

# 8

Charter School Boards & Staff In-Service

Minnesota Employment Law

MN Statute 181

Module No. 8

# Drug & Alcohol Testing

MN Statute 181 Section 950-955



## IN-SERVICE MODULE NO. 8 – DRUG & ALCOHOL TESTING

---

Minnesota charter schools are subject to MN Statute 181 - Employment Law. This law is the general employment law in the State of Minnesota that applies to all employers and employees.

One of the fiduciary duties of board members is to know the laws that apply to the school, and the charter school has a legal responsibility to notify employees of the terms and conditions of employment in the public charter school - especially since those terms and conditions are different than employment in traditional public schools.

These In-service Modules provide “bite size” lessons on Minnesota’s Employment Law for use as monthly in-services with public charter school boards and staffs. We hope that charter school boards and administrators will find these in-service modules a helpful tool.

---

### DRUG & ALCOHOL TESTING

*In the 2009 revision of Minnesota’s Charter School Law – MN Statute 124.D 10, the legislature lists MN Statute 181 as a law with which a charter school and a charter school board must comply. Within this law, drug and alcohol testing guidelines are outlined in sections 181.950-181.955.*

---

#### **181.950 - Definitions**

##### Confirmatory test and confirmatory retest

“Confirmatory test” and “confirmatory retest” mean a drug or alcohol test that uses a method of analysis allowed under one of the programs listed in section 181.953, subdivision 1.

##### Drug

“Drug” means a controlled substance as defined in section 152.01, subdivision 4.

##### Drug and alcohol testing and drug or alcohol test

“Drug and alcohol testing” and “drug or alcohol test” mean analysis of a body component sample according to the standards established under one of the programs listed in section 181.953, subdivision 1, for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested.

##### Initial screening test

“Initial screening test” means a drug or alcohol test which uses a method of analysis under one of the programs listed in section 181.953, subdivision 1.

##### Positive test result

“Positive test result” means a finding of the presence of drugs, alcohol, or their metabolites in the sample tested in levels at or above the threshold detection levels contained in the standards of one of the programs listed in section 181.953, subdivision 1.

### Random selection basis

“Random selection basis” means a mechanism for selection of 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.

### Reasonable suspicion

“Reasonable suspicion” means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.

### Safety-sensitive position

“Safety-sensitive position” means 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.

## **181.951 - Authorized Drug and Alcohol Testing**

Limitations on testing:

- An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section.
- An employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required in section 181.952; and, is conducted by a testing laboratory which participates in one of the programs listed in section 181.953, subdivision 1.
- An employer may not request or require an employee or job applicant to undergo drug and alcohol testing on an arbitrary and capricious basis.

### Job applicant testing

An employer may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position. If the job offer is withdrawn, as provided in section 181.953, subdivision 11, the employer shall inform the job applicant of the reason for its action.

### Routine physical examination testing

An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.

### Random testing

An employer may request or require employees to undergo drug and alcohol testing on a random selection basis only if (1) they are employed in safety-sensitive positions, or (2) they are employed as professional athletes if the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with the collective bargaining agreement.

### Reasonable suspicion testing

An employer may request or require an employee to undergo drug and alcohol testing if the employer has a reasonable suspicion that the employee:

- (1) is under the influence of drugs or alcohol;
- (2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy;
- (3) has sustained a personal injury, as that term is defined in section 176.011, subdivision 16, or has caused another employee to sustain a personal injury; or
- (4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

### Treatment program testing

An employer may request or require an employee to undergo drug and alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan, in which case the employee may be requested or required to undergo drug or alcohol 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.

### No legal duty to test

Employers do not have a legal duty to request or require an employee or job applicant to undergo drug or alcohol testing as authorized in this section.

## **181.952 - Policy Contents; Prior Written Notice**

### Contents of the policy

An employer's drug and alcohol testing policy must, at a minimum, set forth the following information:

- (1) the employees or job applicants subject to testing under the policy;
- (2) the circumstances under which drug or alcohol testing may be requested or required;
- (3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;
- (4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;
- (5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and
- (6) any other appeal procedures available.

### Notice of policy

An employer shall provide written notice of its drug and alcohol testing policy to all affected employees upon adoption of the policy, to a previously non-affected employee upon transfer to an affected position under the policy, and to a job applicant upon hire and before any testing of the applicant if the job offer is made contingent on the applicant passing drug and alcohol testing. An employer shall also

## IN-SERVICE MODULE NO. 8 – DRUG & ALCOHOL TESTING

---

post notice in an appropriate and conspicuous location on the employer's premises that the employer has adopted a drug and alcohol testing policy and that copies of the policy are available for inspection during regular business hours by its employees or job applicants in the employer's personnel office or other suitable locations.

### **181.953 - Reliability and Fairness Safeguards**

#### Use of licensed, accredited, or certified laboratory required

(a) An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory that meets one of the following criteria for drug testing:

- (1) is certified by the National Institute on Drug Abuse as meeting the mandatory guidelines published at 53 Federal Register 11970 to 11989, April 11, 1988;
- (2) is accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, under the forensic urine drug testing laboratory program; or
- (3) is licensed to test for drugs by the state of New York, Department of Health, under Public Health Law, article 5, title V, and rules adopted under that law.

(b) For alcohol testing, the laboratory must either be:

- (1) licensed to test for drugs and alcohol by the state of New York, Department of Health, under Public Health Law, article 5, title V, and the rules adopted under that law; or
- (2) accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, in the laboratory accreditation program.

#### Laboratory testing, reporting, and sample retention requirements

A testing laboratory that is not certified by the National Institute on Drug Abuse according to subdivision 1 shall follow the chain-of-custody procedures prescribed for employers in subdivision 5. A testing laboratory shall conduct a confirmatory test on all samples that produced a positive test result on an initial screening test. A laboratory shall disclose to the employer a written test result report for each sample tested within three working days after a negative test result on an initial screening test or, when the initial screening test produced a positive test result, within three working days after a confirmatory test. A test report must indicate the drugs, alcohol, or drug or alcohol metabolites tested for and whether the test produced negative or positive test results. A laboratory shall retain and properly store for at least six months all samples that produced a positive test result.

#### Prohibitions on employers

An employer may not conduct drug or alcohol testing of its own employees and job applicants using a testing laboratory owned and operated by the employer; except that, one agency of the state may test the employees of another agency of the state. Except as provided in subdivision 9, an employer may not request or require an employee or job applicant to contribute to, or pay the cost of, drug or alcohol testing under sections 181.950 to 181.954.

#### Employer chain-of-custody procedures

An employer shall establish its own reliable chain-of-custody procedures to ensure proper record keeping, handling, labeling, and identification of the samples to be tested. The procedures must require the following:

## IN-SERVICE MODULE NO. 8 – DRUG & ALCOHOL TESTING

---

- (1) possession of a 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;
- (2) 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;
- (3) a sample must be accompanied by a written chain-of-custody record; and
- (4) 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.

### Rights of employees and job applicants

(a) Before requesting an employee or job applicant to undergo drug or alcohol testing, an employer shall provide the employee or job applicant with a form, developed by the employer, on which to acknowledge that the employee or job applicant has seen the employer's drug and alcohol testing policy.

(b) If an employee or job applicant tests positive for drug use, the employee must be given written notice of the right to explain the positive test and the employer may request that the employee or job applicant indicate any over-the-counter or prescription medication that the individual is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for, a positive test result.

(c) Within three working days after notice of a positive test result on a confirmatory test, the employee or job applicant may submit information to the employer, in addition to any information already submitted under paragraph (b), to explain that result, or may request a confirmatory retest of the original sample at the employee's or job applicant's own expense as provided under subdivision 9.

### Notice of test results

Within three working days after receipt of a test result report from the testing laboratory, an employer shall inform in writing an employee or job applicant who has undergone drug or alcohol testing of (1) a negative test result on an initial screening test or of a negative or positive test result on a confirmatory test and (2) the right provided in subdivision 8. In the case of a positive test result on a confirmatory test, the employer shall also, at the time of this notice, inform the employee or job applicant in writing of the rights provided in subdivisions 6, paragraph (b), 9, and either subdivision 10 or 11, whichever applies.

### Right to test result report

An employee or job applicant has the right to request and receive from the employer a copy of the test result report on any drug or alcohol test.

### Confirmatory retests

An employee or job applicant may request a confirmatory retest of the original sample at the employee's or job applicant's own expense after notice of a positive test result on a confirmatory test. Within five working days after notice of the confirmatory test result, the employee or job applicant shall notify the employer in writing of the employee's or job applicant's intention to obtain a confirmatory retest. Within three working days after receipt of the notice, the employer shall notify the original testing laboratory that the employee or job applicant has requested the laboratory to conduct the confirmatory retest or transfer the sample to another laboratory licensed under subdivision 1 to conduct the

## IN-SERVICE MODULE NO. 8 – DRUG & ALCOHOL TESTING

---

confirmatory retest. The original testing laboratory shall ensure that the chain-of-custody procedures in subdivision 3 are followed during transfer of the sample to the other laboratory. The confirmatory retest must use the same drug or alcohol threshold detection levels as used in the original confirmatory test. If the confirmatory retest does not confirm the original positive test result, no adverse personnel action based on the original confirmatory test may be taken against the employee or job applicant.

### Limitations on employee discharge, discipline, or discrimination

(a) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.

(b) In addition to the limitation under paragraph (a), an employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless the following conditions have been met:

- (1) the employer has first given the employee an 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; and
- (2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

(c) Notwithstanding paragraph (a), an employer may temporarily suspend the tested employee or transfer that employee to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided the employer believes that it is reasonably necessary to protect the health or safety of the employee, co-employees, or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative.

(d) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of medical history information revealed to the employer pursuant to subdivision 6 unless the employee was under an affirmative duty to provide the information before, upon, or after hire.

(e) An employee must be given access to information in the employee's personnel file relating to positive test result reports and other information acquired in the drug and alcohol testing process and conclusions drawn from and actions taken based on the reports or other acquired information.

### Limitation on withdrawal of job offer

If a job applicant has received a job offer made contingent on the applicant passing drug and alcohol testing, the employer may not withdraw the offer based on a positive test result from an initial screening test that has not been verified by a confirmatory test.

### **181.954 - Privacy, Confidentiality, and Privilege Safeguards**

#### Privacy limitations

A laboratory may only disclose to the employer test result data regarding the presence or absence of drugs, alcohol, or their metabolites in a sample tested.

#### Confidentiality limitations

Test result reports and other information acquired in the drug or alcohol testing process are, with respect to private sector employees and job applicants, private and confidential information, and, with respect to public sector employees and job applicants, private data on individuals as that phrase is defined in chapter 13, and may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency, or private organization without the written consent of the employee or job applicant tested.

#### Exceptions to privacy and confidentiality disclosure limitations

Notwithstanding subdivisions 1 and 2, evidence of a positive test result on a 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; and
- (3) disclosed to a substance abuse treatment facility for the purpose of evaluation or treatment of the employee.

#### Privilege

Positive test results from an employer drug or alcohol testing program may not be used as evidence in a criminal action against the employee or job applicant tested.

### **181.955 - Construction**

#### Freedom to collectively bargain

Sections 181.950 to 181.954 shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections.

#### Employee protections under existing collective bargaining agreements

Sections 181.950 to 181.954 shall not be construed to interfere with or diminish any employee protections relating to drug and alcohol testing already provided under collective bargaining agreements in effect on the effective date of those sections that exceed the minimum standards and requirements for employee protection provided in those sections.

### QUESTIONS FOR DISCUSSION WITH BOARDS AND SCHOOL STAFF

1. What are the limitations on employers with regard to drug testing?
2. What are the four different situations in which drug or alcohol testing is legal?
3. What is the legal duty does an employer have to do drug and alcohol testing?
4. What are six items that, at minimum, must be present in an employer's drug and alcohol written policy?
5. What is a 'chain-of-custody' procedure? How does it affect drug and alcohol testing?
6. Why can't an employer dismiss an employee after a 'positive' initial sample?
7. What are two options an employee has to continue employment with an employer after a 'positive' drug test?
8. When can a 'positive' drug test be used against an employee or potential employee in a criminal action?
9. What are the two instances in which a random drug screen may be utilized?

### ACTIONS

- ✓ Board has adopted a drug and alcohol testing policy consistent with MN Statutes 181 and the Federal Drug Free Workplace Act and the Safe and Drug Free School Zone Act.
- ✓ Personnel Handbook of the school contains the drug and alcohol testing policy of the school regarding employees.
- ✓ Administration has developed procedures for implementing the board policy on drug and alcohol testing and has made arrangements with an appropriate testing lab for drug and alcohol testing in accordance with policy and statute.
- ✓ Board has developed procedures to review and monitor the implementation of the drug and alcohol testing policy and guidelines.

### OTHER PROVISIONS OF THE LAW RELATED TO DRUG & ALCOHOL TESTING

#### 181.938 – Nonwork Activities; Prohibited Employer Conduct

##### Definition

For the purpose of this section, "employer" has the meaning given it in section [179.01, subdivision 3](#).

##### Prohibited Practice

An employer may not refuse to hire a job applicant or discipline or discharge an employee because the applicant or employee engages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours. For purposes of this section, "lawful consumable products" means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco.

##### Exceptions

(a) It is not a violation of subdivision 2 for an employer to restrict the use of lawful consumable products by employees during nonworking hours if the employer's restriction:

- (1) relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees; or
- (2) is necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibilities owed by the employee to the employer.

(b) It is not a violation of subdivision 2 for an employer to refuse to hire an applicant or discipline or discharge an employee who refuses or fails to comply with the conditions established by a chemical dependency treatment or aftercare program.

(c) It is not a violation of subdivision 2 for an employer to offer, impose, or have in effect a health or life insurance plan that makes distinctions between employees for the type of coverage or the cost of coverage based upon the employee's use of lawful consumable products, provided that, to the extent that different premium rates are charged to the employees, those rates must reflect the actual differential cost to the employer.

(d) It is not a violation of subdivision 2 for an employer to refuse to hire an applicant or discipline or discharge an employee on the basis of the applicant's or employee's past or present job performance.

##### Remedy

The sole remedy for a violation of subdivision 2 is a civil action for damages. Damages are limited to wages and benefits lost by the individual because of the violation. A court shall award the prevailing party in the action, whether plaintiff or defendant, court costs and a reasonable attorney fee.

See also: PL 107-110, Title IV Part A – Safe & Drug Free School Zone

#### 181.956 - Remedies

##### Exhaustion

An employee or collective bargaining agent may bring an action under this section only after first exhausting all applicable grievance procedures and arbitration proceeding requirements under a collective bargaining agreement; provided that, an employee's right to bring an action under this section is not affected by a decision of a collective bargaining agent not to pursue a grievance.

## IN-SERVICE MODULE NO. 8 – DRUG & ALCOHOL TESTING

---

### Damages

In addition to any other remedies provided by law, an employer or laboratory that violates sections 181.950 to 181.954 is liable to an employee or job applicant injured by the violation in a civil action for any damages allowable at law. If a violation is found and damages awarded, the court may also award reasonable attorney fees for a cause of action based on a violation of sections 181.950 to 181.954 if the court finds that the employer knowingly or recklessly violated sections 181.950 to 181.954.

### Injunctive relief

An employee or job applicant, a state, county, or city attorney, or a collective bargaining agent who fairly and adequately represents the interests of the protected class has standing to bring an action for injunctive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 181.950 to 181.954.

### Other equitable relief

Upon finding a violation of sections 181.950 to 181.954, or as part of injunctive relief granted under subdivision 3, a court may, in its discretion, grant any other equitable relief it considers appropriate, including ordering the injured employee or job applicant reinstated with back pay.

### Retaliation prohibited

An employer may not retaliate against an employee for asserting rights and remedies provided in sections 181.950 to 181.954.

## **181.957 – Federal Preemption**

### Excluded employees and job applicants

Except as provided under subdivision 2, the employee and job applicant protections provided under sections [181.950](#) to [181.956](#) do not apply to employees and job applicants where the specific work performed requires those employees and job applicants to be subject to drug and alcohol testing pursuant to:

- (1) federal regulations that specifically preempt state regulation of drug and alcohol testing with respect to those employees and job applicants;
- (2) federal regulations or requirements necessary to operate federally regulated facilities;
- (3) federal contracts where the drug and alcohol testing is conducted for security, safety, or protection of sensitive or proprietary data; or
- (4) state agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry, and the adoption of those rules is for the purpose of conforming the nonfederally regulated intrastate component of the industry to identical regulation.

### Exclusion limited

Employers and testing laboratories must comply with the employee and job applicant protections provided under sections [181.950](#) to [181.956](#), with respect to employees or job applicants otherwise excluded under subdivision 1 from those protections, to the extent that the provisions of sections [181.950](#) to [181.956](#) are not inconsistent with or specifically preempted by the federal regulations, contract, or requirements applicable to drug and alcohol testing.