

## D.C. OFFICE OF PERSONNEL

## NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000, and in accordance with Title I of the Child and Youth, Safety and Health Omnibus Congressional Review Emergency Amendment Act of 2005 (Act), effective February 17, 2005 (D.C. Act 16-30), and any similar succeeding legislation, hereby gives notice of the adoption of the following emergency rules. The Act amended the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*) (2001), on an emergency basis, to add a new Subtitle XX-C, Mandatory Drug and Alcohol Testing Program for Certain Employees Who Serve Children. The Act requires that the following individuals be tested by the District government for drug and alcohol use: (1) an applicant for employment in a safety-sensitive position with the District government; (2) a District government employee in a safety-sensitive position who has had a reasonable suspicion referral; (3) a post-accident District government employee in a safety-sensitive position; and (4) a District government employee who is required to drive a motor vehicle to transport children and youth in the course of performing his or her official duties, whenever a supervisor has probable cause or a police officer arrests such employee for a violation of the law and has reasonable grounds to believe such employee to have been operating or in physical control of a motor vehicle within the District of Columbia while that employee's breath contains .08 percent or more, by weight, of alcohol, or while that employee's ability to operate a motor vehicle is impaired by the consumption of intoxicating liquor. District government employees who work in safety-sensitive positions shall be subject to random testing. The Act also requires that rules be issued to implement its provisions. Therefore, to ensure the preservation of the welfare of the public in general, and to ensure the preservation of the welfare of children and youth in particular, action was taken on March 11, 2005 to supersede the Notice of Emergency and Proposed Rulemaking adopted on December 17, 2004 and published at 52 DCR 1021 (February 4, 2005), and adopt the following rules on an emergency basis effective on March 18, 2005. These emergency rules add new sections 3901 through 3910 and 3999 to Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the District of Columbia Municipal Regulations, for the purpose of implementing the provisions of the Act. The rules also modify section 3900 of the chapter, Drivers of Commercial Motor Vehicles. These rules will remain in effect for up to one hundred twenty (120) days from March 18, 2005, unless earlier superseded by another rulemaking notice.

The Director, D.C. Office of Personnel, with the concurrence of the City Administrator, pursuant to Mayor's Order 2000-83, dated May 30, 2000, and in accordance with Title I of the Child and Youth, Safety and Health Omnibus Congressional Review Emergency Amendment Act of 2005 (Act), effective February 17, 2005 (D.C. Act 16-30), and any similar succeeding legislation, hereby gives notice of the intent to adopt the following proposed rules in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. The Act requires that rules be issued to implement its provisions. Accordingly, these proposed rules would add new sections 3901 through 3910 and 3999 to Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the District of Columbia Municipal Regulations, for the

purpose of implementing the provisions of the Act. These proposed rules would also modify section 3900 of the chapter, Drivers of Commercial Motor Vehicles. Upon adoption, these rules will amend Chapter 39, Testing for the Presence of Controlled Substances and Alcohol, of Title 6 of the District of Columbia Municipal Regulations, published at 47 DCR 7931 (September 29, 2000).

## CHAPTER 39

### TESTING FOR THE PRESENCE OF CONTROLLED SUBSTANCES AND ALCOHOL

*Section 3900 is amended to read as follows:*

#### **3900 DRIVERS OF COMMERCIAL MOTOR VEHICLES**

- 3900.1 Pursuant to section 2011 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA), effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-620.11) (2001), the federal regulations issued pursuant to 49 U.S.C. § 31306 (currently, 49 C.F.R. Parts 382-385) shall apply to individuals who are employed, or who are candidates for employment, as drivers of commercial motor vehicles.
- 3900.2 The provisions of section 3900.1 of this section, and the regulations incorporated by reference therein, shall apply to agencies under the personnel authority of the Mayor and other personnel authorities, and to individuals who are employed by or who are candidates for employment in those agencies and personnel authorities as drivers of commercial motor vehicles.

*New sections 3901 through 3910 and 3999 are added to read as follows:*

#### **3901 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – GENERAL**

- 3901.1 Pursuant to Title XX-C of the CMPA, as amended by Title I of the Child and Youth, Safety and Health Omnibus Congressional Review Emergency Act of 2005 (Act), effective February 17, 2005 (D.C. Act 16-30), and any similar succeeding legislation, and as a means of ensuring the health and safety of children and youth, a Mandatory Drug and Alcohol Testing Program for Safety-Sensitive Positions (Program) has been established within the District government. The purpose of the Program is to test appointees to and employees in safety-sensitive positions for illegal drug and alcohol use.
- 3901.2 Implementation of the Act and drug and alcohol testing shall commence as soon as practicable after March 18, 2005.

- 3901.3 Each personnel authority with safety-sensitive positions pursuant to the Act shall contract with a professional testing vendor or vendors to conduct testing under the Program, including random testing. The vendor or vendors shall ensure quality control, chain-of-custody for samples, reliable collection and testing procedures, and any other safeguards needed to guarantee accurate and fair testing, in accordance with the procedures in 49 C.F.R. Part 40, and District government procedures.
- 3901.4 The vendor or vendors selected to conduct the testing shall be certified by the United States Department of Health and Human Services (HHS) to perform job-related drug and alcohol forensic testing.
- 3901.5 The Director, D.C. Office of Personnel (or his or her designee), shall develop operating policies and procedures for the Program for agencies subordinate to the Mayor that are subject to the Act. Such operating policies and procedures shall include, but not be limited to, the following:
- (a) The process by which the database for drug and alcohol testing for employees in safety-sensitive positions in subordinate agencies will be established, maintained, and updated;
  - (b) The process by which subordinate agencies will be informed of the results of each test, including random tests; and
  - (c) The process for reasonable suspicion referrals.
- 3901.6 The provisions of the Program are specified in sections 3902 through 3910 of this chapter.

**3902 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – APPLICABILITY**

- 3902.1 The following subordinate agencies shall be covered under the Program, on the basis that each one of these agencies, as a whole or certain components thereof, has safety-sensitive positions:
- (a) Department of Human Services;
  - (b) Department of Health;
  - (c) Department of Parks and Recreation;
  - (d) Fire and Emergency Medical Services Department;
  - (e) Metropolitan Police Department;
  - (f) State Education Office of the Executive Office of the Mayor;

- (g) Department of Mental Health; and
- (h) Child and Family Services Agency.

3902.2 Pursuant to sections 2032 (a) and 2033 of the CMPA, the following appointees and District government employees shall be subject to drug and alcohol testing:

- (a) An appointee to a safety-sensitive position with a District government agency;
- (b) A District government employee in safety-sensitive position who has a reasonable suspicion referral;
- (c) A post-accident District government employee in a safety-sensitive position, as soon as reasonably possible after the accident; and
- (d) A District government employee who is required to drive a motor vehicle to transport children and youth in the course of performing his or her official duties, whenever a supervisor has probable cause, or a police officer arrests such employee for a violation of the law, and has reasonable grounds to believe such employee to have been operating or in physical control of a motor vehicle within the District of Columbia while that employee's breath contains .08 percent or more, by weight, of alcohol, or while that employee's ability to operate a motor vehicle is impaired by the consumption of intoxicating liquor;

3902.3 Pursuant to section 2032 (b) of the CMPA and in addition to any testing under the conditions described in section 3902.2 of this section, a District government employee in safety-sensitive positions will be subject to random testing, unless the employing agency has additional requirements for drug and alcohol testing of its employees, in which case the stricter testing requirements will apply.

**3903 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – STANDARDS FOR THE IDENTIFICATION OF POSITIONS SUBJECT TO DRUG AND ALCOHOL TESTING UNDER THE ACT**

3903.1 Upon consulting with the head of a District government agency with safety-sensitive positions, the appropriate personnel authority shall identify and determine which positions in the agency shall be designated safety-sensitive positions subject to mandatory drug and alcohol testing under the Program. In identifying the safety-sensitive positions, the personnel authority shall ensure that the duties and responsibilities of each position require the provision of services that affect the health, safety, and welfare of children and youth, including direct care and custody of children and youth, including but not limited to at least one (1) of the following duties and responsibilities:

- (a) Childcare duties;

- (b) Recreational activities;
- (c) Delinquency prevention and control services, including custody, security, supervision, and residential and community support services for committed and detained juvenile offenders;
- (d) Educational activities;
- (e) Individual counseling;
- (f) Group counseling;
- (g) Assessment, case management and support services;
- (h) Psychiatric and psychological assessment services;
- (i) Developmental, speech, and language evaluation services;
- (j) Diagnostic evaluation and treatment services;
- (k) Childhood development services;
- (l) Medical or clinical services;
- (m) Therapeutic services, including individual and group therapy, and play therapy;
- (n) Prevention and intervention services;
- (o) Mentoring services;
- (p) Youth care services;
- (q) Healthcare services, including medical, behavioral, mental health, dental, vision, nutrition, or developmental services;
- (r) Cultural enrichment services;
- (s) Public safety services, including counseling or education intervention services about safety, crime prevention, fire safety, youth problem-solving; or
- (t) Driving a motor vehicle to transport children and youth.

3903.2 The following standards shall be applied in designating a position as safety-sensitive:

- (a) The underlying guiding standard to be applied in identifying safety-sensitive positions shall be one of reasonableness, coupled with the standards outlined in

section 3903.2 (b) through (f) of this section, as applicable.

- (b) A determination that a position is a safety-sensitive position shall be based on a comprehensive analysis of the position description or statement of duties, as applicable. The purpose of the analysis shall be to determine if the position description or statement of duties contains at least one (1) of the duties and responsibilities listed in section 3903.1 of this section or any similar duties and responsibilities and that any incumbent of the position will perform the duties and responsibilities personally and routinely.
- (c) The single fact that a position is located in a District government agency with safety-sensitive positions pursuant to the Act does not automatically make its incumbent subject to testing under the Program.
- (d) Strictly tangential, casual, or occasional contact with children and youth does not automatically make the position safety-sensitive or its incumbent subject to testing under the Program.
- (e) Administrative, clerical, or technical support positions and staff within the immediate office of the head of a District government agency with safety-sensitive positions as well as within other components, units, or divisions of the agency that provide non-operational support services will not be subject to testing under the Program unless the position descriptions or statements of duties, as applicable, contain at least one (1) of the duties and responsibilities listed in section 3903.1 of this section or similar duties and responsibilities and a determination is made that any incumbents of the positions will perform the duties and responsibilities personally and routinely. Such positions may include, but are not limited to the head of the agency, special assistants, administrative officers, staff assistants, and secretaries.
- (f) An employee who is detailed, temporarily promoted, or temporarily reassigned from a nonsafety-sensitive position to a safety-sensitive position shall be tested upon the personnel action being effected and, as applicable, shall be subject to testing under the Program while on temporary assignment.

**3904 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS -- NOTIFICATION REQUIREMENTS**

- 3904.1 Pursuant to section 2035 (a) of the CMPA, the Mayor and other personnel authorities with safety-sensitive positions shall issue a drug and alcohol testing policy, including a notice required under section 2032 (d) of the CMPA, at least thirty days in advance of implementing the Program.
- 3904.2 The drug and alcohol testing policy shall inform employees in safety-sensitive positions of all of the following:

- (a) Which employees will be tested;
- (b) Circumstances under which an employee will be tested;
- (c) The methodology to be used for testing; and
- (d) The consequences of a positive test result.

3904.3 Each employee occupying a safety-sensitive position shall sign an acknowledgment that he or she received a copy of the drug and alcohol testing policy and notice, and has been informed of the requirements for alcohol and drug testing. The original acknowledgment form shall be filed by the agency in a place designated for that purpose and a copy shall be provided to the appropriate personnel authority.

3904.4 Upon acknowledging receipt of the advance written notice, each employee occupying a safety-sensitive position shall be given one (1) opportunity to seek treatment if he or she acknowledges a drug or alcohol problem. An employee who so acknowledges a drug or alcohol problem shall undergo and complete a counseling and rehabilitation program, and shall not be subject to administrative action while completing the counseling and rehabilitation program; however, the employing agency shall immediately detail the employee to a nonsafety-sensitive position while he or she completes the counseling and rehabilitation program.

3904.5 Position vacancy announcements for positions identified and designated as safety-sensitive shall include a statement informing each applicant that:

- (a) The position for which he or she is applying has been identified and designated as a safety-sensitive position subject to mandatory drug and alcohol testing;
- (b) If tentatively selected for the safety-sensitive position, he or she will be required to submit to testing for illegal drug use prior to appointment, and that appointment to the position will be contingent upon a negative drug test result;
- (c) If selected to the safety-sensitive position before the drug test result is received, and contingent upon a negative drug test result, he or she may begin working in a position that is not a safety-sensitive position prior to receiving the result; and
- (d) Once hired into a safety-sensitive position, he or she shall be subject to mandatory random drug or alcohol testing.

3904.6 In the case of non-competitive recruitment for a safety-sensitive position, the appropriate personnel authority shall inform the person being considered for employment of the mandatory testing requirements described in section 3904.4 of this section.

- 3904.7 The position description for each position designated as safety-sensitive shall include a statement of such designation and a statement indicating that incumbents of the position shall be subject to testing for drug and alcohol use.
- 3904.8 The Director, D.C. Office of Personnel (or his or her designee), shall publish the list of safety-sensitive positions in agencies under the personnel authority of the Mayor, in the District Personnel Manual (or any other procedural manual developed). The list shall be updated periodically, as needed.
- 3905 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – TESTING**
- 3905.1 Appointees and District government employees as described in sections 3902.2 and 3902.3 of this chapter shall be tested for drug and alcohol use as specified in this section and section 3906 of this chapter.
- 3905.2 A final offer of appointment to a covered position shall not be made until after the results of any test conducted are received and it is determined that the test result is negative; however, a selectee may begin working in a position that is not a safety-sensitive position prior to receiving the results.
- 3905.3 Pursuant to section 2032 (b) of the CMPA, and except for a District government employee described in section 3905.4 of this section and section 3908 of this chapter, a District government employee in a safety-sensitive position shall be subject to random testing.
- 3905.4 Pursuant to section 2033 of the CMPA, an employee in a safety-sensitive position who operates a motor vehicle in the performance of his or her duties shall be tested whenever a supervisor has probable cause, or a police officer arrests the employee for a violation of the law, and has reasonable grounds to believe such employee to have been operating or was in physical control of a motor vehicle within the District of Columbia while the employee's breath contains .08 percent or more, by weight, of alcohol, or while under the influence of an intoxicating liquor or any drug or combination thereof, or while the employee's ability to operate a motor vehicle is impaired by the consumption of intoxicating liquor.
- 3905.5 An employee who acknowledges a drug or alcohol problem as specified in section 3904.4 of this chapter and who completes a counseling and rehabilitation program for illegal drug use or alcohol abuse shall be tested before being allowed to return to the safety-sensitive position he or she occupied before completion of such a program. After returning to the safety-sensitive position, the employee shall be subject to testing as specified in sections 3905.3 and 3905.4 of this section, and section 3908 of this chapter, as applicable.

- 3906 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS -- TESTING METHODOLOGY**
- 3906.1 Testing for illegal drug use shall be conducted by collecting a urine sample from the individual being tested.
- 3906.2 Testing for alcohol use shall be conducted utilizing an evidentiary breath-testing device or EBT, commonly referred to as a "breathalyzer."
- 3906.3 The vendor or vendors selected to conduct the testing shall, at a location designated by each personnel authority with safety-sensitive positions for such purposes, conduct the breathalyzer test for alcohol use; or collect urine specimens on site for drug testing.
- 3906.4 In the case of drug testing, the vendor shall split each sample and perform enzyme-multiplied-immunossay technique (EMIT) testing on one (1) sample and store the split of that sample. A positive EMIT test shall be confirmed by the vendor, using the gas chromatography/mass spectrometry (GCMS) methodology.
- 3906.5 Prior to testing for illegal drugs, a physician shall sit down with the appointee or employee being tested, as applicable, and ask what medications he or she might have been taking, to rule out any false positives in the drug screening results.
- 3906.6 The appropriate personnel authority shall notify, in writing, any appointee or employee in a safety-sensitive position found to have a confirmed positive urinalysis test result. The appointee or employee may then authorize that the stored sample be sent to another HHS-certified laboratory of his or her choice, at his or her expense, for a confirmation, using the GCMS testing method.
- 3906.7 Probable cause or reasonable suspicion and post-accident employee testing shall follow the same procedures set forth in this section. In the case of a reasonable suspicion referral, as confirmed by a second supervisor, or a post-accident employee, a supervisor shall escort the employee to the vendor's test site for specimen collection or a breathalyzer.
- 3906.8 In the event that a covered employee may require medical care following an accident, medical care shall not be delayed for the purpose of testing.
- 3906.9 A breathalyzer test shall be deemed positive if the vendor determines that one (1) milliliter of the employee's breath (consisting of substantially alveolar air) contains .38 micrograms or more of alcohol.

**3907 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – POSITIVE DRUG AND ALCOHOL TESTS**

3907.1 The following shall be grounds for termination of employment, provided that the notification requirements in section 3904 of this chapter have been met:

- (a) A confirmed positive drug test result;
- (b) A positive breathalyzer test;
- (c) Refusal to submit to a drug test or breathalyzer; or
- (d) In the case of an employee who acknowledged a drug and alcohol problem as specified in section 3904.4 of this chapter, failure to complete the counseling and rehabilitation program, or a confirmed positive drug test result for the test conducted upon completion of the counseling and rehabilitation program pursuant to section 3905.5 of this chapter.

3907.2 The appropriate personnel authority shall decline to make a final offer of employment to a safety-sensitive position to an appointee if he or she:

- (a) Refuses to take the required drug test; or
- (b) Has a confirmed positive drug test result.

3907.3 A person described in section 3907.2 of this section shall not reapply for appointment to a safety-sensitive position with the District government for a period of one (1) year from the date of his or her refusal to take the required drug test or the date of the confirmed positive test result, as applicable.

3907.4 A District government employee who is terminated for any of the events described in section 3907.1 of this section shall be denied subsequent appointment to a safety-sensitive position with the District government for a period of one (1) year from the date of any of these events.

**3908 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – REASONABLE SUSPICION REFERRALS**

3908.1 The immediate supervisor or manager of an employee occupying a safety-sensitive position shall make a reasonable suspicion referral for testing of an employee in a safety-sensitive position when there is a reasonable suspicion that the employee is under the influence of illegal drugs or alcohol to the extent that the employee is too impaired to perform his or her duties.

3908.2 Prior to contacting the appropriate personnel authority to make a referral under this section, the supervisor or manager shall:

- (a) Have probable cause or reasonable suspicion that the employee is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired;
- (b) Gather all information and facts to support this suspicion; and
- (c) Receive a second opinion from another supervisor or manager.

3908.3 A reasonable suspicion referral may be based on direct observation of illegal drug use or possession, physical symptoms of being under the influence of illegal drugs, or intoxicated by alcohol, a pattern of erratic behavior, work performance indicators of drug or alcohol abuse, as well as any other reliable indicators.

3908.4 Testing resulting from a reasonable suspicion referral shall be conducted as specified in sections 3905 and 3906 of this chapter.

**3909 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – REQUIRED TRAINING**

3909.1 Agencies with safety-sensitive positions shall be responsible for providing training in drug abuse detection and recognition; documentation; intervention; and any other appropriate topics, for supervisors and managers in agencies with covered employees.

**3910 MANDATORY DRUG AND ALCOHOL TESTING FOR SAFETY-SENSITIVE POSITIONS – RECORD KEEPING AND CONFIDENTIALITY**

3910.1 All matters relating to test results and applicants for employment and covered employees involved shall be confidential. All records relating to alcohol and drug testing shall be kept by the appropriate personnel authority in a place apart from employment applications or employees' official personnel folders.

3910.2 The results of a random test shall not be turned over to any law enforcement agency without the subject's written consent.

**3999 DEFINITIONS**

3999.1 When used in this chapter, the following terms shall have the meaning ascribed:

**Alcohol** – for the purposes of sections 3901 through 3910 of this chapter, the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols in methyl and isopropyl alcohol, no matter how it is packaged or in what form the alcohol is stored, utilized or found.

**Applicant** – for the purposes of sections 3901 through 3910 of this chapter, a person who has filed a resume or written application for District government employment in a safety-sensitive position.

**Appointee** – for the purposes of sections 3901 through 3910 of this chapter, a person who has been made a tentative offer of appointment with the District government in a safety-sensitive position.

**Breathalyzer/Evidential Breath Testing Device (EBT)** – for the purposes of sections 3901 through 3910 of this chapter, method for measuring the level of alcohol present in an individual.

**Children** – for the purposes of sections 3901 through 3910 of this chapter, persons twelve (12) years of age and under.

**Days** – calendar days, unless otherwise specified.

**Drugs** – for the purposes of sections 3901 through 3910 of this chapter, illegal drugs for which tests are required under 49 C.F.R. part 40, such as marijuana, cocaine, amphetamines, phencyclidine (PCP), and opiates; but not authorized prescription medications.

**Enzyme-Multiplied-Immunoassay Technique (EMIT)** – for the purposes of sections 3901 through 3910 of this chapter, initial method that is used to test for drugs in urine samples.

**Gas chromatography mass spectrometry (GCMS) methodology** – for the purposes of sections 3901 through 3910 of this chapter, the only authorized confirmation-testing method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.

**Personnel authority** – a person or entity with the authority to administer all or part of a personnel management program as provided in Title IV of the CMPA (D.C. Official Code § 1-604.01 *et seq.*) (2001).

**Post-accident employee** – for the purposes of sections 3901 through 3910 of this chapter, a District government employee in a safety-sensitive position who, while on duty, is involved in a vehicular or other type of accident resulting in personal injury or property damage, or both, in which the cause of the accident could reasonably be believed to have been the result, in whole or in part, from the use of drugs or alcohol on part of the employee.

**Probable cause** – for the purposes of sections 3901 through 3910 of this chapter, a reasonable belief by a supervisor that an employee in a safety-sensitive position is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired.

**Random testing** – for the purposes of sections 3901 through 3910 of this chapter, drug or alcohol testing conducted on a District government employee in a safety-sensitive position at an unspecified time for purposes of determining whether the employee has used drugs or alcohol and, as a result, is unable to satisfactorily perform his or her employment duties.

**Reasonable suspicion** – for the purposes of sections 3901 through 3910 of this chapter, a reasonable belief by a supervisor that an employee in a safety-sensitive position is under the influence of an illegal drug or alcohol to the extent that the employee's ability to perform his or her job is impaired.

**Reasonable suspicion referral** – for the purposes of sections 3901 through 3910 of this chapter, referral of an employee in a safety-sensitive position for testing by the District government for drug or alcohol use.

**Safety sensitive position** – for the purposes of sections 3901 through 3910 of this chapter, a position with duties and responsibilities that require the incumbent to provide services that affect the health, safety, and welfare of children and youth, including direct care and custody of children and youth, including but not limited to the duties and responsibilities listed in section 3903.1 (a) through (t) of this chapter.

**Subordinate agency** – any agency under the direct administrative control of the Mayor, including, but not limited to, the agencies listed in section 301 (q) of the CMPA (D.C. Official Code § 1-603.01 (17)) (2001).

**Youth** – for the purposes of sections 3901 through 3910 of this chapter, persons between thirteen (13) and seventeen (17) years of age, inclusive.

Comments on these proposed regulations should be submitted, in writing, to Ms. Lisa R. Marin, SPHR, Director, D.C. Office of Personnel, 441 4<sup>th</sup> Street, NW, Suite 300 South, Washington, D.C. 20001, within thirty (30) days of the date of the publication of this notice. Additional copies of these proposed rules are available from the above address.

## DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION

## NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Director of the District of Columbia Department of Transportation, pursuant to the authority of Section 7 of the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, effective February 15, 2005 (D.C. Act 16-43), or any substantially identical successor legislation ("Act"); Mayor's Order 2005-34 (February 22, 2005); Section 3(b) of the Department of Transportation Establishment Act of 2002, effective May 21, 2002 (D.C. Law 14-137; D.C. Official Code § 50-921.02(b)); and Mayor's Order 2003-11 (January 16, 2003), hereby gives notice of the adoption on an emergency basis of an amendment to Title 24, "Public Space and Safety," by adding a new Chapter 26. The new chapter will require that any carrier engaged in the transportation of certain ultra-hazardous materials within 2.2 miles of the United States Capitol obtain an Ultra-Hazardous Materials Transport Permit. The chapter further describes the permit application procedures; outlines enforcement and adjudication provisions; and establishes a schedule of fines associated with violations of the Act, chapter, and permit.

This emergency action is based on the threat of a terrorist attack near the U.S. Capitol through the use of extremely large shipments of ultra-hazardous materials transported by motor vehicle or rail car. The emergency rulemaking, which redirects the ultra-hazardous materials away from the Capitol via practical alternative routes and allows for the issuance of permits authorizing such shipment in special cases, is necessary for the immediate protection of the public health and justifies emergency action.

This emergency rulemaking was adopted on March 18, 2005, and became effective immediately on that date. However, the emergency rulemaking will not apply to rail carriers until April 11, 2005, and will not apply to motor vehicle carriers until certain issues regarding preemption are resolved.

The Director also gives notice of intent to take final rulemaking action to adopt this rulemaking in not less than thirty (30) days from the date of publication of this notice in the D.C. Register.

The emergency rulemaking will expire on July 16, 2005, or upon publication of a Notice of Final Rulemaking in the D.C. Register, whichever occurs first.

TITLE 24 DCMR, Public Space and Safety, is amended by adding a new Chapter 26 to read as follows:

**CHAPTER 26                    TRANSPORTATION OF ULTRA-HAZARDOUS MATERIALS****2600                            ULTRA-HAZARDOUS MATERIALS TRANSPORT PERMIT**

2600.1 Except as provided in § 2600.4, no carrier shall move a rail car or motor vehicle containing any of the following within the Capitol Exclusion Zone without an Ultra-Hazardous Materials Transport Permit issued by the Department:

- (a) Explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 kilograms;
- (b) Flammable gasses of Class 2, Division 2.1, as designated in 49 C.F.R. § 173.2, in a quantity greater than 10,000 liters;
- (c) Poisonous gasses of Class 2, Division 2.3, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.116; or
- (d) Poisonous materials, other than gasses, of Class 6, Division 6.1, in a quantity greater than 1,000 kilograms, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.133.

2600.2 Except as provided in § 2600.4, no carrier shall move a rail car or motor vehicle within the Capitol Exclusion Zone without a Hazardous Materials Transport Permit issued by the Department that:

- (a) Is capable of containing explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 kilograms, and has exterior placarding or other markings indicating that it contains such materials;
- (b) Is capable of containing flammable gasses of Class 2, Division 2.1, as designated in 49 C.F.R. § 173.2, in a quantity greater than 10,000 liters, and has exterior placarding or other markings indicating that it contains such materials;
- (c) Is capable of containing poisonous gasses of Class 2, Division 2.3, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.116, and has exterior placarding or other markings indicating that it contains such materials; or
- (d) Is capable of containing poisonous materials, other than gasses, of Class 6, Division 6.1, in a quantity greater than 1,000 kilograms, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.133, and has exterior placarding or other markings indicating that it contains such materials.

2600.3 There shall be two (2) types of Ultra-Hazardous Materials Transport Permits:

- (a) Single-trip permit: Covers a one-time movement by a carrier of:
- (1) Ultra-hazardous material by rail car(s) or motor vehicle(s) within the Capitol Exclusion Zone; or
  - (2) Ultra-hazardous material by empty rail car(s) or motor vehicle(s) within the Capitol Exclusion Zone.
- (b) Annual permit: Covers for one (1) year:
- (1) Recurring movements within the Capitol Exclusion Zone by a carrier of an ultra-hazardous material moved from the same point of origination to the same point of termination; or
  - (2) All movements within the Capitol Exclusion Zone by a carrier of empty rail cars or motor vehicles, provided the carrier shall present documentation upon request by the Director or his designated representative sufficient to verify the empty rail cars or motor vehicles.

2600.4 No carrier shall be required to obtain an Ultra-Hazardous Materials Transport Permit if the Director has declared an emergency.

**2601 ULTRA-HAZARDOUS MATERIALS TRANSPORT PERMIT APPLICATION PROCEDURES**

2601.1 The carrier shall complete a permit application for an Ultra-Hazardous Materials Transport Permit provided by the Public Space Management Administration.

2601.2 In addition to such other information as the Public Space Management Administration may request, the permit application for an Ultra-Hazardous Materials Transport Permit shall include the following information:

- (a) Type of ultra-hazardous material to be moved within the Capitol Exclusion Zone;
- (b) Whether a rail car or motor vehicle will move the ultra-hazardous material within the Capitol Exclusion Zone;
- (c) Route of the rail car or motor vehicle moving the ultra-hazardous material, including points of origination and termination;
- (d) Statement and supporting documentation explaining why there is no practical alternative route that can be used to move the ultra-hazardous material;
- (e) Emergency contact information; and
- (f) Statement establishing that by signing the application, the carrier attests that the information provided on the application is true and complete.

2601.3 The carrier shall submit the completed Ultra-Hazardous Materials Transport Permit application to the Public Space Management Administration.

2601.4 After review and analysis of the information provided on the completed Ultra-Hazardous Materials Transport Permit application and upon receipt of the appropriate permit fee, the Director may:

- (a) Issue a permit upon a demonstration that there is no practical alternative route; or
- (b) Deny the permit.

2601.5 If the Director denies the permit application, the carrier may appeal the Director's denial by filing a request for a hearing with the Office of Administrative Hearings within fifteen (15) days after the Director's denial was issued.

2601.6 If the Ultra-Hazardous Materials Transport Permit is denied by the Director, the carrier may request that the Director reconsider the permit application. A request for reconsideration shall not act to stay the time for filing a request for hearing under § 2601.5.

2601.7 The Ultra-Hazardous Materials Transport Permit shall expire:

- (a) Single-trip permit: Seven (7) days after the designated date of movement of the ultra-hazardous material;

- (b) Annual permit: Three hundred sixty-five (365) days after the date of issuance.

2601.8 The Ultra-Hazardous Materials Transport Permit fee shall be:

- (a) Single-trip permit: Three hundred dollars (\$300);
- (b) Annual permit: One thousand dollars (\$1,000).

**2602 ENFORCEMENT AND ADJUDICATION**

2602.1 An enforcement action for any violation of the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit shall be commenced with a written Notice of Violation (NOV) issued to any person deemed appropriate by the Director.

2602.2 The NOV shall be in the form prescribed by the Director and shall contain:

- (a) The name and address of the respondent;
- (b) A citation to the law or rule that the respondent allegedly violated;
- (c) The nature, time, and place of the violation;
- (d) The amount of the penalty applicable to the violation;
- (e) Notification that the penalty must be paid within fifteen (15) days from the date of service of the NOV; and
- (f) A statement explaining that the respondent has a right to request a hearing on the violation charged in the NOV; and
- (g) The procedure by which the respondent may request a hearing on the violation charged in the NOV.

2602.3 The Director shall effect service of the NOV on a respondent by one of the following methods:

- (a) Personal service on the respondent or respondent's agent;
- (b) Delivering the NOV to the last known home or business address of the respondent or respondent's agent and leaving it with a person over the age of sixteen (16) years old residing or employed therein; or

- (c) Mailing the NOV to the last known home or business address of the respondent or respondent's agent. For purposes of this section, "respondent's agent" means a general agent, employee, or attorney of the respondent.

2602.4 A respondent shall answer the NOV in accordance with this section within fifteen (15) days from the date of service of the NOV. In response to an NOV, a respondent shall do the following:

- (a) Admit the violation and enclose the amount of the fine stated on the NOV by use of a personal check, company check, certified check, cashier's check, postal money order, or bank money order made payable to the order of the District of Columbia Treasurer; or
- (b) Deny the commission of the violation and request a hearing to contest the violation.

2602.5 If a respondent has been served an NOV and fails, without good cause, to answer within fifteen (15) days from the date of service, the respondent shall be liable for the penalty applicable to the violation.

2602.6 Upon receipt of a respondent's answer denying the commission of a violation and requesting a hearing, the Director shall commence a case before the Office of Administrative Hearings and that case shall be adjudicated pursuant to the regulations of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code § 2-1821 *et seq.*).

## 2603 SCHEDULE OF FINES

2603.1 Any person found in violation of the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit shall be subject to penalties in accordance with the following schedule:

- (a) First offense: Ten thousand dollars (\$10,000);
- (b) Subsequent offenses: Twenty-five thousand dollars (\$25,000).

2603.2 Each violation shall be treated separately. When the violation is a continuing one, each day of the violation constitutes a separate offense.

2603.3 The Director may temporarily suspend or revoke an Ultra-Hazardous Materials Transport Permit when it can be demonstrated that a carrier has violated the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit.

2603.4 If any person fails to pay any penalty, costs, or interest due as the result of any violation of the Act, this chapter, or any condition of an Ultra-Hazardous Materials Transport Permit, the Director may use any method described in section 8(f) of the Litter Control Administration Act of 1985, effective March 6, 2002 (D.C. Law 14-78; D.C. Official Code § 8-807(f)) (2004 Supp.) to obtain payment.

**2604 APPLICABILITY**

2604.1 Beginning on April 11, 2005, this chapter shall apply to carriers who own locomotives used in providing transportation of ultra-hazardous materials.

2604.2 This chapter shall not apply to a carrier who owns a motor vehicle (excluding the trailer) used in providing transportation of ultra-hazardous materials until thirty (30) days after:

- (a) A court or Federal agency with jurisdiction has determined that the Act is not preempted by 49 U.S.C. § 5125 or 49 C.F.R. § 397.69;
- (b) The Director certifies that the criteria listed in 49 C.F.R. § 397.71 have been met; or
- (c) A waiver of preemption has been granted pursuant to 49 C.F.R. §§ 397.213 and 397.219.

**2699 DEFINITIONS**

2699.1 When used in this chapter, the following terms and phrases shall have the meanings ascribed below:

**Act** – the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, effective February 15, 2005 (D.C. Act 16-43), or any substantially identical successor legislation.

**Capitol Exclusion Zone** – all points within 2.2 miles of the United States Capitol building, except for land located beyond the geographic boundaries of the District of Columbia.

**Carrier** – the person who owns the locomotive or motor vehicle (excluding the trailer) used in providing transportation of ultra-hazardous materials.

**C.F.R.** – Code of Federal Regulations.

**Department** – the District of Columbia Department of Transportation.

**Director** – the Director of the District of Columbia Department of Transportation.

**District** – the District of Columbia.

**Emergency** – an unanticipated, temporary situation that threatens the immediate safety of individuals or property.

**Empty Rail Car or Motor Vehicle** – A rail car or motor vehicle that is capable of containing ultra-hazardous material, has exterior placarding or other markings indicating that it contains such material, and contains less than one percent (1%) by capacity or volume of any ultra-hazardous material.

**Motor Vehicle** – any vehicle propelled by internal-combustion engine, electricity, or steam, other than a vehicle designed to run only on rails or tracks, that is intended or used for moving freight, merchandise, or other commercial loads or property. A motor vehicle shall include any trailer attached to the motor vehicle.

**Person** – an individual, corporation, company, firm, agency, association, partnership, organization, or commercial entity. The term also includes a trustee, receiver, assignee, personal representative, or authorized agent thereof.

**Practical Alternative Route** – a route that lies entirely outside of the Capitol Exclusion Zone and whose use would not make movement of ultra-hazardous material cost-prohibitive.

**Public Space Management Administration** – an administration within the Department that is responsible for the issuance of public space permits, or any successor District government entity.

**Rail Car** – any vehicle without motor power that is intended or used for moving freight, merchandise, or other commercial loads or property on rails or tracks and is drawn by locomotive.

**Trailer** – a vehicle without motor power intended or used for carrying freight, merchandise, or other commercial loads or property and drawn or intended to be drawn by a motor vehicle, whether such vehicle without motor power carries the weight of the property wholly on its own structure or whether a part of such weight rests upon or is carried by a motor vehicle.

**Transportation** – movement of a rail car or motor vehicle within the Capitol Exclusion Zone.

**Ultra-Hazardous Material** – explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 kilograms; flammable gasses of Class 2, Division 2.1, as designated in 49 C.F.R. § 173.2, in a quantity greater than 10,000 liters; poisonous gasses of Class 2, Division 2.3, as designated in 49 C.F.R. § 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.116; or poisonous materials, other than gasses, of Class 6, Division 6.1, in a quantity greater than 1,000 kilograms, and belonging to Hazard Zones A or B, as defined in 49 C.F.R. § 173.133.

**U.S.C.** – United States Code.

All persons interested in commenting on the subject matter of this proposed rulemaking action may file comments, in writing, with: Lars Etzkorn, Associate Director, District Department of Transportation, 2000 14th Street, N.W., 5th Floor, Washington, D.C. 20009. Comments must be received no later than thirty (30) days after the date of publication of this notice in the D.C. Register. Copies of this proposal may be obtained, at cost, by writing to the above address.