

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: WV Office of Miners' Health, Safety and Training TITLE NUMBER: 56

RULE TYPE: Legislative/Emergency CITE AUTHORITY: W. Va. Code § 22A-1A-1 et. seq.

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 19

TITLE OF RULE BEING PROPOSED: Rules Governing Substance Abuse Screening, Standards and Procedure

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON January 28, 2013 AT 4:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

WV Office of Miners' Health, Safety and Training

7 Players Club Drive
Charleston, WV 25311

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.

Angel R. Moore
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

**BRIEF SUMMARY OF THE PROPOSED RULE
AND
STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE**

The legislature passed House Bill (H. B.) 4351 during the 2012 legislative session. Among other things, H. B. 4351 created a new article 1A in Chapter 22A. This new article created a mandatory substance abuse screening policy and program for all coal operators and independent contractors who employ certified persons as defined in W. Va. Code § 22A-1-2. These mandatory substance abuse screening policies and programs require both pre-employment substance abuse tests and random substance abuse testing of current employees who are certified persons or who work in a safety sensitive position.

The new article also requires coal operators and independent contractors to notify the Director of the Office of Miners' Health, Safety and Training (Director) when a person is discharged for failing a random substance abuse test. When the Director receives notification that a person was discharged for failing a random substance abuse test, the Director must temporarily suspend that person's certificate pending a hearing before the Board of Appeals.

The new article also imposes certain confidentiality requirements regarding the substance abuse test results.

This legislative/emergency rule clarifies and implements the above mentioned legislative mandates.

Statement of circumstances which require the proposed rule.

A problem has developed in the mining industry where individuals are working in mines while under the influence of an illicit substance. Those individuals are a safety

risk both to themselves and others working in the mine. This Rule, together with H. B. 4351, is designed to identify and remove those individuals from the mines. Removing these individuals from the mines will reduce accidents and fatalities and prevent substantial harm to the public interest.

H. B. 4351 also mandates that the Director file this rule as an emergency before December 31, 2012. W. Va. Code 22A-6-14.

**TITLE 56
LEGISLATIVE RULE
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING**

**SERIES 19
RULES GOVERNING SUBSTANCE ABUSE SCREENING,
STANDARDS AND PROCEDURES.**

§56-19-1. General.

1.1 Scope. This rule applies to every employer of "certified persons," as that term is defined in W. Va. Code § 22A-1- 2(d)(3), and to every employer of employees who as part of their employment are regularly present at a mine and who are employed in a "safety-sensitive position," as that term is defined in W. Va. Code § 22A-1- 2(f).

1.2 Authority. W.Va. Code § § 22A-1A-1 *et. seq.* and 22A-6-14.

1.3 Filing Date.

1.4 Effective Date.

§56-19-2. Purpose.

2.1 Purpose -- The purpose of this rule is to implement the mandate of W. Va. Code § 22A-1A-1 *et. seq.*

§56-19-3. Definitions.

3.1 Unless the context in which a word or phrase appears clearly requires a different meaning, all terms used in this rule that are not defined herein shall have the meanings set forth in W. Va. Code § 22A-1-2.

3.2 Adulterated Specimen. The term "adulterated specimen" shall mean a specimen that has been altered as evidenced by test results showing that the specimen contains a substance that is not a normal constituent or containing an endogenous substance at a concentration that is not a normal physiological concentration.

3.3 Certified Person. The term “certified person” shall have the meaning set forth in W. Va. Code § 22A-1-2(d)(3).

3.4 Code. The term “code” shall mean the West Virginia Code of 1931, as amended.

3.5 Director. The term “director” shall mean the Director of the Office of Miners’ Health, Safety and Training, and shall include his authorized representatives where applicable.

3.6 Employer. The term “employer” shall mean all operators, independent contractors, subcontractors, or otherwise that employ certified persons who work in mines, or employees who as part of their employment are regularly present at a mine and who are employed in a safety-sensitive position.

3.7 Illicit Substances. The term “illicit substances” shall mean illegal drugs and substances, as well as prescription drugs used illegally or in excess of therapeutic levels.

3.8 Independent contractor. The term “independent contractor” shall mean any firm, corporation, partnership, or individual that contracts to engage in the extraction, production, hauling, loading, processing or preparation activities associated with a mine as defined in section 3.10 of this rule.

3.9 Medical Review Officer. The term “medical review officer” shall mean a licensed physician with knowledge of substance abuse disorders, laboratory testing, chain of custody, collection procedures, and the ability to verify positive, confirmed test results. The medical review officer shall possess the necessary medical training to interpret and

evaluate a positive test result in relation to the person's medical history or any other relevant biomedical information.

3.10 Mine. The term "mine" shall have the meaning set forth in W. Va. Code § 22A-1-2(a)(6) and shall include any underground coal mine, surface coal mine, coal preparation plant, coal loadout, or river coal loadout.

3.11 Operator. The term "operator" means any firm, corporation, partnership, or individual operating any mine or part thereof, as defined in section 3.10 of this rule, or engaged in construction at any mine, as defined in section 3.10 of this rule.

3.12 Pre-employment Testing. The term "pre-employment testing" shall mean the substance abuse testing of any certified person or safety-sensitive person upon hiring by a new operator or new independent contractor, rehiring of any certified person or safety-sensitive person by an operator or independent contractor following a termination of the employment relationship, or transferring to a West Virginia mine from an employer's out-of-state mine to the extent that the substance abuse test required by the employer in the other jurisdiction does not comply with the minimum standards for substance abuse testing required by this rule.

3.13 Random Testing. The term "random testing" shall mean that each person subject to testing has a statistically equal chance of being selected for testing at random and at unscheduled times. The selection of persons for random testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with the person's social security numbers, payroll identification numbers, or other comparable identifying numbers. A random test sample

shall be at least twenty-five per cent (25%) of the employees working at a mine or facility annually. Random testing shall be conducted at least four (4) times annually.

3.14 **Safety-Sensitive Position.** The term “safety-sensitive position” shall mean an employment position where the employee’s job responsibilities include duties and activities that involve the personal safety of the employee or others working at the mine.

3.15 **Split Sample.** The term “split sample” shall mean a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result. Said testing shall be conducted in accordance with the standards and procedures of the United States Department of Transportation’s rule, 49 CFR Part 40, which may be amended from time to time by the Office of Miners’ Health, Safety, and Training through legislative rule.

3.16 **Substance Abuse Policy and Testing Program.** The term “substance abuse policy and testing program” shall include, at a minimum, the ten-panel urine test required by W. Va. Code § 22A-1A-1(a)(1) and established for the purpose of detecting the illicit substances identified therein.

3.17 **Surface Coal Mine.** The term “surface coal mine” shall mean a surface area of land, and all structures, facilities, machinery, tools, equipment, excavations, and other property, real or personal, placed upon or above the surface of such land by any person, which are used in, or to be used in, or resulting from the work of extracting coal from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

3.18 Underground Coal Mine. The term "underground coal mine" shall mean a mine as defined in Section 2(a)(6), Article 1, Chapter 22A of the Code.

§56-19-4. Certification of Employees in Safety-Sensitive Positions.

4.1 No employee of an employer working in a safety-sensitive position shall work or be employed unless he or she possesses a safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training.

4.2 Every employer of an employee who works in a safety-sensitive position shall ensure that the employee has obtained the safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training. Any employee who currently possesses a certification issued by the West Virginia Office of Miners' Health, Safety and Training shall not be required to also obtain a safety-sensitive certification.

4.3 A safety-sensitive certification shall be issued to any person who has received the twenty-four (24) hour MSHA training and completes an application as prescribed by the director. Any administrative personnel employed by an operator or independent contractor shall be eligible to receive a safety-sensitive certification by making application and showing proof that he or she has successfully completed hazard training.

4.4 The director may charge a ten dollar (\$10.00) fee for the issuance of a safety-sensitive certification.

4.5 All persons currently having a certification issued by the West Virginia Office of Miners' Health, Safety and Training who wish to receive a safety-sensitive certification may receive such certification by completing the safety-sensitive

certification application and paying the \$10.00 fee identified in Subsection 4.4 of this rule.

4.6 Any employee who does not currently have a certification issued by the West Virginia Office of Miners' Health, Safety and Training and who is employed in a safety-sensitive position shall request a safety-sensitive certification from the West Virginia Office of Miners' Health, Safety and Training by no later than June 1, 2013. Every applicant for a safety-sensitive certification shall demonstrate eligibility for issuance of said certification through completion of the training program detailed in Subsection 4.3 of this rule.

4.7 Every employer shall submit to the director by no later than March 1, 2013 and by the 1st day of January each year thereafter a list of all employees occupying safety-sensitive positions. Further, every employer shall keep a current list of all employees occupying safety-sensitive positions available for review by the director or his authorized representative.

4.8 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 shall provide its substance abuse policy and testing program to the director for approval as part of its comprehensive mine safety program.

Every employer shall provide any revision to its substance abuse policy and testing program to the director for approval.

5.3 Every employer shall have a pre-employment and random substance abuse policy and testing program which shall, at a minimum, include a ten (10) panel urine test for the following substances:

- 5.3.1 amphetamines,
- 5.3.2 cannabinoids/thc,
- 5.3.3 cocaine,
- 5.3.4 opiates,
- 5.3.5 phencyclidine (pcp),
- 5.3.6 benzodiazepines,
- 5.3.7 propoxyphene,
- 5.3.8 methadone,
- 5.3.9 barbiturates, and
- 5.3.10 synthetic narcotics.

5.4 The substance abuse policy and testing program shall require that split samples be collected by providers 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.

5.5 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.

5.6 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.

5.7 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.

5.8 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 the testing shall constitute grounds for discharge from employment and shall result in the employer notifying the director of said discharge in accordance with Subsection 5.10 of this Rule.

5.9 Every employer shall notify the director at least quarterly, on a form prescribed by the director, of the number of pre-employment substance abuse screening tests administered during the preceding calendar quarter and the number of positive test results.

5.10 Every employer shall notify the director, on a form prescribed by the director, within seven (7) days of having discharged any employee for violation of the employer's substance abuse screening policy and program. With respect to those employees subject to a collective bargaining agreement, the employer shall notify the

director, on a form prescribed by the director, within seven (7) days of having discharged that employee for violation of the employer's substance abuse screening policy and testing program following the completion of an arbitration conducted pursuant to a collective bargaining agreement applicable to the employee.

5.11 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 subsection 5.3 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.

5.12 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 five (5) years.

5.13 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 if the employer has a reasonable suspicion that the person is under the influence of a controlled substance.

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

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

6.1 Upon receipt of a notice as required by subsection 5.10 of this Rule and upon verification that the employee discharged pursuant to that subsection tested positive for at least one (1) of the ten (10) substances identified therein, the director shall issue an immediate temporary suspension of all certificates 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 one (1) of the following options:

6.1.1 Appeal the suspension to the Board of Appeals within thirty (30) days, or

6.1.2 Notify the director within thirty (30) days that the temporarily suspended person intends to be evaluated by a medical professional trained in substance abuse treatment, to complete any prescribed treatment, and to submit an acceptable test result from a SAMSHA approved drug and alcohol test facility as required by Section 5.6 of this Rule. Costs of the evaluation, treatment and drug and alcohol tests shall be the responsibility of the temporarily suspended person.

6.2 The certified mailing shall also inform the individual that failure to file an appeal pursuant to Subsection 6.1.1 or failure to notify the director of that individual's intent to comply with Subsection 6.1.2 of this rule within thirty (30) days shall result in the revocation of all certificates issued by the Office of Miners' Health, Safety and Training for a period of not less than three (3) years and that the individual shall remain ineligible for any other certification issued by the Office of Miners' Health, Safety and Training during the revocation period. At the end of the three (3) year revocation period,

the individual's certificate may only be reinstated if the individual submits to the Office of Miners' Health, Safety and Training proof that he or she has been evaluated by a medical professional trained in substance abuse treatment, completed any prescribed treatment, and submitted an acceptable test result from a drug and alcohol test as required by Section 5.6 of this Rule.

6.3 The director shall immediately and temporarily suspend any certification issued by the Office of Miners' Health, Safety and Training or any safety-sensitive certification upon receipt of a revocation of a certified person's certificate as a miner or other miner specialty in another jurisdiction by the applicable regulatory or licensing authority for substance abuse related matters. The immediate and temporary suspension shall remain in effect until such time as the certified person's certification is reinstated in the other jurisdiction or modified by the Board of Appeals pursuant to W. Va. Code § 22A-1A-2.

6.4 The director shall issue an immediate temporary suspension or notice of revocation of a certified person's West Virginia certificate, including any safety-sensitive certification, under the following circumstances:

- 6.4.1 The person is discharged because of a positive test for any of the ten (10) substances identified in Subsection 5.3 of this rule and is deemed to have failed the test by the medical review officer.
- 6.4.2 The person is discharged because the drug test results demonstrate the submission of an adulterated specimen.
- 6.4.3 The person is discharged because the drug test results demonstrate the submission of a substituted test result.

6.4.4 The person is discharged for refusing to submit to a drug test as required by Section 5.8 of this Rule.

6.5 Any person who has his or her certification temporarily suspended or revoked due to the results of any drug test required by this Rule may file an appeal of the temporary suspension or revocation with the Board of Appeals. The notice of appeal shall be filed with the Board of Appeals within thirty (30) days of issuance of the notice of suspension or revocation.

6.6 No certification may be revoked until such time as the individual has been granted adequate opportunity for a hearing before the Board of Appeals conducted in accordance with W. Va. Code § 22A-1A-2. The notice of appeal shall be initiated by the filing of a notice of appeal by the person whose certification was suspended by the director.

6.7 Upon receipt of a notice as required by subsection 5.10 of this rule of a person having failed an employer's random substance abuse test for a second time, the director shall issue an immediate temporary suspension of all certificates held by the person who failed the random substance abuse screening policy and shall immediately initiate proceedings for the permanent revocation of all certificates held by the person pending a hearing before the Board of Appeals pursuant to W. Va. Code § 22A-1A-2.

6.8 Records of substance abuse and drug testing, written or otherwise, received by the Office of Miners' Health, Safety and Training, its employees, agents and representatives are confidential communications and exempt from disclosure under W. Va. Code § 29B-1-1, except where disclosure is authorized pursuant to § 22A-1A-3.

§56-19-7. Drug Testing Standards.

7.1 Each drug testing vendor shall comply with the following standards for collection and testing of samples:

7.1.1 The drug testing vendor shall follow all standards, procedures, and protocols set forth by the United States Department of Transportation's rule, 49 CFR Part 40 for the collection of urine samples.

7.1.2 Collected samples shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMSHA) for collection and testing.

7.1.3 The drug testing vendor's drug testing protocol shall be a ten (10) panel urine test containing the substances identified in section 5.3. of this Rule.

7.1.4 The drug testing vendor shall provide a medical review officer who shall possess the ability and medical training necessary to verify positive confirmed test results and evaluate those results in relation to a certified person's medical history or other biomedical information and follow all procedures outlined in the SAMSHA medical review officer manual.

§56-19-8. Board of Appeals Hearing Procedures.

8.1 Any hearing conducted after the temporary suspension of a person's certificate pursuant to this rule, shall be conducted within sixty (60) days of the temporary suspension. The Board of Appeals shall make every effort to hold the hearing within forty (40) days of the temporary suspension.

8.2 Any hearing conducted pursuant to this rule shall be conducted in accordance with the provisions of W. Va. Code § 22A-1-31(c), unless the parties agree to informal proceedings.

8.3 The provisions of Sections 1.13 and 1.14, Series 1, Title 37 of the Code of State Rules notwithstanding, any hearing conducted pursuant to this rule shall not be open to the public. All Board records relating to reviewing charges to withdraw certification, review of alleged violations of an employer's substance abuse policy and testing program and all final orders, decisions and opinions in the adjudication of cases under the provisions of this Rule shall not be open for public inspection, nor subject to W. Va. Code § 29B-1-1.

8.4 The Board of Appeals shall suspend all certificates possessed by a person who is found, by a preponderance of the evidence, to have failed a drug test under this rule. In addition, the Board of Appeals shall order that the person be placed on probation. Terms of the probation shall include: substance abuse counseling; in-patient or out-patient substance abuse treatment; or periodic additional drug tests. The costs of any substance abuse counseling, in-patient or out-patient treatment or additional drug tests shall be the sole responsibility of the person found to have failed a drug test.

8.5 Any person who is found, by a preponderance of the evidence, to have refused a drug test provided under this rule shall be suspended for a minimum of one (1) year.

8.6 The Board of Appeals shall permanently revoke all certifications issued by the West Virginia Office of Miners' Health, Safety and Training when the Board finds,

by a preponderance of the evidence, that any person has failed a drug test for the second time.

8.7 No person whose certification is suspended or revoked under this rule may perform any duties under any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals. Furthermore, no person whose certification is suspended or revoked under this rule may apply for or obtain any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals or after his or her certification is revoked.

8.8 Any person adversely affected by a final order or decision issued by the Board of Appeals is entitled to judicial review thereof pursuant to W. Va. Code § 29A-5-4.