

SUBCHAPTER D. SUBSTANCE ABUSE PROGRAM

§4.30 Purpose. This subchapter contains the Texas Transportation Commission's substance abuse program. The goal is to achieve an alcohol- and drug-free workplace, which will help protect the health and safety of the public and of the department's most valuable resource, its employees. The department is committed to rehabilitating and restoring employees whose performance may be impaired by alcohol or drug abuse.

§4.31 Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Alcohol--The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

(2) Alcohol test result--The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

(3) Alcohol- or drug-related driving offense--A conviction or deferred adjudication for any offense involving the driving of a vehicle, whether on-duty or off-duty, while under the influence of alcohol or drugs or while intoxicated.

(4) Commercial driver--An employee who operates a commercial motor vehicle for the department, regardless of the frequency.

(5) Commercial motor vehicle--A motor vehicle or combination of vehicles used to transport passengers or property if it:

(A) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

(B) has a gross vehicle weight rating of 26,001 or more pounds;

(C) is designed to transport 16 or more passengers, including the commercial driver; or

(D) is of any size and is used in the transportation of materials that are considered hazardous under the Hazardous Materials Transportation Act, 49 U.S.C. §5103(b), and that require the motor vehicle to be placarded under the Hazardous Materials Regulations, 49 C.F.R. Part 172, Subpart F.

(6) Completion of treatment--Compliance with all EAP treatment recommendations and requirements, passing all required drug and alcohol tests, and finishing all treatment as prescribed by the EAP counselor or by the treatment program's staff physician.

(7) Critical duties--Driving, commercial driving, performing safety-impact activities, performing vessel crewmember duties, operating motorized equipment, supervising or assisting with the loading or unloading of a motor vehicle, and inspecting, servicing, or maintaining any vehicle.

(8) Department--The Texas Department of Transportation.

(9) Directly involved--The employee's order, action, or failure to act is determined to be or cannot be ruled out as a causative factor in the events leading to or causing a serious accident or a serious marine incident.

(10) Driving for the department--Operating a vehicle, including an automobile, truck, motor-driven equipment, roller, tractor, grader, ferry, or aircraft, during the course and scope of employment, without regard to ownership of the vehicle or the frequency of operation. An employee holds a position that involves driving for the department if the position may require driving for the department.

(11) Drug--A narcotic drug, controlled substance, or marijuana, as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §802, not including a substance legally available by prescription or over the counter.

(12) Employee--A person employed by the department in a full-time, part-time, temporary, project, or seasonal position, including temporary recruitment employees, but not including other temporary employees under contract to the department.

(13) Employee Assistance Program (EAP)--A program designed to assist employees and their immediate family members in dealing with emotional and personal problems, including alcohol and drug abuse, that potentially affect an employee's work performance and safety.

(14) EAP counselors--Licensed medical doctors; licensed doctors of osteopathy; psychologists licensed or certified by the Texas State Board of Examiners of Psychologists or another regulating board; social workers licensed or certified by the Texas State Board of Social Worker Examiners or another regulating board; employee assistance professionals licensed or certified by the Employee Assistance Professionals Association, Inc., or another regulating board; and addiction counselors certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission, by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, or by another regulating board, with knowledge of and clinical experience in the diagnosis and treatment of alcohol- and drug-related disorders, including Substance Abuse Professionals as defined in 49 C.F.R. Part 40.

(15) Final applicant--A person who is given a conditional offer of initial employment.

(16) Human Resources Division--An organizational unit in the department that oversees human resource functions for the department.

(17) Inhalant--A breathable chemical that produces mind-altering vapors, including volatile solvents, aerosols, nitrites, and anesthetics.

(18) Mandatory referral--A referral to the EAP that requires an employee to report to the EAP and complete treatment or be terminated from employment with the department.

(19) Medical review officer--A licensed physician who is responsible for reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

(20) Possession of alcohol or drugs--The presence of alcohol or drugs in an area under an employee's effective control.

(21) Safety-impact employee--An employee who holds a safety-impact position.

(22) Safety-impact position--A full-time, part-time, temporary, project, or seasonal position, as determined by the director of the Human Resources Division, that requires the performance of one or more activities that:

(A) could present a threat to the health or safety of employees or the public if performed with inattentiveness, errors in judgment, diminished coordination, reduced dexterity, or lack of composure; and

(B) are performed with such independence that it cannot reasonably be assumed that mistakes could be prevented by a supervisor or another employee.

(23) Serious accident--Any accident that occurs in the workplace, and results in:

(A) injury to an employee who is directly involved in the accident and who requires professional medical treatment beyond first aid;

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to a vehicle that causes it to be inoperable; or

(D) receipt of a citation by the employee under state or local law for a moving traffic violation in connection with the accident.

(24) Serious marine incident--Any reportable marine incident resulting in:

(A) injury to an employee who is directly involved in the incident, who requires professional medical treatment beyond first aid, and who does not return to work or who returns to work to perform restricted duties;

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to property in excess of \$100,000;

(D) actual or constructive total loss of any ferry subject to Coast Guard inspection under 46 U.S.C. §3301 or to any self-propelled vessel of 100 gross tons or more if not subject to Coast Guard inspection;

(E) a discharge of 10,000 or more gallons of oil into navigable waters of the United States; or

(F) a discharge of a reportable quantity of a hazardous substance into the environment or into the navigable waters of the United States.

(25) Substance control officer--An employee who administers the substance abuse program.

(26) Treatment--Medical or psychological therapy or education for alcohol or drug dependency, whether conducted on an inpatient basis, on an intensive outpatient basis, or as educational or counseling sessions. Treatment includes any aftercare following inpatient treatment or intensive outpatient treatment, including weekly counseling sessions as designated by the EAP counselors.

(27) Supervisor--Any employee who has formal supervisory or managerial responsibilities, who is designated to coordinate the work activities of other employees, or who is designated to direct a team of employees.

(28) Use of alcohol or a drug--The ingestion by any means of any substance containing alcohol, including medication; the use in any way of a drug; or being under the influence of alcohol, an inhalant, or a drug. Drug use and drug abuse include the use of an inhalant in a manner other than that for which it was intended and that causes or is known to cause intoxication.

(29) Vessel Crewmember--An individual who:

(A) is working on board a vessel, whether or not as a member of the vessel's crew;

(B) occupies or performs the functions of a position required by the vessel's Certificate of Inspection;

(C) performs the duties of a patrolman or watchman; or

(D) is assigned during an emergency to warn passengers or control the movement of passengers on a vessel.

(30) Workplace--Any location where an employee works, whether or not on state-owned property. An employee is in the workplace when operating or riding in a state vehicle.

§4.32 Department Actions Relating to Substance Abuse

- (a) Administrative and disciplinary actions. An employee who violates the policies and prohibitions of this subchapter will be subject to discipline, up to and including termination from the department.
- (b) Mandatory referral. In addition to or instead of disciplinary action, an employee may be mandatorily referred to the EAP and required to complete treatment.
- (c) Voluntary referral. The department provides the EAP and encourages employees to use its services voluntarily to deal with alcohol or drug abuse before job performance is affected. Completion of treatment may mitigate the need for discipline.
- (d) Acknowledgement of policy. As a condition of employment, each employee must comply with this subchapter and must sign a form acknowledging these standards of conduct.

§4.33 Prohibited Conduct

- (a) Employee obligation. Department employees have an obligation to uphold the public's trust in the department by projecting a positive image to other employees and the public at all times.
- (b) Alcohol and drug use. An employee is prohibited from using alcohol or drugs, possessing an open container of an alcoholic beverage, or possessing a drug in the workplace.
- (c) Alcohol use after accident. An employee is prohibited from using alcohol within eight hours after an accident or before undergoing a post-accident alcohol test, whichever comes first.
- (d) Sale of drugs. An employee is prohibited from the illegal sale, dispensing, distribution, transportation, or manufacture of drugs, whether in the workplace or outside the workplace. This prohibition includes any violation of state and federal controlled substances acts.
- (e) Lawful medication. An employee is prohibited from reporting to work, working, or operating a state vehicle while under the influence of lawfully prescribed or over-the-counter substances if the employee's performance is impaired. An employee may appropriately use prescribed or over-the-counter medications if work performance is not impaired.

(f) Responsibilities of supervisors. A supervisor may not allow an employee to continue to work if the supervisor has actual knowledge that the employee in the workplace is using alcohol or drugs in the workplace, possesses an open container of an alcoholic beverage in the workplace, or possesses a drug in the workplace.

§4.34 Illegal Drugs

(a) Distribution. An employee will be terminated from the department if convicted of a criminal drug violation relating to the sale, distribution, dispensing, transportation, or manufacture of drugs, whether in the workplace or outside the workplace. A final applicant will not be hired if the final applicant is on probation or parole for a felony conviction related to the sale, distribution, transportation, or manufacture of drugs or the possession with the intent to sell, distribute, dispense, transport, or manufacture drugs. An employee will be terminated from the department if it is determined that at the time of hire, the employee was on probation or parole for a felony conviction related to the sale, distribution, dispensing, transportation, or manufacture of drugs or the possession with the intent to sell, distribute, dispense, transport, or manufacture drugs.

(b) Suspicious substance. The following procedure will be followed if a substance appearing to be a drug is found in the possession of an employee in the workplace. It will also be followed if an employee is reasonably suspected of selling, distributing, dispensing, transporting, or manufacturing drugs, or conspiring to sell, distribute, transport, or manufacture drugs, whether in the workplace or outside the workplace. Reasonable suspicion may be based on any circumstance, including direct observation in the workplace or an arrest, charge, or indictment for an offense related to selling, distributing, dispensing, transporting, or manufacturing drugs.

(1) The employee's supervisor will immediately place the employee on administrative leave pending investigation by the department.

(2) The employee will immediately be provided with a letter that:

(A) summarizes the facts on which reasonable suspicion is based;

(B) notifies the employee that involvement in selling, distributing, dispensing, transporting, or manufacturing drugs subjects the employee to termination from the department;

(C) advises that the employee will have a specified time in which to provide a reasonable explanation to the employee's supervisor or substance control officer; and

(D) advises that the employee may be terminated from the department if the employee refuses to offer a reasonable explanation, if the response indicates that the employee sold, distributed, dispensed, transported, or manufactured drugs, or conspired to sell, distribute, dispense, transport, or manufacture drugs, or if the response is insufficient or unacceptable.

(3) An employee who is suspected of involvement in selling, distributing, dispensing, transporting, or manufacturing drugs will be terminated from the department if:

(A) the employee fails to respond within the specified time or to provide a sufficient and acceptable explanation;

(B) the substance control officer confirms the illegal acts; or

(C) investigation by law enforcement or other governmental authorities confirms the illegal acts.

(4) An employee who used or possessed drugs in the workplace, but did not sell, distribute, dispense, transport, or manufacture drugs, or conspire to sell, distribute, dispense, transport, or manufacture drugs, will be mandatorily referred to the EAP and required to complete treatment if:

(A) the employee fails to respond within the specified time or to provide a sufficient and acceptable explanation;

(B) the substance control officer confirms the illegal acts; or

(C) investigation by law enforcement or other governmental authorities confirms the illegal acts.

(5) An employee will be made aware of the EAP if it is determined that the employee used drugs outside the workplace and did not use drugs in the workplace or sell, distribute, dispense, transport, or manufacture drugs.

(6) If an employee is reasonably suspected of selling, distributing, dispensing, transporting, or manufacturing drugs, or conspiring to sell, distribute, transport, or manufacture drugs, the substance control officer shall contact the Office of General Counsel or the substance abuse program staff of the Human Resources Division immediately, before turning the matter over to law enforcement authorities.

(c) Notifications.

(1) An employee shall notify the employee's supervisor in writing if the employee is arrested, charged, or indicted for an offense related to selling, distributing, dispensing, transporting, or manufacturing drugs, whether in the workplace or outside the workplace. If the employee fails to make this notification within one day after returning to work following the occurrence, the employee will be suspended three days without pay.

(2) An employee shall notify the employee's supervisor in writing if the employee is convicted of an offense related to selling, distributing, dispensing, transporting, or manufacturing drugs, whether in the workplace or outside the workplace. If the employee fails to make this notification within one day after returning to work following the occurrence, the employee will be terminated from the department whenever it is discovered.

(3) An employee shall notify the employee's supervisor in writing if the employee is convicted of any violation of any criminal drug statute based on the employee's conduct in the workplace for which notification is not required under paragraph (2) of this subsection. This notification must occur within one work day after the employee returns to work following the conviction if the violation is related to conduct that occurred in the workplace. If the employee fails to make this notification on time, the department will suspend the employee within 30 days after it discovers the conviction. The suspension will be for three days without pay. Under the Drug Free Workplace Act 1988, 41 U.S.C. §§701 - 707, the department will notify the appropriate federal agency of the conviction within 10 days after receipt of the notice.

§4.35 Administrative Actions

(a) Removal from critical duties. A supervisor or substance control officer will immediately remove an employee from critical duties if the employee is suspected of violating this subchapter.

(b) Sufficient documentation. An employee will be tested for cause if a supervisor has a reasonable suspicion that the employee was working under the influence of alcohol or drugs. This determination must be based on observed and documented physical, behavioral, or performance indications.

(c) Insufficient documentation. An employee will be given an opportunity to offer an explanation if a supervisor has a reasonable suspicion that the employee was working under the influence of alcohol or drugs, but does not have sufficient observed and documented indications to justify testing for cause.

(d) Sufficient response. If an employee provides a sufficient and acceptable response under subsection (c) of this section, the employee will remain subject to administrative and disciplinary actions if it is later discovered that the employee has worked under the influence of alcohol or drugs. The supervisor or substance control officer will so advise the employee.

(e) Procedural response.

(1) The department will follow the procedures established in paragraph (2) of this subsection under either of the following circumstances.

(A) A supervisor has a reasonable suspicion under subsection (b) of this section that an employee was working under the influence of alcohol or drugs.

(B) An employee refuses to offer an explanation under subsection (c) of this section, the response indicates that the employee violated this subchapter, or the response is insufficient or unacceptable.

(2) Under any of the circumstances listed in paragraph (1) of this subsection, the department will follow the following procedures.

(A) The supervisor or the substance control officer will mandatorily refer the employee to the EAP and require the employee to complete treatment.

(B) The department may take disciplinary action.

(C) For 24 hours the employee will be prohibited from working and will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(f) Lawful medications. When an employee is unable to work in a safe and effective manner because of the use of lawfully prescribed or over-the-counter substances, the employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(g) Final applicants. The department will not hire a final applicant if the applicant has engaged in conduct that would justify terminating an employee from the department.

§4.36 Testing

(a) Notification to employees. An employee will be notified in writing that the employee is subject to drug and alcohol testing before being required to submit to an alcohol or drug test.

(b) Pre-employment testing.

(1) A final applicant must pass a drug test before being hired for a position that involves driving for the department.

(2) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests those results in writing within 60 calendar days after being notified of the disposition of the employment application. The department will also inform the applicant which drugs, if any, were verified as positive.

(c) Testing for cause. Any employee who is reasonably suspected of using alcohol or drugs in the workplace will be required to undergo an alcohol or drug test.

(1) An employee's direct involvement in a serious accident is considered to be grounds for reasonable suspicion that the employee is using alcohol or drugs in the workplace.

(2) The decision to test an employee who was not directly involved in a serious accident must be based on the reasonable belief of a supervisor who has been trained on the signs and symptoms of alcohol and drug use. The decision must be based on specific, contemporaneous, articulable observations concerning appearance, behavior, speech, body odor, performance, or other indications of probable use. These observations may include indications of chronic use and withdrawal symptoms.

(3) When a supervisor reasonably suspects an employee who was not directly involved in a serious accident of using alcohol or drugs in the workplace, the supervisor will contact the substance control officer immediately. The supervisor will make an immediate inquiry into all relevant surrounding circumstances and may confer with the employee. The substance control officer will document whether testing is justified based on the supervisor's observations and the substance control officer's independent analysis. Within 24 hours the supervisor or substance control officer will submit that person's observations in writing to the substance abuse program staff in the Human Resources Division.

(4) Testing for cause must be approved by the director of the Human Resources Division or designee and by the relevant district engineer, district administrator, division director, office director, or designee not below the level of deputy district engineer, deputy division director, deputy office director, or business services coordinator.

(5) Pending a decision to test or if testing is not available, the employee will be removed from critical duties. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave. This will continue until:

- (A) an alcohol test indicates a result of less than 0.02;
- (B) a negative drug test result is reported; or
- (C) twenty-four hours elapse after the decision to test.

(6) An alcohol test should be administered as soon as possible and preferably within two hours after the decision to test was made. If the test is not administered within two hours, the substance control officer will record why the test was not administered until later. An alcohol test may not be administered after more than eight hours after the decision to test was made.

(7) A drug test should be administered as soon as possible. A drug test may not be administered more than 32 hours after the decision to test was made.

(d) Required training. Before making a decision to test, a supervisor or substance control officer must have been trained in the indications of drug and alcohol use and on the department's policy and procedures related to testing for cause.

§4.37 Test Results

(a) An employee shall complete the following requirements if the employee has a positive drug test result or an alcohol test result of 0.04 or greater, if the employee refuses to test, or if the employee is a commercial driver, safety-impact employee, or vessel crewmember who violated §4.44(b)(1) - (5) of this subchapter.

(1) The supervisor or the substance control officer will mandatorily refer the employee to the EAP and require the employee to complete treatment.

(2) The employee will undergo a return-to-duty alcohol or drug test. An alcohol test must indicate a result of less than .02, and a drug test must indicate a verified negative result. An employee will be terminated from the department if the employee fails to pass the return-to-duty drug or alcohol test.

(3) The employee will provide a completed return-to-work form before resuming any critical duties. Commercial drivers, vessel crewmembers, and safety-impact employees who are not required to provide a return-to-work form will still be subject to a return-to-duty test.

(4) The employee will undergo follow-up testing for alcohol or drugs for up to 60 months. Follow-up testing will include at least 6 tests in the first 12 months after the employee's return to duty. The number and frequency of follow-up tests will be established by the EAP counselors. The EAP counselors may terminate the requirement for further testing at any time after the first six tests have been administered. An employee who fails to pass a follow-up drug or alcohol test has not completed treatment and will be terminated from the department.

(b) An employee who has accrued twelve months or less of employment with the department or who is a project or temporary employee will be terminated from the department if the employee has a positive drug test result or an alcohol test result of 0.04 or greater.

(b) If an employee has an alcohol test with a result of 0.02 or greater but less than 0.04, the supervisor or the substance control officer will prohibit the employee from working for 24 hours and will require the employee to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

§4.38 Test Procedures

(a) General procedures. A person to be tested shall report to the test site designated by the department and follow the directions of testing officials. Alcohol and drug testing conducted under this title will comply with the procedures set forth in 49 CFR, Part 40.

(b) Costs. Alcohol and drug tests will be conducted at department expense with the exception of a split specimen test. The employee must pay for a split specimen test, which occurs when the employee requests separate testing of the second of two contemporaneous samples.

(c) Retest. If a negative drug test has a creatinine and specific gravity value lower than expected for human urine, the employee will be directed to take another test immediately.

§4.39 Refusal to Test

(a) Termination for refusal. An employee who refuses to test will be terminated from the department.

(b) Covered conduct. An employee will be considered to have refused to test under any of the following circumstances.

(1) The employee explicitly declines to take a required test, whether a first test or a subsequent test.

(2) The employee fails to appear for an alcohol or drug test, except a pre-employment test, within a reasonable time, as determined by the department, after being directed to do so.

(3) The employee fails to remain at the testing site until the testing process is complete. In the case of a pre-employment test, a final applicant who leaves the testing site before the testing process begins has not refused to test.

(4) The employee does not attempt to provide a breath specimen for a required alcohol test or to provide a urine specimen for a required drug test.

(5) The employee does not permit the observation or monitoring of the employee's provision of a specimen in the case of directly observed or monitored collection.

(6) The employee fails to provide a sufficient breath specimen or a sufficient amount of urine when directed and there is no adequate medical explanation for the failure, as determined through a required medical evaluation.

(7) The employee fails to undergo a medical examination or evaluation that was directed by an appropriate official. In the case of a pre-employment test, the final applicant has refused to test on this basis only if the test is conducted after the final applicant has been given a conditional offer of employment.

(8) The employee fails to sign the certification at Step 2 of the Alcohol Testing Form.

(9) The employee fails to cooperate in any part of the testing process, including refusing to empty pockets when so directed by the collector, behaving in a confrontational way that disrupts the collection process, fails to wash hands after being directed to do so by the collector, or any other uncooperative behavior.

(10) The specimen contains levels of a substance that is lower than expected for human urine, a specimen that contains levels of a substance that are inconsistent with human urine, or a specimen has a creatinine and specific gravity value lower than expected for human urine.

(11) An employee does not remain available for any mandatory alcohol or drug test.

(12) For an observed collection, the employee fails to follow the observer's instructions to raise clothing above the waist, lower clothing and underpants, or to turn around to permit the observer to determine if the employee has any type of prosthetic or other device that could be used to interfere with the collection process.

(13) The employee possesses or wears a prosthetic or other device that could be used to interfere with the collection process.

(14) The employee admits to the collector or medical review officer that the employee adulterated or substituted the specimen.

§4.40 Mandatory Referral and Treatment

(a) Effect of referral. Except as otherwise provided in this subchapter, an employee who has a problem associated with alcohol or drug use will be mandatorily referred to the EAP if the problem may affect the employee's conduct or performance in the workplace. Until an employee provides a return-to-work form, the employee will be removed from critical duties.

(b) Procedure. The department will pay for the cost of counseling sessions provided by the EAP vendor, including an initial assessment. Employees who are referred by the EAP vendor to an outside treatment provider are responsible for any costs incurred as a result of the referral. An EAP counselor shall evaluate a referred employee to determine the extent of the dependence on alcohol or drugs and refer the employee to appropriate initial treatment, which shall include one or more of the following elements.

(1) An employee may participate in an inpatient rehabilitation treatment program and will not be able to work while enrolled in the program.

(2) An employee may participate in an intensive outpatient treatment program, which will provide individual counseling, group therapy, and educational services for varying lengths of time, normally up to 10 weeks. An employee participating in an outpatient program will normally be able to continue to work while participating in the program.

(3) An employee may participate in a counseling program that includes education or counseling sessions. The EAP counselors will prescribe the content, frequency, and duration of these sessions, as appropriate, and may include group or individual education or counseling sessions.

(c) Return to work. The EAP counselor will then refer the employee to a medical doctor or other licensed practitioner to complete a return-to-work form.

(d) No assistance needed. The EAP counselor will notify the employee's substance control officer in writing if the employee does not need assistance in resolving a problem associated with alcohol or drug use. A completed return-to-work form will not be required.

(e) Failure to complete treatment. An employee will be terminated from the department if the employee is mandatorily referred to the EAP and fails to complete treatment.

§4.41 Voluntary Admissions

(a) Scope. In this section the term alcohol or drug problem includes alcohol or drug use in the workplace.

(b) Employees in general. An employee, other than a commercial driver, safety-impact employee, or vessel crewmember, will be subject to the following provisions if the employee voluntarily admits to an alcohol or drug problem.

(1) The employee will be removed from driving duties until the employee provides a completed return-to-work form.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(c) Commercial drivers, safety-impact employees, and vessel crewmembers. An employee who is a commercial driver, safety-impact employee, or vessel crewmember will be subject to the following provisions if the employee voluntarily admits to an alcohol or drug problem.

(1) The employee will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(3) The employee will be subject to all the requirements of §4.37 of this subchapter, except that the employee will not be required to undergo follow-up testing unless the employee admitted using alcohol or drugs while performing a critical duty.

(d) Disciplinary action. No disciplinary action will be taken against an employee solely because the employee voluntarily admitted having a drug or alcohol problem if the admission occurred prior to a determination that the employee should be subjected to testing for cause. This subsection supersedes any other provision in this subchapter.

§4.42 Recurrence of Substance Abuse

(a) Recurrence as grounds for termination. An employee will be terminated on the need to be mandatorily referred to the EAP a second time. A second referral after a break in service will be treated as if there had been no break in service.

(b) Exceptions. It is not considered a mandatory referral within the meaning of this section if:

(1) an employee is assessed by the EAP counselors as not needing assistance in resolving problems associated with alcohol or drug use on a first mandatory referral; or

(2) an employee is referred for an alcohol- or drug-related driving offense.

(c) Effect of pre-1999 referrals. An employee will be terminated from the department if the employee received and completed one or two mandatory referrals before January 1, 1999, and that employee becomes subject to mandatory referral for a third time.

§4.43 Employees Who Drive for the Department

(a) Scope. An employee who drives for the department is subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Records. Each employee's driving record will be checked at least once each year. Each employee who drives for the department shall sign a form acknowledging awareness of the department's driving policies.

(c) Driver's licenses. An employee must have a valid driver's license to drive for the department. An occupational driver's license will be accepted if it allows the employee to perform driving duties for the department, other than operating a commercial motor vehicle. Employees without a valid driver's license will be removed from all driving duties, and the supervisor will assign non-driving duties, if available.

(d) Loss of legal authority to drive.

(1) An employee shall notify the employee's supervisor if the employee loses the legal authority to drive as a result of any alcohol- or drug-related driving offense or any other offense involving alcohol or drugs, including administrative license revocation due to multiple tickets for moving traffic violations. If the employee fails to make this report within one day after returning to work following the loss of legal authority to drive, the employee will be suspended three days without pay.

(2) An employee will be terminated from the department if the employee drives for the department after losing the legal authority to drive as a result of any alcohol- or drug-related driving offense or any other offense involving alcohol or drugs, including administrative license revocation due to multiple tickets for moving traffic violations.

(e) Alcohol- and drug-related driving offenses. If an employee has an alcohol- or drug-related driving offense, the following procedures will be followed.

(1) An employee shall report an alcohol- or drug-related driving offense to the employee's supervisor. If the employee fails to make this report within one day after returning to work following the occurrence, the employee will be suspended three days without pay.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(3) The employee will be given a letter summarizing these actions. The employee shall acknowledge receipt by signing the letter and returning it to the supervisor.

(4) The employee will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(5) An employee will be terminated from the department after a second alcohol- or drug-related driving offense within ten years.

(f) Final applicants.

(1) The department will not hire a final applicant for a position that may involve driving for the department if the final applicant has two alcohol- or drug-related driving offenses within three years before the date of application.

(2) The department will not hire a final applicant for a seasonal position that requires driving for the department if the final applicant has an alcohol- or drug-related driving offense within the three years before the date of application. A seasonal employee will be terminated if hired in violation of this paragraph.

(3) The department will not hire a final applicant for a position that involves driving for the department if the final applicant has an alcohol- or drug-related driving offense within three years before the date of application unless the final applicant agrees to:

(A) complete treatment; and

(B) comply with the procedures described in subsection (e) of this section.

§4.44 Commercial Drivers, Safety-Impact Employees, and Vessel Crewmembers

(a) Scope. Commercial drivers, safety-impact employees, and vessel crewmembers are subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Prohibited activities. Commercial drivers, safety-impact employees, and vessel crewmembers shall not:

- (1) report to work within four hours of consuming alcohol;
- (2) report to work or remain at work while under the influence of alcohol or drugs;
- (3) consume or possess alcohol while on duty or while driving a commercial motor vehicle;
- (4) use alcohol within eight hours after an accident or before undergoing a post-accident alcohol test, whichever comes first;
- (5) have a positive drug test result or an alcohol test result of 0.04 or greater; or
- (6) refuse to test.

(c) Testing.

(1) The department will not hire or employ a final applicant for a position as a commercial driver, a safety-impact employee, or a vessel crewmember unless that final applicant passes a drug test.

(A) A current employee must pass a drug test before being transferred or promoted into a position as a commercial driver, safety-impact employee, or vessel crewmember. If a current employee fails that drug test, the employee will not be transferred or promoted into the position and will be mandatorily referred to the EAP and required to complete treatment.

(B) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests those results in writing within 60 calendar days after being notified of the disposition of the employment application. The department will also inform the applicant which drugs, if any, were verified as positive.

(C) Pre-employment inquiries for commercial drivers and vessel crewmembers will be conducted in accordance with 49 C.F.R. Part 40.

(2) Commercial drivers are subject to post-accident testing if directly involved in a serious accident. Safety-impact employees are subject to post-accident testing if directly involved in a serious accident that occurs on a day in which the employee has performed or will perform a safety-impact function. Vessel crewmembers are subject to post-accident testing if directly involved in a serious marine incident.

(A) Nothing in this section requires or permits delaying medical attention for injured people or prohibits an employee from leaving the scene of an accident for as long as necessary to obtain assistance in responding to the accident or to obtain emergency medical care.

(B) Alcohol and drug tests will be administered after a serious accident or a serious marine incident.

(i) An alcohol test should be administered as soon as possible after a serious accident or a serious marine incident and preferably within two hours. If the test is not administered within two hours, it may be administered within eight hours. In that case, the substance control officer will record why the test was not promptly administered.

(ii) A drug test should be administered as soon as possible after a serious accident and in any event within 32 hours.

(iii) A drug test should be administered as soon as possible after a serious marine incident. If a drug test is not administered within 32 hours due to safety concerns, it may be administered as soon as the safety concerns are addressed. If the drug test was not administered within 32 hours, the substance control officer will record why the test was not promptly administered.

(C) The department will rely on a breath or blood test for the use of alcohol or a urine test for the use of drugs if it is conducted by federal, state, or local officials having independent authority for the test, if it conforms to applicable federal, state or local requirements, and if the department obtains the results of the tests.

(3) Commercial drivers, safety-impact employees, and vessel crewmembers are subject to random alcohol and drug testing.

(A) Commercial drivers, safety-impact employees, and vessel crewmembers will be selected for alcohol and drug testing on a random basis so that each employee has a substantially equal chance of selection. A commercial driver, safety-impact employee, or vessel crewmember will be subject to the possibility of random testing as long as the employee is employed by the department in that capacity. The department may randomly test all commercial drivers in one or more sections if each section is equally subject to selection, the

department may randomly test all safety-impact employees in one or more sections if each section is equally subject to selection, and the department may randomly test all vessel crewmembers on one vessel as long as each vessel is equally subject to selection.

(B) The Human Resources Division will ensure that the commercial drivers and safety-impact employees are tested annually at a rate equal to or higher than the U.S. Department of Transportation annual random testing rate for the Federal Motor Carrier Safety Administration for alcohol and for drugs and vessel crewmembers are tested annually at a rate equal to or higher than the U.S. Department of Transportation annual random testing rate for the U.S. Coast Guard requirements for alcohol and for drugs.

(d) Administrative and disciplinary actions.

(1) A commercial driver, safety-impact employee, or vessel crewmember who violates subsection (b) of this section will be subject to all potential administrative and disciplinary actions available under this subchapter.

(2) The commercial driver, safety-impact employee, or vessel crewmember will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(3) A final applicant for a position as a commercial driver, safety-impact employee, or vessel crewmember will not be hired if the final applicant has engaged in conduct that would violate subsection (b) of this section and has not received the equivalent of the required treatment. A commercial driver, safety-impact employee, or vessel crewmember will be terminated from the department if it is determined that at the time of hire, the applicant had engaged in conduct that would violate subsection (b) of this section and had not received the equivalent of the required treatment.

(e) Education. Each commercial driver, safety-impact employee, vessel crewmember, and supervisor of an employee in any of those categories will receive training on indications of alcohol or drug use and on the effects of alcohol and drug use on personal health, safety, and the work environment.

(f) Additional reporting requirements for vessel crewmembers.

(1) If a vessel crewmember receives a positive drug test result, the substance control officer shall report it in writing to the nearest Coast Guard Officer in Charge, Marine Inspection.

(2) A vessel crewmember who has received a positive drug test result may not perform vessel crewmember duties until found by the medical review officer to be drug free and to pose a sufficiently low risk for further illegal drug use and the requirements of 46 C.F.R. Part 5 have been satisfied. The employee must agree to follow-up testing determined by the medical review officer for an additional period of up to 60 months.

§4.45 Confidentiality

(a) Prohibition on disclosure. Alcohol and drug test information shall be kept confidential except as required by law or in accordance with 49 CFR, Part 40.

(b) Records. All information relating to the substance abuse program will be maintained by the substance control officer in a locked file that is separate from that employee's standard personnel file. The information in this separate file will include mandatory referrals to the EAP, documentation of post-accident and reasonable cause determinations, and records of treatment, appeals, and litigation.

(c) Disciplinary action. An employee who willfully discloses confidential information relating to the substance abuse program, except in accordance with this subchapter, will be subject to disciplinary action, which may include termination from the department.

§4.46 Education

The department will conduct an alcohol and drug-free awareness program providing all employees and supervisors with training on the department's policy, actions that will be taken for violations of the policy, the dangers of alcohol and drug abuse in the workplace, and the EAP.