

STATE OF OHIO
ADJUTANT GENERAL'S DEPARTMENT
2825 West Dublin Granville Road
Columbus, Ohio 43235-2789

MEMORANDUM

TO: State of Ohio Employees and Supervisors
FROM: Major General John C. Harris Jr., The Adjutant General
DATE: April 20, 2019
SUBJECT: WORK RULE - Drug-Free Workplace Policy

JCH 20 APR 19

1.0 SCOPE

This policy applies to all state of Ohio employees of the Adjutant General's Department (ADJ).

2.0 PURPOSE

The ADJ desires a **workplace**¹ that is free from the adverse effects of alcohol and other drugs. Substance abuse is a serious and complex, yet treatable, condition/disease that adversely affects the productive personal and family lives of employees. Substance abuse may lead to safety and health risks in the workplace, for the abusers, their co-workers, and the public-at-large. The emphasis of the drug-free workplace program is to prevent abuse and rehabilitate employees and to abate risks created by employees who are on duty in an impaired condition.

3.0 POLICY

The ADJ is a drug-free workplace. To provide and maintain a drug-free workplace, ADJ employees (or "employees") are required to follow the standards established by this policy. Additionally, the ADJ will not hire anyone who is known to currently **abuse a restricted substance**. However, this policy shall not preclude the State from hiring persons who are in recovery.

3.1 Fit for Duty Requirement:

ADJ employees are required to be **fit-for-duty**, at the time they report to work and any time they are in active work status or otherwise in the workplace. For the purposes of this policy,

¹ A glossary of terms found in this policy is located in Appendix A - Definitions. The first occurrence of a defined term is in bold italics and linked to Appendix A.

fit-for-duty means the employee is able to perform the essential functions of his/her job and he/she does not currently abuse a restricted substance.

3.1.1 Note on Enforcement: An employee who is suspected of abusing a restricted substance in violation of this policy shall be subject to the testing procedures administered by the ***State of Ohio Drug-Free Workplace Services Program*** and/or discipline, as provided in Section 3.4.

3.2 Prohibitions on Unlawful Activities: While in active work status or otherwise in the workplace, state of Ohio employees shall not unlawfully manufacture, distribute, dispense, possess, purchase, transfer, or use a restricted substance.

3.3 Limitations on Additional Activities: Regardless of whether the conduct is otherwise lawful, state of Ohio employees who are in active work status or otherwise in the workplace are also subject to the following limitations:

3.3.1 Alcohol: Alcohol is a restricted substance for purposes of this policy (see Appendix A, Definitions). Accordingly, except as provided in Section 3.3.4, state of Ohio employees who are in active work status or otherwise in the workplace shall not manufacture, distribute, dispense, possess, purchase, transfer, or use alcohol.

3.3.2 Medical Marijuana: ***Medical marijuana*** is a restricted substance for purposes of this policy (see Appendix A, Definitions). Accordingly, except as provided below in Section 3.3.4, state of Ohio employees who are in active work status or otherwise in the workplace shall not manufacture, distribute, dispense, possess, purchase, transfer, or use medical marijuana.

3.3.2.1 Application to Employees Outside of Active Work Status and Outside of the Workplace: This policy is not intended to prohibit medical marijuana use by ADJ employees (or applicants) who are **NOT** in active work status at the time of use, provided that:

- Such use is in accordance with applicable Ohio law, this policy, and any other applicable policy, procedure, work rule, or directive (collectively "standards");
- Such use does not occur within the workplace;
- The employee's position is not subject to the Federal Department of Transportation (DOT) Testing (see Sections: 3.3.6; 3.4.1.6; and, 3.4.3.3);
- The employee's position does not require an individual holding that position to transport, carry, or otherwise possess a firearm or ammunition (see Sections 3.3.5 and 3.4.3.2); and,
- When the employee returns to active work status or is otherwise in the workplace, he/she is fit-for-duty as provided in Section 3.1.

3.3.3 Prescription Medication: A *prescription medication* is a restricted substance for purposes of this policy (see Appendix A, Definitions). Accordingly, state of Ohio employees who are in active work status or otherwise in the workplace shall not abuse a prescription medication.

3.3.3.1 Note regarding medical marijuana: For purposes of this policy, medical marijuana is not a prescription medication (see Appendix A, Definitions). As explained in Section 3.3.2, state of Ohio employees cannot possess medical marijuana while in active work status or otherwise in the workplace.

3.3.4 Exception: This policy is not intended to prohibit an act that is pursuant to an employee's job duties, such as undercover investigations conducted by law enforcement.

3.3.5 Firearms: Any employee (or applicant) in a position that requires him/her to carry or otherwise possess or transport a firearm(s) or ammunition is prohibited from unlawfully using any controlled substance as defined by federal law.

3.3.5.1 Note regarding medical marijuana: Marijuana is a controlled substance that is prohibited by federal law. As such, any employee (or applicant) who holds a position that is required to carry or otherwise possess or transport a firearm(s) or ammunition is prohibited from using medical marijuana, at any time, even if a medical marijuana recommendation or other medical documentation is provided.

3.3.6 Employees Subject to Federal DOT Testing: This policy does not affect, in any way, the requirements of the federal Omnibus Transportation Employee Testing Act of 1991 and applicable United States Department of Transportation regulations (collectively, "DOT drug testing laws"). Any employee (or applicant) in a position that is subject to Federal DOT Testing is prohibited from using drugs and/or alcohol (both defined by federal law) in a manner that violates DOT drug testing laws.

3.3.6.1 Note regarding medical marijuana: Marijuana is one of the classes of drugs included in a Federal DOT Test. As such, any employee (or applicant) who holds a position that is subject to Federal DOT Testing is prohibited from using medical marijuana, at any time, even if a medical marijuana recommendation or other medical documentation is provided.

3.4 Enforcement: This policy will be enforced through management supervision and the State of Ohio Drug-Free Workplace Services Program. Where appropriate, violations of this policy shall be reported to the State Human Resource Office and the Ohio State Highway Patrol or other appropriate law enforcement authorities. Agencies should consult legal counsel to assist in making this determination.

The State of Ohio Drug-Free Workplace Services Program will include the following components:

3.4.1 Types of Tests:

3.4.1.1 *Applicant testing*: Final applicants for: 1) **safety sensitive** positions in state service that have tentatively met all relevant employment criteria but have not been officially offered employment with the ADJ (see Appendix B - Applicant Testing Designated Positions); or 2) any final applicant for a designated unclassified position will undergo drug testing prior to hiring. Applicants for these positions must complete and successfully pass the drug test as a condition of employment. Agencies may waive the applicant drug-testing requirement for a state employee if the employee has a negative drug test on record and has not had a break in service since that test was conducted.

3.4.1.2 *Random drug testing*: Employees who occupy a position designated as a safety sensitive position are subject to random drug and alcohol testing according to the requirements of any applicable collective bargaining agreement(s). Employees in safety sensitive positions that are exempt from collective bargaining are subject to random drug and alcohol testing requirements as determined by the Director of the Department of Administrative Services (DAS).

3.4.1.3 *Rebuttable presumption testing*: Pursuant to ORC § 4123.54, when an employee who suffers a work-related injury tests positive for alcohol or drugs or refuses to be tested, the positive test or refusal to test creates a **rebuttable presumption** that the presence of alcohol/drugs in an employee's system is the proximate cause of a work-related injury. The burden of proof then shifts to the employee to prove that the presence of the alcohol or drug was not the proximate cause of the work-related injury. An employee who tests positive or refuses to submit to chemical testing may be disqualified for compensation and benefits under the Workers' Compensation Act.

- *Note regarding medical marijuana*: This policy does NOT affect rebuttable presumption testing pursuant to ORC § 4123.54. Accordingly, medical marijuana use is not excused for purposes of rebuttable presumption testing.

3.4.1.4 *Reasonable suspicion testing*: Any employee may undergo alcohol and/or drug testing based on a for-cause determination by management. Any employee involved in a significant incident in which the health or safety of himself/herself or other individuals is involved, or in which extensive property damage has occurred, will be subject to **reasonable suspicion testing** in

accordance with the requirements of any applicable collective bargaining agreement(s) or the Director of DAS.

3.4.1.5 *Follow-up testing*: Any employee referred through administrative channels to a counseling or rehabilitation program as a result of that employee's positive test may be subject to **follow-up testing** according to specifications and provisions of any applicable collective bargaining agreement(s), or, for employees exempt from collective bargaining, the policy of the Director of DAS.

3.4.1.6 *Federal DOT testing*: Employees whose duties require them to have a commercial driver's license and drive certain types of vehicles are subject to drug and alcohol testing in accordance with the federal Omnibus Transportation Employee Testing Act of 1991 and applicable United States DOT regulations.

3.4.2 **Confidentiality of Test Results**: Confidentiality of alcohol and/or other drug test results will be maintained to the extent provided by law, and employees shall have the opportunity to refute the results of any alcohol and/or other drug tests as provided in Section 3.4.3.

3.4.3 **Opportunity to Provide Medical Documentation**: Employees or applicants shall be given the opportunity as required by applicable collective bargaining agreements, or in the absence of such agreements, as stipulated by the Director of DAS, to offer an explanation or submit medical documentation of legally prescribed medication, medical marijuana recommendation, or exposure to toxic substances which may explain a positive test result. Such information shall be reviewed only by the **medical review officer (MRO)** in his/her determination of the validity of a positive test and shall be released to the employer only to explain a test result.

3.4.3.1 *Employee responsibility*: The employee is solely responsible for providing medical documentation as instructed by the MRO. This responsibility includes, but may not be limited to, coordinating any necessary records exchange between the employee's physician and the MRO and ensuring that the MRO receives the requested documentation within the timeframe provided by the MRO.

3.4.3.2 *Firearms/Ammunition*: Any employee (or applicant) in a position that requires him/her to carry or otherwise possess or transport a firearm(s) or ammunition is prohibited from unlawfully using any controlled substance as defined by federal law. Marijuana is a controlled substance that is prohibited by federal law. As such, any employee (or applicant) who holds a position that is required to carry or otherwise possess or transport a firearm(s) or ammunition is prohibited from using medical marijuana, at any time, even if a medical marijuana recommendation or other medical documentation is provided.

3.4.3.3 Employees subject to federal DOT testing: Any employee (or applicant) in a position that is subject to Federal DOT Testing is prohibited from using drugs and/or alcohol (both defined by federal law) in a manner that violates DOT drug testing laws. Marijuana is a prohibited drug for purposes of Federal DOT Testing. As such, any employee (or applicant) who holds a position that is subject to Federal DOT Testing is prohibited from using medical marijuana, at any time, even if a medical marijuana recommendation or other medical documentation is provided.

3.4.4 **Refusal to Test:** An employee's test will be treated as a positive test, subject to discipline as provided in Section 2.4.5, if the employee refuses to submit to a properly-ordered test or if the employee otherwise fails to cooperate with the testing process. An applicant will not be hired if the applicant refuses to submit to an applicant test or if the applicant fails to cooperate with the testing process.

3.4.4.1 Examples: The types of actions listed below will be considered a refusal to test. This list is not intended to be all inclusive.

- Refusal to sign test forms;
- Refusal to provide a specimen to be tested OR an adequate amount of the specimen;
- Alteration or substitution of the test specimen;
- Any other failure to cooperate during the testing process that prevents proper completion of the test; or
- Any other act of refusal as described in the State of Ohio Employees Drug Free Workplace Manual.

3.4.5 **Disciplinary Action:** An employee who violates any of the standards contained in this policy will be subject to disciplinary actions pursuant to ORC § 124.34, the disciplinary provisions of any applicable state collective bargaining agreements, employing agency, board, or commission work rules, and/or other applicable policies/procedures. In particular, sale or improper possession of a restricted substance will result in the strongest form of discipline possible, up to and including termination.

3.4.5.1 A test result which indicates a .04% blood alcohol level or higher will be considered a positive test. Any employee whose blood alcohol level tests at or above .02% and below .04% shall be immediately removed from duty until the start of the employee's next scheduled shift or for twenty-four (24) hours, whichever is greater.

- Employees removed from duty may use any accrued leave or compensatory time at the employee's option, or be placed in a leave without pay status if accrued leave or compensatory time is not available.

3.4.5.2 *Rehabilitation Program*: Employees who have a confirmed positive alcohol or other drug test may be required to enroll in and successfully complete a substance abuse rehabilitation program certified by the Ohio Department of Mental Health and Addiction Services.

- If an employee has a confirmed positive test while enrolled in, or subsequent to completion of, the rehabilitation program, the employee will be subject to discipline, up to and including termination.
- This provision in no way limits the employer's ability to also discipline for workplace or job-related incidents that may be directly or indirectly associated with the test results.

3.5 **Voluntary Employee Assistance Program Participation**: The Ohio Employee Assistance Program (or "EAP") refers employees or their families to appropriate substance abuse rehabilitation programs. These programs are often covered by the employee's health insurance plan. Employees with substance abuse problems are encouraged to voluntarily contact the EAP and enroll in a rehabilitation program certified by the Ohio Department of Mental Health and Addiction Services. Voluntary contact of the EAP or enrollment in a substance abuse program will not adversely affect employment. However, unacceptable job performance, attendance, and/or behavioral problems may result in disciplinary action, up to and including termination.

3.6 **Reasonable Accommodations**: The state recognizes that some prescription medications and medical marijuana may affect judgment, coordination, and physical ability. Employees who need an accommodation should submit a request to their agency human resources office.

3.6.1 **Prescription Medication**: For accommodation requests regarding prescription medication, agencies, boards, and commissions shall evaluate such requests in accordance with applicable law, the standards established in this policy, and any other applicable policy or directive.

3.6.2 **Medical Marijuana**: For accommodation requests regarding medical marijuana, agencies, boards, and commissions may evaluate such requests in accordance with the standards established in this policy and any other applicable policy or directive.

3.6.3 **Testing**: For accommodation requests regarding testing, agencies, boards and commissions shall evaluate such requests in accordance with applicable

law, the standards established in this policy, and any other applicable policy or directive.

3.7 Applicants or Employees in Recovery: All State agencies, boards, and commissions shall ensure their agency, board, or commission drug-free workplace policy and implementation thereof complies with the Americans with Disabilities Act. In accordance with 28 CFR § 35.131, agencies, boards, and commissions shall not discriminate against an applicant or employee who is not engaging in current illegal use of a restricted substance and, who:

- Successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;
- Is participating in a supervised rehabilitation program; or
- Is erroneously regarded as engaging in such use.

3.8 Criminal Drug Convictions: Each employee is required to notify the Appointing Authority of his/her agency, board, or commission within five (5) calendar days after he/she receives a **conviction** for violating any federal or state criminal drug statute where such violation occurred at the workplace or any location where official state business is conducted.

3.8.1 Any employee who fails to report such a conviction will be subject to immediate termination.

3.8.2 The employing state agency, board, or commission may have an obligation to notify any U.S. government agency with which it has a contract or grant within ten (10) days after receiving notice from the employee or otherwise actual notice of such conviction. If required, any criminal drug conviction occurring in the workplace will be reported to federal granting authorities.

3.8.3 Within thirty (30) days of such notification, the Appointing Authority will be required to take appropriate disciplinary action against such an employee, up to and including termination. The Appointing Authority may also refer the employee to the Ohio EAP for referral and treatment.

3.9 Contractors and Vendors: Agencies, boards, and commissions shall require contractors and vendors to comply with applicable state and federal laws regarding a drug-free workplace. Contractors and vendors shall be required to make a good-faith effort to ensure that their employees, while working on state property, will not unlawfully manufacture, distribute, dispense, possess, purchase, transfer, or use a restricted substance. Agencies, boards, and commissions should consult with their legal counsel to develop appropriate language to include in contracts.

3.10 **Training:** All state of Ohio employees will be provided with periodic Drug-Free Workplace training. The training will include information regarding the:

- Dangers of alcohol and other drug abuse in the workplace;
- State of Ohio Drug-Free Workplace Policy;
- Ohio EAP and other available treatment programs; and,
- Penalties that may be imposed upon employees for alcohol and/or other drug abuse violations occurring at the workplace or any location where official business is conducted.

4.0 AUTHORITY

Americans with Disabilities Act of 1990, as amended, Omnibus Transportation Employee Testing Act of 1991; 18 USC 922(g)(3), 28 CFR 35.131, 49 CFR Part 40; ORC 124.09, 3719.01 et seq., 3796 et seq., and 4123.54; OAC 123:1-76-01 through 123:1-76-14, and 3796 et seq; applicable collective bargaining agreements; OAP AS-D-01. State of Ohio Administrative Policy - DAS HR-39, 2 CFR Part 182

Appendix A – Definitions

For purposes of this policy, the defined terms specifically designated within shall have the meanings prescribed below:

- a. Abuse. Means the following:
 - 1) The use of any prescription medication in a manner inconsistent with its prescription, or under circumstances where use is not permitted;
 - 2) The use of recommended medical marijuana in a manner inconsistent with a medical purpose, or under circumstances where use is not permitted; or,
 - 3) The use of any other restricted substance under circumstances where use is not permitted.
- b. Active Work Status. The conditions under which an employee is actually in a work status and is eligible to receive pay. Active work status includes stand-by status or any other circumstance where the employee is notified by his/her employing agency to be available during off-duty hours for a possible call to report to work and the employee receives compensation for all such hours. Active work status does not include vacation pay, sick leave, bereavement leave, compensatory time, holidays, personal leave, and disability leave.
- c. Alcohol. Is ethyl alcohol or ethanol.
- d. Controlled Substance. A drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V, as provided in ORC § 3719.41.
- e. Conviction. A finding of guilty, no contest (including a plea of nolo contendere), or the imposition of a sentence by a judge or jury in any federal or state court.
- f. Fit-for-Duty. For purposes of this policy, fit-for-duty means the employee is able to perform the essential functions of his/her job and he/she does not currently abuse a restricted substance.
- g. Follow-up Testing. Testing ordered as a result of an employee testing positive on a prior test, in violation of an employer's work policy, state drug or alcohol testing regulations, federal drug or alcohol testing regulations, and/or applicable collective bargaining agreement provisions.
- h. Medical Marijuana. Marijuana that is cultivated, processed, dispensed, tested, possessed, or used for a medical purpose, as defined in ORC § 3796.01. Medical marijuana is a controlled substance. A patient only qualifies to use medical marijuana if he or she is on the registry established by the Ohio State Board of Pharmacy with a valid and active recommendation issued by a physician.
 - 1) Note: For purposes of this policy, medical marijuana is not a prescription medication.

- i. Medical Review Officer. A person who is a licensed physician or other professional delineated in federal regulations with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with a person's medical history and other relevant biomedical information.
- j. Prescription Medication. A written or oral order for a controlled substance for the use of a particular person given by a practitioner in the course of professional practice and in accordance with the regulations promulgated by the director of the United States Drug Enforcement Administration pursuant to the federal drug abuse control laws.

Note: For purposes of this policy, medical marijuana is not a prescription medication.

- k. Reasonable Suspicion Testing. Alcohol or other drug testing based on a belief that an employee is using or has used a restricted substance in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience.
- l. Rebuttable Presumption. An assumption of fact that is accepted to be true unless someone proves it to be untrue.
- m. Restricted Substance. Includes:
 - 1) "Alcohol" as defined in paragraph c;
 - 2) "Controlled Substance[s]" as defined in paragraph d; and,
 - 3) Any substance, legal or illegal, that is used intentionally, inappropriately, and impairs job performance.

Please Note: Medical marijuana and prescription medications (see definitions in paragraphs h and j) are "controlled substances," and, therefore, each is a "restricted substance" for purposes of this policy.

- n. Safety Sensitive. Any job, position, work-related function, or job task designated as such by the employer, which through the nature of the activity could be dangerous to the physical well-being of or jeopardize the security of the employee, co-workers, customers, or the general public through a lapse in attention or judgment.
- o. State of Ohio Drug-Free Workplace Services Program. The program administered by the Ohio DAS to administer and coordinate Ohio's compliance with provisions of the federal Drug-Free Workplace Act of 1988, the Omnibus Transportation Employee Testing Act of 1991, collective bargaining agreements, and any other federal or state laws or regulations requiring substance abuse testing.
- p. Workplace. A state-owned or utilized premises for official state business or any place where official state business is conducted. This includes state-owned/leased vehicles and other motorized equipment.