

IV. Development of the Uniform Standards and Overview of Current Uniform Standard #4

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SB 1441 (*Statutes of 2008*)

2008

- The impetus for this bill were failures of one of our diversion programs and the “immediate and grave risks to the public posed by licensees who continued to practice despite their chemical dependency.”
- Several boards with diversion programs, contracted with the same provider to operate their diversion programs.
- While the summary and intent of the bill clearly targets “diversion programs,” the actual language enacted did not make this same distinction.
- As a result, all healing arts boards were included in establishing uniform standards in dealing with “substance-abusing licensees.”

DCA Substance Abuse Coordination Committee

2009

- By the authority in SB 1441 the DCA Substance Abuse Coordination Committee was established in 2009 and was comprised of:
 - Executive Officers of all DCA healing arts boards
 - Executive Officer of the State Board of Chiropractic Examiners
 - Executive Officer of the Osteopathic Medical Board of California
 - A designee of the State Department of Alcohol and Drug Programs
 - Chaired by the Director of Consumer Affairs
- The charge of the Committee was to establish Uniform Standards for 16 specific areas related to monitoring substance-abusing diversion participants and probationers.

Development of Uniform Standards

2009

- While the standards were being established in 2009, there was no clear understanding of how they would be applied. Many believed these would merely be “guidelines” but not necessarily subject every probationer or diversion participant to every standard.
- As it was becoming apparent toward the latter part of 2009, that the standards may actually be strictly enforced, several boards expressed concern for Uniform Standard #4 which required biological drug testing be performed 104 times a year for every probationer or diversion participant, regardless of extenuating circumstances.

Uniform Standard #4 Subcommittee

2010

- As required by SB 1441, 16 uniform standards were established in January 2010 and formally adopted in April 2010, though there was an understanding that Uniform Standard #4 would likely be revisited.
- In or about August 2010, the DCA formed the Uniform Standard #4 Subcommittee to re-examine this standard which was comprised of
 - executive officers from the Respiratory Care Board, the Board of Behavioral Sciences, the Dental Board of California, the Board of Pharmacy, the Physical Therapy Board and the Board of Registered nursing, as well as a doctor from the Department of Alcohol and Drug Programs.

Application of Standards-Guidance Sought

2011

- In April 2011, Uniform Standard #4 had been revised to take into consideration extenuating circumstances.
- Even after the Uniform Standards were adopted, boards continued to search for guidance on the applicability of the Standards and legal opinions were sought.
- In 2011, the Legislative Counsel Bureau provided a legal opinion that the Uniform Standards were:
 - not “discretionary”
 - must be established in regulation
 - should be established by each board

Legislative Counsel Bureau

2012

Since 2012, the Legislature has specifically inquired as part of each board's sunset review process:

What is the status of the board's implementation of the Uniform Standards for Substance Abusing Licensees?

Indicating that some formal process to recognize the standards is expected.

Legislative Sunset Review

2015

However, in 2015, the Office of the Attorney General provided a legal opinion that contradicted the Legislative Counsel Bureau's legal opinion providing that uniform standards:

- did not need to be placed in regulation
- provided for some discretion in application

DCA Legal Affairs Implementation Guide

2016

- On February 11, 2016, DCA's Legal Affairs Division provided a guide for all affected boards, to reconcile the two differing legal opinions by:
 - Recommending each healing arts board to “formally implement the Standards through regulations adopted pursuant to the Administrative Procedure Act.”
 - Clarifying that Boards may have limited discretion in applying the Standards to some cases, but that boards are not authorized to “ignore, discard or disregard” a mandatory Standard.
 - Providing for each Standard, whether it is discretionary or mandatory
 - Standard #4 was identified as mandatory

Overview of Current Uniform Standard #4

- In August 2010, the Uniform Standard #4 Subcommittee convened to reexamine the “Drug and Alcohol Testing” standard
- SB 1441 requires Standard #4 to address the following:
 - frequency of testing,
 - randomness,
 - method of notice to the licensee,
 - number of hours between the provision of notice and the test,
 - standards for specimen collectors,
 - procedures used by specimen collectors,
 - the permissible locations of testing,
 - whether the collection process must be observed by the collector,
 - backup testing requirements when the licensee is on vacation or otherwise unavailable for local testing,
 - requirements for the laboratory that analyzes the specimens, and
 - the required maximum timeframe from the test to the receipt of the result of the test

Comments/Concerns Raised by Interested Parties

- Testing diversion participants more frequently upon return to work is appropriate
- A distinction should be made in frequency of testing for those licensees actually practicing and those that are not
- Significant financial burden to probationers and diversion participants associated with increasing biological fluid testing
- DCA boards' missions are to protect consumers and public protection should be its highest priority
- Testing 104 times per year diminishes a key component in testing: "Random"
- Data related to increased testing costs and effectiveness of testing more frequently was reviewed

UNIFORM STANDARD #4 REVISED

- This standard shall govern all aspects of testing required to determine abstinence from alcohol and drugs for any person whose license is placed on probation or in a diversion program due to substance use:

TESTING FREQUENCY SCHEDULE

- A board may order a licensee to drug test at any time. Additionally, each licensee shall be tested RANDOMLY in accordance with the schedule below:

Level	Segments of Probation/Diversion	Minimum Range of Number of Random Tests
I	Year 1	52-104 per year
II*	Year 2+	36-104 per year

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I	Year 1	52-104 per year
II*	Year 2+	36-104 per year

*The minimum range of 36-104 tests identified in level II, is for the second year of probation or diversion, and each year thereafter, up to five (5) years. Thereafter, administration of one (1) time per month if there have been no positive drug tests in the previous five (5) consecutive years of probation or diversion.

Nothing precludes a board from increasing the number of random tests for any reason. Any board who finds or has suspicion that a licensee has committed a violation of a board's testing program or who has committed a Major Violation, as identified in Uniform Standard 10, may reestablish the testing cycle by placing that licensee at the beginning of level I, in addition to any other disciplinary action that may be pursued.

EXCEPTIONS TO TESTING FREQUENCY SCHEDULE

I. PREVIOUS TESTING/SOBRIETY

In cases where a board has evidence that a licensee has participated in a treatment or monitoring program requiring random testing, prior to being subject to testing by the board, the board may give consideration to that testing in altering the testing frequency schedule so that it is equivalent to this standard.

II. VIOLATION(S) OUTSIDE OF EMPLOYMENT

An individual whose license is placed on probation for a single conviction or incident or two convictions or incidents, spanning greater than seven years from each other, where those violations did not occur at work or while on the licensee's way to work, where alcohol or drugs were a contributing factor, may bypass level I and participate in level II of the testing frequency schedule.

III. NOT EMPLOYED IN HEALTH CARE FIELD

A board may reduce testing frequency to a minimum of 12 times per year for any person who is not practicing OR working in any health care field. If a reduced testing frequency schedule is established for this reason, and if a licensee wants to return to practice or work in a health care field, the licensee shall notify and secure the approval of the licensee's board. Prior to returning to any health care employment, the licensee shall be subject to level I testing frequency for at least 60 days. At such time the person returns to employment (in a health care field), if the licensee has not previously met the level I frequency standard, the licensee shall be subject to completing a full year at level I of the testing frequency schedule, otherwise level II testing shall be in effect.

IV. TOLLING

A board may postpone all testing for any person whose probation or diversion is placed in a tolling status if the overall length of the probationary or diversion period is also tolled. A licensee shall notify the board upon the licensee's return to California and shall be subject to testing as provided in this standard. If the licensee returns to employment in a health care field, and has not previously met the level I frequency standard, the licensee shall be subject to completing a full year at level I of the testing frequency schedule, otherwise level II testing shall be in effect.

V. SUBSTANCE USE DISORDER NOT DIAGNOSED

In cases where no current substance use disorder diagnosis is made, a lesser period of monitoring and toxicology screening may be adopted by the board, but not to be less than 24 times per year.

OTHER DRUG STANDARDS

- Drug testing may be required on any day, including weekends and holidays.
- The scheduling of drug tests shall be done on a random basis, preferably by a computer program, so that a licensee can make no reasonable assumption of when he/she will be tested again. Boards should be prepared to report data to support back-to-back testing as well as, numerous different intervals of testing.
- Licensees shall be required to make daily contact to determine if drug testing is required.

- Licensees shall be drug tested on the date of notification as directed by the board.
- Specimen collectors must either be certified by the Drug and Alcohol Testing Industry Association or have completed the training required to serve as a collector for the U.S. Department of Transportation.
- Specimen collectors shall adhere to the current U.S. Department of Transportation Specimen Collection Guidelines.
- Testing locations shall comply with the Urine Specimen Collection Guidelines published by the U.S. Department of Transportation, regardless of the type of test administered.
- Collection of specimens shall be observed

- Prior to vacation or absence, alternative drug testing location(s) must be approved by the board.
- Laboratories shall be certified and accredited by the U.S. Department of Health and Human Services.
- A collection site must submit a specimen to the laboratory within one (1) business day of receipt. A chain of custody shall be used on all specimens. The laboratory shall process results and provide legally defensible test results within seven (7) days of receipt of the specimen. The appropriate board will be notified of non-negative test results within one (1) business day and will be notified of negative test results within seven (7) business days.
- A board may use other testing methods in place of, or to supplement biological fluid testing, if the alternate testing method is appropriate.

OUTCOMES AND AMENDMENTS

- For purposes of measuring outcomes and effectiveness, each board shall collect and report historical and post implementation data as follows:
 - Historical Data - Two Years Prior to Implementation of Standard
Each board should collect the following historical data (as available), for a period of two years, prior to implementation of this standard, for each person subject to testing for banned substances, who has 1) tested positive for a banned substance, 2) failed to appear or call in, for testing on more than three occasions, 3) failed to pay testing costs, or 4) a person who has given a dilute or invalid specimen.

- Post Implementation Data- Three Years
Each board should collect the following data annually, for a period of three years, for every probationer and diversion participant subject to testing for banned substances, following the implementation of this standard.
- Data Collection
The data to be collected shall be reported to the Department of Consumer Affairs and the Legislature, upon request, and shall include, but may not be limited to:
 - Probationer/Diversion Participant Unique Identifier
 - License Type
 - Probation/Diversion Effective Date
 - General Range of Testing Frequency by/for Each Probationer/Diversion Participant
 - Dates Testing Requested
 - Dates Tested
 - Identify the Entity that Performed Each Test
 - Dates Tested Positive
 - Dates Contractor (if applicable) was informed of Positive Test
 - Dates Board was informed of Positive Test
 - Dates of Questionable Tests (e.g. dilute, high levels)
 - Date Contractor Notified Board of Questionable Test
 - Identify Substances Detected or Questionably Detected
 - Dates Failed to Appear
 - Date Contractor Notified Board of Failed to Appear
 - Dates Failed to Call In for Testing
 - Date Contractor Notified Board of Failed to Call In for Testing
 - Dates Failed to Pay for Testing
 - Date(s) Removed/Suspended from Practice (identify which)
 - Final Outcome and Effective Date (if applicable)

Uniform Standard #16

- Each board shall report the following information on a yearly basis to the Department of Consumer Affairs and the Legislature as it relates to licensees with substance abuse problems who are either in a board probation and/or diversion program.
 - Number of intakes into a diversion program
 - Number of probationers whose conduct was related to a substance abuse problem
 - Number of referrals for treatment programs
 - Number of relapses (break in sobriety)
 - Number of cease practice orders/license in-activations
 - Number of suspensions
 - Number terminated from program for noncompliance
 - Number of successful completions based on uniform standards
 - Number of major violations; nature of violation and action taken
 - Number of licensees who successfully returned to practice
 - Number of patients harmed while in diversion

Respiratory Care Board Outcomes

- Number of Probationers subject to Drug Testing each year since FY 09/10: 60-115
- Number of Probationers Testing Positive for banned substances each year: 3-13
- From FY 09-10 through FY 15-16, the Board saw an increase from 4% to 15% in the number of probationers testing positive for banned substances- nearly a 300% increase.
- 32% of these probationers tested positive w/in the first three months of probation; and a total of 61% within the first year; 25% in the second year, and 14% in the third year.

QUESTIONS





Uniform Standards: Mandatory or Discretionary

- Standard 1. Clinical Diagnostic Evaluation
• IF ordered, however, a cease practice order and diagnostic report is mandatory
Discretionary
- Standard 2. Practice Restrictions
• Mandatory IF a clinical diagnostic evaluation is ordered
- Standard 3. Names and Addresses and Consent to Communicate with Employer
Mandatory

Uniform Standards: Mandatory or Discretionary

- Standard 4. Drug and Alcohol Testing **MANDATORY**
- Standard 5. Group Support Meetings Discretionary
- Standard 6. Inpatient or Outpatient Treatment Discretionary
- Standard 7. Worksite Monitors Discretionary

Uniform Standards: Mandatory or Discretionary

- Standard 8. Cease Practice Order for Positive Test Mandatory
- Standard 9. Consequences for Major Violation
for Positive Test Mandatory
- Standard 10. Definitions of and Consequences
for major and minor violations Discretionary

Uniform Standards: Mandatory or Discretionary

- Standard 11. Criteria for Petitioning for Modification Mandatory
- Standard 12. Criteria for Petitioning for Reinstatement Mandatory
- Standard 13. Criteria for Specimen Collection and
Other Providers; Vendor Requirement Discretionary

Uniform Standards: Mandatory or Discretionary

- Standard 14. Board Disclosure of Information to the Public Discretionary
- Standard 15. Criteria for Audits of Vendors Discretionary
- Standard 16. Criteria for Board Reports to the Department and Legislature Mandatory

PETITIONS FOR REINSTATEMENT

- Nothing herein shall limit a board's authority to reduce or eliminate the standards specified herein pursuant to a petition for reinstatement or reduction of penalty filed pursuant to Government Code section 11522 or statutes applicable to the board that contains different provisions for reinstatement or reduction of penalty.