

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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SENATE BILL 23*
Judiciary III Committee Substitute Adopted 5/4/89

Short Title: Drug Testing Regulation.

(Public)

Sponsors:

Referred to:

January 18, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO PERMIT WORKPLACE DRUG TESTING.

3 The General Assembly of North Carolina enacts:

4 Section 1. Chapter 95 of the General Statutes is amended by adding a new
5 Article 19 to read:

6 **“ARTICLE 19.**
7 **“WORKPLACE DRUG TESTING REGULATION ACT.**

8 **“§ 95-224. State of purpose.**

9 The General Assembly finds that a healthy and productive work force and safe
10 working conditions free from the effects of drug abuse are important to employers,
11 employees and the general public. The General Assembly also finds that the abuse of
12 drugs creates a variety of workplace problems such as increased injuries on the job,
13 increased absenteeism, increased financial burden on health and benefit programs,
14 increased workplace theft, decreased employee morale, decreased productivity, and a
15 decline in the quality of products and services. The General Assembly further finds that
16 individuals should be protected from unreliable and inadequate drug screening and from
17 arbitrary and unnecessary invasions of their privacy. Therefore, in balancing the
18 interests of employers, employees, and the welfare of the general public, the General
19 Assembly finds that fair and equitable testing for drugs in the workplace, in accordance
20 with this act, is in the best interest of all parties.

21 **“§ 95-225. Definitions.**

1 As used in this Article, unless the context clearly requires otherwise, the following
2 terms have the meanings specified:

- 3 (1) 'Drug' means a controlled substance as defined in G.S. 90-87(5) or a
4 metabolite thereof.
- 5 (2) 'Employer' means a person doing business in the State who has one or
6 more employees, including State, county, and municipal employees.
- 7 (3) 'Employee' means an individual currently performing services for
8 compensation for an employer.
- 9 (4) 'Random test' means a drug test of an employee selected by a method
10 that provides an equal probability that any employee from a group of
11 employees will be selected and does not give an employer discretion to
12 waive the selection of any employee selected by the selection method.
- 13 (5) 'Reasonable suspicion drug testing' means drug testing based on a
14 belief that an employee is using or has used drugs in violation of the
15 employer's policy. This belief shall be based upon facts and
16 reasonable inferences including but not limited to:
- 17 a. Direct observation of drug use and/or the physical symptoms or
18 manifestations of being under the influence of a drug; or
- 19 b. Abnormal conduct or erratic behavior while at work, a pattern
20 of absenteeism, tardiness, or deterioration in work performance;
21 or
- 22 c. A report of drug use provided by reliable and credible sources
23 and which has been independently corroborated; or
- 24 d. Evidence that an individual has tampered with a drug test,
25 during his/her employ with the current employer; or
- 26 e. Information from a reliable and credible source, that an
27 employee has caused, or contributed to an accident at work
28 while under the influence of drugs; or
- 29 f. Evidence that an employee is involved in the use, possession,
30 sale, solicitation, or transfer of drugs while working or while on
31 the employer's premises or operating the employer's vehicle,
32 machinery, or equipment.
- 33 (6) 'Employee assistance program' means a program provided by an
34 employer offering, as a minimum, assessment and referral services to
35 employees.
- 36 (7) 'Job applicant' means a person who has requested a job application
37 provided by the employer.
- 38 (8) 'High risk or safety sensitive position' means a position requiring the
39 operation of vehicles, machinery, equipment or the handling of
40 hazardous materials, the mishandling of which may place fellow
41 employees or the general public at risk of serious injury, or the nature
42 of which would create a security risk in the workplace.

43 **"§ 95-226. Authorized drug testing.**

1 (a) General. An employer may request or require an employee or a job applicant
2 to undergo drug testing as authorized in this Article.

3 (b) Reasonable Suspicion Drug Testing. An employer may request or require
4 any employee to submit to reasonable suspicion drug testing. In such a case, the
5 employee must be informed by the employer the basis for the reasonable suspicion and
6 upon request by the employee, such information must be provided in writing. If the
7 employee does request a written explanation of the basis of the suspicion, no person
8 may bring a defamation action for disclosure of the contents of the explanation except
9 as provided in G.S. 95-231.

10 (c) Random Testing. An employer may require a random test of an employee if
11 the employee serves in a high risk or safety sensitive position.

12 (d) Post-Accident Testing. An employer may require drug testing of an
13 employee involved in any accident involving personal injuries or property damage in
14 excess of two hundred dollars (\$200.00).

15 (e) Applicant Testing. An employer may require a job applicant to submit to a
16 drug test provided that:

17 (1) The job applicant is informed in writing at the time of application of
18 the employer's intent to conduct a drug test; and

19 (2) The test is administered in accordance with the provisions of G.S. 95-
20 227. A confirmed positive drug test result may be used by an
21 employer as a basis for denying or limiting employment of a job
22 applicant.

23 (f) Treatment Program Testing. An employer may require drug testing of any
24 employee who has previously had a confirmed positive test and who is participating in,
25 or has participated within the previous 12 months in a counseling or treatment program
26 pursuant to the confirmed positive test.

27 (g) Other Testing. An employer may require drug testing of any employee who
28 works at a facility that manufactures, distributes, dispenses, conducts research with,
29 stores, or otherwise handles drugs as part of the employer's business, provided that the
30 test is administered in accordance with the provisions of G.S. 95-227.

31 **"§ 95-227. Procedural requirements for the administration of drug tests.**

32 (a) Limitations. An employer who requests or requires a job applicant or
33 employee to submit to a drug test shall comply with all of the following procedural
34 requirements. An employer may take no adverse action against any employee or job
35 applicant based on the results of a drug test unless the employer has complied with all of
36 the following procedural requirements.

37 (b) Written Policy. The employer shall provide all persons tested with a written
38 policy that identifies:

39 (1) The circumstances under which the employee may be required to
40 submit to a test;

41 (2) The test procedures;

42 (3) The classes of drugs that may be tested for;

43 (4) The consequences of a confirmed positive test result;

44 (5) The consequences of a refusal to take a drug test;

1 (6) The right to a second test at the employee's expense of a positive drug
2 test result, to be taken from the original sample;

3 (7) The right of an employee or job applicant to explain a positive test
4 result; and

5 (8) The right of an employee, if he requests, to be notified in writing of the
6 basis for any drug test based on reasonable suspicion.

7 (c) Collection of Sample. The collection of samples shall be performed under
8 reasonable and sanitary conditions. Individual dignity shall be preserved to the extent
9 practicable. Samples shall be collected in a manner reasonably calculated to prevent
10 substitution of samples and interference with the collection or testing of samples. No
11 employer or his representatives may directly observe an employee or job applicant in
12 the process of producing a urine sample unless there is reason to believe there has been
13 tampering with or substitution of samples.

14 (d) Approved Labs. The employer shall use only laboratories approved and
15 certified by the North Carolina Department of Human Resources, or laboratories that
16 have demonstrated satisfactory performance in the proficiency testing programs of the
17 National Institute on Drug Abuse or the College of American Pathology. An approved
18 lab shall confirm any sample that tests positive by a second test of the sample utilizing
19 gas chromatography with mass spectrometry or an equivalent scientifically accepted
20 method.

21 (e) Split Samples. A portion of every sample that produces a confirmed positive
22 test result shall be preserved by the laboratory that conducts the confirmatory test for a
23 period of at least 90 days from the time the results of the confirmed positive test are
24 mailed or otherwise delivered to the employer.

25 (f) Test Results. The employer shall provide each employee a copy of his test
26 result, within five work days of employer notice of the test result, regardless of whether
27 the test result is positive or negative. Upon request, the employer shall provide each job
28 applicant a copy, within five working days, of any positive test result.

29 (g) Chain of Custody. The employer or his agent shall establish procedures
30 regarding chain of custody for sample collection and testing to ensure proper record
31 keeping, handling, labeling, and identification of the test samples.

32 (h) Opportunity to Explain Positive Test. The employer shall provide the
33 employee or job applicant tested the opportunity to rebut verbally or explain in writing a
34 confirmed positive drug test result.

35 (i) Opportunity for Retest. An employee may request a retest of the original
36 sample at the employee's own expense after notice of a positive test result. Within five
37 working days after notice of the test result, the employee shall notify the employer in
38 writing of the employee's intention to obtain a retest. Within five working days after
39 receipt of the notice, the employer shall notify the original testing laboratory that the
40 employee has requested the laboratory to conduct the retest or to transfer the sample to
41 another laboratory to conduct the retest. The retest must use the same drug threshold
42 detection levels as used in the original test. If the retest does not confirm the original
43 positive test result, no adverse personnel action based on the original test may be taken
44 against the employee.

1 (j) Confidentiality. An employer or laboratory shall not release to any person
2 any information related to drug test results, except the following:

3 (1) The employee;

4 (2) The job applicant;

5 (3) Employer's medical staff;

6 (4) Direct supervisory personnel;

7 (5) Other personnel as designated by the employer on a need to know
8 basis;

9 (6) Any person that the employee or job applicant has expressly in writing
10 granted permission for the employer or laboratory to release
11 information to; or

12 (7) Employee assistance program personnel designated by the employer
13 on a need to know basis.

14 (8) Federal or state government agency that requests or requires such
15 information in connection with an employer's license to manufacture,
16 distribute, dispense, conduct research with, store, sell, possess, or
17 otherwise handle drugs.

18 (9) Upon order, to a court of competent jurisdiction.

19 (k) Employee Assistance Program. The employer shall be encouraged to provide
20 an employee assistance program for any permanent employee tested as part of a random
21 testing program upon his first confirmed positive drug test. The employee assistance
22 program provides the employee with, or refers the employee to, an appropriate drug
23 abuse counseling, rehabilitation or treatment program at the employee's own expense or
24 as part of an employee benefit plan.

25 Employee assistance programs under this act shall be registered with the North
26 Carolina Department of Labor and shall abide by the guidelines established by the
27 Department of Labor.

28 (l) Cost of Counseling. The employee's counseling, rehabilitation or treatment
29 shall be paid for according to the employer's health benefit plan or at the employee's
30 expense if no such plan exists.

31 (m) Time Limits on Drug Test Records. The employer shall remove any
32 reference to the results of a drug test and subsequent treatment from the personnel
33 records of an employee if, after three years, the employee continues to be employed by
34 the same employer and shows no evidence of illegal drug use. This section does not
35 apply to employee medical records.

36 **"§ 95-228. Employer drug test results not to be used in criminal action.**

37 No drug test results from an employer drug testing program or the employee's retest
38 may be used as evidence in a criminal action against the employee, job applicant, or
39 employer. However, a test report accompanied by an affidavit by the analyst or other
40 designated certifying officer of the approved laboratory conducting the test, sworn to
41 and properly executed before an official authorized to administer oaths, shall be
42 admissible without further authentication as **prima facie** evidence in any hearing before
43 the Department of Labor, Employment Security Commission, or other administrative
44 agencies of the State concerned with employer-employee relations. The Department of

1 Human Resources shall develop a form for use by approved laboratories in making this
2 affidavit.

3 If either employer or employee desires that the analyst, or other representative of the
4 approved lab who conducted the test, personally testify at the hearing, he may subpoena
5 and examine that person as though he were an adverse witness.

6 **"§ 95-229. No duty to test.**

7 Nothing in this Article shall be construed to place a duty on employers to conduct
8 drug testing of their employees or job applicants.

9 **"§ 95-230. Administrative relief.**

10 (a) The Commissioner of Labor is authorized to investigate complaints from
11 employers, employees, or job applicants regarding compliance with this Article. The
12 Commissioner or his representative shall have the power to enter any place of
13 employment and gather such facts as are essential to determine whether or not a
14 violation of this Article has occurred.

15 (b) The Commissioner or his representative shall have the power to hold
16 hearings, administer oaths, examine witnesses, issue subpoenas, compel the attendance
17 of witnesses and the production of papers, books, records, physical evidence and
18 documents, and take depositions and affidavits in any proceeding hereunder.

19 (c) Subject to the requirements of Chapter 150B, the Commissioner is authorized
20 to adopt such rules as are necessary for the purpose of carrying out the provisions of this
21 Article.

22 (d) The Commissioner may order an employer, laboratory or medical facility
23 found to be in violation of this act to provide appropriate relief to the affected employee
24 or employees. Appropriate relief may include back pay, reinstatement to the same or an
25 equivalent job, reinstatement of full employee benefits and seniority rights, and deletion
26 of references from files.

27 (e) Administrative and judicial appeals of any order of the Commissioner
28 pursuant to this Article shall be conducted according to the provisions of Chapter 150B.

29 (f) Complaints regarding compliance with this Article must be filed within one
30 year following notification to the employee regarding the results of the drug test or
31 within one year of the occurrence of the violation, whichever is later.

32 (g) Claims based upon an employer's failure to comply with G.S. 95-226 may be
33 challenged only pursuant to this section or pursuant to action by the Commissioner of
34 Labor under G.S. 95-231.

35 **"§ 95-231. Remedies.**

36 An employee, job applicant, or the Commissioner of Labor on behalf of such
37 employee or job applicant alleging a violation of this act by an employer, laboratory or
38 other medical facility may bring an action for injunctive relief or damages or both.
39 Relief may include:

- 40 (1) An injunction to restrain the continued violation of this act;
41 (2) Reinstatement of the employee to the same position held before the
42 unlawful drug testing, disciplinary action or discharge, or to an
43 equivalent position;
44 (3) Reinstatement of full employee benefits and seniority rights;

- 1 (4) Actual damages, including reasonable attorney's fees.
- 2 (a) The provisions of this Article shall apply only to cases of employees working
3 within the State and job applicants making application within the State.
- 4 (b) G.S. 95-226 and G.S. 227 (k) and (l) shall not apply to certified law
5 enforcement officers.
- 6 (c) Any federal statute or regulation in conflict with any provision of this Article
7 shall supersede this Article.
- 8 (d) No cause of action may be brought by any person against an employer who
9 has established a drug testing program in accordance with this Article, when the cause
10 of action is based on defamation of character, libel, slander, or damage to reputation
11 arising out of a drug test administered in conformity with this Article unless:
- 12 (1) The information was disclosed to any person other than a person
13 authorized under this Article to receive the information, and
- 14 (2) The information disclosed was based on a false test result, and
- 15 (3) The false test result was disclosed with malice."
- 16 Sec. 2. This act shall become effective October 1, 1989.