

# HOUSE BILL 1705

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By: **Delegate McConkey**

Introduced and read first time: February 16, 2018

Assigned to: Rules and Executive Nominations

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## A BILL ENTITLED

1 AN ACT concerning

2 **Health – Job–Related Drug Testing – Breath Tests for Alcohol**

3 FOR the purpose of authorizing certain employers who require certain job–related drug  
4 testing to test a breath specimen using a certain alcohol measurement device;  
5 providing for a certain exception from a provision that allows certain persons to  
6 request independent testing of a certain specimen; authorizing the Maryland  
7 Department of Health to adopt certain regulations; altering certain definitions;  
8 defining a certain term; making stylistic and conforming changes; and generally  
9 relating to authorizing employers to use breath tests for testing the presence of  
10 alcohol for job–related drug testing.

11 BY repealing and reenacting, with amendments,  
12 Article – Health – General  
13 Section 17–214  
14 Annotated Code of Maryland  
15 (2015 Replacement Volume and 2017 Supplement)

16 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,  
17 That the Laws of Maryland read as follows:

18 **Article – Health – General**

19 17–214.

20 (a) (1) In this section the following words have the meanings indicated.

21 (2) “Alcohol or controlled dangerous substance testing” means a procedure  
22 used to determine whether or not a specimen contains a controlled dangerous substance or  
23 alcohol.

24 (3) “Certification” means the approval granted by the Department for a

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 laboratory to engage in job-related alcohol or controlled dangerous substance testing.

2 (4) "Controlled dangerous substance" has the meaning stated in §  
3 5-101 of the Criminal Law Article.

4 **(5) "EVIDENTIAL BREATH MEASUREMENT DEVICE" MEANS AN**  
5 **INSTRUMENT THAT MEASURES THE ALCOHOL CONCENTRATION LEVEL IN AN**  
6 **INDIVIDUAL'S BREATH AND THAT:**

7 **(I) IS EASILY PORTABLE AND CAN BE ADMINISTERED AT A**  
8 **WORK SITE OR OTHER APPROPRIATE TESTING SITE; AND**

9 **(II) IS LISTED ON THE FEDERAL NATIONAL HIGHWAY TRAFFIC**  
10 **SAFETY ADMINISTRATION'S CONFORMING PRODUCTS LIST OF EVIDENTIAL BREATH**  
11 **MEASUREMENT DEVICES.**

12 ~~[(5)]~~ **(6)** "Job applicant" means an individual who:

13 (i) Has applied for a position with an employer; and

14 (ii) Is not currently employed by the employer.

15 ~~[(6)]~~ **(7)** "Job-related" means any alcohol or controlled dangerous  
16 substance testing used by an employer for a legitimate business purpose.

17 ~~[(7)]~~ **(8)** "Laboratory" means a facility or other entity that conducts  
18 job-related alcohol or controlled dangerous substance testing.

19 ~~[(8)]~~ **(9)** "Medical review officer" means a licensed physician with  
20 knowledge of drug abuse disorders and drug and alcohol testing **WHO IS CERTIFIED BY:**

21 **(I) THE AMERICAN ASSOCIATION OF MEDICAL REVIEW**  
22 **OFFICERS; OR**

23 **(II) THE MEDICAL REVIEW OFFICER CERTIFICATION**  
24 **COUNCIL.**

25 ~~[(9)]~~ **(10)** "Preliminary screening procedure" means a controlled dangerous  
26 substance test that uses a single-use test device that:

27 (i) Is easily portable and can be administered at a work site or other  
28 appropriate collection site;

29 (ii) Meets the requirements of the federal Food and Drug  
30 Administration for commercial distribution; and

1 (iii) Meets generally accepted cutoff levels such as those in the federal  
2 Substance Abuse and Mental Health Services Administration Guidelines for drug-free  
3 workplace testing programs.

4 [(10)] (11) “Single-use test device” means the reagent-containing unit of a  
5 test system that:

6 (i) Is in the form of a sealed container or cartridge that has a validity  
7 check, a nonresealable closure, or an evidentiary tape that ensures detection of any  
8 tampering;

9 (ii) Is self-contained and individually packaged;

10 (iii) Is discarded after each test; and

11 (iv) Does not allow any test component or constituent of a test system  
12 to interact between tests.

13 [(11)] (12) “Specimen” means:

14 (i) Blood derived from the human body;

15 (ii) Urine derived from the human body;

16 (iii) Hair derived from the human body as provided in subsection  
17 (b)(3) of this section; [or]

18 (iv) Saliva derived from the human body; **OR**

19 (v) **BREATH DERIVED FROM THE HUMAN BODY BY FORCED**  
20 **EXHALATION FROM THE LUNGS.**

21 (b) (1) Except as provided in [paragraph (2)] **PARAGRAPHS (2) AND (4)** of  
22 this subsection, an employer who requires any person to be tested for job-related reasons  
23 for the use or abuse of any controlled dangerous substance or alcohol shall:

24 (i) Have the specimen tested by a laboratory that:

25 1. Holds a permit under this subtitle; or

26 2. Is located outside of the State and is certified or otherwise  
27 approved under subsection (f) of this section; and

28 (ii) At the time of testing, at the person’s request, inform the person  
29 of the name and address of the laboratory that will test the specimen.

1           (2) (i) 1. Except as provided in subparagraph 2 of this  
2 subparagraph, an employer may use a preliminary screening procedure to test a job  
3 applicant for the use or abuse of any controlled dangerous substance.

4                           2. Subsubparagraph 1 of this subparagraph does not apply  
5 to an employer that has entered into a collective bargaining agreement that prohibits the  
6 employer from using a preliminary screening procedure to test a job applicant for the use  
7 or abuse of any controlled dangerous substances.

8                           (ii) If the result of a preliminary screening procedure is positive, the  
9 employer shall submit the specimen for testing by a laboratory as required under  
10 paragraph (1) of this subsection.

11                           (iii) Following voluntary disclosure and documentation by an  
12 applicant of the taking of a legally prescribed medication, an employer may hire the  
13 applicant pending confirmation of a positive test result by the medical laboratory and  
14 review by the employer's medical review officer.

15                           (iv) An employer may not use a preliminary screening procedure to  
16 test an individual who is not applying for a job with that employer.

17                           (v) An employer may designate a medical laboratory licensed to  
18 perform job-related testing for controlled dangerous substances to also perform  
19 preliminary screening procedures on job applicants for the employer.

20           (3) (i) An employer who requires any person to be tested for  
21 job-related reasons for the use or abuse of any controlled dangerous substance may use  
22 hair derived from the human body as a specimen in accordance with this paragraph.

23                           (ii) An employer may use hair derived from the human body only for  
24 pre-employment purposes.

25                           (iii) If an employer uses hair derived from the human body as a  
26 specimen, the employer may not:

27   1. Use a specimen that is longer than one and one-half  
28 inches measured from the human body; or

29   2. Use the specimen for any purpose other than testing for  
30 controlled dangerous substances.

31           **(4) AN EMPLOYER THAT REQUIRES ANY PERSON TO BE TESTED FOR**  
32 **JOB-RELATED REASONS FOR THE USE OR ABUSE OF ALCOHOL MAY TEST A BREATH**  
33 **SPECIMEN USING AN EVIDENTIAL BREATH MEASUREMENT DEVICE.**

34           (c) (1) An employer who requires any employee, contractor, or other person to

1 be tested for job–related reasons for the use or abuse of any controlled dangerous substance  
2 or alcohol and who receives notice from the laboratory under subsection (b) of this section  
3 that an employee, contractor, or other person has tested positive for the use or abuse of any  
4 controlled dangerous substance or alcohol shall, after confirmation of the test result,  
5 provide the employee, contractor, or other person with:

6 (i) A copy of the laboratory test indicating the test results;

7 (ii) A copy of the employer’s written policy on the use or abuse of  
8 controlled dangerous substances or alcohol by employees, contractors, or other persons;

9 (iii) If applicable, written notice of the employer’s intent to take  
10 disciplinary action, terminate employment, or change the conditions of continued  
11 employment; and

12 (iv) A statement or copy of the provisions set forth in subsection (e)  
13 of this section permitting an employee to request independent testing of the same sample  
14 for verification of the test result.

15 (2) The information required to be provided to the employee, contractor, or  
16 other person under paragraph (1) of this subsection shall be delivered to the employee,  
17 contractor, or other person:

18 (i) Either in person or by certified mail; and

19 (ii) Within 30 days from the date the test was performed.

20 (d) An employer that uses a preliminary screening procedure to test specimens  
21 for the use or abuse of a controlled dangerous substance under this section shall:

22 (1) In using a single–use test device, collect, handle, store, and ship each  
23 specimen in a manner that:

24 (i) Maintains the specimen donor’s identity and confidentiality and  
25 the physical integrity of the specimen; and

26 (ii) Precludes contamination of the specimen; and

27 (2) Maintain a written record of the chain of custody of each specimen from  
28 the time that the specimen is collected until the time that the specimen is no longer needed  
29 for retesting.

30 (e) (1) **[A] EXCEPT FOR A PERSON TESTED UNDER SUBSECTION (B)(4) OF**  
31 **THIS SECTION,** A person who is required to submit to job–related testing, under subsection  
32 (b) or (c) of this section, may request independent testing of the same specimen for  
33 verification of the test results by a laboratory that:

1 (i) Holds a permit under this subtitle; or

2 (ii) If located outside of the State, is certified or otherwise approved  
3 under subsection (f) of this section.

4 (2) The person shall pay the cost of an independent test conducted under  
5 this subsection.

6 (f) (1) The [Maryland] Department [of Health]:

7 (i) Shall adopt regulations governing the certification of  
8 laboratories that conduct job-related alcohol or controlled dangerous substance testing;  
9 and

10 (ii) May adopt regulations governing the oversight of [preliminary  
11 screening] **THE FOLLOWING** procedures administered by employers:

12 **1. PRELIMINARY SCREENING; AND**

13 **2. ALCOHOL TESTING USING AN EVIDENTIAL BREATH**  
14 **MEASUREMENT DEVICE.**

15 (2) In addition to any other laboratory standards, the regulations shall:

16 (i) Require that the laboratory comply with the guidelines for  
17 laboratory accreditation, if any, as set forth by the College of American Pathologists, the  
18 Centers for Medicare and Medicaid Services, or any other government agency or program  
19 designated to certify or approve a laboratory that is acceptable to the Secretary;

20 (ii) Require that a laboratory performing confirmation tests for  
21 controlled dangerous substances or alcohol be inspected and accredited in forensic drug  
22 analysis by the College of American Pathologists, the Centers for Medicare and Medicaid  
23 Services, or any other government agency or program designated to inspect and accredit a  
24 laboratory that is acceptable to the Secretary;

25 (iii) Require that, if the laboratory performs job-related drug testing,  
26 the laboratory be a participant in a program of proficiency testing of drug screening  
27 conducted by an organization acceptable to the Secretary;

28 (iv) Require that the laboratory comply with standards regarding  
29 cutoff levels for positive testing that are established by the United States Department of  
30 Health and Human Services or established by the Secretary as mandatory guidelines for  
31 workplace drug testing programs; and

32 (v) Include procedures for annual recertification and inspection.

1 (g) This section does not apply to:

2 (1) Alcohol or controlled dangerous substance testing of a person under  
3 arrest or held by a law enforcement or correctional agency;

4 (2) Alcohol testing procedures conducted by a law enforcement or  
5 correctional agency on breath testing equipment certified by the State Toxicologist; or

6 (3) Controlled dangerous substance testing by a laboratory facility of a law  
7 enforcement or correctional agency that maintains laboratory testing standards  
8 comparable to the standards in this section.

9 (h) This section applies to job-related alcohol and controlled dangerous substance  
10 testing of any person, including preemployment applicants, employees, and contractors.

11 (i) (1) Except as provided in paragraphs (2) and (3) of this subsection, in the  
12 course of obtaining information for, or as a result of, conducting job-related alcohol or  
13 controlled dangerous substance testing for an employer under this section, a laboratory, a  
14 physician, including a physician retained by the employer, or any other person may not  
15 reveal to the employer information regarding:

16 (i) The use of a nonprescription drug, excluding alcohol, that is not  
17 prohibited under the laws of the State; or

18 (ii) The use of a medically prescribed drug, unless the person being  
19 tested is unable to establish that the drug was medically prescribed under the laws of the  
20 State.

21 (2) The prohibitions against disclosure of information under paragraph (1)  
22 of this subsection do not apply to the extent that they prevent a person from complying with  
23 the applicable provisions of the federal Commercial Motor Vehicle Safety Act of 1986 and  
24 the federal Motor Carrier Safety Regulations.

25 (3) The prohibitions against disclosure of information under paragraph (1)  
26 of this subsection do not apply if, prior to the administration of a preliminary screening for  
27 controlled dangerous substances, the test operator notifies the applicant that if the  
28 preliminary test is positive, the applicant may voluntarily disclose and provide  
29 documentation to the operator that the applicant is taking a legally prescribed medication.

30 (j) (1) An employer using preliminary screening procedures to test job  
31 applicants under this section shall have a medical review officer review a positive test result  
32 after laboratory confirmation of the positive test result.

33 (2) The employer may contract for the services of an outside medical review  
34 officer if the employer does not have a medical review officer on staff.

35 (k) (1) An employer using preliminary screening procedures shall establish a

1 program to train individuals to collect specimens and perform controlled dangerous  
2 substance tests in the workplace.

3 (2) The employer may designate an employee or any other individual to be  
4 trained, including any individual employed by a medical laboratory designated under  
5 subsection (b)(2)(v) of this section who will perform preliminary screening procedures for  
6 the employer.

7 (3) A trainee shall receive appropriate and practical instruction, which  
8 includes:

9 (i) A reading of the test manufacturer's package insert sheet;

10 (ii) Observing the test manufacturer's training video or receiving  
11 training from the test manufacturer;

12 (iii) Completing the test manufacturer's self-administered test; and

13 (iv) The actual performance of tests and the actual interpretation of  
14 the results.

15 (4) (i) The employer shall:

16 1. Keep a record of the training received by each trainee; and

17 2. Establish a procedure for training each trainee as having  
18 received the minimum training required to properly perform the test.

19 (ii) After the trainee has demonstrated competency in performing  
20 the test, the employer shall maintain documentation that indicates that the trainee has  
21 been trained under this section.

22 (l) The provisions of a collective bargaining agreement that concern drug testing  
23 override and preempt the provisions of this section that authorize an employer to use a  
24 preliminary screening procedure to test a job applicant.

25 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect  
26 October 1, 2018.