

Drug Testing Laws: Utah

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A Q&A guide to drug testing law for private employers in Utah. 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.

UTAH DRUG AND ALCOHOL TESTING ACT: UTAH CODE §§ 34-38-1 TO 34-38-15

The Utah Drug and Alcohol Testing Act (UDATA) governs pre-employment and employment drug and alcohol testing.

The UDATA applies to all private employers in Utah, regardless of size (Utah Code § 34-38-2(4)). Under the UDATA, an employer is generally not required to test employees for drugs and alcohol. However, organizations that store or transfer high-level nuclear

or radioactive waste within the state must test applicants and employees for drugs or alcohol. (Utah Code § 34-38-3.)

Employers who choose to test their employees and applicants for drugs and alcohol must periodically test management to be protected from certain liability claims (Utah Code § 34-38-3(1)). However, Utah law does not specify the frequency or circumstances under which managers are to be tested.

In addition, employers are protected from certain liability claims if they test their employees and applicants for drugs and alcohol if the employers:

- Comply with the UDATA.
- Have a written drug or alcohol testing policy.
- Do not rely on inaccurate results to take action against an employee in bad faith.

(Utah Code §§ 34-38-3(1), 34-38-7(1), and 34-38-10(2).)

- The UDATA also requires that any drug or alcohol testing must:
 - Occur either during or immediately after the employee's regular work period.
 - Be deemed work time for compensation purposes.
 - Be paid for by the employer.

(Utah Code § 34-38-5.)

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.

Under Utah law, employers may conduct drug and alcohol tests to:

- Investigate possible employee impairment.
- Investigate workplace accidents or theft.
- Maintain safety for employees or the public.

- Maintain:
 - productivity;
 - product or service quality; or
 - security of property or information.

(Utah Code § 34-38-7(2).)

However, employers may only conduct drug and alcohol tests consistent with the terms of a written policy. Employers must:

- Distribute the policy to employees.
- Have the policy available for review by applicants.

(Utah Code § 34-38-7(1).)

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

Under the Utah Drug and Alcohol Testing Act (UDATA), employers may collect the following samples for drug and alcohol testing:

- Urine.
- Blood.
- Breath.
- Saliva.
- Hair.

(Utah Code § 34-38-2(9).)

Testing must:

- Conform to scientifically accepted analytical methods and procedures.
- If failed, be confirmed by a confirmation test by:
 - gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method; and
 - a laboratory that is certified by the US Department of Health and Human Services under the National Laboratory Certification Program, if using a urine sample.

(Utah Code § 34-38-6(6).)

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

Under the Utah Drug and Alcohol Testing Act (UDATA), employers may test for alcohol and drugs.

Alcohol is defined under the UDATA as either:

- Ethyl alcohol.
- Ethanol.

(Utah Code § 34-38-2(1).)

The UDATA defines drug as "a substance recognized as a drug in the United States Pharmacopeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug compendia, or supplement to any of those compendia" (Utah Code § 34-38-2(2)).

DRUG TESTING PROTOCOLS

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

To obtain protection from certain liability claims related to drug or alcohol testing under the Utah Drug and Alcohol Testing Act (UDATA), a sample must be:

- Collected under reasonable and sanitary conditions.
- Tested and collected:
 - with due regard to the tested individual's privacy; and
 - in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of a reliable sample.
- Labeled, to prevent mistaken identification of test results.
- Collected, stored, and transported in a way to reasonably prevent sample contamination or adulteration.

(Utah Code § 34-38-6(2)-(5).)

In addition, employers must allow tested individuals to provide relevant information, such as:

- Prescription and over the counter drug use.
- Other relevant medical information.

(Utah Code § 34-38-6(4)(b).)

Testing must also:

- Conform to scientifically accepted analytical methods and procedures.
- If failed, be confirmed by a confirmation test by:
 - gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable analytical method; and
 - a laboratory that is certified by the US Department of Health and Human Services under the National Laboratory Certification Program, if using a urine sample.

(Utah Code § 34-38-6(6).)

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)?

The Utah Drug and Alcohol Testing Act (UDATA) does not require a specific protocol for responding to a positive drug test. However, before a test of a sample may be considered a failed test and used as a basis for an action by an employer, the sample must be confirmed by a confirmation test (see Question 5) (Utah Code § 34-38-6(6)(b)).

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

Utah employers must pay all drug and alcohol testing costs. This includes transportation costs, if the employee's drug and alcohol test is conducted at a place other than the workplace. (Utah Code § 34-38-5(2).)

8. Where can/must drug tests take place (on-site or otherwise)?

In Utah, drug tests may take place both in and outside the workplace (Utah Code § 34-38-5(2)).

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

The Utah Department of Environmental Quality and Utah Labor Commission enforce the Utah Drug and Alcohol Testing Act (UDATA) for nuclear and radioactive waste storage and transportation facilities (Utah Code § 34-38-3(2)). There is no agency enforcing the UDATA for other employers, as the UDATA only provides liability protection for most employers.

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?

For most employers, the Utah Drug and Alcohol Testing Act (UDATA) only protects against liability if they comply with the UDATA. If an employer has a drug and alcohol testing policy and complies with the UDATA, individuals may only sue if the employer takes the action based on an inaccurate test result that was not relied on in good faith. (Utah Code §§ 34-38-3(1) and 34-38-10(2).)

In addition, employers may not be sued if they have established a policy and initiated a testing program that complies with the UDATA for:

- Failure to test for:
 - alcohol;
 - drugs;
 - a specific drug; or
 - some other substance.
- Failure to test for or failure to detect any:
 - specific drug or other substance;
 - disease, infectious agent, or virus; or
 - other physical abnormality, problem, or defect.
- Termination or suspension of any drug or alcohol testing program or policy.

(Utah Code § 34-38-9.)

Also, employers that have established a drug or alcohol testing program cannot be sued for defamation of character, libel, slander, or damage to reputation unless all of the following are satisfied:

- The test results were disclosed to any third party that is not either:
 - the employer;
 - an authorized employee or agent of the employer; or

- the tested employee or prospective employee.
- The information disclosed is based on an inaccurate test result.
- The inaccurate test result is disclosed with malice.
- All elements of an action for defamation of character, libel, slander, or damage to reputation are satisfied.

(Utah Code § 34-38-11.)

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)?

For private employers in Utah that do not store or transport nuclear or radioactive waste, the Utah Drug and Alcohol Testing Act (UDATA) only protects them against certain private causes of action, if the employer:

- Complies with the UDATA.
- Relies on an inaccurate test result in good faith.

(Utah Code §§ 34-38-3(1) and 34-38-10(2).)

Otherwise, the UDATA does not provide for consequences for violations of the drug testing law.

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?

Employers may use a test result or a refusal to take a test as the basis for disciplinary or rehabilitative actions, including:

- Requiring that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program as a condition of continued employment, which may include additional drug or alcohol testing.
- Suspending the employee with or without pay for a period of time.
- Terminating employment.
- Not hiring a prospective employee.
- Enforcing other disciplinary measures that conform with the employer's usual procedures, for example, those found under a collective bargaining agreement.

(Utah Code § 34-38-8(2).)

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?

Under Utah law, information relating to a drug or alcohol test belongs to the employer. Test-related information includes:

- Information.
- Interviews.
- Reports.

- Statements.
- Memoranda.
- Test results.

(Utah Code § 34-38-13(1).)

Test-related information is confidential and cannot be used, obtained, or disclosed unless it relates to:

- Licensing, in which test-related information may be disclosed to an agency governing occupational and professional licensing.
- An employer's disciplinary or rehabilitative actions.
- A defamation, libel, slander, or damage to reputation action.

(Utah Code § 34-38-13(2), (3).)

OTHER DRUG TESTING LAWS

14. Please describe any additional drug testing laws or requirements that employers should consider, including significant laws in major jurisdictions within your state.

Section 3.24.115 of the Salt Lake City City Code requires contractors bidding on city-funded building improvement and public works projects that cost over \$250,000, and all their subcontractors, to certify that they have and will maintain a drug and alcohol testing policy for the duration of the contract with the city. The policy must:

- Apply to all covered employees of the contractor or any subcontractor.
- Require covered employees to submit to random drug tests under the testing policy.

(Salt Lake City, Utah, City Code § 3.24.115(B)(1)(b).)

Salt Lake County requires that vendors seeking a veterans hiring preference from the county have or maintain a drug and alcohol testing policy for the duration of the contract with the county. The policy must:

- Apply to all covered individuals that the vendor employs or hires.
 - Require covered individuals to submit to random drug testing.
- (Salt Lake County, Utah, Mun. Code § 3.15.010.)

Although public employees are beyond the scope of this Q&A, Salt Lake County requires its employees holding a commercial driver's license or performing safety sensitive duties to undergo random alcohol and drug testing. Every calendar year, Salt Lake County tests a minimum of 50% of all commercial driver's license holders for drugs and a minimum of 10% for alcohol abuse, using a computerized random selection procedure that:

- Gives all commercial driver's license-holding employees an equal chance of being chosen for testing.
- Is evenly spaced throughout the calendar year.
- Is unannounced.

Where the employee chosen for random drug or alcohol testing is not on duty, the employee's supervisor or designee must file a written record that states the reasons the testing was not administered. (Salt Lake County Human Resources Policy 3-700: CDL and Safety Sensitive Alcohol and Drug Screening, Testing, and Treatment.)

In addition, Salt Lake County allows for reasonable suspicion-based drug testing of any of its employees (Salt Lake County Human Resources Policy 3-600: Alcohol and Drug Screening, Testing, and Treatment).

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