

807 KAR 5:023. Control of drug use in gas operations.

RELATES TO: KRS Chapter 278, 49 C.F.R. Part 199, 49 U.S.C. 1674

STATUTORY AUTHORITY: KRS 278.280(2), 49 C.F.R. Part 199, 49 U.S.C. 1674

NECESSITY, FUNCTION, AND CONFORMITY: Section 5 of the Natural Gas Pipeline Safety Act of 1978 (49 USC 1674) requires each state participating in the federal/state pipeline safety program to certify that it has adopted each federal safety standard established under the Act that is applicable to interstate pipeline transportation under its jurisdiction. Pursuant to that requirement, this administrative regulation adopts the standards set out in 49 CFR Part 199 for drug testing of employees of operators of natural gas pipeline facilities which are subject to 807 KAR 5:022.

Section 1. Definitions. (1) "Accident" means an incident reportable under 807 KAR 5:027, Section 3(1)(a) through (f) involving gas pipeline facilities or any incident that is significant in the judgment of the operator even though it did not meet the reporting requirements of 807 KAR 5:027.

(2) "Administrator" means the Administrator of the Research and Special Programs Administration (RSPA), or any person who has been delegated authority in the matter concerned.

(3) "DOT procedures" means the "Procedures for Transportation Workplace Drug Testing Programs" published by the Office of the U.S. Secretary of Transportation in 49 CFR Part 40.

(4) "Employee" means a person who performs on a pipeline an operating, maintenance, or emergency-response function regulated by 807 KAR 5:022. This does not include clerical, truck driving, accounting, or other functions not subject to 807 KAR 5:022. The person may be employed by the operator, be a contractor engaged by the operator, or be employed by such a contractor.

(5) "Fail a drug test" means that the confirmation test result shows positive evidence of the presence under DOT procedures of a prohibited drug in an employee's system.

(6) "Operator" means a person who owns or operates pipeline facilities subject to 807 KAR 5:022.

(7) "Pass a drug test" means that initial testing or confirmation testing under DOT procedures does not show evidence of the presence of a prohibited drug in a person's system.

(8) "Prohibited drug" means any of the following substances specified in Schedule I or Schedule II of the Controlled Substances Act, 21 USC 801.812 (1981 & 1987 Cum.P.P.): marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). In addition, for the purpose of reasonable cause testing, "prohibited drug" includes any substance in Schedule I or II if an operator has obtained prior approval from RSPA, pursuant to the "DOT procedures" in 49 CFR Part 40, to test for such substance, and if the U.S. Department of Health and Human Services has established an approved testing protocol and positive threshold for such substance.

(9) "Commission" means the Kentucky Public Service Commission.

Section 2. DOT Procedures. The antidrug program required by this administrative regulation shall be conducted according to the requirements of this administrative regulation and the DOT procedures. In the event of conflict, the provisions of this administrative regulation prevail. Terms and concepts used in this administrative regulation have the same meaning as in the DOT procedures.

Section 3. Antidrug Plan. Each operator shall maintain and follow a written antidrug plan that conforms to the requirements of this administrative regulation and the DOT procedures. The plan shall contain:

(1) Methods and procedures for compliance with all the requirements of this administrative regulation, including the employee assistance program;

(2) The name and address of each laboratory that analyzes the specimens collected for drug testing; and

(3) The name and address of the operator's medical review officer; and

(4) Procedures for notifying employees of the coverage and provisions of the plan.

Section 4. Use of Persons Who Fail or Refuse a Drug Test. (1) An operator shall not knowingly use as an employee any person who:

(a) Fails a drug test required by this administrative regulation and the medical review officer makes a determination under Section 7(4)(b) of this administrative regulation; or

(b) Refuses to take a drug test required by this administrative regulation.

(2) Subsection (1)(a) of this section does not apply to a person who has:

(a) Passed a drug test under DOT procedures;

(b) Been recommended by the medical review officer for return to duty in accordance with Section 7(3) of this

administrative regulation; and

(c) Not failed a drug test required by this administrative regulation after returning to duty.

Section 5. Drug Tests Required. Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(1) Preemployment testing. No operator shall hire or contract for the use of any person as an employee unless that person passes a drug test or is covered by an antidrug program that conforms to the requirements of this administrative regulation.

(2) Postaccident testing. As soon as possible but no later than thirty-two (32) hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. If an employee is injured, unconscious, or otherwise unable to evidence consent to the drug test, all reasonable steps shall be taken to obtain a urine sample. An operator may decide not to test under this subsection but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.

(3) Random testing. Each operator shall administer, every twelve (12) months, a number of random drug tests at a rate equal to fifty (50) percent of its employees. Each operator shall select employees for testing by using a random number table or a computer-based random number generator that is matched with an employee's social security number, payroll identification number, or other appropriate identification number. However, during the first twelve (12) months following the institution of random drug testing under this administrative regulation, each operator shall meet the following conditions:

(a) The random drug testing is spread reasonably through the twelve (12) month period;

(b) The last test collection during the year is conducted at an annualized rate of fifty (50) percent; and

(c) The total number of tests conducted during the twelve (12) months is equal to at least twenty-five (25) percent of the covered population.

(4) Testing based on reasonable cause. Each operator shall drug test each employee when there is reasonable cause to believe the employee is using a prohibited drug. The decision to test shall be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use. At least two (2) of the employee's supervisors, one (1) of whom is trained in detection of the possible symptoms of drug use, shall substantiate and concur in the decision to test an employee. The concurrence between the two (2) supervisors may be by telephone. However, in the case of operators with fifty (50) or fewer employees subject to testing under this administrative regulation, only one (1) supervisor of the employee trained in detecting possible drug use symptoms shall substantiate the decision to test.

(5) Return to duty testing. An employee who refuses to take or does not pass a drug test shall not return to duty until the employee passes a drug test administered under this administrative regulation and the medical review officer has determined that the employee may return to duty. An employee who returns to duty shall be subject to a reasonable program of follow-up drug testing without prior notice for not more than sixty (60) months after his return to duty.

Section 6. Drug Testing Laboratory. (1) Each operator shall use for the drug testing required by this administrative regulation only drug testing laboratories certified by the U.S. Department of Health and Human Services under the DOT procedures.

(2) The drug testing laboratory must permit:

(a) Inspections by the operator before the laboratory is awarded a testing contract; and

(b) Unannounced inspections, including examination of records, at any time, by the operator, the administrator or a commission representative.

Section 7. Review of Drug Testing Results. (1) MRO appointment. Each operator shall designate or appoint a medical review officer (MRO). If an operator does not have a qualified individual on staff to serve as MRO, the operator may contract for the provision of MRO services as part of its antidrug program.

(2) MRO qualifications. The MRO shall be a licensed physician with knowledge of drug abuse disorders.

(3) MRO duties. The MRO shall perform the following functions for the operator:

(a) Review the results of drug testing before they are reported to the operator.

(b) Review and interpret each confirmed positive test result as follows to determine if there is an alternative medical explanation for the confirmed positive test result:

1. Conduct a medical interview with the individual tested.
2. Review the individual's medical history and any relevant biomedical factors.
3. Review all medical records made available by the individual tested to determine if a confirmed positive test resulted from legally prescribed medication.
4. If necessary, require that the original specimen be reanalyzed to determine the accuracy of the reported test result.
5. Verify that the laboratory report and assessment are correct.
 - (c) Determine whether and when an employee who refused to take or did not pass a drug test administered under DOT procedures may be returned to duty.
 - (d) Determine a schedule or unannounced testing, in consultation with the operator, for an employee who has returned to duty.
 - (e) Ensure that an employee has been drug tested in accordance with the DOT procedures before the employee returns to duty.
- (4) MRO determinations. The following rules govern MRO determinations:
 - (a) If the MRO determines, after appropriate review, that there is a legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO is not required to take further action.
 - (b) If the MRO determines, after appropriate review, that there is no legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO shall refer the individual tested to an employee assistance program, or to a personnel or administrative officer for further proceedings in accordance with the operator's antidrug program.
 - (c) Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the MRO may conclude that a particular drug test result is scientifically insufficient for further action. Under these circumstances, the MRO should conclude that the test is negative for the presence of a prohibited drug or drug metabolite in an individual's system.

Section 8. Retention of Samples and Retesting. (1) Samples that yield positive results on confirmation shall be retained by the laboratory in properly secured, long-term, frozen storage for at least 365 days as required by the DOT procedures. Within this 365-day period, the employee or his representative, the operator, the administrator, or a commission representative may request that the laboratory retain the sample for an additional period. If, within the 365-day period, the laboratory has not received a proper written request to retain the sample for a further reasonable period specified in the request, the sample may be discarded following the end of the 365-day period.

(2) If the medical review officer (MRO) determines there is no legitimate medical explanation for a confirmed positive test result other than the unauthorized use of a prohibited drug, the original sample shall be retested if the employee makes a written request for retesting within sixty (60) days of receipt of the final test result from the MRO. The employee may specify retesting by the original laboratory or by a second laboratory that is certified by the U.S. Department of Health and Human Services. The operator may require the employee to pay in advance the cost of shipment (if any) and reanalysis of the sample, but the employee shall be reimbursed for such expense if the retest is negative.

(3) If the employee specifies retesting by a second laboratory, the original laboratory shall follow approved chain-of-custody procedures in transferring a portion of the sample.

(4) Since some analytes may deteriorate during storage, detected levels of the drug below the detection limits established in the DOT procedures, but equal to or greater than the established sensitivity of the assay, shall, as technically appropriate, be reported and considered corroborative of the original positive results.

Section 9. Employee Assistance Program. (1) Each operator shall provide an employee assistance program (EAP) for its employees and supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The operator may establish the EAP as a part of its internal personnel services or the operator may contract with an entity that provides EAP services. Each EAP shall include education and training on drug use. At the discretion of the operator, the EAP may include an opportunity for employee rehabilitation.

(2) Education under each EAP shall include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding the use of prohibited drugs.

(3) Training under each EAP for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause shall include one (1) sixty (60) minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use.

Section 10. Contractor Employees. With respect to those employees who are contractors or employed by a contractor, an operator may provide by contract that the drug testing, education, and training required by this administrative regulation be carried out by the contractor provided:

(1) The operator remains responsible for ensuring that the requirements of this administrative regulation are complied with; and

(2) The contractor allows access to property and records by the operator, the administrator, and a commission representative for the purpose of monitoring the operator's compliance with the requirements of this administrative regulation.

Section 11. Recordkeeping. (1) Each operator shall keep the following records for the periods specified and permit access to the records as provided by subsection (2) of this section:

(a) Records that demonstrate the collection process conforms to this administrative regulation shall be kept for at least three (3) years.

(b) Records of employee drug test results that show employees failed a drug test, and the type of test failed (e.g., postaccident), and records that demonstrate rehabilitation, if any, shall be kept for at least five (5) years, and include the following information:

1. The functions performed by employees who failed a drug test.
2. The prohibited drugs which were used by employees who failed a drug test.
3. The disposition of employees who failed a drug test (e.g., termination, rehabilitation, leave without pay).
4. The age of each employee who failed a drug test.

(c) Records of employee drug test results that show employees passed a drug test shall be kept for at least one (1) year.

(d) A record of the number of employees tested, by type of test (e.g., postaccident), shall be kept for at least five (5) years.

(e) Records confirming that supervisors and employees have been trained as required by this administrative regulation shall be kept for at least three (3) years.

(2) Information regarding an individual's drug testing results or rehabilitation may be released only upon the written consent of the individual, except that such information shall be released regardless of consent to the administrator or a commission representative upon request as part of an accident investigation. Statistical data related to drug testing and rehabilitation that is not name-specific and training records shall be made available to the administrator or a commission representative upon request. (18 Ky.R. 1259; Am. 1897; eff. 1-10-92.)