

## Guidance for Adoption of Drug Test Policy

Federal law requires entities, including local governmental entities that employ certain categories of workers to implement a Drug and Alcohol policy. This law is administered by the United States Department of Transportation (“USDOT”). Employees who *must* be tested pursuant to USDOT regulations include all CDL drivers who operate commercial motor vehicles on public highways and all transit employees. In addition, the Association of County Commissions of Alabama recommends that all members adopt a comprehensive Drug and Alcohol policy applicable to all employees. Such a policy ensures the safety of all County residents and employees and can lower your liability risk.

Therefore, the Association is providing a sample Drug and Alcohol policy, which may be customized and adopted for your county. This policy satisfies current USDOT requirements and is the policy recommended under the Association’s Workers’ Compensation Self-Insurers’ Fund and Liability Self-Insurance Fund. While you should read the entirety of the policy very carefully, there are a few areas to which you should pay special attention, including as follows:

- **Safety Sensitive Employees:** Please carefully review the definition of “safety sensitive employees” contained in the sample policy. When determining whether an employee is safety sensitive, ask yourself whether the employee could seriously injure or kill himself or others if he makes a mistake while intoxicated. If the answer is “probably not,” then the employee is not safety-sensitive. It is very important that you have current, accurate job descriptions that clearly state whether the position is safety-sensitive.
- **Random Testing:** Public employers cannot randomly drug test all employees. Only those employees who hold positions that have been designated to be safety sensitive can be randomly drug tested! Randomly drug testing public employees who do not qualify as safety sensitive is a violation of the Fourth Amendment of the United States Constitution.
- **Pre-Employment Testing:** There is a debate about whether non-safety sensitive employees may be subjected to pre-employment testing. The issue has not been definitively decided in Alabama. Some courts across the country have held that pre-employment testing is acceptable because it is different from random drug testing in that an applicant’s interest in obtaining a job is lower than a current employee’s interest in maintaining a job, while the employer’s interest in finding out whether the applicant has used drugs is higher than their interest in randomly testing employees with satisfactory job performance. However, many other courts have rejected that test. Importantly, in Chandler v. Miller, 520 U.S. 305 (1997), the United States Supreme Court has held candidates for public office, who are essentially applicants for public employment, may not be subjected to drug-testing as a precondition to getting on the ballot, finding that there was no justification for doing so that outweighed the candidates’ Fourth Amendment rights because the positions at issue could not be considered safety sensitive. After carefully considering the relevant law, the ACCA recommends that counties only conduct both random and pre-employment testing for safety-sensitive positions.

- **Reasonable Suspicion/Post-Accident Testing:** The restrictions on pre-employment and random testing do not mean that you must tolerate non-safety-sensitive employees being intoxicated at work. All employees can and should be subjected to reasonable suspicion and post-accident testing.
- **Employee Assistance Program:** As stated in the sample policy, employers are required to provide information to employees regarding Substance Abuse Professionals (“SAPs”) who can assist them in fighting a drug or alcohol addiction. In addition, employers *may*, but are not required to, institute an Employee Assistance Program (“EAP”) to assist employees who are fighting such an addiction while remaining employed. A brief sample EAP policy is included in the larger sample policy. If you do not wish to adopt an EAP, then you should delete it. If you currently have an EAP or wish to institute such a program, then you should customize this policy to your needs.
- **USDOT Requirements:** USDOT has very specific requirements for drug and alcohol policies. The Association recommends that most of these requirements, such as the provision of annual training for employees and supervisors and the use of certified testing labs, be adopted across the board. However, even if a comprehensive policy is adopted, there are still a few special requirements for employees subject to USDOT regulations. For example, USDOT has very specific yearly requirements for how many employees must be randomly tested and requires that these employees be placed in a separate random-testing pool from other safety-sensitive employees. You should check USDOT’s website each year to ensure compliance ([www.dot.gov/adapc](http://www.dot.gov/adapc)). USDOT may also require you to submit a report to ensure compliance; therefore, it is important that you keep appropriate records of all testing.

**Drug Program Coordinator:** Each county should designate a Drug Program Coordinator who will be responsible for ensuring compliance with your drug and alcohol policy, including ensuring that the testing laboratories and Medical Review Officer are properly certified.