

TITLE 40 OF THE OKLAHOMA STATUTES
CHAPTER 15. STANDARDS FOR WORKPLACE DRUG AND ALCOHOL TESTING ACT

§40-551. Short title.

Sections 1 through 15 of this act shall be known and may be cited as the "Standards for Workplace Drug and Alcohol Testing Act".
Added by Laws 1993, c. 355, § 1, emerg. eff. June 10, 1993.

§40-552. Definitions.

*Multiple Amendments Enacted During the 2005 Legislative Session
See §40-552v1 or §40-552v2.*

§40-552v1.* Definitions.

As used in the Standards for Workplace Drug and Alcohol Testing Act:

1. "Alcohol" means ethyl alcohol or ethanol;
2. "Applicant" means a person who has applied for a position with an employer;
3. "Board" means the State Board of Health;
4. "Confirmation test" means a drug or alcohol test on a sample to substantiate the results of a prior drug or alcohol test on the same sample and which uses different chemical principles and is of equal or greater accuracy than the prior drug or alcohol test;
5. "Department" means the State Department of Health;
6. "Drug" means amphetamines, cannabinoids, cocaine, phencyclidine (PCP), hallucinogens, methaqualone, opiates, barbiturates, benzodiazepines, synthetic narcotics, designer drugs, or a metabolite of any of the substances listed herein;
7. "Drug or alcohol test" means a chemical test administered for the purpose of determining the presence or absence of a drug or its metabolites or alcohol in a person's bodily tissue, fluids or products;
8. "Employee" means any person who supplies a service for remuneration or pursuant to any contract for hire to a private or public employer in this state;
9. "Employer" means any person, firm, corporation, partnership, association, nonprofit organization or public employer, which has one or more employees within this state, or which has offered or may offer employment to one or more individuals in this state;
10. "Public employer" means the State of Oklahoma or any political subdivision thereof, including any department, agency, board, commission, institution, authority, public trust, municipality, county, district or instrumentalities thereof;
11. "Random selection basis" means a mechanism for selecting employees for drug or alcohol testing that:

* Reference the Oklahoma Attorney General Opinion, cite 2006 OK AG 3, attached to this Rule and decided on 03/06/2006, for a discussion of which § 40-552 version is controlling. Web link:
<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=445716>.

- a. results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected, and
- b. does not give an employer discretion to waive the selection of any employee selected under the mechanism;

12. "Reasonable suspicion" means a belief that an employee is using or has used drugs or alcohol in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience, and may be based upon, among other things:

- a. observable phenomena, such as:
 - (1) the physical symptoms or manifestations of being under the influence of a drug or alcohol while at work or on duty, or
 - (2) the direct observation of drug or alcohol use while at work or on duty,
- b. a report of drug or alcohol use while at work or on duty, provided by reliable and credible sources and which has been independently corroborated,
- c. evidence that an individual has tampered with a drug or alcohol test during his employment with the current employer, or
- d. evidence that an employee is involved in the use, possession, sale, solicitation or transfer of drugs while on duty or while on the employer's premises or operating the employer's vehicle, machinery or equipment;

13. "Review officer" means a person, qualified by the State Board of Health, who is responsible for receiving results from a testing facility which have been generated by an employer's drug or alcohol testing program, and who has knowledge and training to interpret and evaluate an individual's test results together with the individual's medical history and any other relevant information;

14. "Sample" means tissue, fluid or product of the human body chemically capable of revealing the presence of drugs or alcohol in the human body; and

15. "Testing facility" means any person, including any laboratory, hospital, clinic or facility, either off or on the premises of the employer, which provides laboratory services to test for the presence of drugs or alcohol in the human body. The administration of on-site drug or alcohol screening tests to applicants or employees to screen out negative test results are not laboratory services under this paragraph, provided the on-site tests used are cleared by the federal Food and Drug Administration for commercial marketing or by the National Highway Traffic Safety Administration for alcohol testing, and all positive results of such tests are confirmed by a testing facility in accordance with the Standards for Workplace Drug and Alcohol Testing Act.

*Added by Laws 1993, SB 143, c. 355, § 2, emerg. eff. June 10, 1993;
Amended by Laws 2000, HB 1289, c. 335, § 1, emerg. eff. June 6, 2000;
Amended by Laws 2005, HB 1502, c. 190, § 5, eff. September 1, 2005.*

§40-552v2. * Definitions.

As used in the Standards for Workplace Drug and Alcohol Testing Act:

1. "Alcohol" means ethyl alcohol or ethanol;
2. "Applicant" means a person who has applied for a position with an employer;
3. "Board" means the State Board of Health;
4. "Confirmation test" means a drug or alcohol test on a sample to substantiate the results of a prior drug or alcohol test on the same sample and which uses different chemical principles and is of equal or greater accuracy than the prior drug or alcohol test;
5. "Department" means the State Department of Health;
6. "Drug" means amphetamines, cannabinoids, cocaine, phencyclidine (PCP), hallucinogens, methaqualone, opiates, barbiturates, benzodiazepines, synthetic narcotics, designer drugs, or a metabolite of any of the substances listed herein;
7. "Drug or alcohol test" means a chemical test administered for the purpose of determining the presence or absence of a drug or its metabolites or alcohol in a person's bodily tissue, fluids or products;
8. "Employee" means any person who supplies a service for remuneration or pursuant to any contract for hire to a private or public employer in this state;
9. "Employer" means any person, firm, corporation, partnership, association, nonprofit organization or public employer, which has one or more employees within this state, or which has offered or may offer employment to one or more individuals in this state;
10. "Public employer" means the State of Oklahoma or any political subdivision thereof, including any department, agency, board, commission, institution, authority, public trust, municipality, county, district or instrumentalities thereof;
11. "Random selection basis" means a mechanism for selecting employees for drug or alcohol testing that:
 - a. results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected, and
 - b. does not give an employer discretion to waive the selection of any employee selected under the mechanism;
12. "Reasonable suspicion" means a belief that an employee is using or has used drugs or alcohol in violation of the employer's written policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience, and may be based upon, among other things:

* Reference the Oklahoma Attorney General Opinion, cite 2006 OK AG 3, attached to this Rule and decided on 03/06/2006, for a discussion of which § 40-552 version is controlling. Web link:
<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=445716>.

- a. observable phenomena, such as:
 - (1) the physical symptoms or manifestations of being under the influence of a drug or alcohol while at work or on duty, or
 - (2) the direct observation of drug or alcohol use while at work or on duty,
- b. a report of drug or alcohol use while at work or on duty, provided by reliable and credible sources and which has been independently corroborated,
- c. evidence that an individual has tampered with a drug or alcohol test during his employment with the current employer, or
- d. evidence that an employee is involved in the use, possession, sale, solicitation or transfer of drugs while on duty or while on the employer's premises or operating the employer's vehicle, machinery or equipment;

13. "Review officer" means a person, qualified by the State Board of Health, who is responsible for receiving results from a testing facility which have been generated by an employer's drug or alcohol testing program, and who has knowledge and training to interpret and evaluate an individual's test results together with the individual's medical history and any other relevant information;

14. "Sample" means tissue, fluid or product of the human body chemically capable of revealing the presence of drugs or alcohol in the human body; and

15. "Testing facility" means any person, including any laboratory, hospital, clinic or facility, either off or on the premises of the employer, which provides laboratory services to test for the presence of drugs or alcohol in the human body.

Added by Laws 1993, SB 143, c. 355, § 2, emerg. eff. June 10, 1993; Amended by Laws 2000, HB 1289, c. 335, § 1, emerg. eff. June 6, 2000; Amended by Laws 2005, HB 1502, c. 190, § 5, eff. September 1, 2005; Amended by Laws 2005, SB 374, c. 134, § 1, eff. November 1, 2005.

§40-553. Construction of act.

A. The Standards for Workplace Drug and Alcohol Testing Act shall not be construed as requiring or encouraging employers to conduct drug or alcohol testing.

B. Except as provided in subsection C of this section, employers who choose to conduct drug or alcohol testing of job applicants or persons employed in this state shall be governed by the provisions of this act and the rules promulgated pursuant thereto.

C. Drug or alcohol testing required by and conducted pursuant to federal law or regulation shall be exempt from the provisions of the Standards for Workplace Drug and Alcohol Testing Act and the rules promulgated pursuant thereto.

D. This act shall not be construed as preventing the negotiation of collective bargaining agreements that provide greater protection to employees or applicants than is provided by this act.

Added by Laws 1993, c. 355, § 3, emerg. eff. June 10, 1993.

§40-554. Drug or alcohol testing by employers - Restrictions.

Employers who choose to conduct drug or alcohol testing may only request or require an applicant or employee to undergo testing under the following circumstances:

1. Applicant testing: A public or private employer may request or require a job applicant, upon a conditional offer of employment, to undergo drug or alcohol testing and may use a refusal to undergo testing or a confirmed positive test result as a basis for refusal to hire, provided that such testing does not violate the provisions of the Americans with Disabilities Act of 1990, 42 U.S.C., Section 12101 et seq., and provided that such testing is required for all applicants who have received a conditional offer of employment for a particular employment classification;

2. Reasonable suspicion testing: A public or private employer may request or require an employee to undergo drug or alcohol testing if the employer has a reasonable suspicion that the employee has violated the employer's written policy;

3. Post-accident testing: A public or private employer may require an employee to undergo drug or alcohol testing if the employee or another person has sustained a work-related injury or the employer's property has been damaged, including damage to equipment, in an amount reasonably estimated at the time of the accident to exceed Five Hundred Dollars (\$500.00). For purposes of workers' compensation, no employee who tests positive for the presence of substances defined and consumed pursuant to Section 465.20 of Title 63 of the Oklahoma Statutes, alcohol, illegal drugs, or illegally used chemicals shall be eligible for such compensation unless the employee proves by a preponderance of the evidence that the substances, alcohol, illegal drugs, or illegally used chemicals were not the proximate cause of the injury or accident;

4. Random testing: A public or private employer may request or require an employee to undergo drug or alcohol testing on a random selection basis, except that a public employer may require random testing only of employees who:

- a. are police or peace officers,
- b. have drug interdiction responsibilities,
- c. are authorized to carry firearms,
- d. are engaged in activities which directly affect the safety of others, or
- e. work in direct contact with inmates in the custody of the Department of Corrections or work in direct contact with juvenile delinquents or children in need of supervision in the custody of the Department of Human Services;

5. Scheduled, periodic testing: A public or private employer may request or require an employee to undergo drug or alcohol testing if the test is conducted as a routine part of a routinely scheduled employee fitness-for-duty medical examination or is scheduled routinely for all members of an employment classification or group and which is part of the employer's written policy, except that a public employer may require scheduled, periodic testing only of employees who:

- a. are police or peace officers,
- b. have drug interdiction responsibilities,
- c. are authorized to carry firearms,
- d. are engaged in activities which directly affect the safety of others, or
- e. work in direct contact with inmates in the custody of the Department of Corrections or work in direct contact with juvenile delinquents or children in need of supervision in the custody of the Department of Human Services; and

6. Post-rehabilitation testing: A public or private employer may request or require an employee to undergo drug or alcohol testing without prior notice for a period of up to two (2) years commencing with the employee's return to work, following a confirmed positive test or following participation in a drug or alcohol dependency treatment program under an employee benefit plan or at the request of the employer.

Added by Laws 1993, SB 143, c. 355, § 4, emerg. eff. June 10, 1993; Amended by Laws 2001, 1st Extr. Sess., HB 1003, c. 3, § 1, emerg. eff. October 23, 2001; Amended by Laws 2005, 1st Extr. Sess., SB 1, c. 1, § 4, emerg. eff. July 1, 2005; Amended by Laws 2008, HB 1531, c. 132, § 11, eff. November 11, 2008.

§40-555. Written policy required - Notice of policy changes - Distribution.

A. No employer may request or require an applicant or employee to undergo drug or alcohol testing unless the employer has first adopted a written, detailed policy setting forth the specifics of its drug or alcohol testing program. The written policy shall be uniformly applied to those covered by the policy and shall include, but not be limited to, the following information:

1. A statement of the employer's policy respecting drug or alcohol use by employees;
2. Which applicants and employees are subject to testing;
3. Circumstances under which testing may be requested or required;
4. Substances which may be tested. To comply with the provisions of this paragraph, it shall be sufficient for an employer to state in the written policy that the substances tested shall be for drugs and alcohol as defined in the Standards for Workplace Drug and Alcohol Testing Act, including controlled substances approved for testing by rule by the State Commissioner of Health;
5. Testing methods and collection procedures to be used;
6. Consequences of refusing to undergo testing;
7. Potential adverse personnel action which may be taken as a result of a positive test result;
8. The rights of an applicant and employee to explain, in confidence, the test results;
9. The rights of an applicant and employee to obtain all information and records related to that individual's testing;
10. Confidentiality requirements; and
11. The available appeal procedures, remedies and sanctions.

B. An employer who is implementing a drug or alcohol testing policy for the first time, or is implementing changes to its policy, shall provide at least thirty (30) days' notice to its employees prior to implementation of the policy or changes to the policy.

C. An employer shall post a copy of the drug or alcohol testing policy, and any changes to the policy, in a prominent employee access area in the place of employment and shall give deliver a copy of the policy, and any changes to the policy, to each employee and to each applicant upon his or her receipt of a conditional offer of employment. Delivery to employees and persons who are offered employment may be accomplished by:

1. Hand-delivery of a paper copy of the policy or changes to the policy;

2. Mailing a paper copy of the policy or changes to the policy through the U.S. Postal Service or a parcel delivery service to the last address given by the employee or prospective employee to the employer; or

3. Electronically transmitting a copy of the policy through an e-mail server or the Internet to an electronic mail address assigned by the employer to the employee or prospective employee with documented receipt capability, or to an electronic mail address provided by the employee or prospective employee to the employer for the purpose of receiving employment-related e-mails with documented receipt capability.

Added by Laws 1993, SB 143, c. 355, § 5, emerg. eff. June 10, 1993;

Amended by Laws 2007, SB 1028, c. 78, § 2, eff. November 1, 2007;

Amended by Laws 2008, SB 1531, c. 132, § 12, eff. November 11, 2008.

§40-556. Time of employer testing - Payment of costs.

A. Any drug or alcohol testing by an employer shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.

B. An employer shall pay all costs of testing for drugs or alcohol required by the employer, including confirmation tests required by this act and the cost of transportation if the testing of a current employee is conducted at a place other than the workplace. Provided, however, an individual who requests a retest of a sample in order to challenge the results of a positive test shall pay all costs of the retest, unless the retest reverses the findings of the challenged positive test. In such case, the employer shall reimburse the individual for the costs of the retest.

Added by Laws 1993, c. 355, § 6, emerg. eff. June 10, 1993.

§40-557. Testing standards and procedures - Implementation and enforcement - Rules.

A. The State Board of Health shall implement and enforce the provisions of the Standards for Workplace Drug and Alcohol Testing Act. The Board shall have the power and duty to promulgate, prescribe, amend and repeal rules for the licensure and regulation of testing facilities and for the establishment and regulation of minimum

testing standards and procedures, which shall include, but not be limited to, the following:

1. Qualifications of testing facilities which shall include the requirement that facilities doing urine analysis for initial or confirmation tests either be certified for forensic urine drug testing pursuant to guidelines or regulations of the federal Department of Health and Human Services or be accredited for forensic urine drug testing by the College of American Pathologists or other organizations recognized by the State Board of Health;
2. Qualifications of testing facility personnel;
3. Body component samples that are appropriate for drug and alcohol testing, to include saliva, urine and hair;
4. The drugs in addition to marihuana, cocaine, opiates, amphetamines and phencyclidine, and their metabolites, for which testing may be conducted;
5. Methods of analysis and internal quality control procedures to ensure reliable test results;
6. Internal review and certification process for test results;
7. Security measures to preclude adulteration;
8. Chain-of-custody procedures;
9. Retention and storage procedures and durations to ensure availability of samples for retesting;
10. Procedures for ensuring confidentiality of test results;
11. Proficiency testing;
12. Training and qualifications of review officers which shall include, but not be limited to, licensure to practice medicine and surgery or osteopathic medicine or holding a doctorate in clinical chemistry, forensic toxicology, or a similar biomedical science;
13. Training and qualifications of collection site personnel;
14. Sample collection procedures that ensure the privacy of the individual and prevent and detect tampering with the sample;
15. Sample documentation, storage and transportation to the testing facility; and
16. Procedures for the testing facility to provide the necessary documentation of testing procedures and test results to the employer requesting testing services as may be required by a court or administrative proceeding.

B. The rules promulgated by the State Board of Health pursuant to the provisions of this act shall in all applicable respects be consistent with any federal laws and regulations for drug and alcohol testing in the workplace and shall include safeguards, standards and procedures not less stringent than those applicable to federally regulated drug and alcohol testing in the workplace, except where to do so would create a conflict with a provision of this act.

Added by Laws 1993, c. 355, § 7, emerg. eff. June 10, 1993. Amended by Laws 2006, c. 277, § 3, eff. Nov. 1, 2006.

§40-558. Licensing of testing facilities - Fees - Administrative fines.

A. On and after July 1, 1994, no testing facility shall provide laboratory services to an employer to test for the presence or absence of drugs or alcohol unless it meets the qualifications established for

testing facilities pursuant to Section 7 of this act and is licensed by the State Department of Health to perform such tests. The State Board of Health shall promulgate rules relating to the issuance of such license, including rules governing license revocation, suspension and nonrenewal.

B. The fees for licensure of testing facilities by the State Department of Health shall be set by the State Board of Health and shall not be more than One Hundred Fifty Dollars (\$150.00) annually.

C. Any testing facility providing laboratory services to an employer to test for the evidence of drugs or alcohol which is not licensed by the State Department of Health pursuant to this section shall be subject to an administrative fine of not more than Five Hundred Dollars (\$500.00) for each offense. Each test performed by the unlicensed testing facility in violation of this section shall constitute a separate offense.

Added by Laws 1993, c. 355, § 8, emerg. eff. June 10, 1993.

§40-559. Sample collection and testing - Conditions.

All sample collection and testing for drugs and alcohol pursuant to the provisions of this act shall be conducted in accordance with the following conditions:

1. Samples shall be collected and tested only by individuals deemed qualified by the State Board of Health and may be collected on the premises of the employer;
2. Only samples deemed appropriate by the State Board of Health for drug and alcohol testing shall be collected;
3. The collection of samples shall be performed under reasonable and sanitary conditions;
4. A sample shall be collected in sufficient quantity for splitting into two separate specimens, pursuant to rules of the State Board of Health, to provide for any subsequent independent analysis in the event of challenge of the test results of the main specimen;
5. Samples shall be collected and tested with due regard to the privacy of the individual being tested. In the instances of urinalysis, no employer or representative, agent or designee of the employer shall directly observe an applicant or employee in the process of producing a urine sample; provided, however, collection shall be in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;
6. Sample collection shall be documented, and the documentation procedures shall include:
 - a. labeling of samples so as reasonably to preclude the probability of erroneous identification of test results, and
 - b. an opportunity for the applicant or employee to provide notification of any information which the applicant or employee considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs, or other relevant information;

7. Sample collection, storage, and transportation to the testing facility shall be performed so as reasonably to preclude the probability of sample contamination or adulteration;

8. Sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or an equivalent scientifically accepted method of equal or greater accuracy as approved by Board rule, at the cutoff levels as determined by Board rule, before the result of any test may be used as a basis for refusal to hire a job applicant or any action by an employer pursuant to Section 12 of this act; and

9. A written record of the chain of custody of the sample shall be maintained from the time of the collection of the sample until the sample is no longer required.

Added by Laws 1993, c. 355, § 9, emerg. eff. June 10, 1993.

§40-560. Confidentiality of testing results and records - Disclosure of general health information prohibited.

A. Employers shall maintain all drug and alcohol test results and related information, including, but not limited to, interviews, reports, statements and memoranda, as confidential records, separate from other personnel records. Such records, including the records of the testing facility, shall not be used in any criminal proceeding, or any civil or administrative proceeding, except in those actions taken by the employer or in any action involving the individual tested and the employer or unless such records are ordered released pursuant to a valid court order.

B. The records described in subsection A of this section and maintained by the employer shall be the property of the employer and, upon the request of the applicant or employee tested, shall be made available for inspection and copying to the applicant or employee. An employer shall not release such records to any person other than the applicant, employee or the employer's review officer, unless the applicant or employee, in writing following receipt of the test results, has expressly granted permission for the employer to release such records or pursuant to a valid court order.

C. A testing facility, or any agent, representative or designee of the facility, or any review officer, shall not disclose to any employer, based on the analysis of a sample collected from an applicant or employee for the purpose of testing for the presence of drugs or alcohol, any information relating to:

1. The general health, pregnancy or other physical or mental condition of the applicant or employee; or

2. The presence of any drug other than the drug or its metabolites that the employer requested be identified and for which a medically acceptable explanation of the positive result, other than the use of drugs, has not been forthcoming from the applicant or employee.

Provided, however, a testing facility shall release the results of the drug or alcohol test, and any analysis and information related thereto, to the individual tested upon his request.

Added by Laws 1993, c. 355, § 10, emerg. eff. June 10, 1993.

§40-561. Employee assistance program.

Drug or alcohol testing governed by the Standards for Workplace Drug and Alcohol Testing Act shall not be requested or required of an employee by an employer unless the employer provides an employee assistance program. For the purposes of this section, "employee assistance program" means an in-house or contracted program which at a minimum provides drug and alcohol dependency evaluation and referral services for substance abuse counseling, treatment or rehabilitation. *Added by Laws 1993, c. 355, § 11, emerg. eff. June 10, 1993.*

§40-562. Disciplinary actions permitted.

A. No disciplinary action, except for a temporary suspension or a temporary transfer to another position, may be taken by an employer against an employee based on a positive test result unless the test result has been confirmed by a second test using gas chromatography, gas chromatography-mass spectroscopy, or an equivalent scientifically accepted method of equal or greater accuracy as approved by rule of the State Board of Health, at the cutoff levels determined by Board rule.

B. An employer may take disciplinary action against an employee who refuses to undergo drug or alcohol testing conducted in accordance with the provisions of this act.

C. An employee discharged on the basis of a refusal to undergo drug or alcohol testing or a confirmed positive drug or alcohol test conducted in accordance with the provisions of this act shall be considered to have been discharged for misconduct for purposes of unemployment compensation benefits as provided for in Section 16 of this act.

Added by Laws 1993, c. 355, § 12, emerg. eff. June 10, 1993.

§40-563. Willful violation of act - Civil actions - Remedies.

A. Any person aggrieved by a willful violation of the Standards for Workplace Drug and Alcohol Testing Act may institute a civil action in a court of competent jurisdiction within two (2) years of the person's discovery of the alleged willful violation or of the exhaustion of any internal administrative remedies available to the person, or be barred from obtaining the relief provided for in subsection B of this section.

B. A prevailing party may be awarded declaratory or injunctive relief and compensatory damages which may include, but not be limited to, employment, reinstatement, promotion, the payment of lost wages and other remuneration to which the person would have been entitled and payment of and reinstatement to full benefits and seniority rights. Reasonable costs and attorney fees may be awarded to the prevailing party.

Added by Laws 1993, c. 355, § 13, emerg. eff. June 10, 1993.

§40-564. Time for compliance with act.

On and after the effective date of this act no employer shall implement a drug or alcohol testing program subject to the provisions of this act unless the program is in compliance with the provisions of this act and the rules promulgated pursuant thereto. Provided, a drug

or alcohol testing program subject to the provisions of this act which is in effect prior to the effective date of this act shall be in compliance with the provisions of this act and the rules promulgated pursuant thereto no later than July 1, 1994.

Added by Laws 1993, c. 355, § 14, emerg. eff. June 10, 1993.

§40-565. Violations - Penalties.

Any person who willfully and knowingly violates the provisions of the Standards for Workplace Drug and Alcohol Testing Act shall be guilty of a misdemeanor and, upon conviction, punishable by a fine of not less than One Hundred Dollars (\$100.00) nor more than Five Thousand Dollars (\$5,000.00) or imprisonment in the county jail for not more than one (1) year, or by both such fine and imprisonment.

Added by Laws 1993, c. 355, § 15, emerg. eff. June 10, 1993.

Question Submitted by: The Honorable Glen Coffee, State Senator, District 30
2006 OK AG 3
Decided: 03/06/2006
Oklahoma Attorney General Opinions

¶0 This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

When a statute has been amended twice during the same Legislative Session with two different effective dates and the two statutes cannot be harmonized, which statute controls?

Background

¶1 In the 2005 First Regular Session of the 50th Legislature two separate legislative bills were enacted into law amending the definition of the term "testing facility" in the Standards for Workplace Drug and Alcohol Testing Act ("Act") ([40 O.S. 2001 & Supp.2005, §§ 551 - 565](#)). See 2005 Okla. Sess. Laws ch. 134, § 1; 2005 Okla. Sess. Laws ch. 190, § 5 (amending [40 O.S. 2001, § 552](#)). The Act does not require or encourage employers to conduct drug or alcohol testing, but provides that with certain exceptions employers who choose to conduct drug or alcohol testing of job applicants or employees are subject to the Act. [40 O.S. 2001, § 553\(A\)](#). Under the Act, qualifications for testing facilities are set forth by statute. *Id.* §§ 557(A)(1). The State Department of Health is required to license testing facilities and shall promulgate rules relating to the issuance, revocation, suspension and nonrenewal of the licenses. *Id.* § 558(A).

¶2 The statute which prompts your question, [40 O.S. Supp.2005, § 552](#), was first amended by Senate Bill 374. See 2005 Okla. Sess. Laws ch. 134, § 1. The amendment was approved by the Governor on May 2, 2005 with an effective date of November 1, 2005. That amendment altered the definition of "testing facility." The text of the bill read as follows:

15. "Testing facility" means any person, including any laboratory, hospital, clinic or facility, either off or on the premises of the employer, which provides laboratory services to test for the presence of drugs or alcohol in the human body. ~~The administration of on-site drug screening tests to applicants or employees to screen out negative test results are not laboratory services under this paragraph, provided the on-site tests are cleared by the federal Food and Drug Administration for commercial marketing, and all positive results of such tests are confirmed by a testing facility in accordance with the Standards for Workplace Drug and Alcohol Testing Act.~~

Id.

¶3 That amendment deleted language from the definition of "testing facility" which had been in existence since the year 2000, removing from the definition on-site drug screening tests to screen out negative test results under certain conditions. See 2000 Okla. Sess. Laws ch. 335, § 1(15).

¶4 The Legislature, through House Bill 1502, also amended the statute at 2005 Okla. Sess. Laws ch. 190, § 5 with approval by the Governor on May 18, 2005 and an effective date of September 1, 2005. That later amendment maintained the language deleted by SB 374 and added the words underscored in the definition below, changing the definition of "testing facility" to:

15. "Testing facility" means any person, including any laboratory, hospital, clinic or facility, either off or on the premises of the employer, which provides laboratory services to test for the presence of drugs or alcohol in the human body. The administration of on-site drug or alcohol screening tests to applicants or employees to screen out negative test results are not laboratory services under this paragraph, provided the on-site tests used are cleared by the federal Food and Drug Administration for commercial marketing or by the National Highway Traffic Safety

Administration for alcohol testing, and all positive results of such tests are confirmed by a testing facility in accordance with the Standards for Workplace Drug and Alcohol Testing Act.

2005 Okla. Sess. Laws ch. 190, § 5.

¶5 The two amendments cannot be harmonized as they contain conflicting definitions of the term "testing facility." One provides an exception from the definition of "testing facility" for on-site drug or alcohol screening tests under certain conditions while the other does not. These conflicting amendments raise the question of which amendment controls.

Statutory Construction

¶6 The general rule of statutory construction is that when there is an irreconcilable conflict between two statutes, later-enacted legislation, as the most recent expression of legislative will, controls over earlier-enacted provisions. *Pickett v. Okla. Dep't of Human Serv.*, [932 P.2d 543](#), 545 (Okla. 1996). The later-enacted statute operates as a repeal of the earlier to the extent that they are repugnant. *Id.* The Oklahoma Supreme Court, in recognizing that the latest enactment will ordinarily prevail, has said that this general principle:

[I]s an outgrowth of the basic principle of statutory construction that the primary object in construing a statute is to determine the intent of the legislative body in enacting it, and where two or more enactments are involved, the primary object is to determine the latest expression of the legislative will.

Trask v. Johnson, [452 P.2d 575](#), 577 (Okla. 1969).

¶7 Applying the rule of construction that the later-enacted provision controls, H.B. 1502 is the controlling statute as it was approved by the Governor on May 18, 2005, a later date than S.B. 374 which was approved by the Governor May 2, 2005. See 2005 Okla. Sess. Laws ch. 134, § 1; 2005 Okla. Sess. Laws ch. 190, § 5.

¶8 The legal principle of repeal by implication also applies here. "It is a cardinal principle of construction that repeals by implication are not favored." *City of Tulsa v. Smittle*, [702 P.2d 367](#), 370 (Okla. 1985) (citation omitted). "When there are two acts upon the same subject, the rule is to give effect to both if possible." *Id.* This presumption is especially strong against the implied repeal of an act by another at a later date in the same session of the Legislature. *Okla. Ass'n of Mun. Attorneys v. State*, [577 P.2d 1310](#), 1315 (Okla. 1978). However, where there is an irreconcilable conflict between two statutes, the later modifies the earlier, even where both sections were enacted in the same official codification. *City of Sand Springs v. Dep't of Pub. Welfare*, [608 P.2d 1139](#), 1151 (Okla. 1980). Applying these principles here, although H.B. 1502 did not explicitly repeal S.B. 374, we find an irreconcilable conflict constituting an implied repeal of S.B. 374.

¶9 An additional concern exists in the question you raise as the earlier-enacted provision, S.B. 374, has an effective date of November 1, 2005 while the later-enacted provision, H.B. 1502, has an earlier effective date of September 1, 2005. Thus, we must consider the legal effect of the fixing of an effective date by the Legislature.

¶10 Courts have held that the fixing of an effective date is equivalent to a legislative declaration that a statute will have no effect until the date designated. *Phillips v. D. & J. Enter., Inc.*, 288 So.2d 137, 138 (Ala. 1973); *Iowa v. Allan*, 166 N.W.2d 752, 760 (Iowa 1969) (citations omitted). In *Cities Service Oil Co. v. Oklahoma Tax Commission*, [129 P.2d 597](#), 598-99 (Okla. 1942), the Oklahoma Supreme Court considered a situation where a provision in a statute placed the statute in effect on a date specified in the

future, yet contained an emergency clause providing that the statute would take effect after its passage and approval. The court stated that the emergency clause did "not fix the date at which the legislation shall become effective." *Id.* at 598. In noting that the emergency clause was subordinate to the effective date, the court provided:

Although the emergency clause in this case provided that the Act take effect and be in full force from and after its passage and approval, that provision should be looked upon as subordinate to the express provision contained in the body of the Act suspending its operation until a future date.

Id. at 599. Under this reasoning, the significance of an effective date is that it fixes a time when a statute becomes effective. An effective date does not determine which of two conflicting statutes controls.

Conclusion

¶11 By enacting H.B. 1502, the Legislature repealed S.B. 374 before it was to take effect. See 2005 Okla. Sess. Laws ch. 134, § 1; 2005 Okla. Sess. Laws ch. 190, § 5. If the statute had become effective, any person providing laboratory services to test for drugs or alcohol would have had to comply with the Act, and there would be no exception for on-site screening tests under the conditions set forth in the statute. However, H.B. 1502 controls and on-site drug or alcohol screening tests are an exception to the definition of "testing facility" for purposes of the Standards for Workplace Drug and Alcohol Testing Act under certain conditions.

¶12 It is, therefore, the official Opinion of the Attorney General that:

1. When two bills arising from the same legislative session are passed into law and address the same statute, the later-enacted statute controls if the two cannot be harmonized. *Pickett v. Okla. Dep't of Human Serv.*, [932 P.2d 543](#), 545 (Okla. 1996).
2. Where there is an irreconcilable conflict between two statutes, the earlier provision will be repealed by the later one. *City of Sand Springs v. Dep't of Pub. Welfare*, [608 P.2d 1139](#), 1151 (Okla. 1980).
3. A statute with an effective date fixed by the Legislature has no effect until the date designated. *Phillips v. D. & J. Enter., Inc.*, 288 So.2d 137, 138 (Ala. 1973); *Iowa v. Allan*, 166 N.W.2d 752, 760 (Iowa 1969).
4. Senate Bill 374 and House Bill 1502, defining the term "testing facility" under the Standards for Workplace Drug and Alcohol Testing Act, [40 O.S. Supp.2005, §§ 551 through 565](#), are in conflict and cannot be reconciled with one another. See 2005 Okla. Sess. Laws ch. 134, § 1; 2005 Okla. Sess. Laws ch. 190, § 5. As House Bill 1502 was amended later, it is controlling, and the term "testing facility" does not include on-site drug or alcohol screening tests to screen out negative test results under certain conditions.

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