

# U. S. DEPARTMENT OF COMMERCE

## DRUG-FREE WORKPLACE PLAN



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Approved by: **JESSICA  
PALATKA**

Digitally signed by JESSICA  
PALATKA  
Date: 2025.01.17 09:00:34  
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Jessica S. Palatka  
Deputy Assistant Secretary for Administration (DASA), Acting  
Chief Human Capital Officer

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Date

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## I. INTRODUCTION

NOTE: Executive Order 12564 and this plan apply to all Department of Commerce federal civilian employees.

### A. Background

On September 15, 1986, President Reagan signed Executive Order (E.O.) 12564 (Order), establishing the goal of a Drug-Free Federal Workplace. The Order made it a condition of employment for all Federal employees to refrain from using illegal drugs on or off duty. In a letter to all executive branch employees dated October 4, 1986, the President reiterated his goal of ensuring a safe and drug-free workplace for all Federal workers.

The Order recognized that illegal drug use is seriously impairing a portion of the national workforce, resulting in the loss of billions of dollars each year. As the largest employer in the Nation, the Federal Government has a compelling proprietary interest in establishing reasonable conditions of employment. Prohibiting employee drug use is one such condition. The Department of Commerce (Department) is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity. The intent of the policy is to offer help to those who need it, while sending a clear message that any illegal drug use is, quite simply, incompatible with Federal service.

On July 11, 1987, Congress passed legislation affecting implementation of the Order under Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 United States Code (U.S.C.) § 7301 note (1987), (hereafter, the Act), in an attempt to establish uniformity among Federal agencies' drug testing plans, reliable and accurate drug testing, employee access to drug testing records, confidentiality of drug test results, and centralized oversight of the Federal Government's drug testing program.

The purpose of the Department's Drug-Free Workplace Plan (Plan) is to set forth objectives, policies, procedures, and implementation guidelines, and to achieve a drug-free Federal workplace, consistent with the provisions of the Executive Order, Section 503 of the Act, and guidance issued by the Interagency Coordinating Group Executive Committee (ICGEC). The ICGEC is convened by the Office of National Drug Control Policy and includes members from the Department of Health and Human Services, Department of Justice, and the Office of Personnel Management. It reviews and concurs with agency drug-free workplace plans and lists of Testing Designated Positions (TDPs).

### B. Statement of Policy

The Department, because of its economic development and technology advancement responsibilities, as well as the sensitive nature of its work, has a compelling obligation to eliminate illegal drug use from its workplace.

The Department fulfills its mission by:

- Participating with other Federal Government agencies in the creation of national policy, through the President's Cabinet and its subdivisions;
- Promoting and assisting international trade;
- Strengthening the international economic position of the United States;
- Promoting progressive domestic business policies and growth;
- Improving understanding and uses of the physical environment and its oceanic life;
- Ensuring effective use and growth of the Nation's scientific and technical resources; and
- Acquiring, analyzing, and disseminating information regarding the Nation and the economy to help achieve increased social and economic benefit.

The use of illegal drugs by any of its employees is incompatible with the conduct and performance that the American people expect from employees of the Department. In addition, the Department, as an employer, is legitimately concerned with maintaining a healthy and productive workforce as well as a safe and secure workplace.

The use of drugs would be particularly detrimental given the sensitive nature of much of the Department's work and its custody of substantial national security information related to trade. Although the Department's work is very diverse, much of it involves custody of sensitive information or safeguarding of public health and safety. Compromise of the workforce by drug use could readily result in damage to the national security, financial and trade systems, or public safety. Examples include, but are not limited to, the following:

- The Department develops and releases a variety of statistical economic indicators, including gross national product, market indices, balances of payments, and investment forecasts. Misuse or premature release of this data could adversely affect the Nation's economy or give unfair advantage to individual investors.
- The Department issues export licenses, holds vital trade information, safeguards the release of advanced technologies with potential military application to adversarial countries, and enforces export trade laws. Employees impaired by drug use or subject to compromise due to drug use could cause significant damage to the national security and America's trade and military position in the world.
- The Department compiles and maintains a storehouse of information on the American population, which is the basis for vital business decisions, allocation of public funds, and determinations of representation in government. Error or misuse of this database could have significant impact on the lives of the American people.
- The Department tracks weather systems, including severe storms, hurricanes, tsunamis, and tornadoes and provides warnings to the public, the military defense system, and transportation systems. It also tracks rainfall and water levels in the Nation's waterways and provides flood warnings. Failure to act promptly and prudently on accurate information in any of these situations due to drug use could have tragic consequences involving loss of lives and destruction of property.

- The Department operates and maintains a nuclear reactor facility to support its research work. Negligence or error in the operation of the reactor or in the handling of materials could result in serious injury and property damage.

As a result, the Department has undertaken steps to develop the Plan in accordance with the Order. The Plan identifies those positions where the use of illegal drugs could have the most serious impact on public health, national security, and the ability of the Department to carry out its most important functions and provides a means of ensuring that the performance of these functions is not impaired by the use of illegal drugs.

The Plan provides information and assistance to Department employees and, where feasible, to their families. The goal of the drug-testing component is to act as a deterrent to employees considering using illegal drugs and to identify employees in sensitive positions who are using illegal drugs.

The Plan contains important safeguards for the rights of employees, including advance notice of circumstances under which testing is permissible, the scope of testing, privacy during collection, stringent laboratory standards, and provisions for employees to justify positive results. The Plan's design is to establish and maintain a drug-free workplace while providing the maximum safeguards possible for employee rights and privacy.

The mark of a successful drug-free workplace plan depends on how well the Department can administer the program, including how well it informs its employees of the hazards of drug use. Equally important is the assurance to employees of the respect for personal dignity and privacy in reaching the Department's goal of a drug-free workplace. Therefore, the Plan includes policies and procedures for: (1) employee assistance; (2) supervisory training; (3) employee education; and (4) identification of illegal drug use through drug testing on a carefully controlled and monitored basis.

It is the Department's policy that its workplace be free from the illegal use, possession, or distribution of Schedule I and II controlled substances, as defined in 21 U.S.C. § 802(6), Part B, Subchapter 13. The Department will deal with possession and distribution of controlled substances promptly in accordance with legal and administrative disciplinary procedures. However, the policy's primary goal is to ensure the elimination of illegal drug use and make certain that the Department workplace is safe, healthy, productive, and secure.

### C. Nature, Frequency, and Type of Drug Testing to be Instituted

Section 503 of the Act requires the Plan to specify the nature, frequency, and type of drug testing utilized by the Department. The Plan includes the following types of drug testing:

- Applicant/Pre-Employment testing;
- Random testing of those employees in positions that have been identified as TDPs;
- Reasonable suspicion testing;
- Accident or unsafe practice testing;
- Voluntary testing; and

- Testing as part of or as follow-up to counseling or rehabilitation.

The frequency of testing for random testing and voluntary testing is specified at Section IX.C. The frequency of follow-up testing is addressed at Section XII.C. The Department reserves the right to increase or decrease the frequency of testing based on the Department's mission, need, availability of resources, and experience in the program, consistent with the duty to achieve a drug-free workplace under the Order.

#### D. Drugs for Which Individuals Are Tested

Section 503 of the Act requires the Plan to specify the drugs subject to testing in individuals. The drugs are:

- Marijuana
- Cocaine
- Amphetamines, including Amphetamine, Methamphetamine, Methylenedioxymethamphetamine (MDMA), and Methylenedioxyamphetamine (MDA)
- Opioids, including 6-Acetylmorphine, Codeine, Morphine, Hydrocodone, Hydromorphone, Oxycodone, and Oxymorphone
- Phencyclidine (PCP)

#### E. Scope

The Plan covers all component organizations of the Department.

#### F. References

- Executive Order 12564;
- Executive Order 13467
- Executive Order 13526
- Section 503 of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat. 391, 468-471, codified at 5 U.S.C. § 7301 note (1987);
- Mandatory Guidelines for Federal Workplace Drug Testing Programs, revised;
- 5 U.S.C. Chapter 71;
- Section 523 and 527 of the Public Health Service Act and implementing regulations at Title 42, Code of Federal Regulations (CFR) Part 2, Confidentiality of Alcohol and Drug-Abuse Patient Records;
- The Privacy Act of 1974 (5 U.S.C. § 552a), prescribing requirements governing the maintenance of records by agencies pertaining to the individuals and access to these records by the individual(s) to whom they pertain;
- 15 CFR Part 4, implementing the Privacy Act of 1974 within the Department;
- Federal Employees Substance Abuse Education and Treatment Act of 1986, Pub. L. 99-570; and
- Department Administrative Order 202-751, "Discipline."



## II. DEFINITIONS

**Applicant/Pre-Employment** – Any individual tentatively selected for employment in a TDP or any individual tentatively identified for placement in a TDP (i.e., directed reassignment, voluntary reassignments, temporary promotions or details for the “good of the service”) who has not been subject to random testing immediately prior to the placement.

**Employee Assistance Program (EAP)** – The Department-based counseling program that offers assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, mental health problems, personal and work-related problems, and monitors the process of employees while in treatment.

**Employee Assistance Program Administrator** – The individual responsible for ensuring the development, implementation, and review of the Department’s EAP.

**Employee Assistance Program Coordinator** – The individual responsible for implementing and operating the specific EAP contract for the covered bureau/operating unit.

**Employee Assistance Program Counselor** – The individual responsible for providing counseling, treatment, and education services to employees and supervisors under the specific EAP contract for the covered bureau/operating unit.

### **Employees in Sensitive Positions:**

- Employees in positions designated by the Secretary of Commerce or designee as Special Sensitive, Critical Sensitive, or Noncritical Sensitive under Department issuance;
- Employees in positions designated by the Secretary or designee as sensitive in accordance with Executive Order 10450, as amended, and related Department issuances;
- Employees granted access to classified information or who may be granted access to classified information pursuant to a favorable determination of eligibility for access made by the Secretary or designee;
- Individuals serving under Presidential appointments;
- Law enforcement officers as defined in 5 U.S.C. §§ 8331(20) and 8401(17) or;
- Other positions that the Secretary determines involve law enforcement, national security, the protection of life and property, public health, or safety, or other functions requiring a high degree of trust and confidence.

**Illegal Drugs** – A controlled substance included in Schedule I or II of 21 U.S.C. § 802(6), the possession of which is unlawful under 21 U.S.C., Chapter 13. The term “illegal drugs” does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by federal law.

**Interagency Coordinating Group Executive Committee (ICG-EC)** – The ICG-EC is chaired by the White House Office of National Drug Control Policy and consists of members from the Department of Health and Human Services (HHS), Department of Justice, and the Office of

Personnel Management. ICG-EC concurrence is required on any substantive changes in the Department's Drug-Free Workplace Plan and on other than presumptive TDP designations. The decision of the ICG-EC is final and not subject to further administrative review.

**Management Official** – An employee required or authorized by the Department to formulate, determine, or influence the policies of the Department (5 U.S.C. § 7103(a)(11)).

**Medical Review Officer** – The official responsible for receiving laboratory results generated from the Department's Drug-Free Workplace Program (Program), who is a licensed physician with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results together with an individual's medical history and any other relevant biomedical information.

**Principal Human Resources Manager (PHRM)** – The head of a Servicing Human Resources Office.

**Random Testing** – A system of drug testing imposed without individualized suspicion that a particular individual is using illegal drugs. Random testing may either be uniform, unannounced testing of testing designated employees occupying a specified area, element, or position; or may be a statistically random sampling of such employees based on a neutral criterion, such as social security numbers.

**Servicing Human Resources Office (SHRO)** The organization that provides operational human resources services for an employee's organizational unit.

**Supervisor** – An employee having authority to hire, fire, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove other employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment (5 U.S.C. § 7103(a)(10)).

**Testing Designated Positions** – Positions consistent with the criteria in the ICG-EC's Guidance for Selection of Testing Designated Positions, those positions designated by the Secretary and those that the department has selected for random and pre-employment drug testing.

**Verified Positive Test Results** – A test result that has been screened positive by an FDA-approved immunoassay test, confirmed by a gas chromatography/mass spectrometry assay, or other confirmatory tests approved by HHS, and reviewed and verified by the Medical Review Officer in accordance with this plan and the *Mandatory Guidelines for Federal Workplace Drug Testing Programs*.

### **III. EMPLOYEE ASSISTANCE PROGRAM (EAP)**

#### **A. Function**

The Department's EAP plays an important role in preventing and resolving employee drug use by:

- Demonstrating the Department's commitment to eliminating illegal drug use; providing employees an opportunity, with appropriate assistance, to discontinue their drug use;
- Providing educational materials to supervisors and employees on drug use issues;
- Assisting supervisors in confronting employees who have performance and/or conduct problems and making referrals to appropriate treatment and rehabilitative facilities;
- Monitoring the progress of individuals during the rehabilitation period and encouraging successful completion of the program.

**Each SHRO is responsible for ensuring they have an EAP program in place for their employees.**

The EAP, however, shall not be involved in the collection of urine samples or the initial reporting of test results. Specifically, the EAP shall:

- Provide counseling and assistance to employees who self-refer for treatment or whose drug tests have been confirmed positive, and monitor the employees' progress through treatment and rehabilitation;
- Provide needed education and training to employees on types and effects of drugs, symptoms of drug use and its impact on performance and conduct, relationship of the EAP with the drug testing program, and related treatment, rehabilitation, and confidentiality issues; and
- Ensure that confidentiality of test results and related medical treatment and rehabilitation records is maintained in accordance with Section XIV.

#### **B. Structure**

The Department's EAP is a contracted service with locations in the Herbert C. Hoover Building (HCHB), Washington, D.C.; Bureau of the Census, Suitland, Maryland; National Institute of Standards and Technology (NIST), Gaithersburg, Maryland; National Oceanic and Atmospheric Administration (NOAA), Silver Spring, Maryland; and the U.S. Patent and Trademark Office (USPTO), Alexandria, Virginia.

The bureau/operating units shall be responsible for local oversight and implementation of the EAP, and will provide high-level direction and promotion of the EAP.

### C. Referral and Availability

Any current employee found to be using illegal drugs shall be referred to the EAP. The EAP shall be administered separately from the testing program and shall be available to all employees without regard to finding of drug use. The EAP shall provide counseling or rehabilitation for all referrals, as well as education and training regarding illegal drug use, in accordance with the terms of the applicable EAP contract. The EAP is available not only to Department employees, but, when feasible, to the families of employees with drug problems and to employees with family members who have drug problems, in accordance with the terms of the applicable EAP contract.

In the event the employee is not satisfied with the program of treatment or rehabilitation, the employee may seek review of the EAP Counselor's referral by notifying the EAP Administrator, for their applicable EAP, prior to completion of the program. The EAP Administrator will consult with the EAP Counselor's supervisor or other senior EAP official to review the referral and receive a recommended decision from the EAP supervisor/official. The EAP Administrator shall communicate the decision to the employee, and that decision shall be final and shall not be subject to further administrative review. Regardless of the treatment program chosen, the employee remains responsible for successful completion of the treatment. Assertions that the counselor failed to consider one or more of the applicable factors in making a referral shall not constitute either an excuse for continuing to use illegal drugs or a defense to disciplinary action if the employee does not complete treatment.

### D. Leave Allowance

Employees shall be granted 2 hours of excused absence coded as administrative leave to participate in counseling, including necessary travel time, during the assessment/referral phase of rehabilitation. Absences during duty hours for rehabilitation or treatment must be charged to the appropriate leave category in accordance with law and leave regulations.

## **IV. SUPERVISORY/MANAGEMENT TRAINING**

### **A. Objectives**

Because supervisors have a key role in establishing and monitoring a drug-free workplace, the Department and its bureaus/operating units shall provide training to assist supervisors and managers in recognizing and addressing illegal drug use by agency employees. The purpose of supervisory training is to understand:

- Department policies relevant to work-performance problems, drug use, and the Department's EAP;
- The responsibilities of offering EAP services;
- How to identify performance and behavioral changes should be recognized and how to document such changes;
- The roles of the medical staff, supervisors, personnel, and EAP personnel; and
- The process of integrating employees into the workforce.

### **B. Implementation**

The Office of Human Resources Management (OHRM) shall be responsible for implementing supervisory training and shall ensure that all employees and supervisors are fully informed of the Department's Plan.

### **C. Training Package**

All supervisory training shall be required to successfully complete training on a drug-free workplace. The training will include the following topics:

- Overall Department policy;
- The prevalence of various employee problems with drugs;
- The EAP approach to handling problems;
- How to recognize employees with possible problems;
- How to prepare documentation in support of a recommendation to test an employee on grounds of "reasonable suspicion";
- Documentation of employee performance or behavior;
- How to approach the employees with possible problems;
- Bureaus/Operating Units procedures for referring employees to EAP;
- Disciplinary action, and removals from sensitive positions, as required by Section 5(c) of the Order; and
- Reintegration of employees into the workforce

## **V. EMPLOYEE EDUCATION**

### **A. Objectives**

Bureaus/Operating Units shall offer drug education training to its employees. Drug education training will include the following:

- The Department's drug free workplace plan;
- Types and effects of drugs;
- Symptoms of drug use, and the impacts on performance and conduct;
- The relationship of the EAP to the drug-testing program; and
- Other relevant treatment, rehabilitation, and confidentiality issues.

### **B. Means of Education**

Drug education activities may include:

- Distribution of written materials;
- Online training in Commerce Learning Center;
- Audio-visual materials;
- Lunch-time employee forums; and
- Employee drug-awareness days.

## **VI. SPECIAL DUTIES AND RESPONSIBILITIES**

At the direction of the Chief Financial Officer/Assistant Secretary for Administration (CFO/ASA), the Department must efficiently implement a plan for all bureau/operating units in accordance with the Order and all other applicable regulations.

### **A. General Program/Structural Provisions**

The Office of Policy and Benefits (OPB), OHRM will administer a central operating framework with a Drug-Free Program Manager (DPM) and a budget to carry out the Plan. The DPM shall coordinate implementation of all aspects of the program throughout the Department. This will conserve resources and more efficiently administer the Plan.

### **B. Government Contractors**

Wherever existing facilities are inadequate to implement this order, the DPM shall:

- Contract with other Federal agencies on a reimbursable basis to perform drug-screening tests;
- Ensure that contractors chosen to perform the drug-screening tests are duly certified pursuant to the HHS guidelines and that all contracts conform to the technical specifications of the HHS guidelines; and
- Establish, by contract or with Department employees as deemed appropriate, the positions and specific responsibilities of the DPM and the Medical Review Officer (MRO) as required by HHS Mandatory Guidelines.

### **D. Drug-Free Workplace Program Manager (DPM)**

The DPM shall implement, direct, administer, and manage the drug-free program for the Department. The DPM shall serve as the principal contact with the laboratory in assuring the effective operation of the testing part of the program. In carrying out this responsibility, the DPM shall among other duties:

- Assure all testing is conducted as authorized under this Plan as arranged by the Drug Program Coordinators (DPC);
- Receive verified positive test results from the MRO and communicate these to the SHRO, and the applicable Employee Assistance Program, and the appropriate management official empowered to initiate disciplinary action (EAP);
- In coordination with the EAP Counselor, publicize and disseminate educational materials on the drug program, and oversee training and education sessions on drug use and rehabilitation; and
- Coordinate all DPM duties in offices wherever possible to conserve resources and to efficiently and speedily accomplish reliable and accurate testing objectives;

### **D. PHRMs**

The PHRMs are responsible for verification of the TDPs in the bureaus/operating units serviced by their organizations. Annual verification involves a review by the SHROs of positions not currently designated as a TDP. The review evaluates positions against current *Guidance for Selection of Testing Designated Position*.

Each PHRM will annually certify by September 30, to the DPM the accuracy and completeness of the review conducted by their organization. The certification will include:

- A list of positions currently not designated as a TDP that are being proposed as new TDPs. The list of such positions must include the following supporting documentation:
  - Job descriptions or a summary of the duties performed by positions proposed for inclusion in the random testing pool; and
  - Justification for inclusion of each position. (In some cases, group justifications may suffice for positions that share common duties and fall under the same TDP category.)
  - Concurrence of Office of General Counsel

The DPM will review and evaluate proposed positions, seek and receive the concurrence of the ICGEC to add these to the department's TDP list, and notify the PHRMs when positions may be added and individuals notified and tested.

#### E. Drug Program Coordinators (DPCs)

Each Servicing Human Resources Office (SHRO) will have a DPC responsible for directing implementation of the Drug Free Workplace Plan within the bureaus/offices serviced by their organization. The DPC will:

- Serve as the primary contact on issues of pre-employment and random drug testing within their serviced organizations;
- Monitor the progress of conducting pre-employment and random drug testing within their serviced organizations;
- Arrange as needed for reasonable suspicion, post-accident, and follow-up testing; and
- Serve as the principal contact with the DPM in assuring the effective operation of the collection part of the program.

#### F. Servicing Human Resources Organizations (SHROs)

The SHRO is responsible for the administration of pre-employment, reasonable suspicion, post-accident, random testing (when initiated by the OHRM/DPM), and follow up testing in the bureaus/operating units. The SHRO shall:

- Schedule pre-employment drug tests for individuals selected for a TDP;
  - Provide the individuals with the date, time, and location of the pre-employment test in advance of such test;
  - Ensure that new hires for a TDP and employees entering a new TDP from a non TDP are provided with a 30-calendar-day advance notice memorandum as



required by this Plan and obtain the signed acknowledgment form from the individual;

- Ensure the signed acknowledgment is placed in the employee's e-OPF;
- Ensure that all employees randomly selected for testing have a signed acknowledgment form on record (or a copy of the vacancy announcement for their current position stating that the position is a TDP). No employee may be randomly tested unless an acknowledgment form for advance notice or appropriate vacancy announcement is in the employee's e-OPF;
  - Notify supervisors of employees selected for random drug testing no more than 3 hours in advance of the scheduled test
  - Notify employees selected for random drug testing no more than 2 hours in advance of the scheduled test. Explain to the employee that they are under no suspicion of taking drugs and that their name was selected randomly. Explain that the employee is required to report for testing and that failure to do so will result in disciplinary action up to and including removal. Provide the location and time of the testing and the name of the organization conducting the testing; and
  - Notify the appropriate individual in the SHRO if the employee fails or refuses to take the scheduled random drug test.

#### G. Employee Assistance Program Counselors

The EAP Counselors shall:

- Serve as the initial point of contact for employees who ask or are referred for counseling;
- Be qualified and trained in counseling employees in the occupational setting;
- Provide counseling and treatment services to all employees referred to the EAP by their supervisor or on self-referral, and otherwise offer employees the opportunity for counseling and rehabilitation, in accordance with the applicable EAP contract;
- Monitor the progress of referred employees during and after the rehabilitation period, in accordance with applicable EAP contract, and provide feedback to supervisors in accordance with 42 CFR Part 2, Confidentiality of Substance Use Disorder Patient Records;
- Document and sign the treatment plan prescribed for all employees referred for treatment, after obtaining the employee's signature on this document; and
- In making referrals, consider the:
  - Nature and severity of the problem;
  - Location of the treatment;
  - Cost of the treatment;
  - Intensity of the treatment environment;
  - Availability of inpatient/outpatient care;
  - Other special needs, such as transportation and child care; and
  - The preferences of the employee.

#### H. Medical Review Officer

The Department shall contract for the services of a Medical Review Officer (MRO) to carry out the purposes of this Plan. The MRO shall, among other duties:

- Receive all laboratory test results;
- Assure that an individual who has tested positive has been afforded an opportunity to justify the test results;
- Consistent with confidentiality requirements, refer written determinations on all verified positive test results to the DPM (including a positive drug test result indicating the result has been verified), together with all relevant documentation and a summary of findings; and
- Coordinate with and report to the DPM on all activities and findings on a regular basis.

#### I. Supervisors

Supervisors will be trained through CLC or bureau/operating unit to recognize and address illegal drug use by employees and will be provided information regarding referral of employees to the EAP, procedures and requirements for drug testing, and behavioral patterns that give rise to a reasonable suspicion that an employee may be using illegal drugs. Except as modified by the Secretary of Commerce to suit specific program responsibilities, first-line supervisors shall:

- Complete training sessions on illegal drug use in the workplace;
- Initiate a reasonable suspicion test, after completing the Reasonable Suspicion Checklist documenting those observations, and obtaining higher-level supervisory approvals;
- Refer employees to the EAP for assistance in obtaining counseling and rehabilitation, upon a finding of illegal drug use;
- Initiate appropriate disciplinary action upon a finding of illegal drug use; and
- In conjunction with the applicable employee relations office with the SHRO, assist higher-level supervisors and the EAP Counselor in evaluating employee performance and/or personnel problems that may be related to illegal drug use.

## VII. NOTIFICATION OF DRUG TESTING

### A. General Notice

A general notice from the Department announcing the testing program, as required by the Executive Order Section 4 (a), was provided to all employees when the Department's plan was certified in 1988 sixty (60) days prior to its implementation.

### B. Individual Notice

#### 1. Applicants

All vacancy announcements for TDPs must include language that, as a condition of employment, the position requires the applicant to take and pass a pre-employment drug test and the position is subject to random drug testing in accordance with the Department's applicable policy.

Further, the offer letter to the applicant must include similar language that, as of a condition of employment, the individual must take and pass a pre-employment drug test and the position is subject to random drug testing in accordance with the Department's applicable policy.

If the vacancy announcement and/or offer letter contains the required information on random drug testing, the individual hired for the TDP does not get the 30-calendar day advance notice for that position.

#### 2. Incumbents

Individuals in newly designated TDPs must receive a 30-calendar-day advance notice of the testing requirement. The notice serves as notification to the individual that they occupy a TDP, and that random testing of incumbents of TDPs will begin no sooner than 30 days following the date of the notice. This notice is required if the employee is being reassigned to a new TDP. There is no waiting period if the job opportunity announcement for the position contained notification that the position was a TDP.

These notices will explain:

- That the employee's position has been designated a TDP;
- That the employee will have the opportunity to voluntarily admit to being a user of illegal drugs and to receive counseling and rehabilitation and shall not be subject to disciplinary action;
- Section VIII. F, Safe Harbor, which creates an absolute bar to disciplinary action for certain volunteers. This does not preclude disciplinary action for misconduct when the admission of drug use is provided by the employee as an affirmative defense for the misconduct;

- That the employee's position will be subject to random testing no sooner than 30 calendar days after the date of the notice; and
- Refusal or failure to take the random test will result in initiation of disciplinary action, up to and including removal from Federal service.

#### C. Signed Acknowledgment

Each individual receiving the notice shall be asked to acknowledge in writing that he or she received and read the notice. If the employee refuses to sign the acknowledgment, the employee's supervisor shall note on the acknowledgment form that the employee received the notice. This acknowledgment form will be placed in the employee's e-OPF. An employee's failure to sign the notice shall not preclude testing that employee or otherwise affect the implementation of this Plan.

#### D. Administrative Relief

Administrative relief does not apply to bargaining unit employees covered by a negotiated grievance procedure (NGP) unless the NGP specifically excludes the subject of the position designation as a TDP under the Preferred or Presumptive criteria from the scope of the NGP. If the employee believes his or her position has been wrongly designated as a TDP, they may file a request with the OHRM/DPM. The employee must submit, in writing, a request for review to the OHRM/DPM or designee within 15 calendar days of notification, providing all relevant information. The OHRM/DPM or designee will issue a written decision on the request. If the employee is unhappy with the decision, they may file a request with the Chief Financial Officer and Assistant Secretary for Administration (CFO/ASA) or designee for review of the designation. The employee must submit, in writing, a request for review to the CFO/ASA or designee within 15 calendar days of notification, providing all relevant information. The CFO/ASA or designee shall review the request in the context of the criteria applied in designating the position as a TDP. The CFO/ASA or designee will issue a written decision on the request. The decision of the CFO/ASA or designee is final. The decision by the CFO/ASA, or designee, is subject to review and approval by the ICGEC under E.O. 125564.

Relief for Bargaining Unit Employees. Bargaining unit employees covered by an NGP that does not specifically exclude the issue of designation of a position as a TDP under the Preferred or Presumed criteria from the scope of the NGP must use the NGP. If the matter is referred to the arbitration, either party (management or labor) may file exceptions with the Federal Labor Relations Authority under 5 U.S.C. § 7122. However, the final decision under is subject to review and approval by the ICGEC under E.O. 125564.

## **VIII. A FINDING OF DRUG USE, AND DISCIPLINARY CONSEQUENCES**

### **A. Determination**

An employee may be found to use illegal drugs based on any appropriate evidence including, but not limited to:

- Direct observation;
- Evidence obtained from an arrest or criminal conviction;
- A verified positive test result; or
- An employee's voluntary admission.

### **B. Mandatory Administrative Actions**

An employee who is found to use illegal drugs shall be referred to the EAP. If the employee occupies a sensitive position, they shall be immediately removed from performance in that position without regard to whether it is a TDP. At the discretion of the Secretary of Commerce, or designee however, and as part of an EAP, an employee may be returned to duty in a sensitive position if the employee's return would not endanger public health or safety or national security.

### **C. Range of Consequences**

The severity of the disciplinary action taken against an employee found to use illegal drugs will depend on the circumstances of each case, will be consistent with the Order, and will include the full range of disciplinary actions, including removal from Federal service. The Department shall initiate disciplinary action against any employee found to use illegal drugs, except if they meet the conditions for "safe haven".

Such disciplinary action, consistent with the requirements of the Department Administrative Order 202-751 and the Civil Service Reform Act, other statutes, and regulations, may include any of the following measures but some type of disciplinary action must be initiated:

- Reprimanding the employee in writing;
- Suspending the employee for a specified number of days;
- Suspending the employee indefinitely until they successfully complete the EAP or until the Department determines that action other than suspension is more appropriate;
- Removing the employee from Federal service; or
- Reducing the employee in pay or grade.

### **D. Initiation of Mandatory Removal from Service**

The Department shall initiate action to remove an employee from Federal service for:

- Refusing to obtain counseling or rehabilitation through an EAP, as required by the Order after having been found to use illegal drugs; or
- Having been found not to have refrained from illegal drug use after a first finding of illegal drug use.

Proposals and decisions on removal actions must be coordinated with the applicable Employee Relations Office and in consultation with the Office of General Counsel.

#### E. Refusal to Take Drug Test When Required

- No applicant who refuses to be tested shall be extended an offer of employment.
- An employee who refuses to be tested when required will be subject to the full range of disciplinary action, including dismissal.
- Attempts to alter or substitute the specimen provided will be deemed a refusal to take the drug test when required.

#### F. Safe Harbor

Under Executive Order 12564, the Department is required to initiate action to discipline any employee found to use illegal drugs in every circumstance except under the “safe harbor” protection. If an employee (1) voluntarily admits his or her drug use; (2) completes counseling or an EAP; and (3) and thereafter refrains from drug use, such discipline “is not required.”

1. Because the Executive Order 12564 permits an agency to create a "safe harbor" for an employee who meets all three of these conditions, the Department has created such a "safe harbor" and will not initiate disciplinary action against employees who satisfy the provisions of this Section.
2. A fundamental purpose of the Department's drug testing Plan is to assist employees who themselves are seeking treatment for drug use. For this reason, the Department will not initiate disciplinary action against any employee who meets all three of these conditions:
  - a. Voluntarily identifies him or her self as a user of illegal drugs prior to being identified through other means;
  - b. Obtains counseling or rehabilitation through an Employee Assistance Program; and
  - c. Thereafter refrains from using illegal drugs.

This self-referral option allows any employee to step forward and identify him or her self as an illegal drug user for the purpose of entering a drug treatment program under the EAP. In stepping forward, an employee may volunteer for a drug test as a means of identification. Although this self-identification test may yield a verified positive test

result, such result shall not subject the employee to discipline assuming the three safe harbor requirements are met.

3. Since the key to this provision's rehabilitative effectiveness is an employee's willingness to admit their problem, this provision will not be available to an employee who is asked to provide a urine sample when required, or who is found to have used illegal drugs and who thereafter requests protection under this provision.

This Plan does not require bureau/operating units to extend safe harbor to employees on an appointment that does not provide sufficient time to complete a rehabilitation program plus the one-year follow-up testing period, or to employees serving on a probationary or trial period.

## SECTION IX. DETERMINATION OF TDPs and RANDOM TESTING

### A. Criteria for Positions Designated for Random Drug Testing

The Order requires random testing for employees in sensitive positions that have been designated as TDPs. This includes current Federal and Schedule C employees. Positions covered by this Plan include TDPs in the Presumptive and Preferred categories under the Interagency Coordination Group Executive Committee's "Guidance for Selections of Testing Designated Positions". The list of these positions is displayed in Appendix A and is available upon request to the DPM.

- *Presumptive* positions
  - Employees required to carry firearms;
  - Motor Vehicle Operators Carrying Passengers who meet certain criteria; and
  - Aviation Flight Crew Members and Air Traffic Controllers.
- *Preferred* positions
  - Employees authorized to carry firearms;
  - Aviation personnel (e.g., flight instructors, ground instructors, flight testing personnel, aircraft dispatchers, maintenance personnel, aviation security and screening personnel, and aircraft safety inspectors);
  - Presidential Appointees Requiring Senate Confirmation (PAS);
  - Law Enforcement Personnel; and
  - Positions requiring "Secret" "Top Secret" or "Top Secret with SCI access".

### B. Determining TDPs

Each SHRO will annually review all the positions in their serviced organizations that are not designated as a TDP and review them against the latest "Guidance for Selection of Testing Designated Positions" (2013). The PHRM will submit the list of proposed TDPs, with the following information, to the DPM for review by September 30:

- Job descriptions, or a summary of the duties performed by positions, proposed for inclusion in the random testing pool;
- Justification for inclusion of each position (in some cases, group justifications may suffice for positions that share common duties and fall under the same TDP category); and
- Concurrence of Office of General Counsel.

The DPM will review and evaluate proposed positions, seek and receive the concurrence of the ICGEC to add these to the department's TDP list, and notify the PHRMs when positions may be added and individuals notified and tested.

Pursuant to 42 U.S.C. § 290dd(b)(2)(E), the Secretary has determined that all positions which have been or will be designated as TDPs under this Plan are "sensitive positions" and are therefore exempted from coverage under 42 U.S.C. § 290dd(b)(1), which provides that no person



may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the basis of prior drug abuse.

### C. Implementing Random Testing

In implementing random testing, the DPM shall:

- Ensure that the means of random selection remains confidential; and
- Evaluate periodically whether the number of employees tested and the frequency with which those tests will be administered, satisfy the Department's duty to achieve a drug-free workforce and meet the testing requirements prescribed by the Department of Health and Human Services regulations.

The Department will conduct a number of random tests each year that is normally equivalent to a least 10 percent of the number of FTEs (Full-Time Equivalencies) in the random testing pool. There will be multiple random draws each year and every employee in a TDP will have an equal chance of being selected for testing in each draw. Thus, it will be possible for an employee to be selected for random testing more than once in a year.

### D. Notification of Selection

An individual selected for random testing, and the individual's first-line supervisor, shall be notified by the DPC the same day the test is scheduled, preferably within 2 hours of the scheduled testing.

The DPC shall explain to the employee that they are under no suspicion of taking drugs and that their name was selected randomly. The DPC will also explain that the employee is required to report for testing and failure to do so may result in disciplinary action up to and including removal.

### E. Deferral of Testing

An employee selected for random drug testing may obtain a deferral of testing if the employee's first-line and second-line supervisors concur that a compelling need necessitates a deferral because the employee is:

- In an approved leave status (sick, annual, administrative, or leave without pay); or
- In official travel status away from the test site or about to embark on official travel scheduled prior to testing notification.

An employee whose random drug test is deferred will be subject to an unannounced test within the following sixty (60) calendar days.

## **X. REASONABLE SUSPICION TESTING**

### **A. Grounds**

Reasonable suspicion testing may be required of any employee in a position which is designated as a TDP when there is a reasonable suspicion that the employee uses illegal drugs whether on or off duty. Reasonable suspicion testing may also be required of any employee in any position when there is a reasonable suspicion.

Reasonable suspicion testing may be based upon, among other things:

- Observable phenomena, such as direct observation of the drug or possession and/or the physical symptoms of being under the influence of a drug;
- A pattern of abnormal conduct or erratic behavior;
- Arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking (including distribution) of controlled substances;
- Information provided either by reliable and credible sources or independently corroborated; or
- Newly discovered evidence that the employee tampered with a previous drug test.

Although reasonable suspicion testing does not require certainty, mere “hunches” are not sufficient to meet this standard.

### **B. Procedures**

If an employee is suspected of using illegal drugs, the appropriate supervisor will gather and document all information, facts, and circumstances leading to and supporting this suspicion. This documentation and the recommendation for testing on grounds of reasonable suspicion is submitted to the applicable Employee Relations Office. The ER Office must obtain advance concurrence from the Office of General Counsel and the DPM on the decision to test or not to test. Once approval has been obtained and arrangements made for testing, the supervisor will prepare a written report detailing the facts and circumstances that warranted the testing.

### **C. Obtaining the Sample**

The employee may be asked to provide the urine sample under observation only under the circumstances detailed at [XIII.B.](#)

### **D. Supervisory Training**

In accordance with Section IV, supervisors will be trained through CLC or bureau/operating unit to address illegal drug use by employees, to recognize facts that give rise to a reasonable suspicion, and to document facts and circumstances that support a finding of reasonable suspicion. Failure to receive such training, however, shall not invalidate otherwise proper reasonable suspicion testing.

## SECTION XI. APPLICANT/PRE-EMPLOYMENT TESTING

### A. Objectives

To maintain the high professional standards of the Department's workforce, it is imperative that individuals who use illegal drugs be screened out during the initial employment screening process before they are placed on the employment rolls. This procedure will have a positive effect on reducing instances of illegal drug use by employees working in the Department and will provide for a safer work environment.

### B. Extent of Testing

Except as prohibited by law, drug testing shall be required of all individuals tentatively selected for employment in testing designated positions TDPs within the Department.

### C. Job Opportunity Announcements (JOAs)

Every JOA for TDPs shall state:

Except as prohibited by law, all applicants tentatively selected for this position will be required to submit to a urinalysis to screen for illegal drug use prior to appointment and, if appointed, the incumbent will be subjected to random drug testing procedures.

In addition, the applicant will be notified that appointment to the position will be contingent upon a negative drug test result. Failure of the JOA to contain this statement notice will not preclude applicant testing if advance written notice is provided to applicants in some other manner, such as in a tentative job offer.

### D. Procedures

The Servicing Human Resources Officer, Drug Program Coordinator (DPC) shall direct applicants to an appropriate collection facility. The drug test must be undertaken as soon as after notification as possible, and no later than 48 hours after the notice to the applicant. When appropriate, applicants who are current Department employees may be reimbursed for reasonable travel expenses.

Applicants will be advised of the opportunity to submit medical documentation that may support a legitimate use for a specific drug and that information will be reviewed only by the MRO to determine whether the individual is legally using an otherwise illegal drug.

### E. Human Resources Officials

The DPC shall verify that a drug test is conducted on individuals sent for testing, and that a negative test result is received prior to a final job offer being extended.

#### F. Consequences

The Department will not extend a final job offer of employment to any applicant with a verified positive test result, and such applicant may not reapply to the Department for a period of 6 months. The SHRO working on the applicant's certification must file an objection to the applicant on the basis of failure to pass the physical, a lack of personal characteristics necessary to relate to public employment, or failure to support the goals of the Department. The SHRO shall inform the applicant that a confirmed presence of an illegal drug in the applicant's urine precludes the Department from hiring the applicant.

## SECTION XII. ADDITIONAL TYPES OF DRUG TESTING

### A. Accident or Unsafe Testing

The Department is committed to providing a safe and secure work environment. It also has a legitimate interest in determining the cause of serious accidents so it can undertake appropriate corrective measures. Post-accident drug testing can provide invaluable information in furtherance of that interest. Accordingly, employees may be subject to testing, when, based upon the circumstances of the accident, his or her actions are reasonably suspected of having caused or contributed to an accident that meets the following criteria:

- The accident results in a death or personal injury requiring immediate hospitalization; or
- The accident results in damage to government or private property in excess of \$10,000.

If an employee is suspected of having caused or contributed to an accident meeting the above criteria, the appropriate supervisor will gather and document all information, facts, and circumstances leading to and supporting this suspicion. This documentation and the recommendation for testing on grounds of an accident or unsafe act are to be submitted to the applicable employee relations (ER) office. The ER office must obtain advance concurrence from the OGC and the DPM on the decision to test or not to test. Once approval has been obtained and arrangements made for testing, the supervisor will prepare a written report detailing the facts and circumstances that warranted the testing.

### B. Voluntary Testing

In order to demonstrate his or her commitment to the Department's goal of a drug-free workplace and to set an example for other Federal employees, employees not in TDP positions may volunteer for unannounced random testing by notifying the DPM. These employees will then be included in the pool of testing designated positions subject to random testing and be subject to the same conditions and procedures, including the provisions of VIII (F). Volunteers shall remain in the TDP pool for the duration of the position which the employee holds, or until the employee withdraws from participation by notifying the DPC of such intent at least 48 hours prior to a scheduled test.

### C. Follow-up Testing

All employees referred through EAP channels that undergo a counseling or rehabilitation program for illegal drug use through the EAP will be subject to unannounced testing following completion of such a program for a period of 1 year. Such employees shall be tested at the frequency stipulated in the abeyance contract or last chance agreement. Such testing is separate from testing that may be imposed as a component of the EAP.

### **SECTION XIII. TEST PROCEDURES IN GENERAL**

#### **A. Mandatory Guidelines for Federal Workplace Drug Testing**

The Department shall adhere to the Mandatory Guidelines for Federal Workplace Drug Testing Programs issued by Health and Human Services (HHS). The organization(s) selected to conduct the Department's drug testing shall have professionally trained collection personnel, quality assurance requirements for urinalysis procedures, and strict confidentiality requirements.

#### **B. Privacy Assured**

Any individual subject to testing under this Plan shall be permitted to provide urine specimens in private and in a restroom stall or similar enclosure so that the employee is not observed while providing the sample. Collection site personnel of the same gender as the individual tested, however, may observe the individual providing the urine specimen when such personnel have reason to believe the individual may alter or substitute the specimen to be provided. Collection site personnel may have reason to believe that a particular individual may alter or substitute the specimen to be provided when the individual:

- Has previously tampered with a sample;
- Is under the influence of drugs at the time of the test;
- Has previously been confirmed by the agency to be an illegal drug user;
- Is seen to have equipment or implements used to tamper with urine specimens'
- The temperature of original specimen was out of range; or
- The specimen appeared to have been tampered with.

#### **C. Failure to Appear for Testing**

Failure to appear for testing without an authorized deferral will be considered refusal to participate in testing and will subject an employee to a range of disciplinary actions, including dismissal, and for an applicant to the cancellation of an offer of employment. If an individual fails to appear at the collection site at the assigned time, the collector shall contact the DPC to obtain guidance on action to be taken.

#### **D. Opportunity to Justify a Positive Test Result**

When a confirmed positive result has been returned by the laboratory, the MRO shall perform the duties set forth in the HHS Guidelines. The MRO must review all medical records made available by the tested employee when a confirmed positive test could have resulted from legally prescribed medication. Evidence to justify a positive result may include, but is not limited to:

- A valid prescription; or
- A verification from the individual's physician verifying a valid prescription.

Individuals are not entitled, however, to present evidence to the MRO in a trial-type administrative proceeding, although the MRO has the discretion to accept evidence in any manner the MRO deems most efficient or necessary.

If the MRO determines there is no justification for the positive result, such result will then be considered a verified positive test result. The MRO shall immediately contact the DPM, who will then contact the SHRO/DPC, upon obtaining a verified positive test result.

#### E. Employee Counseling and Assistance

While participating in a supervised counseling or rehabilitation program, and at the request of the program, the employee may be exempt from the random TDP pool for a period not to exceed 60 calendar days, or for a period specified in an abeyance contract or rehabilitation plan approved by the authorized official of the bureau/operating unit. Upon completion of the program, the employee immediately shall be subject to follow-up testing pursuant to XII.C.

#### F. Savings Clause

To the extent that any of the procedures specified in this section are inconsistent with any of those specified in the Mandatory Guidelines for Federal Workplace Drug Testing Programs promulgated by HHS, or any subsequent amendment thereto, such HHS Guidelines or amendment shall supersede the procedures specified in this section, but only to the extent of the inconsistency.



## SECTION XIV. RECORDS AND REPORTS

### A. Confidentiality of Test Results

The laboratory may disclose confirmed laboratory test results only to the MRO or the staff of the MRO. Any positive result which the MRO justifies by licit and appropriate medical or scientific documentation to account for the result as other than the intentional ingestion of an illegal drug, will be treated as a negative test result and may not be released for purposes of identifying illegal drug use. Test results will be protected under the provisions of the Privacy Act (Act), 5 U.S.C. § 552a, et seq., and Section 503(e) of the Act, and may not be released in violation of either Act. The MRO may maintain only those records necessary for compliance with this Plan. Any records of the MRO, including drug test results, may be released to any management official for purposes of auditing the activities of the MRO, except that the disclosure of the results of any audit may not include personal identifying information on any employee.

In order to comply with Section 503(e) of the Act, the results of a drug test of a Department employee may not be disclosed without the prior written consent of such employee, unless the disclosure would be:

- To the MRO;
- To the DPM;
- To the EAP Administrator with which the employee is receiving counseling or treatment or is otherwise participating;
- To any supervisory or management official in the Department having authority to take adverse personnel action against such employee; or
- Pursuant to the order of a court of competent jurisdiction or where required by the United States Government to defend against any challenge against any adverse personnel action.

For purposes of this Section, “management official” includes any management or Government official whose duties necessitate review of the test results in order to process adverse personnel action against the employee. In addition, test results with all identifying information removed shall also be made available to Department personnel, including the DPM, for data collection and other activities necessary to comply with Section 503(f) of the Act.

### B. Employee Access to Records

Any employee who is the subject of a drug test shall, upon written request, have access to any records relating to:

- Such employee’s drug test; and
- The results of any relevant certification, review, or revocation of proceedings, as referred to in Section 503(a)(1)(A)(ii)(III) of the Act.

Except as authorized by law, an applicant who is the subject of a drug test, however, shall not be entitled to this information.

### C. Confidentiality of Records in General

All drug testing information relating to individuals is confidential and should be treated as such by anyone authorized to review or compile program records.

All records and information of the personnel actions taken on employees with verified positive test results should be held confidential by the SHRO/DPC and stored electronically in secure, password-protected files

### D. Employee Assistance Program Records

The EAP Administrator shall maintain only those records necessary to comply with this order and carry out its duties. All medical and or rehabilitation records concerning the employee's drug misuse, including EAP records of the identity, diagnosis, prognosis, or treatment are confidential and may be disclosed only as authorized by 42 CFR Part 2, including the provision of written consent by the employee. With written consent, the patient may authorize the disclosure of those records to the patient's employer for verification of treatment or for a general evaluation of treatment progress.

### E. Maintenance of Records

The Department shall establish or amend a recordkeeping system to maintain the records of the Drug-Free Workplace Program consistent with its Privacy Act System of Records and with all applicable Federal laws, rules, and regulations regarding confidentiality of records including the Privacy Act 5 U.S.C. § 552a. If necessary, records may be maintained as required by subsequent administrative or judicial proceedings, or at the discretion of the Secretary of Commerce. The recordkeeping system should capture sufficient documents to meet the operational and statistical needs of this Plan, and include:

- Notices of verified positive test results referred by the MRO;
- Written materials justifying reasonable suspicion testing or evidence that an individual may have altered or tampered with a specimen;
- Anonymous statistical reports; and
- Other documents the DPM or MRO deems necessary for efficient compliance with this Plan.

### F. Records Maintained by Government Contractors

Any contractor hired to satisfy any part of this Plan shall comply with the confidentiality requirements of this Plan and all applicable Federal laws, rules, regulations and guidelines.

### G. Statistical Information

The DPM shall collect and compile anonymous statistical data for reporting the number of:

- Random tests, reasonable suspicion tests, accident or unsafe practice tests, follow-up

- tests, or applicant tests administered;
- Verified positive test results;
- Voluntary drug counseling referrals;
- Involuntary drug counseling referrals;
- Terminations or denial of tentative job offers resulting from refusal to submit to testing;
- Terminations or denial of tentative job offers resulting from alteration of specimen;
- Terminations or denial of tentative job offers resulting from failure to complete a drug abuse counseling program; and
- Employees who successfully complete EAP.

These data, along with other pertinent information, shall be compiled for inclusion in the Department's annual report to Congress required by Section 503(f) of the Act. These data shall also be provided to HHS in the Annual Summary Report to assist in overall program evaluation and to determine whether changes to the HHS Guidelines may be required.

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