



Lynn Fitch
ATTORNEY GENERAL
OPINIONS AND POLICY

August 2, 2022

David Ringer, Esq.
Attorney, City of Florence
Post Office Box 737
Florence, Mississippi 39073

Re: Municipal Drug Testing

Dear Mr. Ringer:

The Office of the Attorney General has received your request for an official opinion.

Background

According to your request, the City of Florence (the “City”) is aware that it is authorized to establish drug and alcohol policies and may, as a condition of employment, require employees to submit to neutral selection drug and alcohol testing. You acknowledge that it is unlawful for an individual to be in possession of a controlled substance, which includes the Schedule I controlled substance Tetrahydrocannabinols (“THC”), but there are exemptions and exceptions which appear to allow the lawful ingestion of THC products in certain forms and under certain circumstances.

Question Presented

May the City have personnel policies under which the City can terminate the employment of a City employee who is given a drug test and tests positive for THC, given that the presence of THC may be indicative of unlawful ingestion of a drug, but the presence of THC may also be indicative of THC in a legal form?

Brief Response

Yes. The City is authorized to institute an alcohol and drug testing policy that aligns with the statutes and the corresponding regulations. It is up to the governing authorities of the City to determine the parameters of its policy and the resultant actions that may be taken for a violation of that policy, so long as the terms of the statute are implemented in full. Miss. Code Ann. § 71-7-3(1).

Applicable Law and Discussion

Mississippi Code Sections 71-7-1 *et seq.* govern employer alcohol and drug testing policies. Section 71-7-3 authorizes voluntary alcohol and drug testing by public and private employers. *See* MS AG Op., *Jacks* at *1 (Oct. 7, 2016) (authorizing municipality to adopt drug testing policy provided it is consistent with provisions of Miss. Code Ann. § 71-7-1 *et seq.*). Part of the statutory scheme, however, is the mandate that if any employer voluntarily chooses to follow the chapter, the employer must implement the statute fully. Miss. Code Ann. § 71-7-3(1). In your request, you state that this office has previously opined in MS AG Op., *Dees* at *2 (Nov. 8, 1996) that “governmental employers, including municipalities, [are authorized] to establish drug and alcohol policies and to require as a condition of employment that employees submit to neutral selection drug and alcohol testing.” The *Dees* opinion stops short of discussing the limitations placed on governmental employers when crafting drug testing policies. Section 71-7-7 specifies which government employees are subject to neutral selection drug and alcohol testing as a condition of employment or continued employment. Accordingly, this office has consistently opined that a government employer does not have the authority to require all employees to submit to drug and alcohol screening as a condition of employment or continued employment; the employer may only require neutral selection testing of employees engaged in law enforcement, security, and/or activities affecting the public health or safety. MS AG Op., *Danks* at *2 (Nov. 17, 2017). *See also* MS AG Op., *Nowak* at *3 (May 29, 2012) (reiterating “that drug testing policies adopted by local governing authorities can only apply to employees named in [§ 71-7-7] subsection (2)”); MS AG Op., *Myers* (Oct. 11, 1996) (explaining governmental employer may not drug test all employees but just those employees under 71-7-7(2), and also must provide employees a written policy statement at least thirty days prior to drug testing.)

The requirements of Section 71-7-3 include the provision of the written policy to employees, which must contain, among other things, the grounds for any drug testing, the resultant actions after a positive test, a list of all the drugs tested for, and the opportunity for the employee to contest the accuracy or explain any positive result. Section 71-7-3(d) in particular, requires that the written policy statement contain the procedure for any employee to confidentially report his or her use of prescription and/or nonprescription medications prior to being tested.

The statute also mandates that the Mississippi State Board of Health (Mississippi State Department of Health) “shall develop standard language for those sections of alcohol and drug testing notices” required by Section 71-7-3(2)(b), (c), and (d). Miss. Code Ann. § 71-7-3(4). The Department of Health’s drug and alcohol testing regulations state that an employer may include the following in its alcohol and drug testing protocols: “marijuana, cocaine, opiates, amphetamines, phencyclidine, alcohol and other controlled substances.” 15 Miss. Admin. Code Pt. 16, Subpt. 1, R. 53.4.

Your question asks specifically about testing for THC, which, while a Schedule I controlled substance, is also exempted in particular situations and in certain forms. Until recently, except in very limited situations, Mississippi law did not provide for the legal ingestion of THC, one of the main chemical compounds found in the cannabis plant. However, Mississippi has recently enacted the Mississippi Medical Cannabis Act (the “Act”). Senate Bill 2095, 2022 Regular Session. While the Act does not interfere with an employer’s authority to adopt and enforce a drug testing policy, there are several sections that speak to the establishment and enforcement of such a policy in light

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of medical cannabis, and the City should bear them in mind when crafting a drug testing policy. *See* Senate Bill 2095, 2022 Regular Session §§ 7, 8, 10 (addressing, among other things, employer and employee rights and responsibilities in context of medical cannabis prescription and use).

Ultimately, the City of Florence is authorized to institute an alcohol and drug testing policy that aligns with the statutes and the corresponding regulations. It is up to the governing authorities of the City to determine the parameters of its policy and the resultant actions that may be taken for a violation of that policy so long as the terms of the statute are fully implemented. Miss. Code Ann. § 71-7-3(1).

While this office does not opine on questions of federal law, be aware that the statute does not apply to any employer “who is subject to federal law or federal regulations governing the administering of drug and alcohol tests to any of its employees or applicants for employment.” Miss. Code Ann. § 71-7-29.

If this office may be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

LYNN FITCH, ATTORNEY GENERAL

By: */s/ Misty Monroe*

Misty Monroe
Assistant Attorney General

OFFICIAL OPINION