

Clearinghouse Rule 17-005

PROPOSED ORDER OF DEPARTMENT OF HEALTH SERVICES TO ADOPT PERMANENT RULES

The Wisconsin Department of Health Services proposes an order to **create** chapter DHS 38, relating to drug testing for participants in the FoodShare Employment and Training Program who are able-bodied adults.

RULE SUMMARY

Statute interpreted

See “Statutory authority.”

Statutory authority

Section 49.79 (9) (d), Wis. Stats., reads:

1. The department shall promulgate rules to develop and implement a drug screening, testing, and treatment policy to screen and, if indicated, test and treat participants in an employment and training program under this subsection who are able-bodied adults for use of a controlled substance without a valid prescription for the controlled substance. The policy shall include at least all of the following elements:

b. If a participant tests negative for use of a controlled substance, or tests positive for the use of a controlled substance but presents evidence satisfactory to the department that the individual possesses a valid prescription for each controlled substance for which the individual tests positive, the individual will have satisfactorily completed the substance abuse testing requirements under this paragraph.

c. If a participant tests positive for use of a controlled substance for which he or she does not have a valid prescription, then the individual must participate in substance abuse treatment to remain eligible for the employment and training program.

d. While participating in treatment, an individual who has tested positive for the use of a controlled substance without a valid prescription for the controlled substance shall submit to random testing for the use of a controlled substance, and the test results must be negative, or positive with evidence of a valid prescription, in order for the individual to remain eligible for the employment and training program under this subsection. If a test result is positive and the individual does not have a valid prescription for the controlled substance for which the individual tests positive, the individual may begin treatment again one time and will remain eligible for the employment and training program. If the individual completes treatment and tests negative for use of a controlled substance, or tests positive for the use of a controlled substance but presents evidence satisfactory to the department that the individual possesses a valid prescription for each controlled substance for which the individual tests positive, the individual will have satisfactorily completed the substance abuse screening and testing requirements under this paragraph.

2. Subject to the promulgation of rules under subd. 1., the department shall screen and, if indicated, test and treat participants in an employment and training program under this subsection who are able-bodied adults for illegal use of a controlled substance without a valid prescription for the controlled substance.

Explanation of agency authority

Wis. Stat. 49.79 (9) (d) directs the Department to develop and implement a drug screening, testing, and treatment policy to screen and, if indicated, test and treat participants in an employment and training program within the state's FoodShare program who are able-bodied adults for use of a controlled substance without a valid prescription for the controlled substance. The Department is required to promulgate rules to develop and implement the policy.

Related statute or rule

None.

Plain language analysis

Proposed rules may affect: able-bodied adults without dependents who need to meet a requirement for continued FoodShare benefits; income maintenance consortia and FSET contracted vendors that screen and make referrals for testing and treatment; entities that do drug testing; entities that provide substance abuse treatment; and Wisconsin businesses that will benefit by having more individuals ready to be hired and perform work.

Wis. Stat. 49.79 (9) (d) directs the Department to develop and implement a drug screening, testing, and treatment policy to screen and, if indicated, test and treat participants in an employment and training program within the state's FoodShare program who are able-bodied adults for use of a controlled substance without a valid prescription for the controlled substance.

This process will ensure that able-bodied adults without dependents who are receiving taxpayer supported workforce training services are work-ready. It will also provide individuals who do test positive for an illegal substance a path to treatment.

No reasonable alternative exists to rulemaking because the Wisconsin Legislature has directed the Department to promulgate rules to develop and implement the policy.

Summary of, and comparison with, existing or proposed federal regulations

21 U.S.C. § 862b provides:

Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.

The proposed rule will operationalize this federally-authorized testing in Wisconsin.

Comparison with rules in adjacent states

The only adjacent state that has passed legislation for drug testing for public assistance recipient is Michigan. In 1999, Michigan passed a law requiring all applicants for Michigan's Temporary Assistance for Needy Families program, the Family Independence Program, to undergo drug testing. That law was declared unconstitutional in a decision that held Michigan law authorizing suspicionless drug testing of welfare recipients was unconstitutional because it was not intended to address public safety, and the state's desire to address substance abuse as a barrier to employment was not a special need sufficient to justify departure from the Fourth Amendment requirement of individualized suspicion. While initially reversed on appeal to the 6th Circuit Court of Appeals, the initial decision was vacated when the 6th Circuit Court decided to hear the case en banc. The full court split 6-6 without decision, and the effect was to affirm the District Court's decision and order.

In 2014, the Michigan legislature authorized a new three-county pilot project to evaluate drug testing of applicants for public assistance based on suspicion, and the bills were signed into law on December 2014.

There are no administrative rules for this project, which is scheduled to run for one year ending in September, 2016.

Other states have adopted administrative rules relating to drug testing and treatment of recipients of public assistance include North Carolina, Tennessee, and Missouri. Unlike Wisconsin where the enabling statute addresses participation in work experience programs, the North Carolina, Tennessee, and Missouri rules determine eligibility to receive cash benefits.

As of March 2016, at least 17 states have proposed legislation requiring some form of drug testing or screening for public assistance recipients this year. The states include: Hawaii, Illinois, Iowa, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Vermont, Virginia and West Virginia.

Summary of factual data and analytical methodologies

The Department drafted proposed rules based upon the direction given by the Wisconsin Legislature in Wis. Stat. 49.79 (9) (d). The Department also reviewed chs. DWD 131 and DCF 105, as well as rulemaking documents associated with these chapters.

Analysis and supporting documents used to determine effect on small business

None. The proposed rules impose no compliance or reporting requirements on small businesses.

Effect on small business

None. The proposed rules impose no compliance or reporting requirements on small businesses.

Agency contact person

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Statement on quality of agency data

See “Summary of Factual Data and Analytical Methodologies.”

Place where comments are to be submitted and deadline for submission

Comments may be submitted to the agency contact person that is listed above until the deadline given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules Website at <http://adminrules.wisconsin.gov> after the hearing is scheduled.

RULE TEXT

SECTION 1. Chapter DHS 38 is created to read:

Chapter DHS 38

SUBSTANCE ABUSE SCREENING, TESTING AND TREATMENT FOR CERTAIN DEPARTMENT EMPLOYMENT AND TRAINING PROGRAMS

DHS 38.01 Purpose. The purpose of this chapter is to establish a process to screen for, and, if appropriate, test for the use of controlled substances by applicants for certain employment and training programs administered by the department, and to refer individuals determined to be abusing a controlled substance to a treatment provider for a substance abuse assessment and evaluation and appropriate treatment as required by s. 49.79 (9) (d), Stats.

DHS 38.02 Definitions. In this chapter:

(1) “Able-bodied adult” or “able-bodied adult without dependents” has the meaning given in s. 49.79 (1) (am), Stats.

(2) “Administering agency” means single county consortia under s. 49.78 (1r), Stats.; multicounty consortia under s. 49.78 (1) (br), Stats.; tribal governing body under s. 49.78 (cr), Stats.

(3) “Confirmation test” or “confirmed test” means an analytical procedure used to quantify a specific controlled substance or its metabolite in a specimen through a test that is different in scientific principle from that of the initial test procedure and capable of providing requisite specificity, sensitivity, and quantitative accuracy to positively confirm use of a controlled substance.

(4) “Controlled substance” or “substance” has the meaning given for “controlled substance” in s. 49.79 (1) (b), Stats., and 21 USC 802 (6).

(5) “Department” means the department of health services.

(6) “Employment and training program” or “food stamp employment and training program” or “program” in this chapter has the meaning given in s. 49.79 (9), Stats.

(7) “Food stamp program” has the meaning under s. 49.49 (1) (c), Stats.

(8) “Individual” means a person who is an able-bodied adult and who has been referred to participate in an employment and training program.

(9) “Medical review officer” means a licensed medical provider employed by or providing services under contract to a drug testing vendor who has knowledge of substance abuse disorders and laboratory testing procedures and who has the necessary training and experience to interpret and evaluate an individual’s positive test result in relation to the individual’s medical history and current, valid prescriptions.

(10) “Metabolite” means a chemical present in the body when a controlled substance is being broken down through natural metabolic processes that can be detected or measured as a positive indicator that a controlled substance associated with the metabolite has been used.

(11) "Screening" means completion of a questionnaire regarding the individual's current and prior use of controlled substances.

(12) "Specimen" means tissue, fluid, or a product of the human body capable of revealing the presence of controlled substances or their metabolites.

(13) "Treatment" means services that are conducted under clinical supervision to assist an individual through the process of recovery from controlled substance abuse and may include screening, application of approved placement criteria, intake, orientation, assessment, individualized treatment planning, intervention, individual or group and family counseling, referral, discharge planning, after care or continuing care, recordkeeping, consultation with other professionals regarding the patient's treatment services, recovery and case management, crisis intervention, client education, employment, and problem resolution in life skills functioning.

(14) "Treatment program" means a program certified to provide treatment for controlled substance abuse as a medically managed inpatient service under s. DHS 75.10, a medically monitored treatment service under s. DHS 75.11, a day treatment service under s. DHS 75.12, an outpatient treatment service under s. DHS 75.13, a transitional residential treatment service under s. DHS 75.14, or a narcotic treatment service for opiate addiction under s. DHS 75.15.

(15) "Treatment provider" or "provider" means a provider of treatment services for controlled substance abuse certified by the department under the provisions of ch. DHS 75, a provider certified under s. 440.88, Stats, or other licensed professional who meets the requirements of SPS 163.

DHS 38.03 Information about the requirement for controlled substance abuse screening, testing, and treatment. An administering agency shall provide information in a format approved by the department to any individual who expresses interest in or is referred to participate in an employment and training program to explain the requirement for participants in certain employment and training programs to undergo screening, testing, and treatment for abuse of controlled substances.

DHS 38.04 Administering a controlled substance abuse screening questionnaire to determine possible substance abuse. (1) WHO MUST COMPLETE A SCREENING QUESTIONNAIRE. An administering agency shall administer a controlled substance abuse screening questionnaire approved by the department to any individual who is referred to participate in an employment and training program.

(2) **EFFECT OF FAILING TO COMPLETE SCREENING QUESTIONNAIRE.** The applicant is required to answer all questions on the screening questionnaire, sign and date the questionnaire, and submit it to the administering agency for his or her application for an employment and training program to be complete. An individual who fails to submit a completed screening questionnaire is not eligible to participate in the employment and training program, and the administering agency shall not refer the individual to participate in the program. An individual denied eligibility for an employment and training program for failure to complete a screening questionnaire may complete a screening questionnaire at any time to become eligible for the program subject to this chapter.

(3) **EFFECT OF SUCCESSFULLY PASSING THE SCREENING QUESTIONNAIRE.** An individual whose answers to the screening questionnaire do not indicate possible substance abuse of a controlled substance has fully satisfied the requirements of this chapter and may participate in an employment and training program subject to this chapter without further screening, testing, or treatment.

DHS 38.05 Requiring a test for the use of a controlled substance. (1) WHO MAY BE REQUIRED TO UNDERGO DRUG TESTING. An individual whose answers on the screening questionnaire indicate possible abuse of a controlled substance shall be required to undergo a test for the use of a controlled substance.

(2) NATURE OF TESTING REQUIRED. Testing shall consist of laboratory analysis of a specimen collected from an individual by a drug testing vendor. The department shall provide to each administering agency a list of all controlled substances or metabolites of controlled substances that must be included in the test and cutoff levels for the initial test and cutoff levels for a confirmation test that may be used. The department may add or delete controlled substances or metabolites that must be included in the laboratory test to reflect changes in pre-employment drug testing practices of Wisconsin employers. A positive test result on the initial test shall be confirmed through a confirmation test from the original specimen collected from the individual.

(3) CONTRACT FOR TESTING SERVICES. Subject to the department's approval, the administering agency may contract with a qualified drug testing vendor to collect a specimen, carry out laboratory analysis of the specimen, store the specimen for confirmatory testing if required, complete confirmatory testing, and provide review by a medical review officer. The department may require the administering agency to use a specific testing service procured through state contracting if the department determines that volume discounts or other preferential pricing terms can be achieved through a statewide contract.¹

(4) REFUSAL TO SUBMIT TO A TEST. An individual refuses to submit to a test if the individual does any of the following:

- (a) Fails or refuses to provide a specimen during a scheduled drug testing appointment.
- (b) Fails or refuses to appear for a scheduled drug test without good cause.
- (c) Fails or refuses to complete a form or release of information required for testing, including those required by the drug-testing vendor that permit the drug-testing vendor to report test results to the department or administering agency.
- (d) Fails or refuses to provide a valid specimen for testing.
- (e) Fails or refuses to provide verification of identity to the testing vendor.
- (f) Fails or refuses to cooperate with the medical review officer, including refusal to complete an interview or answer questions or refusal to provide records necessary to demonstrate possession of a valid prescription.

(5) EFFECT OF REFUSAL TO SUBMIT TO A TEST. An individual who refuses to submit to a test under sub. (4) is ineligible to participate in the employment and training program until the individual submits to a test. The administering agency may direct an individual who has refused to submit to a test under sub. (4) and subsequently agrees to submit to a test to undergo drug testing on a random basis at any time within 10 business days after the individual agrees to submit to a test. The individual may not participate in an employment and training program until the individual undergoes a test for the use of a controlled substance and test results have been reported to the administering agency.

(6) REQUIREMENT FOR A CONFIRMATION TEST. If an individual tests positive for the use of a controlled substance, the drug testing vendor shall perform a confirmation test using the same

¹ **Note:** The federal Centers for Medicare & Medicaid Services (CMS) regulates all laboratory testing (except research) performed on humans in the U.S. through the Clinical Laboratory Improvement Amendments (CLIA). Any entity or facility performing drug or alcohol testing or screening on specimens derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings is considered a laboratory and must obtain an appropriate CLIA certificate and meet the applicable CLIA standards or cease testing. For information about CLIA, see: <https://www.cms.gov/Regulations-and-Guidance/Legislation/CLIA/index.html>. To obtain an application for CLIA certification contact the Wisconsin Department of Health Services Division of Quality Assurance at: DHSDQACLIA@dhs.wisconsin.gov.

specimen obtained for the initial positive drug test. All test results that are non-negative shall be interpreted as positive or negative by a drug testing vendor's medical review officer who shall be responsible for determining the presence of a controlled substance.

(7) **ACCEPTING TEST RESULTS FROM ANOTHER PROGRAM.** Results of a drug test performed by another state program, including a work experience program under ss. 49.162, 49.36, or 108.133, Stats., an income and maintenance program under 49.45 (23) (g), Stats., or a drug test carried out by the Wisconsin department of corrections, can be used by an administering agency to determine whether to refer an individual to treatment if the prior test results are provided directly to the administering agency, all the controlled substances and metabolites required by the department to be tested under this chapter are included in the prior test results, and the test occurred within the previous 90 days.

(8) **EFFECT OF A NEGATIVE TEST.** An individual who undergoes a test for the use of a controlled substance under s. DHS 38.05 and tests negative for use of a controlled substance or tests positive for use of a controlled substance but provides evidence of a valid prescription for each controlled substance for which the individual tests positive will have fully satisfied the requirements of this chapter and may participate in an employment and training program without further screening, testing, or treatment.

(9) **EFFECT OF A POSITIVE TEST.** An individual whose test results are positive for a controlled substance or metabolite tested and fails to present evidence of a valid prescription for the controlled substance shall be required to participate in treatment under s. DHS 38.06.

DHS 38.06 Requiring participation in treatment. (1) WHO MAY BE REQUIRED TO PARTICIPATE IN CONTROLLED SUBSTANCE ABUSE TREATMENT. Every individual who undergoes a test under s. DHS 38.05 and tests positive for the use of a controlled substance without presenting evidence of a valid prescription as described in s. 49.79 (9) (d), Stats., and as determined by the medical review officer for the drug testing vendor, shall be required to participate in controlled substance abuse treatment to remain eligible to participate in an employment and training program.

(2) **REFERRAL FOR TREATMENT.** The administering agency shall provide information to every individual required to participate in substance abuse treatment about treatment program providers and county-specific assessment and enrollment activities required for entry into treatment. The administering agency shall monitor the individual's progress in entering and completing treatment and the results of a random testing for the use of a controlled substance carried out during and at the conclusion of treatment.

(3) **SUBSTANCE ABUSE EVALUATION AND ASSESSMENT.** A treatment provider may conduct a substance abuse evaluation and assessment and take any of the following actions based on the evaluation and assessment:

(a) If a treatment provider determines an individual does not need substance abuse treatment, the provider shall notify the administering agency of its determination.

(b) If a treatment provider determines an individual is in need of substance abuse treatment, the provider shall refer the individual to an appropriate treatment program to begin treatment and shall notify the administering agency of the referral and the expected begin date and duration of treatment.

(c) If a treatment provider determines an individual is in need of treatment but is unable to refer the individual because there is a waiting list for enrollment in appropriate treatment programs, the provider shall notify the administering agency when the individual is expected to be enrolled.

(4) ELIGIBILITY OF INDIVIDUAL TO PARTICIPATE IN AN EMPLOYMENT AND TRAINING PROGRAM WHEN TREATMENT IS NOT NEEDED OR THE INDIVIDUAL IS PLACED ON A WAITING LIST. (a) An individual who has been determined by a treatment program after assessment not to need treatment will have fully satisfied the requirements of this chapter and may participate in an employment and training program without further screening, testing, or treatment.

(b) An individual who is on a waiting list for enrollment in an appropriate treatment program shall continue to take all necessary steps to continue seeking enrollment in an appropriate treatment program. The individual is eligible to participate in an employment and training program during the waiting list period, provided the individual is not eligible for immediate enrollment in another appropriate treatment program.

(5) SATISFYING THE REQUIREMENT TO PARTICIPATE IN TREATMENT THROUGH PARTICIPATION IN ANOTHER PROGRAM. An administering agency shall accept current participation in any treatment program to satisfy the requirements of this section. The individual participating in another program shall execute a release of information to allow the administering agency to obtain verification of successful participation in that treatment program.

(6) REFUSAL TO PARTICIPATE IN TREATMENT. An individual refuses to participate in treatment if he or she does any of the following:

(a) Fails or refuses to complete a form or releases required for treatment program administration, including those required by the treatment provider in order to share information with the administering agency about the individual's participation in treatment.

(b) Fails or refuses to participate in a controlled substance test required by the treatment provider or the administering agency during the course of required treatment, including random controlled substance testing directed by the treatment provider or administering agency.

(c) Fails or refuses to meet attendance or participation requirements established by the treatment provider.

(d) Fails or refuses to complete a substance abuse assessment.

(7) EFFECT OF REFUSAL TO PARTICIPATE IN TREATMENT. (a) If the treatment provider agrees to continue treatment, an individual who refuses to participate in treatment shall be given one opportunity to participate in treatment by re-entering treatment within 30 days of the refusal to participate.

(b) An individual who does not re-enter treatment within 30 days of a refusal or who refuses a second time to participate in treatment shall be ineligible to participate in a work experience program subject to s. 49.79 (9), Stats., for a period of 3 months.

(8) CONTROLLED SUBSTANCE TESTING DURING REQUIRED TREATMENT. (a) An individual who is participating in treatment shall undergo a minimum of one randomly administered test for the use of a controlled substance as directed by the administering agency during the course of treatment. Additional tests during required treatment may be directed by the administering agency if recommended by the treatment provider or required under par. (c).

(b) An individual who tests positive for use of a controlled substance during treatment without presenting evidence of a valid prescription for the controlled substance may be eligible to re-enter the treatment program. The individual may re-enter treatment only once as a result of a positive test for use of a controlled substance. The treatment provider shall determine the terms of the individual's re-entry into treatment based on an assessment of the individual's treatment needs at the time the individual re-enters treatment. Based on its assessment, the provider may take any action described in sub. (3).

(c) An individual who re-enters treatment under par. (b) shall undergo a minimum of one randomly administered test for the use of a controlled substance during the course of continued treatment following re-entry. After re-entering a treatment program, a confirmed positive test for use of a controlled

substance without evidence of a valid prescription for the controlled substance shall result in the individual being ineligible to participate in an employment and training program.

(d) An individual who is determined to be ineligible to participate in an employment and training program as a result of a second positive test for the use of a controlled substance under par. (c) is not eligible to participate in an employment and training program subject to s. 49.79 (9), Stats., for a period of 3 months.

(9) TESTING FOR USE OF A CONTROLLED SUBSTANCE AT THE CONCLUSION OF REQUIRED TREATMENT. (a) All individuals participating in treatment under this section shall undergo testing for use of a controlled substance at the completion of the treatment program.

(b) If an individual tests negative for the use of a controlled substance, or tests positive for the use of a controlled substance but presents evidence of a valid prescription for each controlled substance for which the individual tests positive, the individual will have satisfactorily completed the treatment and testing requirements under this section and may participate in the employment and training program without further screening, testing or treatment.

(c) An individual who refuses a test or tests positive for use of a controlled substance at the completion of substance abuse treatment without presenting evidence of a valid prescription for each controlled substance for which the individual tests positive is not eligible to participate in an employment and training program administered by the department for a period of 3 months.

(10) PARTICIPATION IN EMPLOYMENT AND TRAINING PROGRAM WORK REQUIREMENTS WHILE IN TREATMENT. An individual who is participating in an employment and training program shall be exempt from compliance with the work requirements under s. 49.79 (9), Stats., while participating in treatment.

DHS 38.07. Effect of completing, voluntarily withdrawing, or being terminated from an employment and training program. An individual who completes or voluntarily withdraws from an employment and training program is no longer subject to s. 49.79 (9), Stats., or this chapter. An individual who is terminated from a program for reasons unrelated to substance abuse screening, testing, and treatment is no longer subject to s. 49.79 (9), Stats., or this chapter.

DHS 38.08. Confidentiality of records. Screening questionnaires, testing results, and treatment records relating to this chapter shall not be disclosed unless for purposes connected with the administration of an employment and training program, unless disclosure is otherwise authorized by law or by written consent from the individual who is the subject of the record. The department may establish administrative, physical, and technical safeguard procedures administering agencies may be required to follow to assure compliance with state and federal laws relating to public assistance program records, drug testing and treatment records, and medical records.

DHS 38.09. Appeals of decisions under this chapter. An adverse decision under this chapter affecting an individual's participation in an employment and training program under s. 49.79 (9) Stats. may be appealed following the procedure under 7 CFR 273.15 and Wis. Admin s. HA 3.03.

DHS 38.10. Payment of costs related to screening, testing and treatment. (1) Administering agencies shall pay for all costs related to screening individuals for controlled substance abuse, including, but not limited to, the costs of producing, administering, and reviewing screening questionnaires.

(2) Administering agencies shall pay for all costs related to testing individuals for controlled substance abuse, including, but not limited to, the provisions under s. DHS 38.05 (3).

(3) The department shall pay costs related to the substance abuse treatment of individuals under this chapter as the payer of last resort.

SECTION 2. EFFECTIVE DATE: This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register, as provided in s. 227.22 (2), Stats.