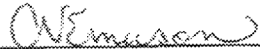


**U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
DRUG-FREE WORKPLACE PLAN**



Homeland
Security

Approved by:



Catherine V. Emerson
Chief Human Capital Officer
Office of the Chief Human Capital Officer

Table of Contents

I.	Introduction	3
II.	Definitions	5
III.	EAP	8
IV.	Supervisory Training	10
V.	Employee Education	10
VI.	Relationship With Testing Facilities	11
VII.	Notices	11
VIII.	Finding of Illegal Drug Use and Disciplinary Consequences	13
IX.	Random Testing	14
X.	Reasonable Suspicion Testing	16
XI.	Applicant Pre-Employment Testing	17
XII.	Additional Types of Drug Testing	19
XIII.	Test Procedures in General	20
XIV.	Records and Reports	22
	Appendix A. Testing Designated Positions	
	Appendix B. Testing Process	

I. Introduction

A. Background

On September 15, 1986, President Reagan signed Executive Order 12564 (Executive Order), which established the goal of a drug-free federal workplace and requires the head of each agency in the executive branch to develop a plan to achieve this objective for their agency. The Executive Order made it a condition of employment for all federal employees to refrain from using illegal drugs on- and off-duty. Subsequently, Congress passed legislation affecting implementation of the Executive Order under § 503 of the Supplemental Appropriations Act of 1987, Public Law (Pub. L.) 100-71, 101 Stat. 391, 468-471, codified at 5 United States Code (U.S.C.) § 7301 (the Act) note (1987), to establish uniformity among federal agency 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 drug-testing program. Since 1988, the oversight responsibility has been led by the White House Office of National Drug Control Policy, which convenes the Interagency Coordinating Group Executive Committee, comprised of representatives of the U.S. Department of Health and Human Services (HHS), the U.S. Department of Justice, and the Office of Personnel Management.

U.S. Immigration and Customs Enforcement (ICE) is the largest investigative branch of the Department of Homeland Security (DHS), with a mission to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. This requires a strong commitment to eliminate illegal drug use from its workplace. A large portion of ICE employees (e.g., immigration enforcement agents, criminal investigators, and detention and deportation officers) are directly engaged in law enforcement duties. These law enforcement officers, particularly those authorized to carry weapons, may become involved in life threatening situations. Illegal use of drugs by such employees inhibits their ability to perform their duties and creates a potential threat to the safety of others with whom they work, the public, and themselves.

In addition, many ICE employees are granted high-level security clearances because of their access or potential access to classified information. Such individuals would pose a serious threat to national security if they were involved in the use of illegal drugs. Not only would their ability to do their jobs be compromised, but illegal drug use has the potential for placing an employee in vulnerable or compromising situations (e.g., blackmail, coercion, financial problems, etc.) that could lead to their willingness to disclose national security information.

Similarly, the majority of ICE employees have access to law enforcement sensitive information and confidential information. Use of illegal drugs by these employees could put them in positions that could increase the potential for unauthorized disclosure of this information.

B. Statement of Policy

ICE is committed to providing its employees with a safe, healthy, productive, and secure work environment and will proactively act to eliminate illegal drug use by employees both in and out of the workplace. To attain this goal, ICE will: conduct mandatory and voluntary drug testing consistent with all scientific and technical guidelines for drug-testing programs promulgated by the HHS Substance Abuse and Mental Health Services Administration (SAMHSA); provide counseling services for employees with drug abuse issues; provide training for supervisors to enable them to effectively identify and deal with drug abuse-related issues; and take prompt, corrective action against employees who possess, use, or distribute illegal drugs, or misuse or illegally distribute legal drugs, per all applicable legal and administrative disciplinary procedures. As a condition of employment, all employees will be subject to drug testing.

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

The ICE Drug-Free Workplace Plan (ICE Plan) includes the following types of drug testing: (1) applicant pre-employment testing; (2) random testing of employees in sensitive positions that have been designated as testing designated positions; (3) reasonable suspicion testing; (4) accident or unsafe practice testing; (5) voluntary testing; and (6) follow-up to counseling or rehabilitation testing.

All individuals selected for employment will be given a pre-employment drug test. Employees who occupy testing designated positions (see appendix A) will be randomly tested to deter the use of illegal drugs among employees whose responsibilities include national security, public safety, and public health.

The rate for random testing and voluntary testing is specified in sections IX(C) and XII(B), respectively, and the rate for follow-up testing is specified in section XII(C). The ICE Director reserves the right to increase or decrease the frequency of testing based on need, availability of resources, and experience in the program, provided the testing program conforms to requirements of the Executive Order.

D. Drugs for Which Individuals Are Tested

ICE will test for the following drugs: Amphetamines; Cocaine; Marijuana; Opiates; Phencyclidine (PCP); and MDMA, MDA (Ecstasy).

If ICE desires to test for any other drug, the ICE Director will make a request to the DHS Under Secretary for Management via the DHS Drug Program Administrator. If approved, the Under Secretary for Management will submit the request for the written approval of the HHS Secretary.

E. Scope

This ICE Plan conforms to the DHS Drug-Free Workplace Plan certified by HHS on February 6, 2013, and supersedes the legacy U.S. Immigration and Naturalization Service (INS) Plan. This ICE Plan has been approved by the ICE Human Capital Officer and upon approval of the ICE Plan by the DHS Office of the Chief Human Capital Officer, it will be effective immediately for all ICE civilian employees.

F. References and Authorities

1. Executive Order 12564, Drug-Free Federal Workplace, September 15, 1986, as amended.
2. Executive Order 10450, Security Requirements for Government Employment.
3. Executive Order 13526, Classified National Security Information.
4. § 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).
5. Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 FR 11970 (1988) (as amended).
6. 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.
7. 6 Code of Federal Regulations (C.F.R.) Part 5, Disclosure of Records and Information, DHS Regulations implementing the Privacy Act of 1974.
8. Civil Service Reform Act of 1978, Pub. L. 95-454.
9. §§ 523 and 527 of the Public Health Service Act and implementing regulations at 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug-Abuse Patient Treatment Records.
10. Federal Employees Substance Abuse Education and Treatment Act of 1986, Pub. L. 99-570.
11. DHS Directive 066-05, Drug-Free Workplace Program.
12. DHS Directive 047-01, Privacy Policy and Compliance.
13. DHS Directive 254-02, Employee Assistance Program.
14. DHS Directive 11005, Suspending Access to DHS Facilities, Sensitive Information and Information Technology Systems.
15. (b)(7)(E) Sensitive Security Information.
16. ICE Policy on Disciplinary and Adverse Action Operating Procedure.
17. ICE Employee Code of Conduct.

II. Definitions

A. Applicant

All individuals tentatively selected for a position with ICE, or an individual who is moving within ICE from a non-testing designated position to a testing designated position.

B. Drug Program Coordinator

An individual within the Office of Human Capital who has overall responsibility for implementing, directing, administering, and managing the ICE Plan and who serves as the first point of contact for supervisors, the Medical Review Officer, and Employee Assistance Program Coordinators in matters related to the ICE Plan.

C. Employee Assistance Program (EAP)

The counseling program used by ICE that offers assessments, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health problems.

D. EAP Coordinator

An individual who has overall management responsibility for the EAP.

E. EAP Counselor

The individual who is the employee's case worker for EAP services.

F. Employee

An individual, as defined in 5 U.S.C. § 2105, who is engaged in the performance of a function for the federal government under authority of law or an Executive Act, excluding contract personnel.

G. Field Responsible Official

The highest-ranking ICE official in any ICE field location. This includes Special Agents in Charge; Field Office Directors; ICE attachés (where applicable); Resident Agents in Charge; Office of the Principal Legal Advisor Chief Counsels; Office of Professional Responsibility (OPR), Personnel Security Unit, Unit Chief; the Academy Chiefs of the ICE Academies; the Directors of the OHC Service Centers; the directors of other satellite operational and administrative facilities; as well as any other officials who have been designated, in writing, by the Director.

H. Headquarters Responsible Officials

Executive Associate Directors of Homeland Security Investigations, Enforcement and Removal Operations, and Management and Administration (M&A); and the Assistant Directors, officers, or equivalent positions who report directly to the Director, Deputy Director, Chief of Staff, or the Executive Associate Director for M&A.

I. ICE Drug-Free Workplace Program

The ICE directive establishing the agency's drug-free workplace policy and personnel responsibilities and the directive's accompanying implementation document, the ICE Plan.

J. Illegal Drug

A controlled substance included in Schedule I or II, as defined by 21 U.S.C. § 802(6), the possession of which is unlawful under Chapter 13 of Title 21, unless when use is per a valid prescription or other use authorized by federal law.

K. Management Official. One who has the authority to take adverse personnel action against an employee.

L. Medical Review Officer

A licensed physician within the Office of Human Capital who is responsible for receiving laboratory results generated from the drug-testing program, with knowledge of substance abuse disorders and the appropriate medical training to interpret and evaluate all positive test results, together with the individual's medical history, and any other relevant biomedical information.

M. Notification of Selection Acknowledgment Form

A form given to an employee who has been selected for routine random testing. Although an employee may refuse to sign the form, he or she must either submit to drug testing or face administrative action up to and including dismissal.

N. Random Drug Testing

A system of drug testing imposed without individualized suspicion that a particular individual is using illegal drugs. It may either be a uniform (i.e., unannounced testing of testing designated position employees occupying a specified area, element, or position) or a statistically random sample of such employees based on a neutral criterion, such as Social Security numbers.

O. Sensitive Positions

Positions described as having critical safety or security responsibilities in the position description and coded as "sensitive."

P. Supervisor

An employee having authority to hire, direct, assign, promote, reward, transfer, furlough,

layoff, recall, suspend, discipline, or remove other employees, to address 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).

Q. Testing Designated Positions

Positions within ICE that, because of their nature, have been designated for random drug testing per section VII of this ICE Plan.

R. Verified Positive Test Result

A test result that was positive on an initial approved Food and Drug Administration 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 per this ICE Plan and the *Mandatory Guidelines for Federal Workplace Drug Testing Programs* (HHS Mandatory Guidelines) issued by the HHS SAMHSA.

III. EAP

A. Function

The EAP is a contracted program that offers a variety of services and assistance to ICE employees and their family members. It plays an important role in preventing and resolving employee drug use by demonstrating ICE's commitment to eliminating illegal drug use in the workplace; providing employees an opportunity and the appropriate assistance with which to discontinue their drug use; providing educational materials to supervisors and employees on drug use issues; advising supervisors how to confront employees who have performance and/or conduct problems related to drug use and make referrals to appropriate treatment and rehabilitative facilities; and following up with individuals during the rehabilitation period to track their progress and encourage successful completion of the program. The EAP, however, will not be involved in the collection of urine samples or the initial reporting of test results. Specifically, the EAP will:

1. Provide assessments, short-term counseling and assistance, and referrals to employees who self-refer for treatment or who have been found to use illegal drugs, and monitor employees' progress through treatment and rehabilitation;
2. Provide needed education and training, upon request, to all levels of ICE employees on the types and effects of drugs, drug use symptoms and the impact on performance and conduct, the relationship of the EAP to drug testing, and related treatment, rehabilitation, and confidentiality issues;
3. Assist supervisors in recognizing drug use and confronting employees who have performance and/or conduct problems related to drug use; and
4. Ensure that confidentiality of test results and related medical treatment and rehabilitation records that it receives, in accordance with section XIV.

EAP representatives may be contacted through a general information toll-free number (800) 222-(b)(7)(E) or one of two websites: (b)(7)(E) or (b)(7)(E). Referrals can be made through a referral toll-free number, (866) 511-(b)(7)(E), or via a website at: <https://www.guidanceresources.com>.

B. Structure

The ICE Office of Talent Management will be responsible for oversight and implementation of the EAP and will provide, with the support of the Director, high-level direction and promotion of the EAP.

C. Referral and Availability

The EAP is available to all employees, without regard to a finding of drug use.

Any employee found to be using illegal drugs will be referred to the EAP. The EAP will be administered separately from the testing program. The EAP is available not only to ICE employees with drug problems, but also to the families of employees with drug problems and to employees with family members who have drug problems.

If the employee is not satisfied with the program of treatment or rehabilitation, he or she may notify the EAP coordinator, before completion of the program, to seek a review of the individual EAP counselor's referral. The EAP coordinator's decision on the adequacy of the treatment is final and not subject to further administrative review. Regardless of the treatment program chosen, the employee remains responsible for successful completion of the treatment, and assertions that the counselor failed to consider one or more of the following factors (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 preference of the employee) in making a referral, will not constitute an excuse for continuing to use illegal drugs nor a defense to disciplinary action if the employee does not complete treatment.

D. Leave Allowance

Employees will be allowed up to one hour (or more as necessitated by travel time) of excused sick leave absence for each counseling session, up to a maximum of 12 hours, during the assessment/referral phase of rehabilitation. Absences during duty hours for rehabilitation or treatment must be charged to the appropriate leave category per law and leave regulations.

E. Records and Confidentiality

All EAP operations will be confidential per section XIV of this ICE Plan relating to records and confidentiality.

IV. Supervisory Training

A. Objectives

Supervisors and managers have a key role in establishing and monitoring a drug-free workplace; therefore, ICE will provide training to assist supervisors and managers in recognizing and addressing illegal drug use by agency employees. Supervisor training in the Drug-Free Workplace Program is mandatory and is available through the Virtual University website. The purpose of supervisory training is to understand:

1. ICE's policies relevant to work performance problems, drug use, and the EAP;
2. How to recognize possible drug use in employees;
3. The responsibilities of offering EAP services;
4. How employee performance and behavioral changes can be recognized and should be documented;
5. How to confront an employee exhibiting signs of possible drug use;
6. The roles of the specimen collectors, the Medical Review Officer, supervisors, and EAP personnel;
7. The procedures for referring employees to the EAP;
8. How the EAP is linked to the performance appraisal and the disciplinary process;
9. The process of reintegrating employees into the workforce and follow-up random drug testing; and
10. Disciplinary options, including removal from sensitive positions, per Section 5c of the Executive Order.

B. Implementation

The ICE Drug Program Coordinator will be responsible for ensuring that supervisors receive training and that all employees are fully informed of the ICE Plan.

C. Training Package

Supervisors should check Virtual University to determine training availability and any other requirements. Printed awareness materials are available for employees.

V. Employee Education

A. Objectives

The EAP coordinator will offer, through the EAP counselor, drug education to all ICE employees. Drug education should include education and training to all levels of ICE on:

1. Types and effects of drugs;
2. Symptoms of drug use and the effects on performance and conduct;
3. The relationship of the EAP to drug testing; and
4. Other relevant treatment, rehabilitation, and confidentiality issues.

B. Means of Education

Drug education activities may include, but are not limited to:

1. Distribution of written materials;
2. Videotapes;
3. Lunchtime employee forums; and
4. Employee drug-awareness days.

VI. Relationship with Testing Facilities

Wherever existing ICE facilities are inadequate to implement this order, the Drug Program Coordinator will:

1. Secure contracts with testing facilities or personnel needed to implement this plan; and
2. Ensure that contract laboratories chosen to perform the drug-screening tests are duly certified according to subpart C of the HHS Mandatory Guidelines, and that any other contracts to implement this ICE Plan conform to the technical specifications of the HHS Mandatory Guidelines.

VII. Notices

A. General Notice

A general notice from the Director announcing the testing program will be provided to all employees no later than 60 days before implementing the approved ICE Plan. The notice will explain:

1. The purpose and history of the federal Drug-Free Workplace Plan;
2. The shift from the legacy INS drug-testing program to this ICE Plan and that the ICE Plan conforms to the DHS Plan;
3. That the ICE Plan will include both voluntary and mandatory testing;
4. That even voluntary admission of illegal drug use may require management action per DHS security policies;
5. That those who hold positions selected for random testing will also receive an individual notice no later than 30 days before commencement of testing, indicating that their position has been designated a testing designated position;
6. The availability of and procedures to follow to obtain counseling and rehabilitation through the EAP;
7. The circumstances under which testing may occur;
8. That employees will be afforded the opportunity to submit medical documentation of lawful use of an otherwise illegal drug;
9. That the laboratory assessment is a series of tests that are highly accurate and reliable, and, as an added safeguard, that laboratory results are reviewed by the Medical Review Officer;

10. That positive test results verified by the Medical Review Officer may be disclosed only to the employee, the Drug Program Coordinator, the appropriate EAP coordinator, the Office of Professional Responsibility, appropriate management Employee Relations, and OPLA officials necessary to process an adverse action against the employee, a suitability or security determination, or a court of law or administrative tribunal in any adverse personnel action; and
11. That all medical and rehabilitation records in an EAP case file will be deemed confidential "patient records" and may not be disclosed without the patient's prior written consent, an authorizing court order, or otherwise as permitted by federal law implemented at 42 C.F.R. Part 2.

B. Individual Notice

An individual notice will be distributed to all employees in testing designated positions explaining that:

1. The employee's position has been designated a testing designated position;
2. The employee's position will be subject to random testing no sooner than 30 days following the notice; and
3. The employee will have the opportunity to voluntarily admit to being a user of illegal drugs and to receive counseling or rehabilitation, in which case disciplinary action may, but is not required to, be initiated under the Executive Order.

C. Signed Acknowledgment

Each employee in a testing designated position will be asked to acknowledge in writing that the employee has received and read the individual notice stating that the employee's position has been designated for random testing and that refusal to submit to testing will result in initiation of disciplinary action, up to and including dismissal. If the employee refuses to sign the acknowledgment, the employee's supervisor shall note on the Notification of Selection Acknowledgment form that the employee received the notice. This acknowledgment, which is advisory only, will be maintained by the Drug Program Coordinator. An employee's failure to sign the notice will not preclude testing of the employee or otherwise affect the implementation of this ICE Plan.

D. Administrative Relief

If an employee believes his or her position has been wrongly designated a testing designated position, the employee may file an administrative appeal to the Drug Program Coordinator. The appeal must be submitted by the employee, in writing, within 15 days of the employee's receipt of the individual notice and state the basis for the appeal. The Drug Program Coordinator will submit the appeal to the Human Capital Officer for review by Employee & Labor Relations (E&LR). The Human Capital Officer will submit the appeal and the E&LR analysis to the Director for ultimate review. The Director will review the appeal based upon the criteria applied in designating that

employee's position a testing designated position. The Director's decision on the appeal is final and is not subject to further administrative review. Records related to appeals will be maintained by the Drug Program Coordinator, supervisor, and any other management official deemed appropriate by the Human Capital Officer.

VIII. Finding of Illegal Drug Use

A. Determination

An employee may be found to have used illegal drugs on the basis of any appropriate evidence including, but not limited to:

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

B. Mandatory Administrative Actions

ICE will refer to EAP an employee found to have used illegal drugs to the EAP. The DPC will refer a positive test to the employee's management and E&LR for possible discipline and a determination of the employee's duty status. Depending on the employee's position and the circumstances of the use, ICE shall assign the employee suitable administrative duties or place the employee on administrative leave, pending the outcome of disciplinary action.

C. Range of Consequences

ICE may initiate disciplinary action against any employee found to use illegal drugs. Disciplinary action may include a full range of actions, up to and including removal. Severity of disciplinary action will depend on the circumstances involved in the employee's drug use to include consideration of relevant mitigating and aggravating factors. (Note: ICE does not provide the "safe harbor" provision allowable under the Executive Order and in place in many federal agencies, i.e., a bar to discipline for individuals who identify themselves as illegal-drug users, seek and receive treatment, and thereafter refrain from use). In determining an appropriate disciplinary action, an employee's successful completion of EAP counseling will be taken into account.

D. Initiation of Mandatory Removal from Service

ICE will initiate action to remove an employee for:

1. Refusing to obtain counseling or rehabilitation through the EAP as required by the Executive Order after having been found to use illegal drugs; or
2. Not refraining from illegal drug use after a first finding of such use.

E. Refusal to Take Drug Test When Required

An employee who refuses to be tested when so required will be subject to the full range of disciplinary actions, including removal from federal service. No applicant who refuses to be tested will be extended an offer of employment. Attempts to alter or substitute the provided specimen will be deemed a refusal to take the test when required.

F. Voluntary Referral

Under the Executive Order, ICE is required to initiate action to discipline any employee found to use illegal drugs in every circumstance except when the employee: (1) voluntarily admits his or her off-duty drug use; (2) completes illegal drug-use counseling or an EAP; and (3) thereafter refrains from illegal drug use. ICE may pursue disciplinary action against an employee who voluntarily admits to drug use, although in determining whether to discipline, ICE will take into consideration the fact that the employee has come forward voluntarily. In addition, the Office of Professional Responsibility will consider it for eligibility to access classified information and retention in a national security position or retention in a public trust position.

An absolute bar to discipline cannot be provided for certain positions, however, because of their extreme sensitivity. In coming forward voluntarily, and consistent with section XII(B), an employee may volunteer for a drug test as a means of identification. The results of this test, however, will not constitute a second finding of illegal drug use under section VIII(D) of this document.

IX. Random Testing

A. Sensitive Positions Designated for Random Testing

The Executive Order requires random testing for employees in sensitive positions, subject to ICE criteria. Some of these sensitive positions are testing designated positions subject to random testing. The position titles designated for random testing are listed in appendix A, along with the criteria applied in designating such positions for drug testing and the justification for selecting each position title for testing.

B. Determining Testing Designated Positions

In determining testing designated positions, ICE reviewed all positions characterized by critical safety or security responsibilities related to ICE's mission. ICE then applied the criteria as follows:

1. Presumptive testing designated positions are positions that must be included in which employees:
 - a. Are required to carry firearms on a regular basis;
 - b. Operate motor vehicles carrying passengers; or
 - c. Work as aviation flight crew members;

2. Preferred testing designated positions are positions in which the government has strong interests in drug testing, such as:
 - a. Certain health and safety positions in which an employee under the influence of drugs could cause immediate substantial injury to others, such as any employees who are authorized to carry firearms in some circumstances vs. those who are required to carry firearms on a regular basis, who fall within the presumptive category;
 - b. Presidential appointees requiring Senate confirmation;
 - c. Drug-rehabilitation employees with direct client contact in providing treatment services; or
 - d. Positions having access to truly sensitive information (e.g., national security material) and requiring a minimum top secret or higher clearance.
3. Discretionary testing designated positions are positions that may warrant designation for testing. Such positions may include confidential (and above) position sensitivity, health care professionals responsible for direct patient care, firefighters, medical doctors (except those performing research or administrative duties), nurses, nursing assistants, pharmacists, and medical technicians.

The Director reserves the right to add or remove positions determined to be testing designated positions pursuant to the criteria established in the Executive Order and this plan, subject to HHS and DHS review requirements.

The Director will propose deletions of presumptive positions and additions and deletions of preferred and discretionary positions to/from the testing designated position list to the drug program administrator for the approval of the DHS Under Secretary for Management and subsequent submission to the Interagency Coordinating Group Executive Committee for its concurrence.

The DHS Secretary has determined that all positions that have been or will be designated as testing designated positions under the DHS Plan are "sensitive positions" and are therefore exempt from coverage under 42 U.S.C. § 290 dd(2).

C. Implementing Random Testing

In implementing the program of random testing, the Drug Program Coordinator will:

1. Ensure that the means of random selection remain confidential; and
2. Evaluate periodically whether the numbers of employees tested and the frequency with which those tests are administered satisfy ICE's duty to achieve a drug-free work force.

Random testing will be administered annually to 10 percent of the employees in testing designated positions specified in appendix A, unless the percentage is increased by the Director.

D. Notification of Selection

An individual selected for random testing will be notified the same day the test is scheduled, preferably within 2 hours of the scheduled testing, by the Chief of Staff, or his/her designee in the employee's program office and be given information regarding the testing site, procedures, and location. The employee's supervisor will explain to the employee that the employee is not under suspicion of taking drugs and that the employee's name was selected randomly by a contractor. The supervisor will give the employee the Notification of Selection Acknowledgment form. If the employee refuses to sign the Notification of Selection Acknowledgment form, the supervisor will annotate the refusal with the time and date of the notification. An employee may refuse to sign the Notification of Selection Acknowledgment form but still submit to drug testing with no negative consequences or need for administrative action. The Drug Program Coordinator will maintain all Notification of Selection Acknowledgment forms.

E. Deferral of Testing

An employee selected for random testing may obtain a deferral of testing from his/her supervisor if the employee's first-line and higher-level supervisors concur that a compelling need necessitates a deferral on the grounds that the employee is:

1. In leave status (sick, annual, administrative, or leave without pay);
2. In official travel status away from the place of assignment or is about to embark on official travel scheduled before testing notification;
3. In a work assignment for which the interruption would hinder the operation or project; or
4. Performing law enforcement duties during an undercover assignment, the interruption of which for the purposes of drug testing would cause irremediable risk to the employee and/or the investigation.

An employee whose random test is deferred will be subject to an unannounced test within the following 60 days.

X. Reasonable Suspicion Testing

A. Grounds

Among other things, reasonable suspicion testing may be based upon:

1. Observable phenomena, such as direct observation of drug use or possession and/or the physical symptoms of being under the influence of a drug;
2. A pattern of abnormal conduct or erratic behavior;
3. 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;
4. Information provided either by reliable and credible sources or independently corroborated; or

5. Newly discovered evidence that the employee has 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 all relevant information leading to this suspicion and write a report detailing the circumstances that form the basis to warrant testing. This report should include:

1. The appropriate dates and times of reported drug-related incidents;
2. Reliable/credible sources of information;
3. The rationale leading to the test; and
4. The action(s) taken by the supervisor in follow-up to the incidents that prompted the suspicion of drug use.

The supervisor will forward this report to the appropriate Headquarters or Field Responsible Official for a determination of whether to pursue a reasonable suspicion drug test. If the Headquarters or Field Responsible Official concurs with the decision to conduct testing, the supervisor will forward this report to the Drug Program Coordinator, who will inform OPLA. OPLA will then either concur with, or deny, the request for reasonable suspicion testing.

C. Supervisory Training

Per section IV, supervisors will be trained to address illegal drug use by employees, to recognize facts that give rise to a reasonable suspicion of illegal drug use, and to document facts and circumstances to support a finding of reasonable suspicion. Failure to receive such training, however, will not invalidate reasonable suspicion testing that is otherwise reasonable.

XI. Applicant Pre-Employment Testing

A. Objectives

To maintain the high professional standards of ICE's workforce, it is imperative that individuals who use illegal drugs be screened out during the initial employment process before they are hired. This procedure will have a positive effect on reducing instances of illegal drug use by employees working within ICE and will provide for a safer work environment. For these reasons, drug testing will be required of all applicants as defined in section II.

B. Vacancy Announcements

Every applicant who is tentatively selected for a position must be drug tested before a

final offer of employment is made. A final offer of employment is contingent upon a negative drug test result. This information must be stated on every vacancy announcement. For testing designated positions, vacancy announcements must also state that incumbents of testing designated positions are subject to random drug testing. Failure of the vacancy announcement to contain this notice will not preclude applicant testing if advance written notice is provided to applicants in some other manner.

C. Procedures

The Drug Program Coordinator, through the Human Capital Service Center and the medical services contractor, will direct applicants to an appropriate collection facility. The drug test must be undertaken as soon as possible after notification and no later than 48 hours after notice to the applicant.

If a test is positive, the applicant will be offered the opportunity to submit medical documentation that may support a legitimate use for a specific drug. Such information will be reviewed only by the Medical Review Officer to determine whether the individual is lawfully using an otherwise illegal drug.

The Drug Program Coordinator will ensure, after consultation with the Medical Review Officer, that a drug test has been conducted on that individual and that the results were reviewed.

D. Human Resources Officials

Upon notification that an individual has been tentatively selected for employment with ICE, Human Capital Service Center personnel will ensure, after consultation with the Drug Program Coordinator, a drug test has been conducted on that individual and determine whether the test result is a verified positive result.

E. Consequences

ICE will decline to extend a final offer of employment to any applicant with a verified positive test result, and such applicant may not reapply to ICE for a period of 12 months. Records relating to the positive test will be retained by the Office of Human Capital for 3 years. The human resources official working on the applicant's certificate will be directed to object to the applicant on the basis of failure to meet a condition of employment. ICE will inform such applicant that a confirmed presence of an illegal drug in the applicant's urine precludes ICE from hiring the applicant. If the applicant is an ICE employee, the employee will be subject to disciplinary action as outlined in section VIII(C). The Office of Human Capital will notify the Office of Professional Responsibility of drug tests failed within the last three years when applicants reapply for ICE positions.

XII. Additional Types of Drug Testing

A. Accident or Unsafe Practice Testing

ICE is committed to providing a safe and secure work environment. Employees involved in on-the-job accidents or who engage in unsafe, on-duty, job-related activities that pose a danger to others or to the overall operation of ICE may be subject to testing. Based on the circumstances of the accident or unsafe act, the supervisor will initiate testing when such circumstances involve:

1. An accident resulting in a death or personal injury requiring immediate hospitalization; or
2. Damage to government or private property in excess of \$10,000.

Incidents that do not reach the personal injury or monetary thresholds of accident or unsafe practice testing may still be referred by a supervisor for reasonable suspicion testing, depending upon the facts and circumstances.

If an employee is suspected of having caused or contributed to an accident meeting the above criteria, the supervisor will present the facts and appropriate documentation leading to suspicion of illegal drug use to the headquarters or field responsible official. This official, in coordination with the Drug Program Coordinator, the Office of the Principal Legal Advisor, E&LR, and other advisors as appropriate, will determine whether reasonable suspicion testing is warranted. The determination will be documented.

B. Voluntary Testing

To demonstrate their commitment to ICE's goal of a drug-free workplace and to set an example for other federal employees, employees not in testing designated positions may volunteer for unannounced random testing by notifying the Drug Program Coordinator. These employees will then be included in the pool of testing designated positions subject to random testing and will be subject to the same conditions and procedures included in the provisions of section VIII(F), should they test positive for drugs. Volunteers will remain in the testing designated position pool until they withdraw from participation by notifying the Drug Program Coordinator of such intent at least 48 hours before the scheduled test.

C. Follow-up Testing

In the event an employee elects to undergo counseling or rehabilitation for illegal drug use with EAP, and that employee is permitted to return to work, the employee will be bound to a contract with management that puts any punishment in abeyance. The abeyance contract will subject the employee to unannounced testing for a period of one year following completion of the counseling and/or rehabilitation. Such employees will be tested at the frequency stipulated in the abeyance contract or, in the alternative, at an

increased frequency of once a month. Such testing is distinct from testing which may be imposed as a part of the EAP.

XIII. Test Procedures in General

A. Mandatory Guidelines for Federal Workplace Drug Testing

ICE will adhere to the HHS Mandatory Guidelines. ICE's drug testing will be conducted under a medical services contract that provides professionally trained collection personnel, laboratory analysis, and Medical Review Officer services; quality assurance requirements for urinalysis procedures; and strict confidentiality requirements.

B. Privacy Assured

Any individual subject to testing under this ICE Plan will 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 provide 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 when:

1. The individual has previously been found by ICE to be an illegal-drug user;
2. The individual has previously tampered with a sample;
3. The facts and circumstances suggest the individual:
 - a. is an illegal-drug user;
 - b. is under the influence of drugs at the time of the test;
 - c. has equipment or implements capable of tampering with or altering urine samples;
4. The specimen:
 - a. has a temperature outside the range of 32–38 degrees centigrade or 90–100 degrees Fahrenheit; or
 - b. shows signs of contaminants.

C. Testing Process

A chart outlining the drug-testing process is provided in appendix B.

D. Failure to Appear for Testing

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

E. Opportunity to Justify a Positive Test Result

When a confirmed positive test result has been returned by the laboratory, the Medical Review Officer will perform the duties set forth in the HHS Mandatory Guidelines. For example, the Medical Review Officer will conduct employee medical interviews, review the employee's medical history, or review any other relevant biomedical factors. The Medical Review Officer 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 test result may include, but is not limited to:

1. A valid prescription; or
2. Verification from the individual's physician verifying a valid prescription.

Individuals are not entitled, however, to present evidence to the Medical Review Officer in a trial-type administrative proceeding, although the Medical Review Officer has the discretion to accept evidence in any manner the Medical Review Officer deems most efficient or necessary. If the Medical Review Officer determines there is no alternative justification for the positive result, such result will then be considered a verified positive test result.

The Medical Review Officer will immediately contact the Drug Program Coordinator upon obtaining a verified positive test result. The Medical Review Officer will notify an employee with a verified positive, adulterated, or substituted result that he/she has 72 hours to request a test of his/her split specimen by another HHS-certified laboratory and that the result is being reported to his/her employer. Results of a follow-up test will be sent to the Drug Program Coordinator, who will notify the appropriate management officials of positive test results. Negative test results will be noted in the employee's file maintained by the Drug Program Coordinator; management officials will not be notified of negative test results.

F. Employee Counseling and Assistance

While participating in a counseling or rehabilitation program, and at the request of the program, the employee may be exempted from the random testing designated position pool for a period not to exceed 60 days or for a time period specified in an abeyance contract or rehabilitation plan approved by the Director or his or her designee.

Upon completion of the program, the employee immediately will be subject to follow-up testing pursuant to section XII(C).

G. Savings Clause

To the extent that any of the procedures specified in this section are inconsistent with any of those specified in the HHS Mandatory Guidelines or any subsequent amendment thereto, such HHS Mandatory Guidelines or amendment will supersede the procedures specified in this section, but only to the extent of the inconsistency.

XIV. Records and Reports

A. Confidentiality of Test Results

The laboratory may disclose laboratory test results only to the Medical Review Officer or the staff of the Medical Review Officer in a secure manner as prescribed in the DHS *Handbook for Safeguarding Sensitive Personally Identifiable Information*. Any positive result justified by the Medical Review Officer by acceptable and appropriate medical or scientific documentation that accounts for the result as being other than from 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, 5 U.S.C. § 552a, *et seq.* and § 503(e) of the Act, and may not be released in violation of either Act. The Medical Review Officer may maintain only those records necessary for compliance with this plan. Any records of the Medical Review Officer, including drug-test results, may be released to management officials for the purpose of auditing the activities of the Medical Review Officer, except that the results of any audit may not include personally identifiable information on any employee.

To comply with § 503(e) of the Act, disclosure of the results of the drug test of an ICE employee may be authorized only with the prior written consent of such employee, unless the disclosure would be:

1. To the Medical Review Officer;
2. To the EAP counselor to whom the employee is receiving counseling or treatment or is otherwise participating;
3. To any supervisory or management official within ICE having the authority to take an adverse personnel action against such employee;
4. To any Office of Professional Responsibility employee or official having the authority to make determinations regarding security access or eligibility to access classified information; and/or
5. Pursuant to the order of a court of competent jurisdiction or where required by the U.S. Government to defend against any challenge against any adverse personnel action.

The Privacy Act of 1974 (5 U.S.C. § 552a(c), accounting for certain disclosures) requires that an accurate accounting be made of any disclosures made outside of DHS. The accounting records will be maintained by the Drug Program Coordinator and will include: 1) date and purpose of each disclosure, 2) nature of disclosure, i.e., what was disclosed, and 3) name and address of the person or agency to which the disclosure is made.

For purposes of this section, "management official" includes any management, government, security, or personnel official whose duties necessitate review of the test

results in order to process an adverse action against the employee. In addition, test results with all identifying information removed will also be made available to ICE personnel, including the Drug Program Coordinator, for data collection and other activities necessary to comply with § 503(f) of the Act.

B. Employee Access to Records

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

1. His or her drug-test results; and
2. The results of any relevant certification, review, or revocation-of-certification proceedings, as referred to in § 503(a)(1)(A)(ii)(III) of the Act.

Although applicants also have the right to access their drug-test records upon written request (Privacy Act, 5 U.S.C. § 552a(d), access to records), the certification proceedings listed above are personnel actions reserved for ICE employees.

C. Confidentiality of Records in General

All drug-test information specifically relating to individuals is confidential and should be treated as such by anyone authorized to review or compile program records. To efficiently implement this ICE Plan and to make information readily retrievable, the Drug Program Coordinator will maintain all records relating to reasonable suspicion testing, suspicion of tampering with evidence, and any other authorized documentation necessary to implement this ICE Plan.

All records and information of the personnel actions taken against employees with verified positive test results should be forwarded to E&LR and will remain confidential, securely locked, with only authorized individuals who have a "need-to-know" having access to them.

D. EAP Records

The EAP coordinator will maintain only those records necessary to comply with this ICE Plan and comply with the confidentiality requirements of this plan, and all applicable federal laws, rules, regulations, and guidelines. After a supervisor refers an employee to the EAP, the EAP will maintain all records necessary to carry out its duties. All medical and rehabilitation records concerning the employee's drug abuse, including the EAP records of the identity, diagnosis, prognosis, or treatment, are confidential and may be disclosed only as authorized by 42 C.F.R. 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

ICE maintains records consistent with System of Records Notice DHS/ALL-022: Privacy Act of 1974: DHS Drug-Free Workplace System of Records. This System of Records Notice governs the type of system records, routine use of these records, and how these records are stored, retrieved, safeguarded, retained, and disposed. If necessary, records may be maintained as required by subsequent administrative or judicial proceedings or at the discretion of the Director or his or her designee. The recordkeeping should capture sufficient documents to meet the operational and statistical needs of this plan and include:

1. Notices of verified positive tests results referred to the Medical Review Officer;
2. Written materials justifying reasonable suspicion testing or evidence that an individual may have altered or tampered with a specimen;
3. Anonymous statistical reports; and
4. Other documents that the Drug Program Coordinator and Medical Review Officer deem necessary for efficient compliance with this ICE Plan.

F. Records Maintained by Government Contractors

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

G. Statistical Information

The Drug Program Coordinator will collect and compile anonymous statistical data for reporting the number of:

1. Random tests, reasonable suspicion tests, accident or unsafe practice tests, follow-up tests, or applicant tests administered;
2. Verified positive test results;
3. Voluntary drug-counseling referrals;
4. Involuntary drug-counseling referrals;
5. Terminations or denial of employment offers resulting from refusal to submit to testing;
6. Terminations or denial of employment offers resulting from alteration of specimens;
7. Terminations or denial of employment offers resulting from failure to complete a drug-abuse counseling program; and
8. Employees who successfully complete the EAP.

This data, along with other pertinent information, will be compiled for inclusion in the ICE annual report to Congress required by § 503(f) of the Act. This data will also be provided to the HHS semi-annually to assist in overall program evaluation and to determine whether changes to the HHS Mandatory Guidelines may be required.



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