

## 2011 Montana statutes related to workplace drug and alcohol testing

(From an unofficial version of Montana Code Annotated, 2011)

### Workforce Drug and Alcohol Testing Act

**39-2-205. Short title.** Sections 39-2-205 through 39-2-211 may be cited as the "Workforce Drug and Alcohol Testing Act".

**39-2-206. Definitions.** As used in 39-2-205 through 39-2-211, the following definitions apply:

(1) "Alcohol" means an intoxicating agent in alcoholic beverages, ethyl alcohol, also called ethanol, or the hydrated oxide of ethyl.

(2) "Alcohol concentration" means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath, as indicated by an evidential breath test.

(3) "Controlled substance" means a dangerous drug, as defined in 49 CFR, part 40, except a drug used pursuant to a valid prescription or as authorized by law.

(4) (a) "Employee" means an individual engaged in the performance, supervision, or management of work in a:

(i) hazardous work environment;

(ii) security position; or

(iii) position:

(A) affecting public safety or public health;

(B) in which driving a motor vehicle is necessary for any part of the individual's work duties; or

(C) involving a fiduciary responsibility for an employer.

(b) The term does not include an independent contractor or an elected official who serves on the governing body of a local government.

(5) (a) "Employer" means a person or entity that has one or more employees and that is located in or doing business in Montana.

(b) The term includes the governing body of a local government.

(6) "Governing body" means the legislative authority of a local government.

(7) "Hazardous work environment" includes but is not limited to positions:

(a) for which controlled substance and alcohol testing is mandated by federal law, such as aviation, commercial motor carrier, railroad, pipeline, and commercial marine employees;

(b) that involve the operation of or work in proximity to construction equipment, industrial machinery, or mining activities; or

(c) that involve handling or proximity to flammable materials, explosives, toxic chemicals, or similar substances.

(8) "Local government" means a city, town, county, or consolidated city-county.

(9) "Medical review officer" means a licensed physician trained in the field of substance abuse.

(10) "Prospective employee" means an individual who has made a written or oral application to an employer to become an employee.

(11) "Qualified testing program" means a program to test for the presence of controlled substances and alcohol that meets the criteria set forth in 39-2-207 and 39-2-208.

(12) "Sample" means a urine specimen, a breath test, or oral fluid obtained in a minimally invasive manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of drug testing that is used to determine the presence of a controlled substance or alcohol.

*(Amended, effective May 6, 2011.)*

**39-2-207. Qualified testing program.** A qualified testing program must comply with the following criteria:

(1) Testing must be conducted according to the terms of written policies and procedures that must be adopted by the employer and must be available for review by all employees 60 days before the terms are implemented or changed. Controlled substance and alcohol testing procedures for samples that are covered by 49 CFR, part 40, must conform to 49 CFR, part 40. For samples that are not covered by 49 CFR, part 40, the qualified testing program must contain chain-of-custody and other procedural requirements that are at least as stringent as those contained in 49 CFR, part 40, and the testing methodology must be cleared by the United States food and drug administration. At a minimum, the policies and procedures must require:

(a) a description of the applicable legal sanctions under federal, state, and local law for the unlawful manufacture, distribution, possession, or use of a controlled substance;

(b) the employer's program for regularly educating or providing information to employees on the health and workplace safety risks associated with the use of controlled substances and alcohol;

(c) the employer's standards of conduct that regulate the use of controlled substances and alcohol by employees;

(d) a description of available employee assistance programs, including drug and alcohol counseling, treatment, or rehabilitation programs that are available to employees;

(e) a description of the sanctions that the employer may impose on an employee if the employee is found to have violated the standards of conduct referred to in subsection (1)(c) or if the employee is found to test positive for the presence of a controlled substance or alcohol;

(f) identification of the types of controlled substance and alcohol tests to be used from the types of tests listed in 39-2-208;

(g) a list of controlled substances for which the employer intends to test and a stated alcohol concentration level above which a tested employee must be sanctioned;

(h) a description of the employer's hiring policy with respect to prospective employees who test positive;

(i) a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute concerning test results;

(j) a provision that all information, interviews, reports, statements, memoranda, and test results are confidential communications that may not be disclosed to anyone except:

(i) the tested employee;  
(ii) the designated representative of the employer; or  
(iii) in connection with any legal or administrative claim arising out of the employer's implementation of 39-2-205 through 39-2-211 or in response to inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500, when there is reason to believe that the tested employee may have caused or contributed to the accident; and

(k) a provision that information obtained through testing that is unrelated to the use of a controlled substance or alcohol must be held in strict confidentiality by the medical review officer and may not be released to the employer.

(2) In addition to imposing appropriate sanctions on an employee for violation of the employer's standards of conduct, an employer may require an employee who tests positive on a test for controlled substances or alcohol to participate in an appropriate drug or alcohol counseling, treatment, or rehabilitation program as a condition of continued employment. An employer may require the employee to submit to periodic followup testing as a condition of the counseling, treatment, or rehabilitation program.

(3) Testing must be at the employer's expense, and all employees must be compensated at the employee's regular rate, including benefits, for time attributable to the testing program.

(4) The collection, transport, and confirmation testing of urine samples must be performed in accordance with 49 CFR, part 40, and the collection, transport, and confirmation testing of nonurine samples must be as stringent as the requirements of 49 CFR, part 40, in requiring split specimens as defined by the United States department of health and human services, requiring transport to a testing facility under the chain of custody, and requiring confirmation of all screened positive results using mass-spectrometry technology.

(5) Before an employer may take any action based on a positive test result, the employer shall have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An employee or prospective employee must be given the opportunity to provide notification to the medical review officer of any medical information that is relevant to interpreting test results, including information concerning currently or recently used prescription or nonprescription drugs.

(6) Breath alcohol tests must be administered by a certified breath alcohol technician and may only be conducted using testing equipment that appears on the list of conforming products published in the Federal Register.

(7) A breath alcohol test result must indicate an alcohol concentration of greater than 0.04 for a person to be considered as having alcohol in the person's body.

**39-2-208. Qualified testing program -- allowable types -- procedures.** Each of the following activities is permissible in the implementation of a qualified testing program:

- (1) An employer may test any prospective employee as a condition of hire.
- (2) An employer may use random testing if the employer's controlled substance and alcohol policy includes one or both of the following procedures:
  - (a) An employer or an employer's representative may establish a date when all salaried and wage-earning employees will be required to undergo controlled substance or alcohol tests, or both.
  - (b) An employer may manage or contract with a third party to establish and administer a random testing process that must include:
    - (i) an established calendar period for testing;
    - (ii) an established testing rate within the calendar period;
    - (iii) a random selection process that will determine who will be tested on any given date during the calendar period for testing;
    - (iv) all supervisory and managerial employees in the random selection and testing process; and
    - (v) a procedure that requires the employer to obtain a signed statement from each employee that confirms that the employee has received a written description of the random selection process and that requires the employer to maintain the statement in the employee's personnel file. The selection of employees in a random testing procedure must be made by a scientifically valid method, such as a random number table or a computer-based random number generator table.
- (3) An employer may require an employee to submit to followup tests if the employee has had a verified positive test for a controlled substance or for alcohol. The followup tests must be described in the employer's controlled substance and alcohol policy and may be conducted for up to 1 year from the time that the employer first requires a followup test.
- (4) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to suspect that an employee's faculties are impaired on the job as a result of the use of a controlled substance or alcohol consumption. An employer shall comply with the supervisory training requirement in 49 CFR, part 382.603, whenever the employer requires a test on the basis of reasonable suspicion.
- (5) An employer may require an employee to be tested for controlled substances or alcohol if the employer has reason to believe that the employee's act or failure to act is a direct or proximate cause of a work-related accident that has caused death or personal injury or property damage in excess of \$1,500.

**39-2-209. Employee's right of rebuttal.** The employer shall provide an employee who has been tested under any qualified testing program described in 39-2-208 with a copy of the test report. The employer is also required to obtain, at the employee's request, an additional test of the split sample by an independent laboratory selected by the person tested. The employer shall pay for the additional tests if the additional test results are negative, and the employee shall pay for the additional tests if the additional test results are positive. The employee must be provided the opportunity to rebut or explain the results of any test.

**39-2-210. Limitation on adverse action.** Except as provided in 50-46-205, no adverse action, including followup testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee's record and destroyed.  
*(Amended, effective May 6, 2011.)*

**39-2-211. Confidentiality of results.** (1) Except as provided in subsection (2) and except for information that is required by law to be reported to a state or federal licensing authority, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding.

(2) Material that is confidential under subsection (1) may be used in a proceeding related to:

(a) legal action arising out of an employer's implementation of 39-2-205 through 39-2-211; or

(b) inquiries relating to a workplace accident involving death, physical injury, or property damage in excess of \$1,500 when there is reason to believe that the tested employee may have caused or contributed to the accident.