eligible employee's name is returned to the same pool and that employee is just as likely as anyone else to be selected next time.

The DOT, in its guidance, notes that if the applicable agency, for example, requires a drug testing rate of 50 percent and an alcohol testing rate of 10 percent, then an employer with 100 safety-sensitive employees would have to ensure 50 or more random drug tests and 10 or more random alcohol tests were conducted during the calendar year. However, the guidance clarifies, this doesn't mean an employer will give random drug tests to 50 different employees or random alcohol tests to 10 different employees.

RELEVANT LINKS:

[49 C.F.R. § 382.103\(b\).](#)

Dep't of Transp.: [Best Practices for DOT Random Drug and Alcohol Testing](#) – see page 3.

Dep't of Transp.: [Best Practices for DOT Random Drug and Alcohol Testing](#) – see page 5.

[Current random testing rates.](#)

As described earlier, it is very likely some employees might be picked and tested more than once, and others not at all.

Occasionally, smaller sized cities will ask how to handle random testing when they have only one CDL driver in their testing pool.

The Office of Enforcement and Compliance with DOT has advised that with only one individual in a pool, there is no random selection basis, so a larger pool, such as one through a consortium, is required. Similarly, FMCSA rules require individual owners/drivers to be included in a random pool consisting of at least two or more persons.

DOT regulations require employers to use a scientifically valid method to select employees for testing, like the use of a random-number table, or a computer-based random number generator matched to a specific employee number like an employee's city payroll ID number, or social security number. Unacceptable random selection practices include selecting numbers from a hat, rolling dice, throwing darts, picking cards, or selecting ping pong balls.

The DOT recommends employers have procedures in place to ensure each employee receives no advanced notice of selection and establish an expected arrival time to ensure the employee reports immediately to the collection site without time to prepare to alter the test result(s) outcome.

“Immediately” means that after notification, all the employee's actions must lead to an immediate specimen collection. The DOT, in its “Best Practices for Random Drug and Alcohol Testing,” notes that many employers develop random testing procedures or policies clearly stating “what activities are acceptable after notification: for instance, which safety-sensitive duties agency regulations permit them to complete.

If an employee is notified of a random test while working ‘off-site’ or ‘on the road,’ the company's policies should spell out exactly what the employee must do before resuming safety-sensitive functions. That way there is no misunderstanding among employees about what is expected.”

a. DOT random testing - alcohol

The current required selection rates are available at the link to the left. Cities employing drivers with CDLs are governed by the rates for the FMCSA.

As of 2020, the minimum annual percentage rate for random alcohol testing is 10 percent of the average number of driver positions. It's important that random alcohol testing be administrated just before, during, or just after performing safety-sensitive functions.

RELEVANT LINKS:

[Current random testing rates.](#)

Federal Register: [Annual Random Controlled Substances Testing Percentage Rate for Calendar year 2020.](#)

See Section VII E (1) a: Pre-Employment Testing.

[49 C.F.R. § 382.307.](#)



Reasonable Suspicion Record of Observed Behavior, LMC Model Form.

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#) - see page 18.

See Section VII-A, *Policy required for Testing.*

[49 C.F.R. § 382.107.](#)

[49 C.F.R. § 382.307.](#)

b. DOT random testing – controlled substances

The current required selection rates are available at the link to the left. Cities employing drivers with CDLs are governed by the rates for the FMCSA.

As of 2020, the minimum annual percentage rate for random controlled substance testing increased to 50% (up from 25 % in 2019) of the average number of driver positions.

Please refer to the pre-employment testing section referenced on the left for information on handling drivers removed from the random testing pool for a period of time.

3. DOT reasonable suspicion testing

Under DOT regulations, a city is required to conduct reasonable suspicion testing if a trained supervisor believes or suspects a safety-sensitive employee is under the influence of drugs or alcohol, or both.

The suspicion must be based on specific contemporaneous (e.g., at the present time the supervisor is making the observation) and articulable observations (e.g., documented or documentable) of employee behavior, speech, appearance, or body odors usually associated with drug or alcohol use.

Testing cannot be required based solely on a guess or hunch or complaint from another person or phone call tip. For reasonable suspicion alcohol testing, observations must be made just before, during, or just after performing safety-sensitive duties.

While DOT regulations do not require two supervisors to make the testing determination, a best practice tip for employers is to have two supervisors, at least one of whom is trained and on-site, make and document the determination.

Cities should also be aware that federal regulations differentiate between (1) circumstances where employers have “reasonable suspicion” and (2) circumstances where employers have actual knowledge of use (i.e. observing the employee using drugs or alcohol) and/or where employees admit to using drugs or alcohol.

If reasonable suspicion alcohol testing is not administrated within two hours following the reasonable suspicion determination, the city will need to document the reasons the test was not promptly administered. If an alcohol test is not administered within eight hours following the reasonable suspicion determination, the city will need to document the reasons why the test was not administered, and cease attempting to administer reasonable suspicion alcohol testing to the safety-sensitive employee.

RELEVANT LINKS:

[49 C.F.R. § 382.303.](#)

[FMCSA Post Accident testing, Guidance Q&A.](#)

Cities cannot allow employees for whom it has a reasonable suspicion that they are under the influence of drugs or alcohol, or both, to continue to perform safety sensitive functions, unless and until:

- An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or
- Twenty-four hours have elapsed following the reasonable suspicion determination.

4. DOT post-accident testing

DOT regulations require drug and alcohol testing after crashes according to the following chart:

Type of accident involved	Citation issued to the DOT-covered CDL driver?	Post-accident test must be performed by the city
i. Human fatality	Yes	Yes
	No	Yes
i. Bodily injury with immediate medical treatment away from the scene	Yes	Yes
	No	No
ii. Disabling damage to any motor vehicle requiring tow away	Yes	Yes
	No	No

FMCSA guidance explains that for accidents where a CDL driver does not receive a citation, but an individual is injured but does not die from the injuries until a later date, that the city is required to test the CDL driver for alcohol and controlled substances as soon as practicable following the accident.

While greater detail is provided below, if an alcohol test is not administered within eight hours following the accident, or if a controlled substance test is not administered within 32 hours following the accident, the employer must cease attempts to administer that test and document the reason(s) the test(s) were not promptly administered. If the fatality occurs following the accident and within the time limits for the required tests, the city will need to conduct the tests until the respective time limits are reached.

If, however, an accident fatality occurs outside of the eight and 32hour time limits, the city is not required to conduct any additional tests.

RELEVANT LINKS:

[49 C.F.R. § 382.303 \(f\).](#)

[49 C.F.R. § 382.303 \(e\).](#)

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#)- see page 18.

[49 C.F.R. § 382.303 \(g\).](#)

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#)- see page 53.

A safety-sensitive employee involved in a motor vehicle accident meeting the DOT criteria as identified above is required to remain readily available for any needed drug and alcohol testing. DOT regulations consider failure by an employee to remain available for testing as a refusal to test.

This requirement to remain ready for testing does not preclude an employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident.

To ensure employees understand their post-accident responsibilities, cities must provide employees with procedures and instructions prior to the employee operating a commercial motor vehicle.

To that end, a city may find it helpful to include city post-accident procedures in the glove box, along with the vehicle insurance information for the city's commercial motor vehicles.

DOT guidance states the supervisor at the scene of the accident/event should know the testing criteria and make a decision to test or not based on the information available at the time.

The decision not to test an employee must be based on a determination that the employee's performance could not have contributed to the accident (i.e., that it can be completely discounted as a contributing factor of the accident). DOT guidance further states the supervisor may consult with others, but it is ultimately the supervisor who has to make the decision. If the testing cannot happen within the required time, the supervisor must document the reasons. (If the employee required to be tested needs medical attention, the employee must get needed medical assistance first).

In the event federal, state or local officials, such as police officers, conduct a drug and/or alcohol test in the course of their duties following an accident, and the city can obtain the test results, then those law enforcement driven test results can be used to meet post-accident DOT testing requirements. Specifically, and only in these limited cases, breath or blood testing may be used for alcohol results and urine used for drug testing.

FMSCA regulations require the testing of only surviving drivers for accidents meeting the DOT post-accident criteria. The regulations do not call for testing of deceased drivers.

a. DOT post-accident alcohol testing

DOT requires post-accident alcohol testing for a safety-sensitive position as soon as practicable following an accident involving a commercial motor vehicle operation on a public road meeting any of the following criteria:

RELEVANT LINKS:

[49 C.F.R. § 382.303 \(a\).](#)

[49 C.F.R. § 382.303 \(d\)\(1\).](#)

[49 C.F.R. § 40.229.](#)

[49 C.F.R. § 382.303 \(b\).](#)

Dep't of Transp.: [Summary of Requirements for DOT-CDL Post-Accident Testing.](#)

- If the accident involved the loss of human life.
- If the individual performing safety-sensitive functions receives a citation within eight hours of the occurrence under state or local law for a moving violation arising from the accident, if the accident involved:
 - Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident.
 - One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

Saliva or breath for alcohol screening, and breath for alcohol confirmation testing, is to be conducted within two hours, but cannot exceed eight hours from the time of the accident.

If post-accident alcohol testing is not administered within two hours following the accident, the city will need to document the reasons the test was not promptly administered.

If a post-accident alcohol test is not administered within eight hours following the accident, the city will need to document the reasons why the test was not administered, and cease attempting to administer post-accident alcohol testing to the safety-sensitive employee.

In some unique circumstances, an employer may find an evidential breath testing (EBT) device is not available at a test location following an alcohol screen.

In this unique situation, an employer would not be considered out of compliance with the regulation if documentation exists showing a “good faith” effort to obtain an EBT.

However, employers have up to eight hours to administer the appropriate alcohol test following a qualifying accident, indicating that this should rarely occur.

b. DOT post-accident drug testing

The DOT requires collection of urine for post-accident drug testing for a safety-sensitive position as soon as practicable following an accident involving a commercial motor vehicle operation on a public road, meeting any of the following criteria:

- If the accident involved the loss of human life.
- If the individual performing safety-sensitive functions receives a citation within 32 hours of the occurrence under state or local law for a moving violation arising from the accident, if the accident involved:

RELEVANT LINKS:

[49 C.F.R. § 382.303 \(d\)\(2\).](#)

[49 C.F.R. § 382.309.](#)
[Dep't of Transp.: What Employers Need to Know About DOT Drug and Alcohol Testing](#) – see page 19.

[FMCSA Covid-19 Drug & Alcohol testing guidance.](#)

[49 C.F.R. § 40.305.](#)
[Dep't of Transp.: Part 40 Federal Register, Court Decisions and Legislations.](#)

[Dep't of Transp.: Reminder Notice- Direct Observation.](#)

[49 C.F.R. § 40.67.](#)

See Section VII-H, *Test results*.

- Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident.
- One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

Post-accident drug testing is to be conducted up to 32 hours from the time of the accident.

If a post-accident drug test is not administered within 32 hours following the accident, the city must document the reasons why the test was not administered, and cease attempting to administer post-accident alcohol testing to the safety-sensitive employee.

5. DOT return-to-duty testing

When a DOT safety-sensitive employee tests positive or violates prohibited drug and alcohol rules (such as refusals or the employer's actual knowledge of prohibited conduct), the employee cannot work again in DOT safety-sensitive duties until:

- (1) Successfully completing the SAP return-to-duty requirements, including a SAP determination that the employee successfully complied with the recommended treatment and education.
- (2) The employee has a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02 for a return-to-duty test.

Despite the COVID-19 pandemic, the FMCSA has reaffirmed in its temporary guidance that return to duty testing must be completed with a negative test result before a city may allow a prospective employee to perform any DOT safety sensitive functions.

Return-to-duty testing must be conducted under direct observation.

Direct observation must include the same gender observer's check for prosthetic and other devices that could be used to cheat a drug test.

The check for a prosthetic or other device includes having an employee raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show, by turning around, they do not have a prosthetic device. This check is in addition to the observer's subsequently watching the employee urinate into the collection container (this includes watching the urine flow from the employee's body into the collection container).

RELEVANT LINKS:

[49 C.F.R. § 40.305.](#)

Dep't of Transp.: [SAP Guidelines.](#)

[49 C.F.R. § 382.311.](#)

[49 C.F.R. § 40.309.](#)
Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#) – see page 19.

Dep't of Transp.: [Reminder Notice- Direct Observation.](#)

[Minn. Stat. § 181.79.](#)

Dep't of Transp.: [What Employers Need to Know about DOT Drug and Alcohol Testing](#)- page 50.

Dep't of Transp.: [DOT- Drug Testing list of certified labs.](#)
[49 C.F.R. § 40.81.](#)

[49 C.F.R. § 40.163.](#)

If an employee declines to allow a directly observed collection required or permitted under DOT regulations, this is considered a refusal to test.

In the event the city wishes to return a DOT covered employees to safety-sensitive duties, DOT regulations require the employee to have first complied with any SAP prescribed education and/or treatment and to have taken and passed a return-to-duty test.

In addition to a negative return-to-duty test, the safety-sensitive employee will be subject to unannounced follow-up testing at least six times in the first 12 months following the employee's return to active safety-sensitive service, but the SAP may direct more tests and extend testing up to five years. An employer cannot let the employee know anything about the SAP's plan for follow-up testing. The employer is responsible to ensure follow-up testing is conducted.

Follow-up tests are the employer's responsibility to conduct on an unannounced basis, and an employer may not substitute other testing, such as random testing, for follow-up testing. Follow-up testing must be conducted under direct observation as described earlier.

F. Costs

The DOT does not specify that the employer must pay for the SAP evaluation and any rehabilitation testing, including return-to-duty testing and follow-up testing. But the employer is responsible to ensure that it occurs. If a city wants an employee to pay for this testing, it should negotiate that requirement with any applicable labor representative, include notice of such a requirement in its policy, and/or get such an agreement in writing from the employee. Confusion about who is responsible to pay for such testing should not interfere with or delay any required testing.

The DOT advises employers may deduct such costs from an employee's paycheck; however, Minnesota law requires any deductions in pay are consented to by the employee in writing.

G. Testing laboratories

All DOT drug testing for urine specimens must be completed at laboratories certified by the Department of Health and Human Services under the

National Laboratory Certification Program. The link to the left includes a listing of certified laboratories.

H. DOT test results

The MRO is responsible for reporting test results to the city's DER.

RELEVANT LINKS:



Negative DOT Random Alcohol or Controlled Substances Test Result Notice, LMC Model Form.

Dep't of Transp.: [Rules on Refusals to test.](#)

FMCSA - § 382.107- Refuse to Submit.

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#) – see page 26.

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#) – page 29.

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#) – page 29.

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#) – see page 29.

1. DOT negative test results

Although not required under DOT rules, many cities find it helpful to communicate negative results in writing to employees.

2. DOT refusals to test

DOT regulations outline refusals to test for drugs and alcohol. Some refusals are determined by MROs, BATs, and STTs. Other refusals are determined by the city's DER.

For a city-made determination on a refusal to test, the determination must be based on DOT instructions and not on, for example, personal opinions about whether the employee is a long-time reliable worker, whether the employee has tested positive or refused to test in the past, or whether the employee claims to have misunderstood the collector's instructions to remain at a collection site, among others.

Most refusals to test are considered equivalent to testing positive, will result in an employee being immediately removed from performing safety-sensitive functions, and may be subject to employer discipline. No employee who refuses a test may return to DOT safety-sensitive functions unless SAP return-to-duty testing is completed.

When a collector for a drug test, or an STT or BAT for an alcohol test, reports a refusal to the DER, the employee must be immediately removed from safety-sensitive duties, and the DER must verify if the employee actually refused the test based on the documentation provided and DOT instructions.

When the DER determines there is a refusal, the employee cannot be returned to safety-sensitive duties until the SAP return-to-duty process is successfully completed.

In the rare case the DER determines there was not a refusal to test, the DER will need to document his or her decision and solid reasoning supporting the determination.

The DOT notes a best practice is to consult with the city's MRO and city attorney to ensure the city makes the correct determination. The city will need to maintain this supporting documentation for any future DOT inquiry or audit.

RELEVANT LINKS:

[49 C.F.R. § 40.23 \(b\).](#)

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#) – see page 29.

[49 C.F.R. § 40.23 \(d\).](#)



[Positive DOT Alcohol or Controlled Substances Test Results Notice, LMC Model Form.](#)

[49 C.F.R. § 40.23 \(a\).](#)

[49 C.F.R. § 40.171.](#)

See Section VII-C, *DOT drug testing and the types of drugs tested*.

[49 C.F.R. § 40.173.](#)

[49 C.F.R. § 40.187.](#)

If the city receives a verified adulterated or substituted drug test result for an employee, the city must consider this a refusal to test and immediately remove the employee involved from performing safety-sensitive functions. Immediate removal from safety-sensitive functions must occur upon receiving the initial report of the verified adulterated or substituted test result. The city should not wait for the written report or the result of a split specimen test to remove an employee from safety-sensitive functions.

For refusals to test determined by the MRO, the MRO's determination is final and not subject to city review.

In the event of an evaluating physician's refusal determination for an employee's insufficient breath, that refusal is also final and not subject to city review.

3. DOT positive test results

When an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, the city cannot return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process.

a. Verified positive DOT drug test result

If the city receives a verified positive drug test result, even if it is simply an initial report of a verified positive test result, the city must then immediately remove the employee involved from performing safety-sensitive functions. A city should not wait to receive the written report of the result of a split specimen test.

The MRO will notify the employee that he or she has a verified positive drug test and/or a refusal to test because of adulteration or substitution, and the employee has 72 hours from the time of notification to request a test of the split sample.

As mentioned earlier in this memo, a split sample is created when an initial urine sample is split into two. One sample is used for the initial screen and, if positive, the second sample is used for the confirmation test. If there is a positive result, the individual being tested may request the confirmation test be completed at a different laboratory.

The employee can be held responsible to pay for the confirmation test; however, disputes over who is going to pay for the test should not delay the test from occurring.

RELEVANT LINKS:

[49 C.F.R. § 40.23.](#)

[49 C.F.R. § 382.505.](#)



*Positive DOT Alcohol or
Controlled Substances Test
Results Notice, LMC Model
Form.*
[49 C.F.R. § 40.23.](#)

[49 C.F.R. § 40.197 \(a\).](#)

The split sample specimen second laboratory results will be reported to the MRO, and, depending on the results, the MRO will direct the city's DER on next steps.

b. Confirmed positive DOT alcohol test result

(1) DOT alcohol test result of 0.020 - 0.039 BAC

If the city receives an alcohol test result of 0.020-0.039, the city must remove the employee involved from performing safety-sensitive functions, and not allow the employee to perform safety-sensitive functions again until the start of the employee's next regularly scheduled shift, but not less than 24 hours following administration of the positive test. Again, the city must not wait to receive the written report of the result of the test to remove the employee from safety-sensitive functions.

An alcohol test result of 0.020 to 0.039 is not considered a positive test result for DOT purposes. Nonetheless, an employee with this alcohol result cannot perform safety-sensitive functions for 24 hours. Many cities in these instances choose to send an employee home from work and place the employee on accrued vacation/PTO leave, but ensure the employee is not driving and has secured an escorted ride home. An employer may, however, discipline a driver for testing in this range, consistent with its lawful policies regarding drug and alcohol use, and any collective bargaining agreement as applicable.

(2) DOT alcohol test result of 0.04 or higher

An employer receiving an alcohol test result of 0.04 or higher, must immediately remove the employee from performing safety-sensitive functions. The city cannot return the employee to the performance of safety-sensitive functions until the employee successfully completes the return-to-duty process described in this memo.

c. DOT dilute test results

(1) Dilute positive results

If the MRO informs the city a DOT safety-sensitive employee's test result was dilute positive, then the city will treat this result as a verified positive test result.

(2) Dilute negative result

How the city will address dilute negative results depends upon the creatinine concentration from the employee's result.

RELEVANT LINKS:

[49 C.F.R. § 40.197 \(b\)\(1\).](#)

[49 C.F.R. § 40.93.](#)

[49 C.F.R. § 40.93.](#)

[49 C.F.R. § 40.197 \(b\)\(2\).](#)

[FMCSA: Drug and Alcohol Clearinghouse Frequently Asked Questions.](#)
[FMCSA: Drug and Alcohol Clearing house FAQ learn more.](#)

[FMCSA: Commercial Driver's License Drug and Alcohol Clearinghouse.](#)

[FMSCA Drug and Alcohol Clearinghouse: Query History: Employer.](#)

A report of a specimen's creatinine concentration equal to or greater than 2 mg/dL, but less than or equal to 5 mg/dL will come from the MRO, and the MRO will most likely direct the city to conduct an immediate recollection under direct observation.

If the MRO advises the city's DER the employee's specimen contains a creatinine concentration greater than 5 mg/dL, the city may choose, but is not required to, direct the employee to take another test immediately. If the city chooses to conduct an additional collection it must do so for all employees with the level of concentration, so as not to retest some employees and not others.

This additional collection is not collected under direct observation. The city may establish different policies for different types of tests. In other words, the city may choose to conduct additional collections for dilute negatives with a creatinine level great than 5 mg/dL for pre-employment situations, for example, and not in random test situations. Consistency is key here—the city will want to test for all employees meeting this criterion.

d. Commercial Driver's License Drug and Alcohol Clearinghouse

Beginning in January 2020, employers of CDL drivers subject to the DOT drug and alcohol testing rules will be required to submit reports to the new DOT Clearinghouse. The Clearinghouse is an electronic database containing records of violations of drug and alcohol prohibitions in subpart B of part 382. Such violations include positive drug or alcohol test results, refusals, and other drug and alcohol violations for drivers required to have a commercial driver's license (CDL). When a driver completes the return-to-duty process, this information must also be reported to the Clearinghouse.

FMCSA employers will be required to both query information to request drug and alcohol testing histories from previous employers (going back three years) and report to the Clearinghouse beginning January 6, 2020.

The purpose of the Clearinghouse is to offer employers a centralized location to report drug and alcohol program violations and enable employers to identify drivers who commit a drug or alcohol program violation while working for one employer, but who fail to subsequently inform another employer. Specifically, the Clearinghouse will allow covered employers to check that no current or prospective employee is prohibited from performing safety-sensitive functions, such as operating a commercial motor vehicle (CMV), due to an unresolved drug and alcohol program violations (such as CDL holders with positive drug and alcohol test results, who refused required drug and alcohol tests, or who have not successfully completed the return-to-duty process). For FMCSA instructions on employer queries, see their website.

RELEVANT LINKS:

FMCSA Drug and Alcohol Clearinghouse: [FAQ learn more.](#)

Actual Knowledge: [Part 382, subpart B.](#)

FMCSA Drug and Alcohol Clearinghouse: [How to Report RTD Information: Employers.](#)

FMCSA: [Commercial Driver's License Drug and Alcohol Clearinghouse, Overview.](#)

[86 FR 55718.](#)

Employers of drivers who are subject to both the DOT/FMCSA's CDL licensing requirements (found in 40 CFR pt 383) and the DOT/FMCSA's drug and alcohol testing requirements (as described in 40 CFR pt 382) (i.e., drivers who perform safety-sensitive functions, such as driving a Commercial Motor Vehicle) are required to report information to the Clearinghouse. That includes public sector employers, unless a specific exception applies (such as, for example, the exception for firefighters, ambulance drivers, and police).

In order to complete the query and reporting actions, employers will need to register for the Clearinghouse.

Employers of these drivers will be required to report the following information to the Clearinghouse by the close of the third business day following the date on which the employer obtained the information:

- A DOT alcohol confirmation test result with an alcohol concentration of 0.04 or greater;
- A negative DOT return-to-duty test result;
- The driver's refusal to submit to a DOT test for drug or alcohol use;
- An "Actual knowledge" violation (defined as actual knowledge by an employer that a driver has used alcohol or controlled substances based on the employer's direct observation, information provided by the driver's previous employer(s), a traffic citation for driving a CMV while under the influence of alcohol or controlled substances, or an employee's admission of alcohol or controlled substance abuse except as provided in § 382.121)
- Employers will also report negative return-to-duty (RTD) test results and the successful completion of a driver's follow-up testing plan as ordered by an SAP. Find FMCSA information on reporting Return to Duty information within the Clearinghouse on their website.

Records of drug and alcohol program violations will remain in the Clearinghouse for five years, or until the driver has completed the return-to-duty process, whichever is later.

Effective November 8, 2021, an actual knowledge violation, based on the issuance of citation for DUI in a CMV, will not be removed from the Clearinghouse when the citation does not result in a conviction. The 2021 final rule amended the regulations to state that a report of actual knowledge of prohibited use of drugs or alcohol, based on the issuance of DUI in a CMV, will remain in the Clearinghouse for 5 years, or until the driver has completed the return-to-duty process, whichever is later, regardless of whether the driver is ultimately convicted of the DUI offense. Drivers who are not convicted of the offense may petition to submit documentary evidence of non-conviction to their Clearinghouse record.

RELEVANT LINKS:

FMCSA: [Drug and Alcohol Clearinghouse Frequently Asked Questions](#).

See section VII E 1 c (1), *Required Commercial Driver's license drug and alcohol clearinghouse checks for new and existing CDL drivers*. Page 32.

[49 C.F.R. § 40.23 \(f\)](#).

[49 C.F.R. § 40.201](#).

[49 C.F.R. § 40.23 \(f\)](#).

[49 C.F.R. § 40.287](#).

NOTE: Only results of DOT drug or alcohol tests or refusals may be reported to the Clearinghouse. While employers may conduct testing that is outside the scope of the DOT testing (such as testing in accordance with the Minnesota Drug and Alcohol Testing in the Workplace Act), positive test results or refusals for such non-DOT testing may not be reported to the Clearinghouse.

As described in more detail above, employers will also be required to query the Clearinghouse before hiring new drivers, and to query the Clearinghouse at least once a year for current drivers determine whether current employees have incurred drug or alcohol violations while working for another employer.

e. DOT cancelled test results

An employer who receives a cancelled test result when a negative result is required (e.g., pre-employment, return-to-duty, or follow-up test), must direct the employee to provide another specimen immediately. In some cases, under direction of the MRO, recollection under direct observation may be required.

f. DOT invalid test results

A drug test result indicating a DOT covered employee's urine specimen test was cancelled because it was invalid will require a second collection to place under direct observation. These steps will be followed:

- The DER must immediately direct the employee to provide a new specimen under direct observation.
- The city must not attach consequences to the finding that the test was invalid other than collecting a new specimen under direct observation.
- The DER must not give any advance notice of this test requirement to the employee.
- The DER must instruct the collector to note on the CCF the same reason (e.g., random test, post-accident test) and DOT Agency (e.g., check DOT and FMCSA) as for the original collection.
- The DER must ensure the collector conducts the collection under direct observation.

g. Provide a list of qualified substance abuse professionals

Upon receipt of a positive test, the city must immediately remove the employee from safety-sensitive functions and provide the employee with a list of qualified SAPs.

RELEVANT LINKS:

SAP list [SAP Training and Continuing Education](#).
[National SAP Network](#).

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#).

Dep't of Transp.: [DOT Employer Record Keeping Requirements for Drug & Alcohol Testing Information](#)- see page 30.

[49 C.F.R. § 382.701\(e\)](#).

Dep't of Transp.: [DOT Employer Record Keeping Requirements for Drug & Alcohol Testing Information](#)- See page 32.

[49 C.F.R. § 390.3](#).

While the regulations do not provide guidance on the exact number of SAPs the listing should contain, it does specify that the SAPs must be suitable to the employer and readily available to the employee. Some cities find providing the name and phone number of SAP networks offering qualified SAPs an easier alternative (links to two such networks are offered to the left).

While the city is required to provide the SAP listing free of charge to the employee, the city is not required to pay for the actual SAP evaluation or any of the SAP's recommended education or treatment. To that end, many cities choose to include in their policies that counseling and treatment programs will be at the employee's own expense or pursuant to the city's health benefit program.

I. DOT recordkeeping

Employers are required to retain DOT drug and alcohol test results. Some of these records include testing process administration (including test results), return-to-duty process administration, employee training, and supervisor training records. The minimum record-keeping requirements under DOT regulations are provided in the link to the left. Testing records are to be retained in locked cabinets with controlled access for only employees with an official need to know.

As of January 6, 2023, an employer with a valid Clearinghouse registration, will satisfy the required recordkeeping period of the three-year prior employer checks. Drug and alcohol records should be kept separate from personnel records or medical records. This way, in the event of a DOT audit, auditors will have access to drug and alcohol test results only, and not employee personnel or medical files.

Notably, the DOT Guidance on Employer Record Keeping Requirements for Drug and Alcohol Testing Information states that while employers may retain electronic records for their own purposes, the DOT requires that original copies be retained.

J. CDL health card

In 2020, generally a DOT medical card is not mandated for municipal employees who are required to possess a CDL.

We understand there was some discussion of making the health card a requirement for municipal employees when the Federal Motor Carrier Safety Administration was making proposed changes to the CDL process that were originally to be effective in February 2020 but were delayed to 2022. While such a health card is not required presently, it may be in the future, and some cities presently choose to require employees to have one as a best practices approach for liability reasons only.

RELEVANT LINKS:

[Minn. Stat. § 363A.03, subd. 36.](#)
[ADA Technical Assistance Manual: Addendum.](#)

As reference, the following documents are not needed for city CDL holders:

- Annual physical (medical card) - cities are exempt from this, but this would be considered a “best practice” for liability reasons only.
- Hours of service logbook.

The following documents are needed for city CDL holders:

- Daily inspection.
- Annual inspection.
- Valid driver’s license.

IX. Employment actions

State and federal law govern what a city can do in response to an employee’s positive drug or alcohol or cannabis test result. For instance, DATWA restricts an employer’s ability to discipline or terminate an employee for a positive test result, and DOT regulations specifically address post-accident testing.

Generally, however, an employer may investigate, discipline, terminate, or take other employment action against an employee for misconduct, even if the misconduct is related to the employee’s drug or alcohol use. In situations where an employee’s suspected impairment poses a safety risk to the employee, other employees, and/or the public, the city will want to act promptly and decisively, typically starting with removing the employee from the workplace. The city will want to follow all applicable laws, city policies, collective bargaining agreements, and best practices related to investigations, discipline, termination, and other employment actions.

The city will want to be mindful at all times whether it is conducting DATWA or DOT testing, given the vast differences between the two.

Further, under the ADA and MHRA, an employer may discipline, terminate, or take other adverse action against an employee because of the results of a medical exam or inquiry if the exam or inquiry shows the employee is unable to perform the essential functions of the job, with or without reasonable accommodation, or the employee poses a direct threat that cannot be eliminated by reasonable accommodation.

A. Discipline under DATWA

A city can enforce reasonable workplace rules against coming to work under the influence and against disruptive behavior, even if that behavior may be associated with an addiction to drugs or alcohol.

RELEVANT LINKS:

[Technical Assistance manual for Title I of the ADA.](#)

[42 U.S.C. § 12114\(b\).](#)

[ADA Technical Assistance Manual: Addendum. Technical Assistance manual for Title I of the ADA.](#)

[Minn. Stat. § 181.953, subds. 10 and 11. Minn. Stat. § 181.951, subds. 8, 9.](#)

[Minn. Stat. § 181.953, subd. 10\(b\).](#)

[Minn. Stat. § 181.953, subd. 10\(c\).](#)

[In re Copeland](#), 455 N.W.2d 503 (Minn. Ct. App. 1990), *review denied* (Minn. July 13, 1990).

Generally, a city may discipline an employee who engages in misconduct, even if chemical dependency may have been the root cause of the misconduct.

A city will want to be able to show the discipline imposed is consistent with the way non-chemically dependent employees have been disciplined for similar offenses.

A city may not discharge or discipline an employee or withdraw a contingent job offer on the basis of a positive test result that has not been verified by a confirmatory test. Likewise, with the Minnesota legislature's passage of legal cannabis, cities must be aware of the limitations in regard to testing, disciplining, and revoking conditional job offers as each pertain to cannabis.

In addition, the city cannot discharge an employee for whom a positive result on a confirmatory test was the employee's first such result on a drug or alcohol or cannabis test, unless:

- The city has first given the employee the chance to participate in a drug or alcohol counseling or rehabilitation program at the employee's own expense or pursuant to coverage under an employee benefit plan, and
- The employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program by withdrawing from the program before its completion or by testing positive on a confirmatory test after completing the program.

The city can determine what type of rehabilitation or counseling program is most appropriate after consulting with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency.

The city can temporarily suspend the tested employee without pay or can transfer him or her to another position at the same rate of pay, pending the outcome of the confirmatory test or retest, provided the city believes such an action is reasonably necessary to protect the health and safety of the employee, co-workers, or the public.

However, an employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or retest is negative. While the statute allows unpaid leave in this circumstance, a conservative approach may be to consider placing the employee on a paid, personal leave (but not medical leave) while the city awaits results.

Using paid leave can avoid the appearance of discrimination based on a disability. Although a city cannot terminate an employee because of a positive test result, the city is not restricted from taking employment action for other reasons, such as for misconduct even if the misconduct is related to drug or alcohol use.

RELEVANT LINKS:

[Minn. Stat. § 181.953, subd. 8.](#)
[Minn. Stat. § 181.953, subd. 10.](#)

[Dep't of Transp.: What Employers Need to Know About DOT Drug and Alcohol Testing-](#) see page 23.

[Dep't of Transp.: What Employers Need to Know About DOT Drug and Alcohol Testing-](#) see page 12.

[Will I lose my job at this link is more helpful](#)

[Minn. Stat. § 221.031, subd. 10.](#)

A city may also need to assess its obligations under the ADA and MHRA where an employee provides notice of a disability such as alcoholism. (For purposes of the ADA and MHRA, while alcoholism is considered a covered disability, current illegal drug use is not).

In general, an employee must be given access to all information maintained by the city relating to his or her own positive test results. The statute specifically mentions that the city must give the employee access to:

- Information in the employee's personnel file relating to positive test results.
- Information acquired in the drug and alcohol and cannabis testing process.
- Conclusions drawn from and actions taken based on the reports or other acquired information.

B. Discipline under federal DOT regulations

1. Employee's first DOT-verified positive drug and/or confirmed alcohol test result

DOT rules do not determine whether an employee can be terminated for a positive test result.

However, if a city wishes to offer an employee the opportunity to return to a DOT safety-sensitive duty following a violation, the city must, before the employee again performs such duties, ensure the employee received a SAP evaluation and then successfully complied with the SAP's recommendations.

Under DATWA, Minnesota's non-DOT testing law, employers are prohibited from terminating an employee for a first time non-DOT positive drug or alcohol or cannabis confirmed test result, unless the employee is provided with an opportunity to participate in either a drug or alcohol counseling or rehabilitation program, and the employee has either refused and the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program.

Although cities may choose to follow this approach for DOT-verified first positives, and there may be very good business reasons to do so, cities are generally not legally bound to offer continued employment for a DOT employee's first positive DOT-verified drug or confirmed alcohol test result.

Each city, when faced with a verified positive DOT drug and/or confirmed alcohol test result, should work with its city attorney to review the unique facts and circumstances present, as well as past precedence and city policy language to determine next steps.

RELEVANT LINKS:

[Minn. Stat. § 171.165.](#)

[49 C.F.R. § 383.51.](#)

[Minn. Stat. § 171.177](#)

Some cities have collective bargaining agreement or personnel policy language limiting termination for a first time DOT-verified positive drug or confirmed alcohol test result, which would need to be followed.

2. Loss of license for CDL driver's off-duty conduct

In August 2005, Minnesota adopted legislation conforming state law to federal regulations addressing standards, requirements, and penalties for CDL holders.

Under Minnesota Statute, convictions for certain offenses (e.g., driving while under the influence of alcohol, or serious traffic violations such as excessive speeding) committed in a commercial motor vehicle or personal vehicle count against a driver's ability to hold a CDL. The link to the left includes a list of offenses and periods for CDL disqualification.

In 2017 Minnesota law was amended to provide for certain automatic license revocations for failure to submit to requested urine or blood-controlled substance or alcohol testing by a peace officer. The timeframes and circumstances are outlined in the link to the left.

While the 2005 and 2017 law changes did not directly affect DOT Controlled Substance and Alcohol testing policies, they could impact the CDL driver's position description, policies related to discipline, and collective bargaining agreements. State law only prescribes the penalties against a driver's ability to hold a CDL. Whether a city will accommodate the loss of a CDL for a DOT covered safety-sensitive employee is generally at the city's discretion but should be determined in consultation with the city attorney, based on a variety of factors including past precedence, any relevant collective bargaining and personnel policy language, and reasonableness regarding current staffing levels and workloads.

What is very clear is that a city cannot permit an employee to drive CDL covered vehicles without appropriate licensure.

3. Applicants

If a DOT safety-sensitive applicant receives a verified positive drug test result, federal regulations permit the applicant or employee to request the split specimen, collected at the time of the original collection, to be sent to another laboratory for testing.

This request should be made to the MRO within 72 hours of the employee being notified of the positive test result.

RELEVANT LINKS:

[49 C.F.R. § 40.287.](#)

While the LMC does not endorse any one consultant over another, here are websites to SAP listings: SAP list [SAPlist.com](#). National SAP Network.

[49 C.F.R. § 40.305.](#)

Dep't of Transp.: [SAP Guidelines](#).

Dep't of Transp.: [SAP Guidelines](#).

[49 C.F.R. § 40.307.](#)

Regardless of whether split specimen testing is undertaken, the city will need to provide the applicant with a listing of qualified SAPs.

While many cities choose to withdraw a conditional job offer for an applicant refusing to participate in or receiving a verified positive drug or confirmed alcohol test result, it is within the city's discretion how to handle the situation and should be handled in consultation with the city attorney based on the unique circumstance present as well as consideration for past precedence and city policy language.

Should a city wish to continue the job offer to the applicant testing positive for drugs or alcohol, then the individual must comply with a SAP evaluation and return-to-duty and follow-up testing as described in this memo.

4. Return-to-duty and follow-up testing

In the event the city wishes to return a DOT covered employee to safety-sensitive duties, DOT regulations require the employee to have first:

- (1) Had a SAP evaluation.
- (2) Successfully complied with SAP prescribed education and/or treatment.
- (3) Received a negative drug test result and/or an alcohol test with an alcohol concentration of less than 0.02.

The city can expect to receive from the SAP an initial evaluation letter outlining the treatment and education recommendations, and a second letter with the SAP's clinical characterization of the employee's level of participation in treatment and education and a statement about whether or not the employee demonstrated successful compliance with the program. If the employee successfully complied with the SAP's recommendations, this letter should also include any plans for aftercare treatment and a follow-up testing plan.

The DOT authorizes the city and the SAP to confer about the employee's DOT testing without the employee's permission. This discussion can include the SAP obtaining information from the DER even if the city terminated the employee.

The SAP will determine the number of and frequency for employee follow-up tests and whether the tests will be for drugs, alcohol, or both. At a minimum, the employee be subject to six unannounced follow-up tests in the first 12 months of safety-sensitive duty following the employee's return to safety-sensitive functions, but the SAP can extend follow-up testing up to five years.

RELEVANT LINKS:

[FMCSA Overview of Drug and Alcohol Rules for Employers.](#)

At a minimum, the employee be subject to six unannounced follow-up tests in the first 12 months of safety-sensitive duty following the employee's return to safety-sensitive functions, but the SAP can extend follow-up testing up to five years.

It is the city's discretion to determine specific test dates and the city cannot let the employee know anything about the SAP's plan or schedule for follow-up testing.

X. Criminal proceedings

Sometimes, in addition to constituting employment misconduct, an employee's on-the-job use of or impairment by drugs or alcohol may violate criminal laws. For instance, an employee who operates a vehicle at work while under the influence of drugs or alcohol is also committing a crime. With other misconduct it may be less clear whether the employee has violated criminal laws.

In situations involving potential criminal conduct, a city will again want to work closely with its city attorney regarding how to proceed. There are a few unique best practices for cities to follow in such situations: Specifically, criminal investigations and proceedings should be kept separate from employment investigations and proceedings, including separate investigators, procedures, etc. Unlike many employers, cities typically employ and have access to law enforcement personnel, and therefore, sometimes the differences between a criminal investigation/proceeding and an employment investigation/proceeding get blurred, which can have negative consequences for the city. Notably, DOT regulations specifically address post-accident testing where a law enforcement officer ordered the testing.

It is often best to allow any criminal proceeding to conclude before an employment investigation is initiated since failure to keep the two separate can result in the tainting of both with severe consequences; a worst case scenario is that criminal charges must be dropped, not for lack of evidence, but for a procedural mishap.

In some instances, it may be appropriate for a city to rely upon the results of a criminal investigation/proceeding – such as a criminal conviction – in a subsequent employment investigation.

XI. City violation of state or federal testing laws

For federal testing laws, the city is ultimately responsible for all actions of third-party administrators (if used by the city), agents, and representatives in carrying out the requirements of the DOT drug and alcohol testing regulations. Employers can be held responsible for service agent errors and resulting civil penalty actions for noncompliance.

RELEVANT LINKS:

[Minn. Stat. § 181.956.](#)

Dep't of Transp.: [What Employers Need to Know About DOT Drug and Alcohol Testing](#)- see page 58.

(800) 925-1122
(651) 281-1200
HRbenefits@lmc.org

A city violating the DATWA may be liable for back pay, employee reinstatement, and other allowable damages, such as emotional distress or punitive damages. Reasonable attorneys' fees may also be awarded if the employer knowingly or recklessly violated the law.

Consistent with other anti-retaliation law, a city may not retaliate against an employee for asserting the employee's rights under statute.

XII. Sources of further assistance

Federal Motor Carrier Safety Administration contacts can be reached at (202) 366-2096.

If you have additional questions, please contact the League's Human Resources and Benefits Department.