

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 471
EMPLOYMENT DEPARTMENT

FILED

11/17/2017 8:16 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Updates To the Drug and Alcohol Adjudication Policy Rules To Include Cannabis

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/22/2017 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Salem, OR 97311

Filed By:
Cristina Koreski
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 12/22/2017

TIME: 2:00 PM - 4:00 PM

OFFICER: Staff

ADDRESS: Oregon Employment
Department Auditorium

875 Union St NE

Salem, OR 97311

SPECIAL INSTRUCTIONS:

Conference Call Line: 888-850-4523
(Passcode # 440528)

NEED FOR THE RULE(S):

The Employment Department is amending the language in Oregon Administrative Rules 471-030-0125 and 471-030-0126 to be consistent with the changes to statute resulting from the passage of Senate Bill (SB) 302 in the 2017 Legislative Session. The department is also making other technical non-substantive updates relating to drugs, cannabis, and alcohol to reflect current workplace practices and testing requirements defined under other areas of state law.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

The enrolled version of SB 302 passed in the 2017 Legislative Session. A copy of the bill is available at <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB302/Enrolled>, or from the agency.

Oregon Revised Statutes, available online at www.oregonlegislature.gov, or from the agency and Oregon Administrative Rules, available online at http://sos.oregon.gov/archives/Pages/oregon_administrative_rules.aspx, or from the agency.

FISCAL AND ECONOMIC IMPACT:

The department does not foresee any substantial fiscal or economic impact due to this rule change.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

There is no impact on state agencies, units of local government or the public.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Any small business, and types of businesses and industries with small businesses, may be subject to the amendment of this rule but only if they discharge workers from employment due cannabis consumption, and the worker files an unemployment claim. The Employment Department does not have any reliable way to provide a specific number because this information has not been historically captured by the department, but estimates there is only a relatively small number, if any, of businesses and types of businesses and industries with small businesses which would be subject to the rule.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

There is no increase in costs for projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services, as a result of the amendment of these rules.

c. Equipment, supplies, labor and increased administration required for compliance:

There is no increase in costs for equipment, supplies, labor and increased administration required for compliance as a result of the amendment of these rules.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were not specifically involved in the development of this rule. However, the department will continue to seek input from small businesses during the public comment and public hearing process.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The department does not have an Administrative Rule Advisory Committee. However, as specified under ORS 657.695, the department does have an Employment Department Advisory Council. We will continue to seek input during the public comment and public hearing stages of the process, and seek input from the Employment Department Advisory Council.

RULES PROPOSED:

471-030-0125, 471-030-0126

AMEND: 471-030-0125

RULE SUMMARY: The Employment Department is amending language in two Oregon Administrative Rules, 471-030-0125 and 471-030-0126, relating to Unemployment Insurance (UI) resulting from the passage of Senate Bill (SB) 302 in the 2017 Legislative Session. SB 302 modified Oregon Revised Statute (ORS) 657.176 to do the following:

1. Replaced all references to the term "Marijuana" with the term "Cannabis";
2. Included "Cannabis" with the two other substances, "Drugs" and "Alcohol", for which an individual can be found to be in possession or under the influence of, be tested for, seek rehabilitation for, and be disqualified from receiving UI; and
3. Established the requirement that individuals who are discharged from employment due to absence or tardiness as a result of cannabis use twice within a 12 month period of time are disqualified from receiving UI.

The department is also making other technical updates relating to drugs, cannabis, and alcohol to reflect current workplace practices and testing requirements defined under other areas of state law.

The Employment Department requests public comment on whether other options should be considered for achieving the rule's substantive goals, while reducing the negative economic impact of the rule on businesses. The agency is holding a public hearing for this rule on Friday, December 22, 2017 from 2:00 p.m. - 4:00 p.m. in the Employment Department Auditorium (875 Union St NE, Salem, OR 97311). Anyone interested in providing the department feedback on the rule is welcome to attend the public hearing in person. If you are unable to attend the hearing in person but want to provide comments on the rule, you have the option of calling the conference line at 888-850-4523 (Passcode # 440528). Written comments may also be submitted via e-mail to OED_Rules@oregon.gov by December 22, 2017 at 5:00 p.m. All comments received will be given equal consideration before the department proceeds with the permanent rulemaking.

CHANGES TO RULE:

471-030-0125

Benefits and Claims: Drug, Cannabis, and Alcohol Adjudication Policy ¶

(1) Purpose. For purposes of any applicable provision of ORS 657.176, this rule establishes policy for adjudicating cases involving the use, sale, possession or effects of drugs, cannabis, or alcohol in the workplace.¶

(2) Definitions. For the purposes of this rule:¶

(a) For purposes of ORS 657.176(9)(~~A~~), "workplace" means the employer's premises or any place at or in which an individual performs services for the employer or otherwise acts within the course and scope of employment.¶

(b) For purposes of ORS 657.176(9)(~~B~~), an individual "fails or refuses to take" a drug, cannabis, or alcohol test when the individual does not take ~~a drug or alcohol~~ the test as directed by the employer in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement.¶

(c) For purposes of ORS 657.176(9)(~~a~~) and 657.176(13)(~~d~~), an individual is "under the influence" of intoxicants if, at the time of a test administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, the individual has any detectable level of drugs, cannabis, or alcohol present in the individual's system, unless the employer otherwise specifies particular levels of drugs, cannabis, or alcohol in its policy or collective bargaining agreement.¶

(d) "Performing services for the employer" as used in ORS 657.176(9)(~~D~~) and "during work" as used in ORS 657.176(9)(~~E~~) mean that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration.¶

(e) For purposes of ORS 657.176(9)(~~F~~), an individual "tests positive" for alcohol, cannabis, or an unlawful drug

when the test is administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test:¶

(A) The amount of drugs, cannabis, or alcohol determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement; or¶

(B) The individual has any detectable level of drugs, cannabis, or alcohol present in the individual's system if the policy or agreement does not specify a cut off level.¶

(f) An individual fails a test for alcohol, cannabis, or unlawful drugs when the individual tests positive as described in subsection (e) of this section.¶

(g) For purposes of ORS 657.176(9) and 657.176(13), "unlawful drug" means a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. This term does not include a drug prescribed and taken by the individual under the supervision of a licensed health care professional and used in accordance with the prescribed directions for consumption, or other uses authorized by law.¶

(h) "Connection with employment" as used in ORS 657.176(9)(a)(F) means where such positive test affects or has a reasonable likelihood of affecting the employee's work or, the employer's interest, and/or workplace.¶

(i) For purposes of ORS 657.176(9)(b)(A):¶

(A) "Recognized drug, cannabis, or alcohol rehabilitation program" means a program authorized and licensed under the provisions of OAR chapter 415, or authorized and licensed under similar provisions in by the State of Oregon, or another state.¶

(B) "Documentation of participation in the program" means a signed statement by an authorized representative of the recognized program that the individual is was engaged in a course of treatment or was participating in a treatment program.¶

(C) "Participation" means to be engaged in a course of treatment through a recognized drug, cannabis, or alcohol rehabilitation program.¶

(3) For purposes of ORS 657.176(9)(a), (10), and 657.176(13)(d), a written employer policy is reasonable if:¶

(a) The policy prohibits the use, sale, possession, or effects of drugs, cannabis, or alcohol in the workplace; and¶

(b) The employer follows its policy policy does not require the employee to pay for any portion of the test; and¶

(c) The policy has been published and communicated to the individual or provided to the individual in writing; and¶

(d) When the policy provides for drug, cannabis, or alcohol testing, the employer has:¶

(A) Probable cause for requiring the individual to submit to the test; or¶

(B) The policy provides for random, blanket or periodic testing.¶

(4) Probable Cause for Testing. For purposes of ORS 657.176(9)(a), an employer has probable cause to require an employee to submit to a test for drugs and/or alcohol, cannabis, alcohol, or a combination thereof if:¶

(a) The employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs, cannabis, or alcohol in the workplace. Such evidence may include, but is not limited to, bizarre abnormal behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property; or¶

(b) The employer has received credible information that a worker uses or may be affected by drugs, cannabis, or alcohol in the workplace; or¶

(c) Such test is required by applicable state or federal law, or an applicable collective bargaining agreement that has not been declared invalid in final arbitration; or¶

(d) Such test is required or allowed pursuant to a reasonable written last chance agreement.¶

(5) Random, blanket and periodic testing. For purposes of ORS 657.176(9) and (10):¶

(a) A "random test for drugs and/or alcohol" means a test for drugs and/or alcohol, cannabis, or alcohol, or a combination thereof given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing.¶

(b) A "periodic test for drugs and/or alcohol, cannabis, or alcohol, or a combination thereof" means a drug and/, cannabis, or alcohol test or a combination thereof administered at various prescribed intervals.¶

(c) A "blanket test for drugs and/or alcohol" means a test for drugs and/or alcohol, cannabis, or alcohol, or a combination thereof applied uniformly to a specified group or class of employees.¶

(6) For purposes of ORS 657.176(9)(a) and 657.176(13)(c), (10), and (13), no employer policy is reasonable if the employee is required to pay for the cost of the test does not follow their own policy.¶

(7) For purposes of ORS 657.176(13)(c), a ~~last chance~~ reasonable agreement is a document signed by the employee for the as a condition of continued employment and is reasonable if:¶

(a) ~~It is written; and~~¶

(b) ~~It contains only reasonable conditions. Reasonable conditions include, but are not li:~~¶

(a) The agreement may require the employee to submitted to, agreeing to remain drug or alcohol free; participating in drug, cannabis, or alcohol testing;¶

(b) The a-rehabilitation program; participating in an employee assistance program, ement may not require the employee to pay for other similar program; submitting to random, blanket, or periodic drug or alcohol testing to demonstrate that the employee remains drug or alcohol free.¶

(c) A term requiring an employee to pay for any of the cost of participation in a rehabilitation program is reasonable only if the cost is reasonable in consideration of the employee's ability to pay.¶

(d) A term requiring an employee to pay for any of the cost of a drug or alcohol test is not a reasonable condition test; and¶

(c) The agreement may not require them to attend a rehabilitation program that causes a hardship to the individual.¶

(8) ~~Failure to Apply/~~ Failure to Accept:¶

(a) A requirement that job candidates submit to a pre-employment drug, cannabis, or alcohol test does not make the work unsuitable for purposes of ORS 657.176(2) and 657.190.¶

(b) If, after being referred by the Employment Department, an individual does not apply for otherwise suitable work because the employer requires a pre-employment drug, cannabis, or alcohol test, the individual has committed a disqualifying act, unless the individual is required to pay for costs associated with the drug, cannabis, or alcohol test.¶

(c) If an individual does not accept an offer of otherwise suitable work because the employer requires pre-employment drug, cannabis, or alcohol testing, the individual has committed a disqualifying act, unless the individual is required to pay for the costs associated with the drug, cannabis, or alcohol test.¶

(9) The employee is discharged or suspended for committing a disqualifying act if:¶

(a) The employee violates or admits a violation of a reasonable written employer policy governing the use, sale, possession or effects of drugs, ~~marijuana~~ cannabis, or alcohol in the workplace; unless in the case of drugs, ~~other than marijuana~~, the employee can show that the violation did not result from unlawful drug use.¶

(b) In the absence of a test, there is clear observable evidence that the employee is under the influence of alcohol in the workplace.¶

(10) ~~Procedures for testing. For~~ For the purposes of ORS 657.176(9)(a) and 657.176(10):¶

(a) ~~In the case of a positive blood or urine test for drugs or alcohol, in order to determine whether an individual fails a test, is under the influence, or tests positive, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory.~~¶

(b) ~~In the case of a positive b~~ Testing for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.¶

(b) Breathalyzer tests for alcohol, a confirming test is not required must be conducted in accordance with ORS 659A.300 and ORS 659.840.¶

(11) If the employer discharges or suspends an employee because of use, sale, or possession of drugs, cannabis, or alcohol in the workplace and the employer has no written policy regarding the use, sale, or possession of drugs, cannabis, or alcohol in the workplace, the provisions of OAR 471-030-0038 apply.

Statutory/Other Authority: ORS 657.610

Statutes/Other Implemented: ORS 657.176 & Ch. 792, OL 2003 (SB 916)

AMEND: 471-030-0126

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CHANGES TO RULE:

471-030-0126

Benefits and Claims: Absence Due to Alcohol, Cannabis, or Drug Use ¶

(1) "Drug" has the meaning given in ORS 475.005(6);¶

(2) "Documentation of program participation" means a signed statement by an authorized representative of the recognized program that the individual is ~~engaged in a course of~~ was participating in a treatment program;¶

(3) "Participation" means to be engaged in a course of treatment through a recognized drug, cannabis, or alcohol rehabilitation program;¶

(4) "~~Recognized alcohol rehabilitation program~~" means ~~a program authorized and licensed under the provisions of OAR chapter 415, or authorized and licensed under similar provisions in another state~~;¶

(5) "~~Recognized drug~~ drug, cannabis, or alcohol rehabilitation program" means a program authorized and licensed ~~under the provisions of OAR chapter 415~~ by the State of Oregon, or authorized and licensed ~~under similar provisions in~~ by another state.

Statutory/Other Authority: ORS 657.610

Statutes/Other Implemented: ORS 657.176