

**Indiana State Department of Health  
Health Care Quality and Regulatory Services  
Division of Acute Care**

**Home Health Care Agency Employee Drug Testing  
House Enrolled Act 1493 (2017)**

ISDH HCQRS: Program Advisory Letter

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Cancel: None

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**PROGRAM ADVISORY SUMMARY**

- ***Effective Date: July 1, 2017.***
- ***This advisory provides guidance to home health agencies regarding compliance to the applicable sections of House Enrolled Act 1493 (2017) concerning drug testing for the illegal use of controlled drugs for certain home health agency personnel [Indiana Code 16-27-2.5, a new chapter].***

**Background:**

The Indiana General Assembly approved legislation in the 2017 session that specifically defines the responsibilities of home health agencies regarding the drug testing of certain employees at the time of hire; annual random sampling and testing; agencies' required actions; and limiting agencies' liability for complying with the statutory requirements. This guidance is being provided in advance of the effective date, July 1, 2017, in order for agencies to come into compliance by or before the effective date. A copy of the applicable portions of HEA1493 (2017) is attached (Attachment A) for reference.

**Agency Guidance:**

Affected employees: The statutory requirement for mandatory drug testing is applicable to any applicant or employee that will or does have direct contact with patients AND is not licensed under Ind Code § 25. [Ind. Code § 16-27-2.5-0.5; Ind. Code § 16-27-2.5-2(b)(1)(A) and (B)]

Notice to affected employees: The agency must provide to the affected employee, prior to testing, a written notice of the agency's drug policy [Ind. Code § 16-27-2.5-1(a)].

Testing Required: The statutory requirement is testing for controlled substances. Controlled substance is a drug or chemical whose manufacture, possession, or use is regulated under 21 U.S.C. § 812 and 856 IAC 2.

<https://www.deadiversion.usdoj.gov/21cfr/21usc/812.htm>

[https://www.deadiversion.usdoj.gov/schedules/orangebook/c\\_cs\\_alpha.pdf](https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf)

[http://www.in.gov/legislative/iac/iac\\_title?iact=856](http://www.in.gov/legislative/iac/iac_title?iact=856)

Upon review of federal regulation and state statutes and rules, a five (5) panel test that includes testing for amphetamines, cocaine, marijuana, opiates and PCP will meet the required testing. This will be the minimum required testing. An agency may go above and beyond the minimum but all testing must include the five tests listed above.

Sample Size Determination: The agency shall establish the number of affected employees as of July 1 of each year. From July 1 through June 30 of the following year, the agency must have test results for *at least* fifty (50) percent of the total number of affected employees established on July 1 of the prior year. New hire testing does not count toward the 50% requirement. A test based on reasonable suspicion can be included in the number of tests necessary to meet the minimum 50% requirement. No confirmatory tests may be applied toward the 50% requirement.

Example 1: On July 1, 1919, the agency had 10 affected employees. Between July 1, 1919 and January 15, 1920, the agency hired 10 new employees that belong in the affected employee group.

By June 30, 1920, the agency must have tested 5 of the affected employees. The 10 new hire tests do not count.

It is possible that some affected employees (likely new hires) may be tested more than once in an annual period due to staff fluctuation.

Example 2: On July 1, 1921, the agency employed 10 affected employees. During the next five months the agency hired 20 new employees and 6 of the 10 employed on July 1, 1921 left services with a remainder of only 4 affected employees of the original 10. By June 30, 1922, the agency must have tested 5 affected employees. Four of those should be the four employees on staff that were included in the July 1, 1921 count. An additional test must be completed. This test will be one of the 'new' hires, even though the testing was done on hire.

In the event agency turnover results in the employee pool being only new hires, then new hires will make up the available pool for random testing and therefore may be tested more than once in a given cycle.

Frequency of testing: All affected employees must submit to, and successfully pass, a drug test at the time of hire. The affected employee may begin work with the agency, but under no circumstance may the affected employee provide care to a patient until a negative test result has been received. [Ind. Code § 16-27-2.5-1(A); Ind. Code § 16-27-2.5-1(c)]

The agency must, on an annual basis, randomly test *at least* fifty (50) percent of the agency's employees who meet both of the following:

- a) Provides direct patient care or has direct contact with a patient; AND
- b) Is NOT licensed by a board or commission under Ind. Code § 25. [Ind. Code § 16-27-2.5-2(b)(1)]

The agency must also test an employee when the agency has reasonable suspicion that the employee is engaged in the illegal use of a controlled substance. [Ind. Code § 16-27-2.5-2(b)(2)]

Required Agency Actions for a Positive Test Result: Unless the employee has a valid prescription for the controlled substance for which the employee tested positive, the agency must take action as follows:

- a) If the employee's test result is positive, the agency must have the test verified by a confirmation test. The employee shall pay for the confirmation test.
- b) If a confirmation test verifies a positive result, the agency shall:
  - a. Discharge the employee; or
  - b. Suspend the employee from direct patient care for *at least* six (6) months. [Ind. Code § 16-27-2.5-3]

Demonstration of Compliance: To demonstrate statutory compliance at the time of survey, the agency must, upon request:

- a. Provide the agency's written drug testing policy. [Ind. Code § 16-27-2.5-2(a)(1)]
- b. Provide the employee's acknowledgement of receipt of the drug testing policy. [Ind. Code § 16-27-2.5-2(a)(2)]
- c. Provide a policy defining which employees are considered affected (i.e., which employee classification(s) require drug testing). This may be part of the agency's written drug testing policy.
- d. Provide documentation showing the employee's name, date of hire, dates and results of any drug test, and the date and type of disciplinary action taken for a positive result.

- e. Provide documentation demonstrating the total number of employees in the “affected employees” category and the names of employees tested to demonstrate a random sample size of fifty (50) percent during the annual period.

Questions:

Questions about this program advisory letter may be addressed to Randy Snyder, Division Director, (317) 233-1286, email: [rsnyder1@isdh.in.gov](mailto:rsnyder1@isdh.in.gov).

Approved by:

/s/

Terry Whitson, Assistant Commissioner  
Health Care Quality and Regulatory Commission  
Indiana State Department of Health

**Attachment A**  
**House Enrolled Act 1493 (2017)**  
**Applicable Sections for Home Health Agencies**

SECTION 8. IC 16-27-2.5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2017]:

Chapter 2.5. Drug Testing of Employees

Sec. 0.5. This chapter does not apply to a home health employee licensed under IC 25.

Sec. 1. (a) After giving a job applicant written notice of the home health agency's drug testing policy, a home health agency shall require a job applicant who is seeking employment with the home health agency for a position that will have direct contact with a patient to be tested for the illegal use of a controlled substance.

(b) A home health agency may use a job applicant's:

- (1) refusal to submit to a drug test; or
  - (2) positive test result from a drug test;
- as a basis for refusing to hire the job applicant.

(c) If a job applicant is hired by the home health agency before the job applicant's results of the drug test are received, the hired individual may not have any contact with patients until the home health agency obtains results of the drug test that indicate that the individual tested negative on the drug test. If the drug test results indicate that the individual tested positive on the drug test, the home health agency shall discharge or discipline the individual. If the home health agency disciplines the individual, the individual may have no direct contact with a patient for at least six (6) months.

Sec. 2. (a) A home health agency must:

- (1) have a written drug testing policy that is distributed to all employees; and
- (2) require each employee to acknowledge receipt of the policy.

(b) A home health agency shall randomly test:

- (1) at least fifty percent (50%) of the home health agency's employees who:
  - (A) have direct contact with patients; and
  - (B) are not licensed by a board or commission under IC 25; at least annually; or
- (2) when the home health agency has reasonable suspicion that an employee is engaged in the illegal use of a controlled substance.

(c) A home health agency shall either discharge or discipline with a minimum of a six (6) month suspension an employee who refuses to submit to a drug test.

Sec. 3. If an employee tests positive on a drug test, and the employee does not have a valid prescription for the substance for

which the employee tested positive on the drug test, the home health agency shall have the results of the test verified by a confirmation test. The employee shall pay for the confirmation test. If the positive test result is confirmed, the home health agency shall either discharge the employee or suspend the employee from coming into direct contact with patients for at least six (6) months after the date of the confirmation test result. An employee who has a valid prescription for the substance for which the employee tested positive on a drug test may not be terminated or suspended under this subsection.

Sec. 4. A home health agency that:

- (1) discharges or disciplines an employee; or
- (2) refuses to hire a job applicant; because of a positive drug test result or a refusal to submit to a drug test is considered to have discharged, disciplined, or refused to hire the individual for just cause.

Sec. 5. (a) A home health agency, when acting in good faith, is immune from civil liability for:

- (1) conducting employee drug testing in compliance with this chapter; or
- (2) taking an employee disciplinary action or discharging an employee in compliance with this chapter as a result of the employee drug testing.

(b) Subsection (a) does not apply to actions that constitute gross negligence or willful or wanton misconduct.