Drug Testing Laws: North Carolina

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A Q&A guide to drug testing law for private employers in North Carolina. This Q&A addresses employers' rights and restrictions when conducting workplace drug and alcohol testing of job applicants and current employees, as well as testing based on suspicion of intoxication or randomized testing. Federal, local or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see *Drug Testing Laws: State Q&A Tool (http://us.practicallaw.com/9-504-3410)*).

OVERVIEW OF STATE DRUG TESTING LAW

1. What laws govern drug testing in employment and pre-employment in your state (whether derived from statute, regulation or case law)? For each source of law please state:

- Which employers, industries (for example, transportation) or entities (for example, government contractors) are covered or exempted.
- Whether employers must have a minimum number of employees to be covered in each case.

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

The Controlled Substance Examination Regulation Act (CSERA) governs employment-related drug testing in North Carolina. The CSERA does not require employers to conduct drug tests (*N.C. Gen. Stat. Ann. § 95-233*). However, all North Carolina employers who perform employment-related drug testing must follow the procedures in the CSERA (*N.C. Gen. Stat. Ann. § 95-232*).

Examinations required by the US Department of Transportation and the Nuclear Regulatory Commission are specifically exempt from the CSERA (*N.C. Gen. Stat. Ann. § 95-235*).

2. For each law identified in *Question 1*, under what circumstances is testing authorized or prohibited? For example:

- Pre-employment.
- Random.
- Reasonable suspicion of intoxication.
- Other circumstances.

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

The Controlled Substance Examination Regulation Act (CSERA) does not specify circumstances under which drug testing is authorized or prohibited.

Employers may set the circumstances and conditions that trigger drug tests, for example:

- Post-accident.
- Random.
- Safety-sensitive.
- Pre-employment.
- Follow-up.
- Reasonable suspicion.

(*N.C. Dept. of Labor: CSERA Publication at 12.*)

3. For each law identified in *Question 1*, what kind of testing is authorized or prohibited (for example, urine, blood or hair)?

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The following samples may be used for drug testing:

- Urine.
- Blood.
- Hair.
- Oral Fluids.

(*13 N.C. Admin. Code 20.0101(4)*.)

4. Do the laws identified in *Question 1* regulate which substances can be tested for (for example, heroin and cocaine)?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

The Controlled Substance Examination Regulation Act regulates testing for any controlled substances or their metabolites (*N.C. Gen. Stat. Ann. §§ 90-87(5) and 95-231(1a)*).

DRUG TESTING PROTOCOLS

5. How must drug tests be conducted in your state (for example, must individuals giving urine samples be visually monitored)?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

Employers must provide written notice to applicants and employees of their rights and responsibilities under the Controlled Substance Examination Regulation Act. This notice must be provided when the sample is taken (*13 N.C Admin. Code 20.0401*). Sample notices are available on the North Carolina Department of Labor's website.

Samples must be collected:

- Under reasonable and sanitary conditions.
- In a manner that preserves individual dignity to the extent practical.
- In a manner reasonably calculated to prevent substitution of samples and interference with the collection, examination or screening of samples.
- In a manner determined to meet the reliability and accuracy criteria accepted by drug-testing laboratories.

(*N.C. Gen. Stat. Ann. § 95-232(b)*; *13 N.C. Admin. Code 20.0101(4)*.)

Employers testing prospective employees:

- May collect samples either onsite or at an approved laboratory.
- May conduct a preliminary screening test onsite on a sample using a single-use test device.
- Must, unless the applicant signs a written waiver when tested or after receiving the preliminary result, confirm a positive result by laboratory examination using:
  - gas chromatography with mass spectrometry; or
  - an equivalent scientifically accepted method.

(*N.C. Gen. Stat. Ann. § 95-232(b), (c) and (c1)*.)

Employers testing current employees:

- May collect samples either onsite or at an approved laboratory.
- Must use an approved laboratory to conduct screening of samples.
- Must confirm a positive result by laboratory examination using:
  - gas chromatography with mass spectrometry; or
  - an equivalent scientifically accepted method.

(*N.C. Gen. Stat. Ann. § 95-232(b), (c) and (c1)*.)

6. What is the protocol required by state law, if any, if the drug test comes back positive (for example, is there a re-testing procedure)?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

If a drug test for an applicant or employee produces a positive result, then the employer generally must confirm that result by a second examination at an approved laboratory (see *Question 5*). The laboratory conducting the confirmation test must preserve a portion of confirmed positive samples for at least 90 days (*N.C. Gen. Stat. Ann. § 95-232*). Within 30 days from when the results are mailed or otherwise delivered to the employer, the employer must give written notice to the affected applicant or employee of:

- Any positive result.
- The applicant's or employee's rights and responsibilities regarding re-testing.

(*13 N.C. Admin. Code 20.0402*.)

Sample notices are available on the North Carolina Department of Labor's website.

An applicant or employee may have a confirmed positive sample re-tested at the same or another approved laboratory. The applicant or employee must provide a written request to release the sample, specifying the laboratory to receive it. (*N.C. Gen. Stat. Ann. § 95-232(f)*.)

7. Who must pay for the drug test and any follow-up drug test?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

The employer must pay expenses related to all drug tests, except re-tests requested by the applicant or employee (*13 N.C. Admin. Code 20.0601*). Applicants or employees must pay all reasonable expenses for re-tests of positive samples, including:

- The actual cost charged by the laboratory.
- The laboratory's assessed fees for expenses associated with the re-test, including those for shipping and chain of custody.
- The employer's expenses for shipping and chain of custody procedures up to $15, unless the employer proves that the actual cost was higher than $15.

(*13 N.C. Admin. Code 20.0602*.)

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8. Where can/must drug tests take place (onsite or otherwise)?

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Prospective employees may be tested either:

- Onsite, meaning any location, other than an approved laboratory, at which screening tests are performed on prospective employees.
- At an approved laboratory.

(*N.C. Gen. Stat. Ann. § 95-232(b)*; *13 N.C. Admin. Code 20.0101.*)

Confirmation tests of positive results and all tests for current employees must be performed at an approved laboratory (*N.C. Gen. Stat. Ann. § 95-232(c), (c1)*).

9. Which state agency (if any) enforces drug testing laws?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

The North Carolina Department of Labor's Wage and Hour Bureau enforces the Controlled Substance Examination Regulation Act.

CONSEQUENCES FOR EMPLOYERS

10. Is there a private right of action for violations of state drug testing law(s)? If so, what is an employer's possible exposure under that law?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

The Controlled Substance Examination Regulation Act does not provide for a private right of action.

11. Apart from private rights of action, what are the consequences for employers if they violate state drug testing law (for example fines, injunctions or criminal penalties)?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

Employers that violate the Controlled Substance Examination Regulation Act are subject to civil penalties of up to $250 per affected applicant or employee. The maximum penalty in a single investigation is $1,000. (*N.C. Gen. Stat. Ann. § 95-234(a).*)

12. What can employers do or not do with drug testing results? For example, are there procedural requirements or limitations regarding termination, discipline or recordkeeping?

CONTROLLED SUBSTANCE EXAMINATION REGULATION ACT: N.C. GEN. STAT. ANN. §§ 95-230 TO 95-239 AND 13 N.C. ADMIN. CODE 20.0101 TO 20.0602

The laboratory that conducts the confirmatory examination must retain a portion of every sample that produces a confirmed positive result for at least 90 days from when the results of the confirmed test are mailed or otherwise delivered to the employer (*N.C. Gen. Stat. Ann. § 95-232(d)*).

Employers and examiners must keep information related to drug tests confidential. Employers may release the information:

- To the applicant or employee or any other person, when the applicant or employee provides written, signed authorization.
- To laboratories for screening or confirmation tests or re-tests of confirmed positive results.
- For employment-related reasons, including performance evaluations, discipline and provision of references.
- To any governmental agency or court having jurisdiction over any claim or proceeding involving the applicant or employee and the employer.

(*13 N.C. Admin. Code 20.0503.*)

LEGAL PROTECTIONS FOR EMPLOYEES

13. What legal protections are recognized by statute, regulation, case law or otherwise to protect employees or applicants who test positive for drugs or alcohol?

Employees and applicants who test positive for drugs or alcohol may be protected by:

- Federal and state disability discrimination laws (see *State Q&A, Anti-discrimination Laws: North Carolina (http://us.practicallaw.com/w-000-2332)*).
- State prohibitions against discrimination against applicants and employees for lawful use of lawful products during non-working hours (*N.C. Gen. Stat. Ann. § 95-28.2*).

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