



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Miners Health Safety And Training TITLE-SERIES: 56-19
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: 56-19 Substance Abuse Screening, Standards and Procedures

PRIMARY CONTACT

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CITE STATUTORY AUTHORITY: W. Va. Code §§22A-1A-2(b) and (c)

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

W. Va. Code §22A-1A-2

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 6/25/2021

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 7/26/2021

COMMENTS RECEIVED: Yes

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: Yes

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

Posted on WVOMHST website; mass mailing to the coal industry and to known drug testing vendors.

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

The Office of Miners Health, Safety and Training has recently found that coal miners who fail a drug test for THC are now claiming that their failed drug test is because of their use of over-the-counter CBD products. The Office of Miners Health, Safety and Training believes that when medical marijuana becomes available for use by West Virginia residents that coal miners will use that as a defense as well. The Office of Miners Health, Safety and Training believes that in the interest of mine safety, THC in any form should be a prohibited substance and the rule removes medical marijuana and CBD products as a defense to a failed drug test for THC.

This rule requires drug testing vendors to become drug testing contractors. A drug testing contractor shall be required to register with the Office of Miners Health, Safety and Training as a contractor and pay the One Hundred Dollar (\$100.00) annual registration fee. Drug testing contractors will be subject to assessments if they fail to follow the requirements of this rule. The Office of Miners Health, Safety and Training is seeing an increase in the reluctance of coal operators, drug testing collectors, laboratories and medical review officers to participate in permanent revocation hearings and contested case hearings in front of the Board of Appeals. Without having available the necessary witnesses to testify at the hearing, the Office of Miners Health, Safety and Training is having difficulty proving that the coal miner did, in fact, fail a drug test. If the Office of Miners Health, Safety and Training is unable to prove that coal miners who contest a failed drug test actually failed the drug test, the entire coal mine drug program could be jeopardized. The Office of Miners Health, Safety and Training believes that the drug testing program, which has been in existence since 2013, has been a success in making coal mines safer for all coal miners. Requiring drug testing vendors to become drug testing contractors will provide the Office of Miners Health, Safety and Training with more authority to compel specimen collectors, laboratories and medical review officers to participate in permanent revocation hearings and contested case hearings in front of the Board of Appeals. Without having available the necessary witnesses to testify at the hearing, the Office of Miners Health, Safety and Training is having difficulty proving that the coal miner did, in fact, fail a drug test. If the Office of Miners Health, Safety and Training is unable to prove that coal miners who contest a failed drug test actually failed the drug test, the entire coal mine drug program could be jeopardized. The Office of Miners Health, Safety and Training believes that the drug testing program, which has been in existence since 2013, has been a success in making coal mines safer for all coal miners. Requiring drug testing vendors to become drug testing contractors will provide the Office of Miners Health, Safety and Training with more authority to compel specimen collectors, laboratories and medical review officers to participate in the hearings.

The rule also removes as a defense the failure of the employer to notify the Director within seven (7) days after being notified that a miner failed or refused a drug or alcohol test.

The rule also defines the terms Board of Appeals, Cannabinoids/THC, drug testing contractor, refusal, and substance abuse treatment program. The rule modifies the definition of the terms medical review officer and substance abuse policy and testing program.

The rule requires employers to ensure that all breath alcohol tests and drug tests are performed by drug testing contractors and that the drug testing contractors comply with Sections 7.1. and 7.2. of the rule.

The rule also reduces the treatment period that an individual must have when he/she refuses a drug test, possesses or submits an adulterated or substituted sample from eighteen (18) months of counseling and eighteen (18) monthly random drug tests to six (6) months of counseling and six (6) monthly random drug and

alcohol tests. The individuals suspension time still remains eighteen (18) months.

Technical and clean-up changes were also made to the rule.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The Office of Miners Health, Safety and Training has recently found that coal miners who fail a drug test for THC are now claiming that their failed drug test is because of their use of over-the-counter CBD products. The Office of Miners Health, Safety and Training believes that when medical marijuana becomes available for use by West Virginia residents that coal miners will use that as a defense as well. The Office of Miners Health, Safety and Training believes that in the interest of mine safety, THC in any form should be a prohibited substance and the rule removes medical marijuana and CBD products as a defense to a failed drug test for THC.

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SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

It is estimated that this rule will generate approximately Five Thousand Dollars (\$5,000.00) in additional revenue from the additional permit fees and assessments paid by drug testing contractors.

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

Both the permit fees and assessments referred to in paragraph A, above, go into two separate special revenue accounts. The Office of Miners Health, Safety and Training estimates that both special revenue accounts will increase by approximately Two Thousand Five Hundred Dollars (\$2,500.00) per year.

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

Drug testing contractors will be required to pay a One Hundred Dollar (\$100.00) yearly permit fee and may be subject to assessments if they violate the law.

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	5,000.00	5,000.00	5,000.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs and Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	5,000.00	5,000.00	5,000.00

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

It is estimated that this rule will generate approximately Five Thousand Dollars (\$5,000.00) in additional revenue from the additional permit fees and assessments paid by drug testing contractors.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Jack M Rife -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 56
LEGISLATIVE RULE
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING

SERIES 19
SUBSTANCE ABUSE SCREENING,
STANDARDS AND PROCEDURES

§56-19-1. General.

1.1. Scope. -- This rule applies to every employer of "certified persons," as that term is defined in W. Va. Code §22A-1-2(d)(3), and to every employer of employees who as part of their employment are regularly present at a mine and who are employed in a "safety-sensitive position," as that term is defined in W. Va. Code §22A-1A-1(e).

1.2. Authority. -- W. Va. Code §§22A-1A-2(b) and (c), ~~and 22A-2-80.~~

1.3. Filing Date. -- ~~March 9, 2020~~ _____.

1.4. Effective Date. -- ~~March 9, 2020~~ _____.

1.5. Sunset Provision . -- This rule shall terminate and have no further force or effect upon _____.

§56-19-2. Purpose.

2.1. Purpose. -- The purpose of this rule is to implement the mandate of W. Va. Code §22A-1A-1 *et seq.*

§56-19-3. Definitions.

3.1. Unless the context in which a word or phrase appears clearly requires a different meaning, all terms used in this rule that are not defined herein shall have the meanings set forth in W. Va. Code §22A-1-2.

3.2. Adulterated Specimen. The term "adulterated specimen" shall mean ~~means~~ a specimen that has been altered as evidenced by test results showing that the specimen contains a substance that is not a normal constituent or containing an endogenous substance at a concentration that is not a normal physiological concentration.

3.3. Alcohol Testing Form. The term "alcohol testing form" shall mean the U.S. Department of Transportation's Alcohol Testing Form (Non-DOT) or a form that substantially conforms with the format set forth in the DOT alcohol testing form.

3.4. ~~Agency. The term "agency" means the West Virginia Office of Miners' Health, Safety and Training created by W. Va. Code §22A-1-1.~~ Board of Appeals. The term "Board of Appeals" shall mean the Board of Appeals created pursuant to W. Va. Code §22A-5-1 *et seq.* and referred to in W. Va. Code §22A-1A-2.

3.5. Breath Test or Breath Test for Alcohol. The term "breath test" or "breath test for alcohol" shall mean ~~means~~ a chemical test of a person's breath to determine the amount of alcohol he/she has consumed, as provided in 49 CFR Part 40, Subpart M, taken using an evidential breath testing device listed on the National Highway Traffic Safety Administration (NHTSA) most current Conforming Products List and

conducted by a breath alcohol technician meeting the training requirements found in 49 CFR Part 40, Subpart J.

3.6. Cannabinoids/THC. The term “Cannabinoids/THC” shall mean THC from any source, whether legal or illegal.

3.7. ~~3.6:~~ Certified Person. The term “certified person” shall have the meaning set forth in W. Va. Code §22A-1-2(d)(3).

3.8. ~~3.7:~~ Code. The term “Code” shall mean ~~means~~ the West Virginia Code of 1931, as amended.

3.9. ~~3.8:~~ Director. The term “Director” shall mean ~~means~~ the Director of the Office of Miners’ Health, Safety and Training, and shall include his/her authorized representatives where applicable.

3.10. Drug Testing Contractor. The term “drug testing contractor” shall mean any firm, corporation, partnership, or individual performing breath alcohol tests or ten (10) panel split sample urine drug tests pursuant to this rule.

3.11. ~~3.9:~~ Duly Licensed, Mental Health Professional. The term “duly licensed, mental health professional” shall mean ~~means~~ a psychiatrist, psychologist, professional counselor or substance abuse counselor in the United States who is licensed by, and in good standing with, the licensing authority of the jurisdiction in which the person practices.

3.12. ~~3.10:~~ Employer. The term “employer” shall mean ~~means~~ all operators, independent contractors, subcontractors, or otherwise that employ certified persons who work in mines, or employ employees who as part of their employment are regularly present at a mine and who are employed in a safety-sensitive position.

3.13. ~~3.11:~~ Hazard Training. The term “hazard training” shall mean ~~means~~ information or instructions on the site specific hazards a person could be exposed to while at the mine, as well as applicable emergency procedures.

3.14. ~~3.12:~~ Independent Contractor. The term “independent contractor” shall mean ~~means~~ any firm, corporation, partnership, or individual that contracts to engage in the extraction, production, hauling, loading, processing or preparation activities associated with a mine as defined in Section ~~3.14:~~ 3.16. of this rule.

3.15. ~~3.13:~~ Medical Review Officer. The term “medical review officer” shall mean ~~means~~ a licensed physician with knowledge of substance abuse disorders, laboratory testing, chain of custody, collection procedures, and the ability to verify positive, confirmed test results. The medical review officer is responsible for receiving and reviewing laboratory results generated by an employer’s drug testing program and evaluating medical explanations for certain drug test results and shall possess the necessary medical training to interpret and evaluate a positive test result in relation to the person’s medical history or any other relevant biomedical information.

3.16. ~~3.14:~~ Mine. The term “mine” shall have the meaning set forth in W. Va. Code §22A-1-2(a)(6) and shall include any underground coal mine, surface coal mine, coal preparation plant, coal loadout, or river coal loadout.

~~3.17. 3.15.~~ Operator. The term “operator” ~~shall mean~~ means any firm, corporation, partnership, or individual operating any coal mine or part thereof, as defined in Section ~~3.14.~~ 3.16. of this rule, or engaged in the construction of any facility associated with a coal mine.

~~3.18. 3.16.~~ Pre-employment Testing. The term “pre-employment testing” ~~shall mean~~ means the substance abuse testing of any certified person or person to be employed in a safety-sensitive position either prior to hiring or upon hiring by a new operator or new independent contractor, the rehiring of any certified person or person employed in a safety-sensitive position by an operator or independent contractor following a termination of the employment relationship, or transferring to a West Virginia mine from an employer’s out-of-state mine to the extent that the substance abuse test required by the employer in the other jurisdiction does not comply with the minimum standards for substance abuse testing required by this rule.

~~3.19. 3.17.~~ Random Testing. The term “random testing” ~~shall mean~~ means that each person subject to testing has a statistically equal chance of being selected for testing at random and at unscheduled times. The selection of persons for random testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with the person’s social security number, payroll identification number, or other comparable identifying number. A random test shall be at least twenty-five per cent (25%) of the employees working at a mine or facility annually. Random testing shall be conducted at least four (4) times annually.

3.20. Refusal. The term “refusal” shall mean a refusal to submit to a drug and alcohol test required by the employer under the substance abuse policy and testing program as defined in Section 3.24. A “refusal” shall be consistent with the standards provided for in 49 CFR Part 40. If the drug and alcohol test is required by the employer, it is not a defense that the employee or person subject to a pre-employment test believed that the required drug and alcohol testing was not following the standards and procedures provided for in 49 CFR Part 40.

~~3.21. 3.18.~~ Safety-Sensitive Position. The term “safety-sensitive position” ~~shall mean~~ means an employment position where the employee’s job responsibilities include duties and activities that involve the personal safety of the employee or others working at the mine.

~~3.22. 3.19.~~ Serious Accident. The term “serious accident” ~~shall mean~~ means an event at a mine which causes bodily injury to an individual which requires such individual to be admitted to a medical facility overnight for reasons other than strains, sprains or observation as determined by a physician.

~~3.23. 3.20.~~ Split Sample. The term “split sample” ~~shall mean~~ means a part of the urine specimen that is sent to a first laboratory and retained unopened, and which is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen or a verified adulterated or substituted test result. Said testing shall be conducted in accordance with the standards and procedures of the United States Department of Transportation’s rule, 49 CFR Part 40, which may be amended from time to time by the Office of Miners’ Health, Safety and Training through legislative rule.

3.24. 3.21. Substance Abuse Policy and Testing Program. The term “substance abuse policy and testing program” shall include, at a minimum, a chemical test of breath to determine the presence of alcohol and the ten-panel urine test required by W. Va. Code §22A-1A-1(a)(1) shall include pre-employment testing, random testing, and any other testing done to enhance mine safety. Such drug and alcohol testing shall include, at a minimum, a chemical test of breath to determine the presence of alcohol and a ten (10) panel

split sample urine test that complies with the requirements of W. Va. Code 22A-1A-1 et seq. and this rule.

3.25 Substance Abuse Treatment Program. The term "substance abuse treatment program" shall mean at least six (6) months of substance abuse treatment under the care of a duly licensed mental health professional which includes at least six (6) monthly random drug and alcohol tests.

§56-19-4. Certification of Employees in Safety-Sensitive Positions.

4.1. No employee of an employer working in a safety-sensitive position may work or be employed unless he or she possesses a safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training. Any employee who currently possesses ~~a~~ another mining certification issued by the West Virginia Office of Miners' Health, Safety and Training shall not be required to ~~also~~ obtain a safety-sensitive certification.

4.2. Every employer of an employee who works in a safety-sensitive position shall ensure that the employee has obtained the safety-sensitive certification issued by the West Virginia Office of Miners' Health, Safety and Training.

4.3. A safety-sensitive certification shall be issued to any person who provides proof that he or she has received the twenty-four (24) hour MSHA training when required by MSHA, completes an application as prescribed by the Director, and shows a valid driver's license, valid passport, or valid state DMV issued photo ID. Any other personnel employed by an operator or independent contractor whose job does not require a miner certification or 24 hour MSHA training shall be eligible to receive a safety-sensitive certification by making application, showing proof that he or she has successfully completed hazard training, and shows a valid driver's license, valid passport, or valid state DMV issued photo ID.

4.4. Safety-sensitive certifications may be obtained at the Office of Miners' Health, Safety and Training's Charleston office or any of its regional offices.

4.5. The application for a safety-sensitive certification requires the following information:

4.5.1. Applicant's name, address, telephone number, social security number, date of birth, and applicant's signature.

4.5.2. Employer's company name, mine name, WV permit number, address, and telephone number.

4.5.3. Employment dates.

4.5.4. A notarized signature of an official of the employer.

4.6. In the event an application for a safety-sensitive certification is denied, the applicant may request a hearing before the Director.

4.7. Any applicant who is adversely affected by a decision of the Director following a hearing on an application for safety-sensitive certification, may petition for judicial review of the Director's decision in the Circuit Court of Kanawha County or in the circuit court of the county in which the applicant resides, pursuant to the provisions of W. Va. Code §29A-5-4.

4.8. The Director may charge a ten dollar (\$10.00) fee for the issuance of a safety-sensitive certification.

4.9. All persons currently having a certification issued by the West Virginia Office of Miners' Health, Safety and Training who desire to receive a safety-sensitive certification may receive such certification by completing the safety-sensitive certification application and paying the \$10.00 fee.

4.10. Every employer shall keep a current list of all employees occupying safety-sensitive positions available for review by the Director or his/her authorized representative.

4.11. The Director may exempt any person responding to a mine emergency or providing rescue services from the requirement that he or she shall have a safety-sensitive certification prior to performing any mine emergency or rescue services.

§56-19-5. Duties of Employers.

5.1. Every employer shall implement a substance abuse policy and testing program which shall be administered to its certified and safety-sensitive employees.

5.2. Every employer's program shall at a minimum comply with all state mine laws relevant to substance abuse screening, standards and procedures.

5.3. Employers shall ensure that all breath alcohol tests and drug tests are performed by a drug testing contractor as defined in Section 3.10. of this rule and that the drug testing contractor is aware of and complies with Sections 7.1. and 7.2. of this rule.

5.4. ~~5.3:~~ Every employer shall have a pre-employment and random substance abuse policy and testing program which shall, at a minimum, include a ten (10) panel split sample urine test for the following substances:

5.4.1. ~~5.3.1:~~ Amphetamines,

5.4.2. ~~5.3.2:~~ Cannabinoids/THC,

5.4.3. ~~5.3.3:~~ Cocaine,

5.4.4. ~~5.3.4:~~ Opiates,

5.4.5. ~~5.3.5:~~ Phencyclidine (PCP),

5.4.6. ~~5.3.6:~~ Benzodiazepines,

5.4.7. ~~5.3.7:~~ Propoxyphene,

5.4.8. ~~5.3.8:~~ Methadone,

5.4.9. ~~5.3.9:~~ Barbiturates, and

5.4.10. ~~5.3.10:~~ Synthetic narcotics.

5.5. ~~5.4:~~ In addition, every employer shall include, as part of its substance abuse screening policy and program, a chemical test of breath for alcohol. No person's blood alcohol level shall meet or exceed four

one hundredths of one percent (.04) concentration at the time of testing.

5.6. ~~5.5.~~ The alcohol confirmation test shall be a chemical test of breath as provided in 49 CFR Part 40, Subpart M, taken using an evidential breath testing device listed on the National Highway Traffic Safety Administration's (NHTSA) most current Conforming Products List and conducted by a breath alcohol technician meeting the training requirements found in 49 CFR Part 40, Subpart J.

5.7. ~~5.6.~~ The substance abuse policy and testing program shall require that the ten (10) panel split sample urine test be conducted in accordance with the standards and procedures set forth in the United States Department of Transportation's rule found at 49 CFR Part 40 and collected by individuals who are certified as complying with standards and procedures set forth in the United States Department of Transportation's rule found at 49 CFR Part 40.

5.8. ~~5.7.~~ Initial and split samples shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection and testing.

5.9. ~~5.8.~~ In the event a person desires to challenge the results of his or her initial sample test result, that person shall have the right to have the split sample tested by another laboratory certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA). The cost associated with the testing of the split sample shall be the responsibility of the person challenging the initial sample test results.

5.10. ~~5.9.~~ Every employer shall review its substance abuse testing program with all persons required to be tested at the time of employment, upon a change in the program, and annually thereafter.

5.11. ~~5.10.~~ Every employer shall provide new and current employees with information about the mandatory substance abuse policy and testing program and inform each employee of his or her rights and responsibilities under the program and that refusal to comply with ~~the testing~~ any drug and alcohol testing required by the employer shall constitute grounds for decertification and shall result in the employer notifying the Director of said refusal in accordance with ~~Subsection~~ Section 5.11. 5.12. of this rule. A record of such review shall be maintained at the mine and made available to an authorized representative of the Director upon request.

5.12. ~~5.11.~~ Every employer shall notify the Director, on a form prescribed by the Director, within seven (7) days of any of the following:

5.12.1. ~~5.11.1.~~ Any positive drug or alcohol test of a certified person. However, for purposes of determining whether a drug test is positive the certified employee may not rely on a prescription dated more than one (1) year prior to the date of the drug test result;

5.12.2. ~~5.11.2.~~ The refusal of a certified person to submit a sample;

5.12.3. ~~5.11.3.~~ A certified person possessing a substituted sample or an adulterated sample; or

5.12.4. ~~5.11.4.~~ A certified person submitting a substituted sample or an adulterated sample.

5.13. Failure of an employer to report a failed drug and alcohol test as set forth in Section 5.12. within seven (7) days of being notified of the failed drug and alcohol test shall not create any procedural defense

for a certified person who has failed the drug and alcohol test.

5.13.1. For purposes of a positive test for THC, the certified person may not rely upon a medical prescription or other type of medical permission for marijuana, including a valid identification card issued under W. Va. Code §16A-5-1 et seq. authorizing the certified person to access medical cannabis under the West Virginia Medical Cannabis Act.

5.13.2. For purposes of a positive test for THC, the certified person may not excuse such a positive test based upon the fact that the THC came entirely from a legal CBD product or any other legal product.

5.14. ~~5.12:~~ When the employer submits the completed notification form prescribed by the Director, the employer shall also submit a copy of the laboratory test results showing the substances tested for and the results of the test as determined by the Medical Review Officer and the chain of custody form. If the employee's breath test for alcohol meets or exceeds four one-hundredths of one percent (.04) at the time of testing, the alcohol testing form shall be submitted with the notification. Other supporting documentation may be required as deemed necessary by the Director.

5.15. ~~5.13:~~ A notice, pursuant to ~~Subsection Section 5.11.~~ Section 5.12. of this rule, shall result in the immediate temporary suspension of all certificates held by the certified person who failed the screening, pending a hearing before the board of appeals pursuant to W. Va. Code §22A-1A-2.

5.16. ~~5.14:~~ Any employer may develop or maintain a drug and alcohol abuse policy, testing program or substance abuse program that exceeds the minimum requirements set forth in ~~Subsection Section 5.3.~~ 5.4. of this rule. The provisions of this rule shall not be construed to require an employer to alter, amend, revise or otherwise change, in any respect, a previously established substance abuse screening policy and program that meets or exceeds the minimum requirements set forth in this rule.

5.17. ~~5.15:~~ Every employer shall maintain a record of substance abuse testing results for each person tested which shall be kept confidential, except that the records shall be open to inspection by the Director or when compelled by a court of competent jurisdiction. Each employer shall maintain records of verified positive drug or alcohol test results and employee refusals to take mandatory tests for a minimum of five (5) years.

5.18. ~~5.16:~~ No part of this rule is intended to prohibit an employer from implementing a policy requiring a certified person or a person in a safety-sensitive position to take a substance abuse test or chemical test of breath for the presence of alcohol if the employer has a reasonable suspicion that the person is under the influence of a controlled substance or alcohol.

5.19. ~~5.17:~~ Every employer shall require any person involved in a serious or fatal accident to be drug and alcohol tested immediately after the accident.

5.20. ~~5.18:~~ Any employee involved in an accident that results in physical injuries or damage to equipment or property may be subject to a drug test by his or her employer.

5.21. ~~5.19:~~ A random test shall be at least twenty-five per cent (25%) of the employees working at a mine or facility annually. Random testing shall be conducted at least four (4) times annually.

§56-19-6. Responsibilities of the Director.

6.1. Upon receipt of a notice as required by ~~Subsection~~ Section 5.11. 5.12. of this rule and upon verification that the pre-employment applicant or the employee tested positive by urine test for at least one (1) of the ten (10) substances identified therein or had a blood alcohol level at or in excess of four one hundredths of one percent (.04) concentration at the time of testing, the Director shall issue an immediate temporary suspension of all certifications held by the person pending a hearing before the Board of Appeals pursuant to W. Va. Code §22A-1A-2. The Director shall mail, by certified mail, to the person notice of the temporary suspension and that he or she has the right to pursue one (1) of the following options:

6.1.1. Appeal the suspension to the Board of Appeals within thirty (30) days, or

6.1.2. Notify the Director within thirty (30) days that the temporarily suspended person intends to enter into a Treatment Plan Agreement sanctioned by the Board of Appeals as set forth in Section 9. of this rule. Costs of the evaluation, treatment and drug and alcohol tests shall be the responsibility of the temporarily suspended person.

6.2. The certified mailing shall also inform the individual that failure to file an appeal pursuant to Subsection 6.1.1. or failure to notify the Director of that individual's intent to comply with Subsection 6.1.2. of this rule within thirty (30) days could result in the Board of Appeals suspending all certifications issued to that individual for a period of not less than three (3) years and that the individual shall remain ineligible for any other certification issued by the Office of Miners' Health, Safety and Training during the suspension period.

6.3. The Director shall immediately and temporarily suspend any certification issued by the Office of Miners' Health, Safety and Training or any safety-sensitive certification upon receipt of a suspension or revocation of a certified person's certificate as a miner or other miner specialty in another jurisdiction by the applicable regulatory or licensing authority for substance abuse related matters. The immediate and temporary suspension shall remain in effect until such time as the certified person's certification is reinstated in the other jurisdiction or modified by the Board of Appeals pursuant to W. Va. Code §22A-1A-2.

6.4. The Director shall issue an immediate temporary suspension of a certified person's West Virginia certification(s), including any safety-sensitive certification, under the following circumstances:

6.4.1. The person tests positive on a urine test for any of the ten (10) substances identified in ~~Subsection Section 5.3: 5.4.~~ of this rule and is ~~deemed~~ verified to have failed the test by the medical review officer.

6.4.2. The person's chemical test of breath shows a blood alcohol level at or in excess of four one hundredths of one percent (.04) concentration at the time of testing.

6.4.3. The person possesses an adulterated specimen or the drug test results demonstrate the submission of an adulterated specimen.

6.4.4. The person possesses a substituted specimen or the drug test results demonstrate the submission of a substituted specimen.

6.4.5. The person refuses to submit to a drug or alcohol test.

6.5. Any person who has his or her certification(s) temporarily suspended by the Director may file an appeal of the temporary suspension with the Board of Appeals. The notice of appeal shall be in writing and

filed with the Board of Appeals within thirty (30) days of issuance of the notice of suspension.

6.6. Upon receipt of a notice as required by ~~Subsection~~ Section 5.11, 5.12 of this rule of a person having failed a substance abuse test for a second time, the Director shall issue an immediate temporary suspension of all certifications held by the person and shall immediately initiate proceedings for the permanent revocation of all certifications held by the person pending a hearing before the Board of Appeals pursuant to W. Va. Code §22A-1A-2.

6.7. No certification may be permanently revoked until such time as the individual has been granted adequate opportunity for a hearing before the Board of Appeals conducted in accordance with W. Va. Code §22A-1A-2.

6.8. Records of substance abuse and drug testing, written or otherwise, received by the Office of Miners' Health, Safety and Training, its employees, agents and representatives are confidential communications and exempt from disclosure under W. Va. Code §29B-1-1, except where disclosure is authorized pursuant to §22A-1A-3.

§56-19-7. Drug Testing Standards.

7.1. The employer shall ~~insure~~ ensure that its drug testing ~~vendor~~ contractor is registered with the Office of Miners' Health, Safety and Training pursuant to 36 CSR 36-20-4 and is aware of this Section of the rule and complies with the following standards for collection and testing of samples:

7.1.1. The drug testing contractor shall comply with all provisions found in 36 CSR §20-1 et seq.

7.1.2. ~~7.1.1:~~ The drug testing ~~vendor~~ contractor shall follow all standards, procedures, and protocols set forth by the United States Department of Transportation's rule, 49 CFR Part 40, for the collection of urine samples and chemical test of breath for the presence of alcohol.

7.1.3. ~~7.1.2:~~ Collected samples shall be tested by laboratories certified by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) for collection and testing.

7.1.4. ~~7.1.3:~~ The drug testing ~~vendor's~~ contractor's drug testing protocol shall be a ten (10) panel split sample urine test containing the substances identified in Section ~~5.3~~ 5.4 of this rule.

7.1.5. ~~7.1.4:~~ The drug testing ~~vendor~~ contractor shall provide a medical review officer who shall possess the ability and medical training necessary to verify positive confirmed test results and evaluate those results in relation to a certified person's medical history or other biomedical information and follow all procedures outlined in the SAMHSA medical review officer manual. However, for purposes of determining whether a drug test is positive the certified employee may not rely on a prescription dated more than one year prior to the date of the drug test result.

7.2. The drug testing contractor shall ensure that its collector, laboratory and medical review officer provide assistance to the Office of Miners' Health, Safety and Training as needed to evaluate and prosecute any failed tests, including testifying at a Board of Appeals hearing and related services. The drug testing contractor shall ensure that its collectors, laboratories, and medical review officers comply with and honor administrative subpoenas issued by the Board of Appeals regardless of whether they are physically present in another state. Laboratory certifying scientists and medical review officers shall be permitted to testify

by telephone. If not set forth contractually between the drug testing contractor and the employer, any costs and fees associated with the testimony and related services of the drug testing contractor, collector, laboratory and medical review officer shall be the responsibility of the employer.

§56-19-8. Disciplinary process.

8.1. Any drug and alcohol test required by the employer as part of its substance abuse policy and testing program as defined in Section 3.24. shall subject a certified person to suspension of his or her mining certifications consistent with W. Va. Code §22A-1A-1 et seq. and this rule.

8.2. ~~8.1.~~ The Board of Appeals shall suspend all certifications possessed by a person who has entered into a treatment plan agreement as specified in ~~Subsection~~ Section 9.1. of this rule or who is found by a preponderance of the evidence to have failed any drug or alcohol test; refused to submit to a drug or alcohol test; possessed a substituted sample; submitted a substituted sample; possessed an adulterated sample; or submitted an adulterated sample. In addition, the Board of Appeals shall order that during the suspension period the person shall complete substance abuse and/or alcohol counseling and treatment and undergo periodic random drug and alcohol tests. The costs of any substance abuse and alcohol counseling, treatment and random drug and alcohol tests shall be the sole responsibility of the person found to have failed a drug or alcohol test.

8.3. ~~8.2.~~ Any person who intends to challenge the sample collection methods, the laboratory test results, the medical review officer's verification of the laboratory test result or the chemical test of breath, shall notify the Director of his or her intent. The person shall submit the notification in writing, either in person or by mail to the Director, at least fourteen (14) days prior to the hearing date. The notification shall specify, in detail, the challenge the person intends to make.

8.4. ~~8.3.~~ If the person submits notification in writing to the Director that he/she intends to challenge the laboratory test results or the medical review officer's verification of the laboratory test result, that person shall have the split sample tested, at his/her expense, at a SAMHSA certified laboratory and those results verified by a medical review officer. The split sample results and the results of the split sample verification by a medical review officer shall be provided to the Director and the original medical review officer. No other form of evidence shall be admissible to challenge the laboratory test result ~~of~~ or the medical review officer's verification of the laboratory test result.

8.5. ~~8.4.~~ If a person fails to comply with the notification requirements of this section, then the sample collection methods, the laboratory test results, the medical review officer's verification of the laboratory test result, or the chemical test of breath shall be admissible as though the person and the Director had stipulated to their admissibility.

8.6. ~~8.5.~~ No person whose certification is suspended or revoked under this rule may perform any duties under any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals or the West Virginia Office of Miners' Health, Safety and Training. Furthermore, no person whose certification is suspended or revoked under this rule may apply for or obtain any other certification issued pursuant to Chapter 22A of the Code during the period of suspension imposed by the Board of Appeals or the West Virginia Office of Miners' Health, Safety and Training, or after his or her certification is revoked.

8.7. ~~8.6.~~ The Board of Appeals shall permanently revoke all certifications issued by the West Virginia Office of Miners' Health, Safety and Training when the Board finds, by a preponderance of the evidence, that

the person has violated Section ~~5.11~~ 5.12 of this rule for the second time.

8.8. On any procedural question not regulated by the rule, the pertinent provisions of the Administrative Procedures Act found in W. Va. Code §29A-5-1 et seq. shall apply.

8.9. ~~8-7:~~ Any person adversely affected by a final order or decision issued by the Board of Appeals is entitled to judicial review thereof pursuant to W. Va. Code §29A-5-4.

8.10. A failed drug or alcohol test is a test in which the certified person or safety-sensitive person has tested positive for a substance listed in Section 5.4. consistent with the standards and procedures provided in 49 CFR Part 40. Where a substance listed under Section 5.4. is not specifically tested for under 49 CFR Part 40, a positive test for such a substance shall be determined by the SAMHSA certified laboratory consistent with all applicable standards and procedures provided for in 49 CFR Part 40.

§56-19-9. Treatment Plan Agreement.

9.1. The Treatment Plan Agreement referred to in Subsection 6.1.2. of this rule shall contain, at a minimum, the following:

9.1.1. If the individual tested positive for alcohol or any substance referred to in ~~Subsection Section 5-3:~~ 5.4 of this rule, that individual shall be required to undergo six (6) months of substance abuse treatment, counseling and after-care under the supervision of a duly licensed, mental health professional and submit to random drug and alcohol screenings at a minimum of one (1) per month during the six (6) month treatment period. Upon completion of the six (6) months of treatment and random drug and alcohol screenings, the individual may petition the Board of Appeals to re-instate his/her certifications.

9.1.2. If the individual refused a substance abuse or chemical test of breath for the presence of alcohol, that individual's mining certification(s) shall be required to undergo ~~required to undergo~~ suspended for a minimum of eighteen (18) months. ~~The individual shall be required to successfully complete at least six (6) months of substance abuse treatment, counseling and after-care under the supervision of a duly licensed mental health professional and submit to random drug and alcohol screenings at a minimum of one (1) per month during the eighteen (18) month treatment period. Upon completion of the eighteen (18) months of treatment suspension and completing the treatment program with monthly~~ and random drug and alcohol screenings, the individual may petition the Board of Appeals to re-instate his/her certifications.

9.1.3. If the individual possessed or submitted an adulterated sample or possessed or submitted a substituted sample, that individual's mining certification(s) shall be required to undergo ~~required to undergo~~ suspended for a minimum of eighteen (18) months. ~~The individual shall be required to successfully complete at least six (6) months of substance abuse treatment, counseling and after-care under the supervision of a duly licensed, mental health professional and submit to random drug and alcohol screenings at a minimum of one (1) per month during the eighteen (18) month treatment period. Upon completion of the eighteen (18) months of treatment suspension and completing the treatment program with monthly~~ and random drug and alcohol screenings, the individual may petition the Board of Appeals to re-instate his/her certifications.

9.2. The Treatment Plan Agreement shall also contain an admission by the individual that he or she has violated the substance abuse laws for the first time and a statement that a second violation of Section ~~5.11:~~ 5.12 of this rule shall result in the permanent revocation of all mining certifications issued to him or her.

9.3 The Director shall review all Treatment Agreements and shall not approve any Agreement that does

not comply with this rule.

9.4. The Board of Appeals shall ~~insure~~ ensure an individual has satisfied all conditions for reinstatement before reinstating any ~~certificate~~ certification.