

SAMHSA'S NEW ORAL FLUID GUIDELINES UPDATE MORE THAN JUST FEDERAL TESTING:

STATE LAW IMPACTS

KATHERINE MILLER

Employers in Kentucky, Maine, Puerto Rico, and Tennessee are all impacted by SAMHSA's recent changes

The addition of oral fluid as an approved specimen for the Substance Abuse and Mental Health Services Administration's (SAMHSA's) mandatory guidelines has changed more than the specimens that can be used in federal drug testing. While many states have drug and alcohol testing laws that are state-specific, some states require compliance with SAMHSA and/or Department of Transportation (DOT) regulations. While the DOT has not yet issued oral fluid guidelines, it is likely that they will, and that they will have an even further reaching impact on state laws than SAMHSA's oral fluid guidelines do.

What States are Impacted by SAMHSA's New Guidelines?

Although the number of states that do not require compliance with SAMHSA regulations far outweighs the number that do, it is still essential for employers to understand if they are impacted by the addition of oral fluid to SAMHSA's mandatory guidelines. Employers in Kentucky, Maine, Puerto Rico, and Tennessee are all impacted by SAMHSA's recent changes. So, what does this mean?

This information is provided for educational purposes only. Reader retains full responsibility for the use of the information contained herein.



Kentucky

Kentucky has a voluntary drug and alcohol testing law, meaning that employers can comply, but are not required to do so. Employers that choose to comply with the voluntary law are eligible for a 5% credit on their workers' compensation premium. Employers that choose not to comply with the voluntary law may have already used oral fluid in the past, however, employers that chose to comply with the law have historically been unable to do so.

Kentucky's law states:

"Drug test' or 'test' means a chemical, biological, or physical instrumental analysis administered by a qualified laboratory, for the purpose of determining the presence or absence of a drug or its metabolites or alcohol **pursuant to standards, procedures, and protocols established by the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA).**" (emphasis added) 803 KAR 25:280(1)(5)

Kentucky's law goes on to state that urine is the appropriate testing specimen for drugs, and breath is the appropriate specimen for alcohol. The addition of oral fluid to SAMHSA's mandatory guidelines, in theory, would permit employers in Kentucky to test via oral fluid and still comply with the voluntary law. However, it is likely that legislators will need to update the law to state either that urine and oral fluid are permitted for drug testing, or that SAMHSA-approved specimens are permitted before employers can comfortably use oral fluid testing in the workplace and comply with the voluntary law.

While some employers may choose to oral fluid test under the voluntary law following the SAMHSA changes, employers that choose to do so must accept a certain level of liability.



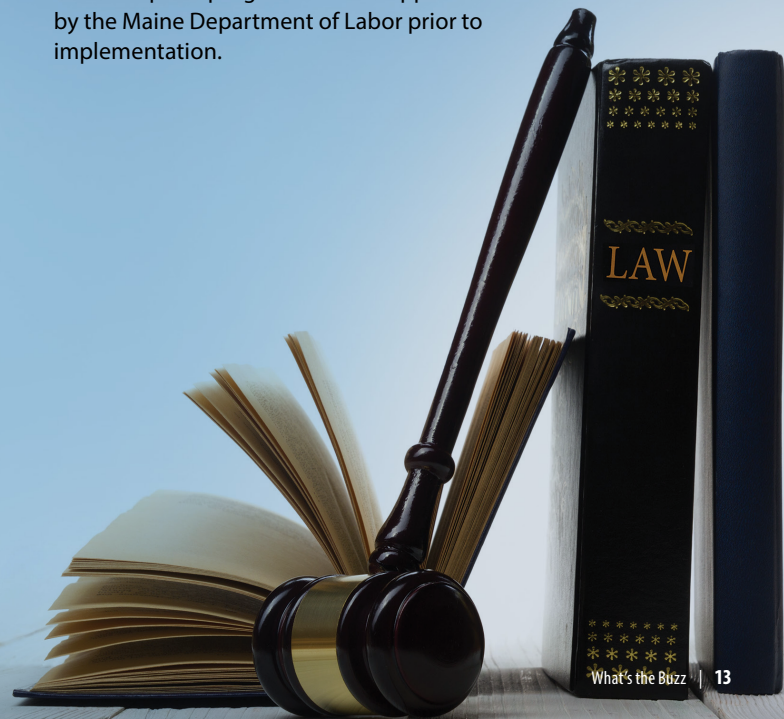
Maine

Compliance with Maine's mandatory law is required for all private employers in the state. Historically, Maine has only permitted oral fluid when used as a non-instrumented, rapid result/instant test. The addition of oral fluid to SAMHSA's mandatory guidelines has changed this.

Maine's law states:

"Screening test' means an initial substance use test performed through the use of immunoassay technology or a **federally recognized substance use test**, or a test technology of similar or greater accuracy and reliability approved by the Department of Health and Human Services..." (emphasis added) Maine Rev. Stat. 26-7-3A-682 7 A

As a subsidiary of the Department of Health and Human Services (HHS), SAMHSA's addition of oral fluid effectively permits lab-based oral fluid testing for employers in the state. Maine's laws contain extremely specific cut-off levels, and, as such, employers should review the law carefully prior to implementing an oral fluid testing program. Additionally, each drug-free workplace program must be approved by the Maine Department of Labor prior to implementation.





Puerto Rico

Puerto Rico’s mandatory law must be followed by all private employers in the territory. The law requires compliance with SAMHSA regulations in terms of specimens, however, the law is very specific when it comes to when alternative testing specimens can be used.

The law states:

“The drug tests shall be made through an urine sample, **except for those circumstances in which it is not possible** to take the same and shall be administered in accordance with scientifically accepted analytical and sample custody chain procedures, so that the privacy of the employee may be protected to the maximum, and **pursuant to the Mandatory Guidelines for Federal Workplace Drug Testing Program.**” (emphasis added) Laws of Puerto Rico 29-8-161b(b) (8)(d)

Although compliance with SAMHSA guidelines is required, which would technically permit the use of oral fluid as an approved testing specimen, the law specifically states that urine is the preferred specimen for drug tests. In fact, employers should not use oral fluid unless the donor is unable to provide a urine sample. In such cases, a SAMHSA-approved alternative specimen, such as oral fluid, can be used, but not outside of such cases.



Tennessee

Employers that choose to comply with Tennessee’s voluntary law qualify for a 5% discount on their workers’ compensation premiums. Under the voluntary law, employers are required to comply with SAMHSA’s mandatory guidelines, meaning that employers in the state are impacted by this update.

Tennessee’s law states:

“If an employee is unable to provide a urine specimen when requested, the United States **Department of Health and Human Services mandatory guidelines on fluid administration and for alternative oral specimen collection shall be followed.**” (emphasis added) Tenn. Comp. Rules & Reg. 0800-02-12-.06(4)

Although oral fluid is now permitted under SAMHSA regulations, employers that choose to comply with the mandatory law are only permitted to use oral fluid when a donor is unable to provide a urine sample. Oral fluid should not be used with all collections taken under the voluntary law.

Moving Forward

Generally speaking, the DOT follows SAMHSA, so it is likely that we will see more updates to state laws in the coming months as the DOT releases oral fluid guidelines for DOT-regulated employees and those states that require compliance with DOT regulations. For the moment, however, four states are impacted by the updates to SAMHSA’s mandatory guidelines, and each state is impacted differently. While Maine, for example, now permits oral fluid across the board, the other three states place restrictions on when oral fluid testing can take place. Consult state laws carefully to ensure that your policy is in compliance.

©2010-2019 The Current Consulting Group, LLC – No portion of this article may be reproduced, retransmitted, posted on a website, or used in any manner without the written consent of the Current Consulting Group, LLC. When permission is granted to reproduce this article in any way, full attribution to the author and copyright holder are required.

It is likely that we will see more updates to state laws in the coming months