



INDIANA  
**WORKFORCE**  
DEVELOPMENT  
AND ITS **WorkOne** CENTERS

**To:** Unemployment Insurance Operations Divisions  
Appeals Division  
Unemployment Insurance Review Board  
Legal Support

**From:** The Department of Workforce Development

**Date:** August 8, 2017

**Subject:** DWD Policy 2017-02  
Evidentiary Standards for Use of Drug and Alcohol Test Results in  
Unemployment Insurance Benefit Claim Disputes

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## Purpose

To provide the standard of acceptable and sufficient evidence in unemployment insurance benefit claim disputes related to discharge from employment for drug and/or alcohol test failure.

## Rescission

DWD Policy 2008-43

## Content

### *Applicability*

The Indiana Department of Workforce Development (DWD) establishes this policy in the interest of providing a fair and consistent standard for accepting or rejecting employee drug test evidence in unemployment insurance (UI) benefit claim disputes. This policy applies to initial determinations of eligibility, as well as any subsequent appeals of those determinations to DWD's UI Appeals Division or the UI Review Board.

### *Statutory Changes*

On July 1, 2014, Indiana Code § 22-4-2-40 was repealed. That statute defined "drug test" with regard to unemployment insurance laws. The definition provided is no longer in effect. Additionally, in the past, a person claiming unemployment insurance benefits had the burden of proving that he or she voluntarily left the employment for good cause in connection with the work. See *Brown v. Ind. Dep't of Workforce Dev.*, 919 N.E.2d 1147, 1151 (Ind. Ct. App. 2009). Alternatively, an employer had the burden of proving that it discharged an employee for just cause. See *City of Carmel v. Ind. Dep't of Workforce Dev.*, 970 N.E.2d 239, 242 (Ind. Ct. App. 2012). However, on July 1, 2014, the Indiana General Assembly mandated that there is no

burden of proof, for any party, in relation to an individual's eligibility for unemployment insurance benefits: "An applicant's entitlement to unemployment benefits is determined based on the information that is available without regard to a burden of proof." Ind. Code § 22-4-1-2(c). Further, "[t]here is no presumption of entitlement or nonentitlement to unemployment benefits. There is no equitable or common law allowance for or denial of unemployment benefits." Ind. Code § 22-4-1-2(d).

### ***Background***

In order to meet eligibility requirements for UI benefits, a claimant must, among other prerequisites, be unemployed through no fault of the claimant's own. If a claimant is discharged by the claimant's most recent employer for just cause or gross misconduct, or by a non-separating base period employer for gross misconduct, that claimant may be ineligible for UI benefits. See Ind. Code § 22-4-15-1 *et seq.* The term "just cause" is defined in Indiana Code § 22-4-15-1(d). The term "gross misconduct" is defined in Indiana Code § 22-4-15-6.1 and explained in DWD Policy No. 2015-10.

### ***Procedure***

This policy relates to UI benefit claim disputes involving discharge for drug and/or alcohol test failure, which may, but do not necessarily, arise from violation of an employer rule. With respect to employer rule violations, the evidence must show that: 1) the employer has a rule; 2) the claimant knew of the rule; 3) the employer's rule was reasonable; 4) the employer uniformly enforced that rule; and 5) the claimant knowingly violated the employer's rule. Uniform enforcement does not require 100% adherence so long as all similarly-situated individuals are treated similarly. With respect to non-rule discharges for drug and/or alcohol test failure, a claimant is ineligible for UI benefits if: 1) the claimant reported to work under the influence of drugs or alcohol; 2) the claimant consumed drugs or alcohol on the employer's premises or during work hours; 3) the claimant's conduct endangered safety of the claimant or coworkers; or 4) the claimant breached a duty reasonably owed an employer by an employee. See *generally* Ind. Code § 22-4-15-1(d).

In order to determine whether a claimant knowingly violated the employer's rule, reported to work under the influence of drugs and/or alcohol, consumed drugs and/or alcohol on the employer's premises or during working hours, endangered the safety of the claimant's self or coworkers, or breached a duty reasonably owed to an employer by an employee, a UI claims adjudicator, an Administrative Law Judge (ALJ), or the UI Review Board may accept into evidence the results of a drug and/or alcohol test. This policy explains the circumstances under which DWD will accept such evidence.

### **Sufficient and Acceptable Drug/Alcohol Test Evidence**

The following evidence is sufficient to support a determination that a claimant knowingly violated a rule related to the use of drugs and/or alcohol, reported to work under the influence of drugs or alcohol, or consumed drugs and/or alcohol on the employer's premises or during working hours, endangered the safety of the claimant's self or coworkers, or breached a duty reasonably owed to an employer by an employee:

- (1) a copy of the results of a drug/alcohol test performed at an independent laboratory;
- (2) in the absence of a copy of such results, credible evidence establishing that a drug/alcohol test was conducted by an independent laboratory, the place of the test, the date of the test, and the results of the test;

- (3) an admission by the claimant that the claimant's conduct violated a rule of the employer;
- (4) an admission by the claimant relating to the claimant's conduct showing sufficient reason for a just cause discharge under Indiana Code § 22-4-15-1(d); or
- (5) any credible evidence that the claimant consumed alcohol, illegal drugs, legal drugs obtained illegally, or any substance prohibited by a rule of the employer.

Consumption of drugs and/or alcohol at the work site or while on duty does not require proof of drug and/or alcohol test failure. Credible eyewitness testimony is sufficient verification of the claimant's consumption of alcohol and/or drug use at the work site or while on duty.

Proof of chain of custody or Substance Abuse and Mental Health Services Administration (SAMHSA) accreditation regarding drug/alcohol tests is not necessary. A determination will be made that the results of a drug and/or alcohol test are acceptable if evidence is obtained by or submitted to DWD establishing:

- (1) that the test result satisfies the standard/level cutoffs for the specific test administered;
- (2) that the test was performed using an acceptable sample, which is understood to include:
  - a. urine;
  - b. blood;
  - c. hair;
  - d. saliva; or
  - e. any other method set forth in the employer's documented alcohol and/or drug rule;
- (3) that the drug test was processed by an independent drug testing laboratory or facility maintained and operated for the purpose of providing independent drug and/or alcohol tests;
- (4) that the claimant gave written consent to be tested for drugs and/or alcohol through the employee handbook or a consent executed prior to the test for the test being presented as evidence; and
- (5) if the discharge was related to the claimant reporting to work under the influence of drugs and/or alcohol or consuming drugs and/or alcohol on the employer's premises during working hours, that the claimant reported to work and/or was on duty during the time for which the drug and/or alcohol test was positive.

Any of the following reasons for requiring drug and/or alcohol tests of an employee by an employer are acceptable for purposes of determining whether the employer's rule related to alcohol and/or drug use is reasonable:

- (1) random drug testing as set forth in a known employer rule;
- (2) evidence of impairment or suspected impairment;
- (3) any reason set forth in the employer's rule; or
- (4) any testing required by law.

#### **Successful Rebuttal of Acceptable Drug and/or Alcohol Test Evidence**

If a party to the UI claims adjudication, the UI Appeals hearing, or the UI Review Board hearing contends that the positive result of a drug/alcohol test was a false positive caused by medication prescribed by a physician to the claimant, that party may successfully rebut otherwise sufficient evidence of drug/alcohol test failure by:

- (1) identifying the medication by name;
- (2) providing a copy of the prescription or note from the prescribing physician indicating the identity of the medication and the dates for which it was prescribed; and
- (3) providing evidence sufficient to establish that the prescribed medication was more likely than not to have caused the false positive test result.

Evidence of the claimant having an opportunity to present the above items to the employer before termination of his/her employment and, if that opportunity was provided, whether the claimant provided those items to the employer, will be considered.

If a party intends to challenge the methodology, chain of custody, or accuracy of a test, the party shall have the opportunity to conduct discovery regarding these aspects of the proffered test. The challenging party shall have an opportunity to submit evidence or expert testimony thereon. If a party intends to present any rebuttal evidence at hearing, including testimony, that party shall provide notice to the opposing party and the hearing officer(s) in advance of the evidentiary hearing. The opposing party shall have an opportunity to conduct discovery concerning the proffered rebuttal evidence.

While there is no burden of proof in an administrative hearing, any party raising a defense is responsible for proving the defense(s) the party raises. It is a defense to raise the issue that a test result is incorrect. Therefore, a party raising the defense of drug and/or alcohol test failure (by error, misconduct, or otherwise), must prove this defense by providing sufficient evidence in the administrative proceeding. Drug and/or alcohol tests, submitted as proscribed herein, shall be presumed to be accurate. This accuracy is a rebuttable presumption. Only sufficient evidence establishing test failure will be sufficient to overcome or rebut the presumed accuracy of a test. Anything less than sufficient proof of test failure, including claimant's denial of use, is insufficient to overcome the presumed accuracy of the test.

### **Off-Duty Drug and/or Alcohol Use**

Off-duty drug and/or alcohol use, where prohibited by a reasonable rule of an employer, will be considered by DWD to be just cause for discharge. *See* 646 IAC 5-8-5. Absent such a rule, off-duty drug and/or alcohol use will not be considered just cause for discharge. The evidentiary standards set forth above apply to determinations involving an employer's off-duty drug and/or alcohol use rule.

## **Ownership**

Unemployment Insurance Director  
Indiana Department of Workforce Development  
10 N. Senate Ave.  
Indianapolis, IN 46204

## **Effective Date**

Immediately

## **Ending Date**

Upon rescission

## **Action**

Indiana's workforce investment system will follow the guidance contained in this policy. Directors and managers will ensure that employees who work with this policy's subject matter are aware of the details contained in this policy and follow its guidelines.