

MANDATORY TESTING FOR COMMUNICABLE DISEASES

TEXAS HEALTH & SAFETY CODE § 81.050; 25 TEX. ADMIN. CODE § 97.12.

Peace Officers and certain other persons who may have been exposed to a *reportable disease in the course of their duties* may request mandatory testing of the person who may have exposed them to the disease. H&S § 81.050(b).

Persons who may request mandatory testing:

1. Peace Officers;
2. Firefighters;
3. EMS/paramedics;
4. Correctional Officers;
5. Correctional Facility Contractors & Employees;
6. Juvenile Probation Department employees;
7. Any other emergency response employee;
8. Volunteers acting in any of these capacities.

H&S § 81.050(b); 25 TAC § 97.12(b).

These persons may request another to be tested, but they, themselves, cannot be required to be tested. H&S § 81.050(k).

COVID-19, a/k/a novel coronavirus, is a “reportable disease” or “notifiable condition.”

H&S § 81.003(8) (defining “reportable disease”);

25 TAC § 97.01(20) (“notifiable condition” is same as “reportable disease” in H&S Code Ch. 81);

DSHS, Notifiable Conditions, <https://dshs.texas.gov/idcu/investigation/conditions/> (listing “coronavirus, novel” as a notifiable condition that requires health professionals to “call immediately” to report the disease to their local or regional health department).

How to Request Mandatory Testing

Requestor must execute an affidavit that states:

1. Requestor was exposed in the course of employment/volunteer service;
2. Requestor believes the exposure places him or her at risk of the reportable disease; and that
3. “delineates the reasons for the request.” (Assert detailed facts; avoid conclusory assertions.)

H&S § 81.050(c); 25 TAC § 97.12(e).

Present the Affidavit to DSHS or its Designee

- There is no formal procedure for presenting the affidavit to the health authority.
H&S § 81.050(c).

Who is the Designated Health Authority?

- The Local Health Authority (LHA) will usually be the designee.
- If the county does not have an LHA, the HA is the DSHS Regional Director.
- If the LHA refuses to decide, the following may decide:
 - A licensed physician employed by the local health department who is responsible for the control of notifiable conditions; or
 - If there is no such physician employed by the county or municipal health department, then the DSHS Regional Director.

25 TAC § 97.12(d).

The Health Authority

1. Reviews the request; and
2. Informs the requestor whether the request meets the criteria for risk of infection.
H&S § 81.050(d); 25 TAC § 97.12(f).

Health Authority Administrative Order

If the HA issues an order for mandatory testing:

THE ORDER must:

1. State the grounds, provisions, and factual basis for the order;
2. Refer the source person to appropriate health care facilities for testing; and
3. Inform the source person of:
 - a. **The source person's right to refuse; and**
 - b. **The HA's authority to request a court order requiring the test.**

NOTICE: The HA must provide notice of the order to the source person that is:

1. Written;
2. Prompt; and
3. Confidential.

H&S § 81.050(e); 25 TAC § 97.12(f).

If the Source Refuses to Comply with the Administrative Order

1. HA may request
2. “the prosecuting attorney who represents the state in district court”
3. petition the district court for a hearing on the matter.
(The statute says the attorney “shall” petition the court.)

H&S § 81.050(f); 25 TAC § 97.12(f).

The Source’s Rights

1. Source has a right to an attorney;
2. The court shall appoint an attorney if the source can’t afford one;
3. Right to an attorney cannot be waived unless the source has consulted with an attorney.

H&S § 81.050(f); § 25 TAC 97.12(g).

District Court Hearing

1. Court reviews administrative order and determines:
 - a. whether exposure occurred; and, if so,
 - b. whether the exposure “presents a possible risk of infection as defined by department rule.”
2. State & Source may present evidence
3. Court issues order requiring counseling & testing of source or denies petition.
(Court may order court costs against requestor if no reasonable cause for request.)

H&S § 81.050(g) (emphasis added); 25 § TAC 97.12(h).

EVIDENTIARY STANDARD: As a “reportable disease,” the criteria for exposure to COVID-19 is whether “there has been an exposure via the usual mode of transmission [of COVID-19] as determined by the department or the local health authority.” 25 TAC § 97.11(c)(6).

BURDEN OF PROOF: Neither H&S § 81.050 nor 25 TAC § 97.12 state a B/P for the court hearing. Legal reasoning suggests that the B/P should be the same as other legal proceedings for obtaining a specimen by legal compulsion, such as a blood draw search warrant; thus, the standard should be probable cause (or “good cause,” or “reasonable cause” in civil terms) which is less than preponderance of the evidence.

ISSUE BEFORE THE COURT, therefore, is whether there is *probable cause* to conclude there was “*possible*” exposure “via the usual mode of transmission” as determined by the HA.

Test results: HA informs requestor and source of results, and need for medical follow-up, if applicable. H&S § 81.050(h); 25 TAC § 97.12(i).