

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

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

4.10. Every employer shall keep a current list of all employees occupying safety-sensitive positions available for review by the Director or his/her authorized representative.

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

§56-19-5. Duties of Employers.

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

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

5.3. Employers shall ensure that all breath alcohol tests and drug tests are performed by a drug testing contractor as defined in Section 3.10. of this rule and that the drug testing contractor is aware of and complies with Sections 7.1. and 7.2. of this rule.

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

- 5.4.1. Amphetamines,
- 5.4.2. Cannabinoids/THC,
- 5.4.3. Cocaine,
- 5.4.4. Opiates,
- 5.4.5. Phencyclidine (PCP),
- 5.4.6. Benzodiazepines,
- 5.4.7. Propoxyphene,
- 5.4.8. Methadone,
- 5.4.9. Barbiturates, and
- 5.4.10. Synthetic narcotics.

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

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

5.7. The substance abuse policy and testing program shall require that the 10-panel split sample urine test be conducted in accordance with the standards and procedures set forth in the United States Department of Transportation's rule found at 49 CFR Part 40 and collected by individuals who are certified as complying with standards and procedures set forth in the United States Department of Transportation's rule found at 49 CFR Part 40.

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

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

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

5.11. Every employer shall provide new and current employees with information about the mandatory substance abuse policy and testing program and inform each employee of his or her rights and responsibilities under the program and that refusal to comply with any drug and alcohol testing required by the employer shall constitute grounds for decertification and shall result in the employer notifying the Director of said refusal in accordance with Section 5.12. of this rule. A record of such review shall be maintained at the mine and made available to an authorized representative of the Director upon request.

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

5.12.1. Any positive drug or alcohol test of a certified person. However, for purposes of determining whether a drug test is positive the certified employee may not rely on a prescription dated more than 1 year prior to the date of the drug test result;

5.12.2. The refusal of a certified person to submit a sample;

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

5.12.4. A certified person submitting a substituted sample or an adulterated sample.

5.13. Failure of an employer to report a failed drug and alcohol test as set forth in Section 5.12. within 7 days of being notified of the failed drug and alcohol test shall not create any procedural defense for a certified person who has failed the drug and alcohol test.

5.13.1. For purposes of a positive test for THC, the certified person may not rely upon a medical prescription or other type of medical permission for marijuana, including a valid identification card issued under W. Va. Code §16A-5-1 *et seq.* authorizing the certified person to access medical cannabis under the West Virginia Medical Cannabis Act.

5.13.2. For purposes of a positive test for THC, the certified person may not excuse such a positive test based upon the fact that the THC came entirely from a legal CBD product or any other legal product.

5.14. When the employer submits the completed notification form prescribed by the Director, the employer shall also submit a copy of the laboratory test results showing the substances tested for and the results of the test as determined by the Medical Review Officer and the chain of custody form. If the employee's breath test for alcohol meets or exceeds .04 at the time of testing, the alcohol testing form shall be submitted with the notification. Other supporting documentation may be required as deemed necessary by the Director.

5.15. A notice, pursuant to Section 5.12. of this rule, shall result in the immediate temporary suspension of all certificates held by the certified person who failed the screening, pending a hearing before the board of appeals pursuant to W. Va. Code §22A-1A-2.

5.16. Any employer may develop or maintain a drug and alcohol abuse policy, testing program or substance abuse program that exceeds the minimum requirements set forth in Section 5.4. of this rule. The provisions of this rule shall not be construed to require an employer to alter, amend, revise or otherwise change, in any respect, a previously established substance abuse screening policy and program that meets or exceeds the minimum requirements set forth in this rule.

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

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

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

5.20. Any employee involved in an accident that results in physical injuries or damage to equipment or property may be subject to a drug test by his or her employer.

5.21. A random test shall be at least 25% of the employees working at a mine or facility annually. Random testing shall be conducted at least 4 times annually.

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

6.1. Upon receipt of a notice as required by Section 5.12. of this rule and upon verification that the pre-employment applicant or the employee tested positive by urine test for at least 1 of the 10 substances identified therein or had a blood alcohol level at or in excess of .04 concentration at the time of testing, the Director shall issue an immediate temporary suspension of all certifications held by the person pending a hearing before the Board of Appeals pursuant to W. Va. Code §22A-1A-2. The Director shall mail, by certified mail, to the person notice of the temporary suspension and that he or she has the right to pursue 1 of the following options:

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

6.1.2. Notify the Director within 30 days that the temporarily suspended person intends to enter into a Treatment Plan Agreement sanctioned by the Board of Appeals as set forth in Section 9 of this rule. Costs