

This is an amendment to 1.7.8 NMAC, Sections 8, 9, 10, 13, 15 and 18, effective 5/20/2025.

**1.7.8.8 OMNIBUS TRANSPORTATION EMPLOYEE TESTING ACT OF 1991:**

**A.** Employees in safety-sensitive positions within the meaning of the *Omnibus Transportation Employee Testing Act of 1991* ("Omnibus Act" (49 U.S.C. Subtitle VI Part B § 31306) are exempt from and are not covered by the provisions of 1.7.8.7 NMAC and 1.7.8.9 NMAC through [~~1.7.8.20~~] 1.7.8.19 NMAC.

**B.** Agencies with employees covered by the Omnibus Act shall develop and submit to the state personnel office (SPO) director a policy for implementing drug and alcohol tests.

**C.** The policy shall contain at the least the:

- (1) covered positions;
- (2) testing requirements for drugs and alcohol;
- (3) collection of specimen;
- (4) reporting and explanation of test results;
- (5) confidentiality;
- (6) training;
- (7) rehabilitation and sanctions;
- (8) record retention;
- (9) rehabilitative and sanction parameters of drug and alcohol abuse; and
- (10) reasonable suspicion.

**D.** Agencies shall advise the board annually of those positions covered by the Omnibus Act. [1.7.8.8 NMAC - Rp, 1.7.8.8 NMAC, 1/14/2025; A, 5/20/2025]

**1.7.8.9 SUBSTANCE ABUSE COORDINATOR:**

**A.** Each agency shall appoint a substance abuse coordinator who shall be responsible for the agency's drug and alcohol abuse program.

**B.** The substance abuse coordinator shall provide drug and alcohol abuse awareness information to employees including but not limited to the:

- (1) dangers of drug and alcohol abuse;
- (2) availability of counseling, rehabilitation, and employee assistance programs; and
- (3) sanctions that may be imposed upon employees as provided in [~~1.7.8.19~~] 1.7.1.18

NMAC.

**C.** The drug abuse coordinator shall ensure that the agency has contracted or made arrangements with a medical review officer to perform the duties required by 1.7.8 NMAC.

[1.7.8.9 NMAC – Rp & Rn., 1.7.8.10 NMAC, 1/14/2025; A, 5/20/2025]

**1.7.8.10 AUTHORIZED DRUG AND ALCOHOL TESTING:**

**A.** The SPO director shall maintain a list of positions designated by the agencies as being safety-sensitive.

**B.** All candidates for safety-sensitive positions are required to submit to drug testing after an offer of employment is made and prior to final selection.

**C.** Agencies that require employees in safety-sensitive positions to undergo regular physical examinations shall require such employees to undergo drug testing as part of those physical examinations.

**D.** Agencies shall require employees to undergo drug, alcohol testing or both if the agency has a reasonable suspicion that the employee has committed drug or alcohol abuse based on, but not limited to:

- (1) direct observation of the physical symptoms or manifestations of being under the influence of a drug or alcohol while on duty; such symptoms may include, but are not limited to liquor on breath, slurred speech, unsteady walk, or impaired coordination; or
- (2) direct observation of the use or possession of drugs or drug paraphernalia, or the use of alcohol while on duty.

**E.** An employee shall submit to a reasonable suspicion drug or alcohol test provided the requesting supervisor has secured the next level supervisor's approval, unless the requesting supervisor is the agency head. The requesting supervisor shall prepare a contemporaneous memorandum outlining the details leading up to the

reasonable suspicion drug or alcohol test. The memorandum shall be submitted to the substance abuse coordinator within 24 hours of the request for testing.

**F** At least ten percent of employees in safety-sensitive positions in each agency shall be required to undergo drug testing on a yearly basis.

(1) The SPO director shall identify the safety-sensitive positions on a random selection basis.

(2) At the discretion of the agency head or substance abuse coordinator, employees may be excused from random drug testing if:

(a) they have previously requested referral in accordance with the provisions of Subsection B of ~~[1.7.8.19]~~ 1.7.1.18 NMAC;

(b) the selection for random drug testing is made during the first 30 calendar days following the request for referral; or

(c) they are on an authorized absence for 30 calendar days or more.

(3) The agency head or substance abuse coordinator shall inform the SPO director of any employee excused from random drug testing within 10 working days of receipt of the notice of safety sensitive testing.

**G.** The SPO director may authorize an agency to conduct more than ten percent (10%) random drug testing on employees in safety sensitive positions upon receipt of an agency's written request that would include justification of how the additional testing is related to the conditions of employment and the use of equipment that could pose a risk to public health or safety.

[1.7.8.10 NMAC – Rp & Rn., 1.7.8.11 NMAC, 1/14/2025; A, 5/20/2025]

#### **1.7.8.13 ALCOHOL TESTS:**

**A.** A test for alcohol shall be administered by a legally recognized and approved method.

**B.** A test by a legally recognized or approved method with results of blood alcohol content (BAC) level of .04 or more shall be deemed positive for alcohol.

**C.** For employees who have undergone alcohol rehabilitation, pursuant to Paragraph (1) of Subsection D of ~~[1.7.8.19]~~ 1.7.1.18 NMAC, a positive test result during the 30 to 180 calendar days following the first positive test shall subject an employee to disciplinary action. Such a test may be performed by urinalysis.

[1.7.8.13 NMAC - Rp, 1.7.8.14 NMAC, 1/14/2025; A, 5/20/2025]

#### **1.7.8.15 EXPLANATION OF POSITIVE TEST RESULTS:**

**A.** Candidates for a safety sensitive position who test positive for drugs, alcohol or both may, within two workdays of being advised of the test results, submit a written request to the agency's substance abuse coordinator for a review of the test results by the medical review officer. The test results of all employees who test positive for drugs, alcohol or both shall be referred by the agency's substance abuse coordinator or designee to the medical review officer.

(1) If the candidate does not request a review of the test results within two workdays, the candidate waives review by the medical review officer and any retesting of the sample and consents to rejection for selection.

(2) The medical review officer shall examine any proffered or possible explanations concerning the validity of the confirmed positive test results. This action may include conducting a medical interview, review of the medical history, review of the chain of custody, and discussions with the collection or laboratory personnel. The medical review officer shall review all medical records made available by the individual when a positive test could have resulted from legally prescribed medications for medical or dental treatment. The medical review officer shall also review the results of any retest done according to the provisions of ~~[1.7.8.17]~~ 1.7.1.16 NMAC.

(a) Should any questions arise as to the accuracy or validity of a confirmed positive test result, only the medical review officer is authorized on behalf of the state to order a reanalysis of the original sample and such retests are authorized to be performed only at a laboratory that meets applicable provisions of any state licensure requirements and is certified by the substance abuse and mental health services administration or the college of American pathologists in forensic urine drug testing.

(b) Prior to making a final decision to verify a positive test result, the medical review officer shall give the candidate or employee an opportunity to discuss the test results. The discussion between the medical review officer and the candidate or employee may be in person or by telephone.

(c) The medical review officer shall advise the appropriate substance abuse coordinator of his or her medical conclusions from the review of the test results. If there are conflicting factual

statements, the medical review officer shall not attempt to resolve that factual conflict, but shall report it along with his or her medical conclusions to the agency substance abuse coordinator. Similarly, the medical review officer shall not attempt to ascertain the factual correctness of any claim by the candidate or employee of involuntary ingestion of drugs or alcohol or both, but shall simply report such claims to the agency substance abuse coordinator with his or her medical opinion as to the possibility that such occurrence could have affected the test results.

**B.** Based upon the medical review officer's report and such other inquiries or facts as the agency may consider, the agency shall determine whether the explanations or challenges of the confirmed positive test results are satisfactory.

- (1) If the explanations or challenges of the positive test results are unsatisfactory the agency:
  - (a) shall provide a written explanation to the candidate or employee as to why the explanation is unsatisfactory, along with the test results, within 11 calendar days of the agency's determination; and
  - (b) shall retain such records as confidential for one year.
- (2) If the explanations or challenges of the positive test results are satisfactory the agency:
  - (a) shall notify the candidate or employee in writing within 11 calendar days of the agency's determination; and
  - (b) shall retain such records as confidential for one year.

[1.7.8.15 NMAC – Rp & Rn., 1.7.8.16 NMAC, 1/14/2025; A, 5/20/2025]

### **1.7.8.18 REHABILITATION AND SANCTIONS:**

#### **A. Candidates for employment:**

(1) A candidate for employment in a safety-sensitive position shall be rejected for selection when he tests positive for drugs and does not seek review by the medical review officer or cannot satisfactorily explain the positive test results.

(2) An employee for transfer or promotion to a safety-sensitive position who tests positive for drugs and is unable to satisfactorily explain the positive test results shall be subject to disciplinary action including dismissal if the employee occupies a safety-sensitive position. If the employee is not in a safety-sensitive position, the employee shall be treated in accordance with the provisions of Subsection D of [~~1.7.8.19~~ 1.7.1.18 NMAC.

#### **B. Voluntary self-identification by employees:**

(1) Any employee who requests referral to an EAP, counseling or a drug or alcohol rehabilitation program, prior to selection for drug and alcohol testing shall be referred by the substance abuse counselor. Any costs for counseling or rehabilitation shall be borne by the employee.

(2) The agency may grant administrative leave to an employee to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial voluntary self-identification only.

(3) Employees in safety-sensitive positions, who have requested referral shall be assigned to non safety-sensitive duties until successful completion of the approved substance abuse program or treatment plan and release by the substance abuse program provider.

(4) Employees are subject to drug, alcohol testing or both at the discretion of the substance abuse coordinator at any time between 30 and 180 calendar days of requesting referral.

(a) Employees in safety-sensitive positions who test positive during this time period or fail to successfully complete such program are subject to disciplinary action including dismissal.

(b) Employees in non safety-sensitive positions who test positive during this time period or fail to successfully complete such program may be subject to disciplinary action including dismissal. The agency may allow the employee to use annual leave, sick leave, or leave without pay for additional counseling or rehabilitation by the agency after considering all factors relevant to the employee's condition and job performance history.

(5) For employees who have been required to undergo an alcohol rehabilitation program, any indication of alcohol at any level during the 30 to 180 calendar day period following the referral shall be considered a positive test result.

**C. Safety-sensitive positions:** Employees in safety-sensitive positions who have not requested referral to an employee assistance program, counseling, or a drug or alcohol rehabilitation program and test positive on a required drug, alcohol test or both shall be subject to disciplinary action including dismissal if they do not have a satisfactory explanation for the positive test results.

#### **D. Non safety-sensitive positions:**

(1) Employees in non safety-sensitive positions who test positive on a reasonable suspicion drug or alcohol test or both required by Subsection [D] E of ~~[1.7.8.11]~~ 1.7.1.10 NMAC and do not have a satisfactory explanation for the positive test results shall be referred to an employee assistance program, counseling, or a drug or alcohol rehabilitation program. Employees are subject to drug or alcohol testing at the discretion of the substance abuse coordinator at any time between 30 and 180 calendar days of the first positive test. Any such employee who tests positive for drugs, alcohol or both between 30 and 180 calendar days of the first positive test without a satisfactory explanation or who fails to enter and successfully complete a program shall be subject to disciplinary action including dismissal.

(2) The agency may grant an employee administrative leave to participate in an employee assistance program, counseling, or a drug or alcohol rehabilitation program for up to 240 hours for the initial reasonable suspicion referral only.

**E. Refusal to cooperate in testing procedure:** Any employee who refuses or fails without good cause to cooperate in the drug or alcohol testing or both procedure by refusing or failing to complete the specified forms, by refusing or failing to submit a urine or breath specimen, or otherwise refuses or fails to cooperate shall be subject to disciplinary action including dismissal.

**F. Possession of drugs or alcohol:**

(1) Employees who illegally sell, purchase, or convey from one person or one place to another drugs or any substance in *Schedules I and II of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978 (Repl. Pamp. 1994)*, while on duty shall be subject to disciplinary action including dismissal and shall be reported to the local law enforcement agency.

(2) When employees, while on duty consume or have in their possession drugs, open containers of alcohol or any substance in *Schedules I and II of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978 (Repl. Pamp. 1994)* without a valid prescription or as otherwise authorized by law, they shall be subject to disciplinary action including dismissal and shall be reported to the local law enforcement agency. [1.7.8.18 NMAC – Rp & Rn., 1.7.8.19 NMAC, 1/14/2025; A, 5/20/2025]