

OFFICE OF MANAGEMENT AND BUDGET

DIVISION OF FACILITIES MANAGEMENT

Statutory Authority: 29 Delaware Code, Section 6908(a)(6) (29 **Del.C.** §6908(a)(6))
19 **DE Admin. Code** 4104

FINAL

ORDER

4104 Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects

The Office of Management and Budget (OMB) initiated proceedings to amend the Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects (19 **DE Admin. Code** 4104). The OMB proceedings to amend regulations were initiated pursuant to 29 **Del.C.** Chapter 101 and authority as prescribed by 29 **Del.C.** Ch. 69, §6908(a)(6). A final order was issued on December 1, 2017 and became effective on January 1, 2018. This is an amendment to that final order.

SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

On June 1, 2017, OMB published proposed amendments related to the Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects in the Delaware *Register of Regulations* (Volume 20, Issue 12). After receiving comments that led to substantive changes, OMB re-published the proposed amendments in the October 1, 2017 Delaware *Register of Regulations* (Volume 21, Issue 4). It was requested at that time that written comments from the public concerning the revised proposed regulations be delivered to OMB by November 3, 2017. OMB did not receive any written comments in response to this request. OMB then published a Final Order in the December, 2017 *Register of Regulations* (Volume 21, Issue 6) adopting and promulgating the amended regulation with an effective date for all large public works projects advertised for bid on or after January 1, 2018.

FINDINGS OF FACT

OMB finds that the proposed amended regulations as set forth in the October, 2017 *Register of Regulations* (Volume 21, Issue 4) represent a fair balance to protect management, labor and members of the public. OMB finds that by placing an effective date of January 1, 2018, it requires Prime and Subcontractors who have an existing contract having to maintain two procedures for the required testing if they are awarded a new contract. In order to mitigate that potential administrative burden and cost on those Prime and Subcontractors, the amended regulation should be effective for all projects including those already in existence as well as those advertised for bid on or before January 1, 2018.

NOW THEREFORE, under the statutory authority and for the reasons set forth above, the Director of the Delaware Office of Management and Budget does hereby ORDER that the amended Regulation be, and that it hereby is, adopted and promulgated and effective for all large public works projects. The effective date of this Order is for all large public works as of February 10, 2018.

Michael S. Jackson, Director
Office of Management and Budget

***Please note: There were no changes made to the text of the final regulation as published in the December 1, 2017 issue of the *Register of Regulations*. The text of the current regulation is reprinted below and available at <http://regulations.delaware.gov/AdminCode/title19/4000/4100/4104.pdf>.**

4104 Regulations for the Drug Testing of Contractor and Subcontractor Employees Working on Large Public Works Projects

1.0 Purpose

The Office of Management and Budget ("Office"), has developed these regulations that require Contractors and Subcontractors to implement a program of mandatory drug testing for Employees who work on Large Public Works Contracts funded all or in part with public funds pursuant to 29 **Del.C.** §6908(a)(6). The regulations establish the mechanism, standards and requirements of a Mandatory Drug Testing Program that will be incorporated by reference into

all Large Public Works Contracts awarded pursuant to 29 Del.C. §6962.

2.0 Definitions

"Consortium"/"Third Party Administrator" or "(C/TPA)" means a service agent that provides or coordinates the provision of a variety of drug and alcohol testing services to employers. C/TPAs typically perform administrative tasks concerning the operation of the employers' drug and alcohol testing programs. This term includes, but is not limited to, groups of employers who join together to administer, as a single entity, the drug and alcohol testing programs of its members.

"Contractor" means an entity such as, but not limited to, an individual, firm, partnership or corporation that has a contractual obligation to perform work for contracts awarded pursuant to 29 Del.C. §6962.

"Division of Facilities Management" and **"DFM"** means the Division of Facilities Management within the Office of Management and Budget.

"Drug Testing Firm" is an entity engaged in the business of providing drug testing services for businesses, individuals, governments or any entity that requires drug testing of Employees, applicants, licensees, etc., in compliance with these requirements.

"Employee" means an individual employed by a Contractor or Subcontractor who works on the Jobsite of a Large Public Works Contract but does not fulfill a clerical or administrative function. For the purpose of this definition, clerical or administrative functions shall refer to job responsibilities that do not generally require an employee to work outside of the Contractor's Jobsite office, home office or other employer-provided office. For the purposes of this regulation, the term "Employee" shall also include supervisors and foremen working on the Jobsite. The term "Employee" shall also include employees of a Contractor or Subcontractor working on or delivering materials and equipment to and from a Jobsite.

"Impairment" or **"Impaired"** means symptoms that an Employee while working may be under the influence of drugs or alcohol that may decrease or lessen the Employee's performance of the duties or tasks of the Employee's job position, including symptoms of the Employee's speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor, irrational or unusual behavior, negligence or carelessness in operating equipment, machinery or production or manufacturing processes, disregard for the safety of the Employee or others, or other symptoms causing a reasonable suspicion of the use of drugs or alcohol.

"Jobsite" means the site or area directly or indirectly owned, operated or controlled by the Owner in which the Contractor or Subcontractor performs work or delivers services to the Owner. For the purpose of this definition, "Jobsite" does not mean a remote work site not under the direct or indirect control of the Owner in which work is performed to fulfill the Contractor's or Subcontractor's obligations.

"Large Public Works Contract" means a contract for a public works construction awarded pursuant to 29 Del.C. §6962.

"Mandatory Drug Testing Program" and **"Program"** means a defined set of basic procedures, requirements and rules that must be used by a Contractor or Subcontractor to test employees for drugs in compliance with these requirements.

"Owner" is the state agency, school district or entity that awards a Large Public Works Contract to a Contractor pursuant to 29 Del.C. §6962.

"Positive Test Result" and **"Fail a Drug Test"** means the result reported by a Health and Human Services certified laboratory when a specimen contains a drug or drug metabolite equal to or greater than the cutoff concentration. For purposes of these regulations, an Employee shall not be considered to have a Positive Test Result nor shall an Employee be considered to "Fail a Drug Test", unless the employee was impaired by marijuana at the Jobsite if:

- The Employee is a Registered Qualifying Patient and;
- The drug detected was marijuana, a component of marijuana, or marijuana metabolites.

"Random Drug Testing" means that an Employee is chosen at random for testing without advance notice, from a pool of Employees or as a member of a Consortium. Specific requirements for random drug testing conducted under these regulations are described in Section 5.0.

"Registered Qualifying Patient" means a person (1) validly issued and in possession of an unexpired Registry Identification Card as defined by 16 Del.C. §4902A (14), and (2) subject to confirmation through a "verification system" as set forth at 16 Del.C. §4902A(17).

"Subcontractor" means an entity such as, but not limited to, an individual, firm, partnership or corporation that has a contractual obligation to perform work for, or supply services to a Contractor as defined in Section 2.0.

3.0 Employee drug testing documentation requirements.

- 3.1 The following documentation requirements apply:
 - 3.1.1 At bid submission - A solicitation for a Large Public Works Contract must require each Contractor that submits a bid for the work to submit with the bid a signed affidavit certifying that the Contractor and Subcontractor(s) has in place or will implement during the entire term of the contract a Mandatory Drug Testing Program that complies with this regulation.
 - 3.1.2 At least two business days prior to contract execution – The awarded Contractor shall provide to the Owner copies of the Employee Drug Testing Program for the Contractor and for all listed Subcontractors.
 - 3.1.3 During contract execution – Contractors that employ additional Subcontractors on the jobsite may do so only after submitting a copy of the Subcontractor's Employee Drug Testing Program. A Contractor or Subcontractor shall not commence work until the Owner has concluded the Employee Drug Testing Program complies with this Regulation as per subsection 3.2.
 - 3.1.4 In the event of an emergency a Contractor may employ additional Subcontractors on the jobsite prior to submitting the Subcontractor's Employee Drug Testing Program provided that said Program is submitted to the Owner as soon as practicable.
- 3.2 A Contractor or Subcontractor shall be treated as having a Mandatory Drug Testing Program that complies with this regulation if the Program includes the following:
 - 3.2.1 The Program meets the minimum standards in Section 4.0 of this regulation.
 - 3.2.2 The Program provides for the frequency of testing of Employees as per Section 5.0 of this regulation:
 - 3.2.3 The Program imposes disciplinary measures on an Employee who fails a drug test as per Section 6.0 of this regulation.
- 3.3 Prequalified Contractors and Subcontractors – A Contractor or Subcontractor may meet the provisions of subsection 3.1 if they are Prequalified through the DFM Prequalification and if the DFM Prequalification includes provisions requiring an Employee Mandatory Drug Testing Program that meet the requirements of Sections 4.0, 5.0 and 6.0 of this Regulation
- 3.4 The State shall not be obligated to pay, and the Contractor or Subcontractor shall expressly agree that, any portion of work performed by a Contractor or Subcontractor commenced before that Contractor or Subcontractor has complied with subsections 3.1 and 3.2, provided however that emergency work as referenced in subsection 3.1.4 may not be subject to this provision.

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4.0 Minimum Standards for a Mandatory Drug Testing Program

- 4.1 Testing for the presence of drugs in an Employee's system and the handling of test specimens shall be conducted in accordance with guidelines for the collection, chain-of-custody procedures, laboratory testing, and Medical Officer Review procedures contained within the Mandatory Guidelines for Federal Workplace Drug Testing Programs published by the Substance Abuse and Mental Health Services Administration (SAMHSA). (49 CFR Part 40).

All tests must be processed by a federal Health and Human Services certified laboratory. Contractors must provide documentation detailing the procedures used in the collection, testing and reporting of drug tests sufficient to show conformance with SAMHSA guidelines.
- 4.2 Contractors and Subcontractors subject to these regulations may procure the services of an appropriate Drug Testing Firm to administer their program. A Contractor or Subcontractor may also participate in a Consortium. A Contractor or Subcontractor may also implement a Mandatory Drug Testing Program using in-house personnel and resources.

- 4.3 Employees subject to drug testing shall be tested using at a minimum a seven-panel protocol testing plus alcohol screening for the following:

Initial test analyte	Initial test cutoff concentration	Confirmatory test analyte	Confirmatory test cutoff concentration
Marijuana metabolites	50 ng/mL	THCA	15 ng/mL.
Cocaine metabolites	150 ng/mL	Benzoylecgonine	100 ng/mL.
Opiate metabolites			
Codeine/Morphine	2000 ng/mL	Codeine	2000 ng/mL.
		Morphine	2000 ng/mL.
6-Acetylmorphine	10 ng/mL	6-Acetylmorphine	10 ng/mL.
Phencyclidine	25 ng/mL	Phencyclidine	25 ng/mL.
Amphetamines			
AMP/MAMP	500 ng/mL	Amphetamine	250 ng/mL.
		Methamphetamine	250 ng/mL.
MDMA	500 ng/mL	MDMA	250 ng/mL.
		MDA	250 ng/mL.
		MDEA	250 ng/mL.
Alcohol	0.04%		

- 4.4 The frequency of Random Drug Testing and the methodology for selecting Employees to be screened are defined in Section 5.0 and shall be incorporated into Contractor and Subcontractor mandatory testing procedures. A Contractor or Subcontractor may incorporate rules or requirements that exceed the requirements defined herein.

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5.0 Drug Testing Requirements – Frequency for the Testing of Employees

- 5.1 Initial Drug Testing - Employees commencing work on a Jobsite must be tested with the exception that an Employee who has passed a random or scheduled drug test within the past 180 days from the date of commencing work or an Employee who passed a pre-employment drug test administered pursuant to an Contractor's or Subcontractor's Program and is subject to testing as part of a Contractor's or Subcontractor's ongoing Program or as part of a Consortium shall be permitted to work at the Jobsite without further testing; however, the Employee is still subject to random testing.
- 5.2 Random Drug Testing - During the course of a project, each Contractor and Subcontractor with Employees on the Jobsite shall maintain a Program that meets or exceeds the following requirements.
- 5.2.1 All Employees will be subject to random, unannounced testing.
- 5.2.2 The selection of Employees shall be made by a scientifically valid method of randomly generating an employee identifier from a Contractor or Sub-contractor's entire pool of employees, through those Employees working on a Public Works Jobsite or through the Contractor or Subcontractor's participation in a Consortium.
- 5.2.3 A Contractor or Subcontractor's Program shall provide that no less than 5% of a Contractor's or Subcontractor's employees shall be randomly selected each month for drug testing and no less than 2.5% of a Contractor or Subcontractor's employees be randomly selected for alcohol testing. Contractors or Subcontractors may participate in a Consortium provided that no less than 5% of the Consortium's pool shall be subject to drug testing each month and no less than 2.5% of the Consortium's pool shall be subject to alcohol testing each month. Contractors or Subcontractors with less than 10 employees that do not participate in a Consortium shall test at least one of their employees, selected randomly per month. Each employee shall have an equal chance of selection each time the selection is made. Because the selection process is random, some Employees may not be tested within a year, while others may be tested more than once. Nothing in this regulation shall require an Employee of a Contractor or Subcontractor not working or assigned to a Public Works Jobsite to be subject to random alcohol testing.
- 5.2.4 Employees notified that they have been selected must report within four hours for testing to a site specified. Employees so notified must have been given such notification at least four hours before the scheduled closing time of the testing facility. Any failure to report for random testing, or to cooperate with the testing procedure shall be considered a positive result.
- 5.2.5 Purposely impeding or delaying an Employee's fulfillment of the testing requirements herein by a Contractor or Subcontractor may subject the Contractor or Subcontractor to sanctions listed in Section 8.0.

- 5.3 Reasonable Suspicion Testing – An Employee will be required to take a drug and/or alcohol test at any time his or her employing Contractor, Subcontractor or the Owner reasonably believes that he or she has an Impairment caused by drugs and/or alcohol. Further, an Employee may be required to take a drug and/or alcohol test at any time his or her employing Contractor, Subcontractor or the Owner finds drug paraphernalia and/or open alcohol containers on the Jobsite.
- 5.4 Return to Duty Testing – As required in Section 6.0.
- 5.5 Accident Triggered Testing – An Employee will be required to take a drug test and may be subject to an alcohol breathalyzer test at any time there is a Jobsite accident involving loss or significant property damage, injury or death to an Employee of the Contractor, Subcontractor, or Owner or member of the public.
 - 5.5.1 As soon as practicable following an accident, the Contractor will notify the Employee(s) whose performance could have contributed to the accident of the need for the test.
 - 5.5.2 The appropriate Contractor shall ensure that an Employee, required to be tested under this section, report to a testing center as soon as practicable, but no longer than 4 hours after the accident. Employees so notified must have been given such notification at least four hours before the scheduled closing time of the testing facility. If the drug test is not conducted within 4 hours, attempts to conduct the test must cease and the reasons for the failure to test documented.
 - 5.5.3 An Employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying a supervisor of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed to have refused to submit to testing.
 - 5.5.4 If an Employee fails or refuses to be tested, he/she must be removed from the Jobsite and shall be subject to consequences in Section 6.0.
 - 5.5.5 Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident, or to prohibit an Employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.
- 5.6 All testing required by this section shall be administered according to the standards outlined in Section 4.0.

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6.0 Consequences of a Positive Test Result

- 6.1 The disciplinary measures contained within a Contractor's or Subcontractor's Program for an employee who tests positive to a mandatory drug test must include at a minimum, all of the following:
 - 6.1.1 The Employee is subject to an immediate suspension from any public works Jobsite.
 - 6.1.2 The Employee is not eligible for reinstatement by the Contractor or Subcontractor to any public works Jobsite until 30 days after the Employee tests negative on a seven drug panel plus alcohol test certified by a medical review officer.
 - 6.1.3 The Employee is subject to unscheduled monthly random testing as per subsection 5.2.
 - 6.1.4 An Employee who has tested positive for more than one drug test within a three year period shall be permanently banned from working at public works Jobsites.
 - 6.1.5 An Employee who has tested positive for marijuana, a component of marijuana, or marijuana metabolites and is a Registered Qualifying Patient shall be exempted from the disciplinary actions contained in this section unless:
 - 6.1.5.1 The Employee was Impaired by marijuana at the Jobsite
 - 6.1.5.2 Employment of the Registered Qualifying Patient would cause the Owner to lose monetary or licensing-related benefits under Federal law.
- 6.2 A Contractor or Subcontractor shall report the Positive Test Result to the Employee's professional licensing board, if applicable.

21 DE Reg. 503 (12/01/17)

7.0 Contractor and Subcontractor Certification of Compliance with Regulations

- 7.1 During the term of the contract:
 - 7.1.1 During the term of the contract, Contractors and Subcontractors on the Jobsite for more than 30 days shall maintain testing data that includes but is not limited to the data elements contained in subsection 7.1.2:
 - 7.1.1.1 A Contractor or Subcontractor that is employed on the Jobsite for less than 30 days shall not be subject to the reporting requirements contained in subsection 7.1.2 of this regulation, unless the Owner specifies that such reporting is required in the Invitation to Bid or Specifications relating to the work to be performed.

- 7.1.2 The data shall at a minimum contain the following elements:
 - 7.1.2.1 The number of Employees who worked on the Jobsite during the previous month or quarter.
 - 7.1.2.2 The number of Employees subjected to random testing during the previous month or quarter.
 - 7.1.2.3 The number of negative results and the number of positive results.
 - 7.1.2.4 Action taken by the Contractor or Subcontractor on an Employee who failed or tested positive to a random test.
- 7.1.3 Test results must be kept by a Contractor or Subcontractor for a minimum of 1 year subsequent to the date of close out of the Public Works project.
- 7.1.4 Any Positive Test Result of an Employee working on a Public Works Jobsite including the Employee name and action taken in response by a Contractor or Subcontractor must be reported by the Contractor or Subcontractor to the Owner in writing within 24 hours of the Contractor or Subcontractor receiving the test results.
- 7.1.5 The Owner shall have the right to periodically audit all Contractor and Subcontractor test results at the Contractor or Subcontractor's offices or by other means to make the data available for inspection by the Owner.
- 7.1.6 The failure to comply with these reporting requirements may be considered a material breach of any agreement relating to the performance of work by the Contractor or Subcontractor.

21 DE Reg. 503 (12/01/17)

8.0 Penalties

- 8.1 A Contractor or Subcontractor on a Large Public Works contract that fails to implement a Mandatory Drug Testing Program in accordance with this regulation or falsifies testing results shall be subject to the following sanctions:
 - 8.1.1 Written warning (1st offense).
 - 8.1.2 Prohibition from bidding on new public works jobs for a period not to exceed three months (2nd offense) and one year (3rd offense).
 - 8.1.3 For subsequent offenses, debarment or bond revocation.
- 8.2 Notwithstanding any other provision of this regulation, if any failure to comply with the requirements of this regulation are particularly flagrant or egregious, the Owner may seek a termination for cause, a temporary suspension, a determination that the Contractor or Subcontractor is not responsible, debarment or bond revocation, and any other statutory, common law, or equitable remedy.

19 DE Reg. 207 (09/01/15)

21 DE Reg. 503 (12/01/17)

21 DE Reg. 645 (02/01/18) (Final)