

**TOWN OF DAY
COUNTY OF SARATOGA, STATE OF NEW YORK
Local Law No. 08 of 2019**

A LOCAL LAW CREATING A DRUG AND ALCOHOL TESTING POLICY FOR
EMPLOYEES OF THE TOWN OF DAY HIGHWAY DEPARTMENT

Be it enacted by the Town Board of the Town of Day (“Town”), County of Saratoga, State of New York (“State”) as follows:

Section 1. Legislative Intent.

A. The United States Department of Transportation (DOT) has issued regulations pursuant to the Omnibus Transportation Employee Testing Act of 1991 (the “Act”), which govern the use of drugs and alcohol by commercial motor vehicle drivers and which also require the Town to conduct mandatory drug and alcohol testing of covered drivers. The regulations required testing to begin on January 1, 1996. It is the Town's intention to comply fully with the law and with DOT's regulations governing drug and alcohol use and testing. In the event that DOT's regulations are amended, the Town reserves the right to apply the amended requirements immediately.

B. The Superintendent of Highway or a designee shall:

- (1) Adopt any work rules necessary to implement this policy and comply with the Act and DOT regulations;
- (2) Also develop drug and alcohol testing educational material that complies with federal regulations for distribution to covered employees;
- (3) Provide written notice to the employees of any change in this policy;
- (4) Arrange for training of all supervisors to allow them to determine whether reasonable suspicion exists to test an employee for alcohol misuse or illegal drugs; and
- (5) Provide for an informal appeal process, whereby an employee may appeal a positive test.

C. Any violation of this policy, the law or DOT regulations by an employee shall be grounds for disciplinary action, up to and including immediate discharge.

Section 2. Applicability.

A. Drug and alcohol testing will be conducted on any current and/or prospective driver, who may be required to operate a commercial motor vehicle, as defined by the DOT.

B. All applicants for a position as a driver of a commercial motor vehicle, regardless of whether they are new applicants or current employees, will be notified of the Town's drug and alcohol testing policy at the time they apply for a covered driver position with the Town and that any offer of employment as such driver will be conditioned on their compliance with it.

Section 3. Definitions.

As used in this local law, the following terms shall have the meanings indicated:

A. ACCIDENT—Any occurrence involving a commercial motor vehicle operating on a public road which results in:

1. A fatality; or
2. A Town driver being cited for a moving traffic violation.

B. ALCOHOL—The intoxicating agent in beverage alcohol, ethyl alcohol or other low-molecular weight alcohols, including methyl and isopropyl alcohol.

C. ALCOHOL CONCENTRATION OR CONTENT—The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test.

D. ALCOHOL USE—The consumption of any beverage, mixture or preparation, including any medication, containing alcohol.

E. CDL—Commercial driver's license.

F. COMMERCIAL MOTOR VEHICLE—A motor vehicle or combination of motor vehicles that operates at normal highway speeds and has:

1. A gross combination weight rating of 26,001 or more pounds, inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds; or
2. A gross vehicle weight rating of 26,001 or more pounds.

G. CONFIRMATION TEST—For alcohol testing, a second test, following a screening test with a result of 0.02% or greater, that provides quantitative data of alcohol concentration. For urine testing, a "confirmation test" means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the initial test. Such a test is one ordered and paid for by the employee by contacting the lab which performed the initial test and requesting that a urine sample be sent to a lab sought by the employee.

H. DRIVER—Any employee required by federal law and regulation to possess a CDL in order to operate a commercial vehicle as defined by federal law and regulation. For the purposes of preemployment/pre-duty testing only, the term "driver" includes a person applying to the Town to drive a commercial motor vehicle.

I. DRIVING—These activities by an employee who holds a federally required CDL:

1. All times at or on Town property or on any public property, waiting to be dispatched as the driver of a commercial vehicle, unless relieved from duty by the Superintendent of Highways; and
2. All time spent driving a federally defined commercial motor vehicle.

J. DRUG—Any substance currently or hereafter listed on Schedule I of Appendix D to Subchapter B of Title 49 of the Code of Federal Regulations or other substance identified in Schedule I.

K. MEDICAL REVIEW OFFICER (MRO)—A licensed physician responsible for receiving and reviewing laboratory results generated by the Town's drug testing program, who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's confirmed positive test result, together with his or her medical history and any other relevant biomedical information evaluating medical explanations for certain drug test results.

L. ON-DUTY TIME—All time from the time a driver begins to work or is required to be in readiness to work until the time he or she is relieved from work and all responsibility for performing work. "On-duty time" shall also include all time spent traveling to and participating in either a drug or alcohol test when it is pursuant to a random, reasonable suspicion, post-accident or follow-up test as directed by or on behalf of the Town.

M. REFUSE TO SUBMIT TO AN ALCOHOL OR URINE TEST—That a driver:

1. Fails to provide adequate breath for testing without a valid medical explanation after the driver has received notice of the requirement for breath testing in accordance with the provisions of this policy;
2. Fails to provide adequate urine for testing without a valid medical explanation after he or she has received notice of the requirement for urine testing, in accordance with the provisions of this policy; or
3. Engages in conduct that clearly obstructs the testing process.

N. SCREENING TEST—(also known as the "initial test")—In alcohol testing, an analytical procedure to determine whether a driver may have a prohibited concentration of alcohol in his or her system. In urine testing, it means a screening to eliminate negative urine specimens from further consideration.

O. SUBSTANCE ABUSE PROFESSIONAL (SAP)—A licensed physician, a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission) with knowledge and/or clinical experience in the diagnosis and treatment of alcohol- and drug-related disorders.

Section 4. Required Testing.

- A. The Town is required to conduct drug and alcohol tests:
- (1) Preemployment and pre-assignment (drug tests only);
 - (2) Following certain accidents;
 - (3) On a random basis;
 - (4) Upon a reasonable suspicion;
 - (5) Upon a return to duty after engaging in conduct that is illegal under the Act or under regulations issued pursuant to it; and
 - (6) Periodic follow-up testing for individuals engaging in conduct that is illegal under the Act or under regulations issued pursuant to it.
- B. Any applicant, required to be tested under federal law, who refuses or fails to submit to a test as directed will not be considered for employment with the Town. A current worker who applies for a driver position and who refuses or fails to submit to a drug test as directed or whose result is positive for the drug test may be subject to discipline up to and including discharge.

Section 5. Methods of Testing.

To ensure the integrity and accuracy of each test, all specimen collection, analysis and laboratory procedures shall be conducted in accordance with DOT rules. This includes, among other things:

- A. Procedures to ensure the correct identity of each driver at the time of testing;
- B. A chain-of-custody procedure to protect a driver's urine specimen;
- C. The use of split urine samples to allow for a verification of an initial positive test;
- D. The use of a trained breath alcohol technician (BAT) and DOT-approved testing devices for conducting alcohol tests;
- E. The use of a federally approved lab as selected by the Town or by a contractor that may be retained by the Town to perform testing;
- F. The confirmation of an initial positive urine test by a second test;
- G. The confirmation of an initial positive breath test by a second test; and
- H. The Town's appointment of a qualified MRO to review urine test results.

Section 6. Test Results.

- A. For alcohol tests:

1. In the event that an initial breath test registers an alcohol concentration level that is less than 0.02%, the test will be reported as a negative and no additional test will be required at that time.
2. In the event that an initial breath test yields a result of 0.02% or greater, a second confirmatory test will be performed. In the event that the confirmatory test registers less than 0.02%, the test result will be reported to the Town as negative. Any driver whose confirmatory test registers 0.02% or more but less than 0.04% will be prohibited from driving until the next regularly scheduled duty period but for no less than 24 hours after the test is given. Such a driver may also be subject to additional disciplinary action by the Town.
3. A driver who has a confirmatory test which registers 0.04% or greater will, at a minimum, be suspended from all driving functions until federal regulations are satisfied so as to allow a return to work and will be subject to a disciplinary penalty as provided for in Section 9, herein.

B. For drug tests: Before a urine test result will be confirmed to the Town as positive for illegal drugs, the driver will be contacted by the Town's MRO and will be given the opportunity to demonstrate that there was a legitimate medical explanation for the positive test result. If the MRO determines that a legitimate medical reason does exist, the test result will be reported to the Town as negative. If the MRO determines that a legitimate medical reason for a positive result does not exist, the test result will be reported to the Town as a positive. A driver who is informed by the MRO that a positive has resulted will have 72 hours to request that the MRO send the split sample to a second approved lab. The cost of the second test shall be paid by the driver. Pending the outcome of the second test, the driver will be prohibited from driving.

Section 7. Prohibited Activities.

- A. A driver for the Town will not:
1. Report for duty or remain on duty requiring the performance of driving functions while the driver has an alcohol concentration of 0.04% or greater;
 2. Possess any amount of alcohol (including alcohol found in medications, food or other alcohol-containing products) while on duty or operating a commercial motor vehicle;
 3. Use alcohol at any time while performing any driving function;
 4. Use alcohol within four hours prior to performing any driving function;
 5. Use alcohol for eight hours following an accident or until the driver undergoes a post-accident alcohol test, whichever occurs first;

6. Refuse to submit to an alcohol or urine test;
7. Consume alcohol when notified of or informed of being on call;
8. Report for duty or remain on duty when required to drive when the driver uses any drug, except when the use is pursuant to the instructions of a physician who has advised the driver that the drug does not adversely affect the driver's ability to safely operate commercial motor vehicle; or
9. Report for duty, remain on duty or perform driving functions when testing positive for drug.

B. A driver, other than applicants for covered driving positions, who violates any of these prohibitions will be subject to the actions mandated by the DOT and will also be subject to disciplinary action, up to and including discharge. Any action taken by the Town which is mandated by federal law or regulation shall not in any way be deemed to be disciplinary in nature. For those employees who need a CDL in order to perform work duties, the Town considers the CDL to be a qualification for employment. In the event that an employee is relieved of work duties as a result of a violation of federal regulations or this policy, the employee will not be assigned other work during a mandated absence. Appropriate accrued paid leave, if any, may be taken to permit an employee who is removed from work duties to remain in a full-pay status. An employee who tests positive for drugs a second time will be subject to a disciplinary penalty as provided for under Section 9, herein.

Section 8. Consequences for Engaging in Prohibited Activities.

A. Any driver engaging in conduct prohibited under the Act or under regulations issued pursuant to it shall not drive. Any driver with a positive urine test or a breath alcohol test of 0.04% or greater must satisfy any return-to-duty requirements and referral, evaluation and treatment program prescribed by a SAP as required by federal regulations before the driver may be permitted to drive. All costs associated with evaluation, treatment and repeat testing shall be borne by the driver.

B. Any driver engaging in conduct prohibited by federal law or regulation or this policy will be subject to disciplinary action by the Town, such penalties to be as provided for in Section 9, herein. A driver whose urine test result is positive will also be subject to civil and criminal penalties imposed by DOT.

C. Each driver who tests positive shall be advised by the Town of the resources available to the driver in evaluating and resolving problems with alcohol or controlled substance use, as the case may be, including the names, addresses and telephone numbers of SAP's and counseling and treatment programs. In some instances, such programs may be available from the individual's health insurance provider.

Section 9. Penalties for Offenses.

- A. First offense.
1. Federal statute states that the employee is prevented from working until he tests negative.
 2. The employee must enroll in a rehabilitation program, at the employee's own expense.
 3. The employee will be given a warning letter.
 4. The employee will receive no compensation from the employer. Accumulated sick time may be used and paid at his prevailing rate. No vacation nor personal time may be used.
- B. Second offense.
1. Federal statute states that the employee is prevented from working until he/she tests negative.
 2. The employee shall be suspended without pay and without the use of vacation, personal sick or other available paid leave for three workdays following negative test results (no sick time).
- C. Third offense. The penalty shall be immediate dismissal.

Section 10. Appeal Procedure.

A. Upon testing positive, a driver may file an appeal with the Superintendent of Highways or other individual as may be designated by the Town by submitting written notice of the grounds for an appeal within five (5) calendar days after the employee receives notice of the test result from the MRO. Following receipt of an employee's notice of appeal, the Superintendent of Highways shall offer the employee an opportunity to be heard. The employee may be accompanied by a representative, whose role in the hearing shall be solely to advise the employee as to his or her rights or responsibilities. Pending the resolution of the appeal, no disciplinary action shall be taken. However, actions which the Town are required to take under federal law or regulation shall not be deemed to be discipline.

B. The Superintendent of Highways shall provide the employee with a written decision. In deciding an appeal from a positive breath or urine test result, the Superintendent of Highways shall take into account the original test result, any retesting done by the employee at the employee's expense and any other pertinent information that the employee or Town may provide. In deciding an appeal from a positive drug test result, the Superintendent of Highways shall also take into account any test results pertaining to the split sample.

Section 11. Town Communications.

An employee tested for drugs must contact the Superintendent of Highways daily while awaiting the results of the test and must also advise the Superintendent of Highways of his or her whereabouts and provide a telephone number where he or she may be reached during time away from work. An employee who refuses to do so or fails to contact the Superintendent of Highways will be considered insubordinate and subject to disciplinary action.

Section 12. Information on Drugs and Alcohol.

A. Each employee will be provided with educational material and information concerning:

1. The effects of drugs and alcohol on an individual's health, work and personal life;
2. The signs and symptoms of a drug or alcohol problem; and
3. The available methods of intervention and treatment when a problem does exist.

B. All questions concerning the educational materials provided by the Town or about this local law should be directed to the appropriate person identified on the contact list included as part of this local law.

Section 13. Quality Assurance/Quality Control.

In the event of a false positive error, the Town shall follow the procedures mandated by federal regulations.

Section 14. Program Confidentiality.

The results of all individual drug and alcohol tests will be kept in a secure location with controlled access. All individual test results are confidential. The release of an individual driver's results will only be given in accordance with the employee's written authorization or as is otherwise required by federal law or regulation.

Section 15. Contact List.

For questions regarding drug and alcohol testing requirements contact the Superintendent of Highways, Town Supervisor, or Town Clerk, of the Town of Day.

Section 16. Severability.

If any clause, sentence, paragraph, subdivision, section, or part of this Local Law or the application thereof to any person, individual, corporation, firm, partnership, entity, or circumstance shall be adjudged by any court of competent jurisdiction to be invalid or

unconstitutional, such order or judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section, or part of this Local Law, or in its application to the person, individual, corporation, firm, partnership, entity, or circumstance directly involved in the controversy in which such order or judgment shall be rendered.

Section 17. Effective Date.

This Local Law shall take effect upon filing with the New York State Secretary of State.

**TOWN BOARD OF THE TOWN OF DAY
COUNTY OF SARATOGA, STATE OF NEW YORK**

Resolution No. ___ of 2019
Adopted _____, 2019

Introduced by _____
who moved its adoption

Seconded by _____

**RESOLUTION INTRODUCING A LOCAL LAW
REGARDING THE TOWN OF DAY DRUG AND ALCOHOL TESTING POLICY**

WHEREAS, the Town Board (the "Town Board") of the Town of Day (the "Town") wishes to consider the adoption of a local law providing for a drug and alcohol testing policy that will affect employees operating certain machinery and vehicles owned by the Town; and

WHEREAS, a proposed local law regarding same has been drafted and is attached hereto; and

WHEREAS, the Town Board wishes to hold a public hearing concerning the proposed local law.

NOW, THEREFORE BE IT

RESOLVED, that the proposed local law regarding a Town of Day Drug and Alcohol Testing Policy is hereby accepted for introduction to the Town Board; and be it further

RESOLVED, that a public hearing shall be scheduled for the consideration of this proposed local law to be held by the Town Board on December 30, 2019 at ___ a.m./p.m. at the Town offices; and be it further

RESOLVED, that the Town Clerk is direct to post and publish a notice of said public hearing in the official newspaper of the Town and to see to the required posting of such local law and public hearing.

RESOLVED, that this resolution shall take effect immediately.

PRESENT:

AYES:

NAYS:

ABSENT: