

MAINE STATE LEGISLATURE

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121st MAINE LEGISLATURE

SECOND REGULAR SESSION-2004

Legislative Document

No. 1760

H.P. 1282

House of Representatives, December 22, 2003

An Act To Amend the Random Drug Testing Laws

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.

Received by the Clerk of the House on December 17, 2003. Referred to the Committee on Labor pursuant to Joint Rule 308.2 and ordered printed pursuant to Joint Rule 401.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative SAVIELLO of Wilton.
Cosponsored by Senator MARTIN of Aroostook and
Representatives: COWGER of Hallowell, JENNINGS of Leeds, MILLS of Farmington,
RICHARDSON of Brunswick, SMITH of Van Buren, THOMPSON of China, USHER of
Westbrook, WATSON of Bath.

Be it enacted by the People of the State of Maine as follows:

2 **Sec. 1. 26 MRSA §683, sub-§2.** as amended by PL 2001, c. 556,
4 §2, is further amended by amending the first paragraph to read:

6 **2. Written policy.** Before establishing any probable cause
substance abuse testing program, or, for an employer with fewer
8 than 50 employees, a random or arbitrary testing policy, an
employer must develop a written policy in compliance with this
10 subchapter providing for, at a minimum:

12 **Sec. 2. 26 MRSA §683, sub-§2, ¶B.** as amended by PL 1989, c.
14 832, §6, is further amended to read:

16 B. When substance abuse testing may occur. The written
policy must describe:

18 (1) ~~Which positions~~ For those employers with fewer
20 than 50 employees, which, if any, will be subject to
~~testing, including any positions subject to~~ random or
22 arbitrary testing under section 684, subsection 3,
paragraph B. For those employers with 50 or more
24 employees, if random or arbitrary testing is used, then
the policy must state that all employees are subject to
26 random or arbitrary testing under section 684,
subsection 3, paragraph C. For applicant testing and
28 probable cause testing of employees, an employer may
designate that all positions are subject to testing; and

30 (2) The procedure to be followed in selecting
employees to be tested on a random or arbitrary basis
32 under subsection 2-A and section 684, subsection 3;

34 **Sec. 3. 26 MRSA §683, sub-§2,** as amended by PL 2001, c. 556,
36 §2, is further amended by amending the last blocked paragraph to
read:

38 An employer must consult with the employer's employees in the
development of any portion of a probable cause substance abuse
40 testing policy or, for an employer with fewer than 50 employees,
a random or arbitrary testing policy under this subsection that
42 relates to the employees. An employer with 50 or more employees
shall abide by the random or arbitrary testing policy developed
44 pursuant to subsection 2-A. The employer is not required to
consult with the employees on those portions of a policy that
46 relate only to applicants. The employer shall send a copy of the
final written policy to the Department of Labor for review under
48 section 686. The employer may not implement the policy until the
Department of Labor approves the policy. The employer shall send

2 a copy of any proposed change in an approved written policy to
the Department of Labor for review under section 686. The
4 employer may not implement the change until the Department of
Labor approves the change.

6 **Sec. 4. 26 MRSA §683, sub-§2-A** is enacted to read:

8 2-A. Random or arbitrary testing policy development. If an
employer chooses to establish random or arbitrary testing, then,
10 in addition to complying with the requirements of subsection 2,
paragraphs C to L, the testing must conform to a policy developed
12 pursuant to this subsection.

14 A. The employer shall establish an employee committee
consisting of no fewer than 10 employees. The employee
16 committee must consist of a cross section of the positions
employed by that employer. The membership of the employee
18 committee must include a person from the medical profession,
including, but not limited to, an allopathic or osteopathic
20 physician, a registered or practical nurse or a nurse
practitioner. If there is not a medical person in the
22 employ of the employer, the employer shall obtain the
services of a person in the medical profession to be a
24 member of the employee committee created pursuant to this
paragraph.

26 B. The employee committee created pursuant to paragraph A
shall establish the policy for random or arbitrary testing.
28 The testing must apply to all employees, regardless of
position. The policy must state the frequency of the random
30 or arbitrary testing and the number of employees to be
tested each time.

34 C. The selection of employees for random or arbitrary
testing must be done by the Department of Labor from a list
36 of all the employees provided by the employer. The list may
not contain any information from which an employee may be
38 identified by the department.

40 D. The employer must submit the policy to the Department of
Labor for approval pursuant to section 686. The policy may
42 not be implemented until the department approves the
policy. Changes may be made to the policy only by the
44 employee committee and only after approval by the department.

46 This subsection applies only to those employees who are not
represented under a collective bargaining agreement and to those
48 employers with 50 or more employees.

2 **Sec. 5. 26 MRSA §683, sub-§3**, as amended by PL 1995, c. 324,
§5, is further amended to read:

4 **3. Copies to employees and applicants.** The employer shall
6 provide each employee with a copy of the written ~~policy probable~~
cause substance abuse testing and random or arbitrary testing
8 policies approved by the Department of Labor under section 686 at
10 least 30 days before any portion of ~~the~~ a written policy
12 applicable to employees takes effect. The employer shall provide
14 each employee with a copy of any change in a written policy
16 approved by the Department of Labor under section 686 at least 60
18 days before any portion of the change applicable to employees
20 takes effect. The Department of Labor may waive the 60-day
22 notice for the implementation of an amendment covering employees
24 if the amendment was necessary to comply with the law or if, in
the judgment of the department, the amendment promotes the
purpose of the law and does not lessen the protection of an
individual employee. If an employer intends to test an
applicant, the employer shall provide the applicant with a copy
of the written ~~policy--under--subsection--2~~ policies developed
pursuant to subsections 2 and 2-A before administering a
substance abuse test to the applicant. The 30-day and 60-day
notice periods provided for employees under this subsection do
not apply to applicants.

26 **Sec. 6. 26 MRSA §684, sub-§3**, as amended by PL 2001, c. 706,
§1, is further amended to read:

28 **3. Random or arbitrary testing of employees.** In addition
30 to testing employees on a probable cause basis under subsection
32 2, an employer may require, request or suggest that an employee
submit to a substance abuse test on a random or arbitrary basis
if ~~at least one of the following conditions is met:~~

34 A. The employer and the employee have bargained for
36 provisions in a collective bargaining agreement, either
before or after the effective date of this subchapter, that
38 provide for random or arbitrary testing of employees. A
random or arbitrary testing program that would result from
40 implementation of an employer's last best offer is not
considered a provision bargained for in a collective
42 bargaining agreement for purposes of this section; ~~or~~

44 B. The For employers with fewer than 50 employees, the
employee works in a position the nature of which would
46 create an unreasonable threat to the health or safety of the
public or the employee's ~~co-workers~~ coworkers if the
48 employee were under the influence of a substance of abuse.
It is the intent of the Legislature that the requirements of
50 this paragraph be narrowly construed; or

2 C. For employers with 50 or more employees, a written
4 random or arbitrary substance abuse testing policy has been
developed pursuant to section 683, subsection 2-A and
approved pursuant to section 686.

6 **Sec. 7. 26 MRSA §685, sub-§2, ¶A,** as amended by PL 1995, c.
8 324, §7, is further amended to read:

10 A. Subject to any limitation of the Maine Human Rights Act
12 or any other state law or federal law, an employer may use a
confirmed positive result or refusal to submit to a test as
a factor in any of the following decisions:

14 (1) Refusal to hire an applicant for employment or
16 refusal to place an applicant on a roster of
eligibility;

18 (2) Discharge of an employee, except as provided in
20 paragraph B;

22 (3) Discipline of an employee; or

24 (4) Change in the employee's work assignment.

26 **Sec. 8. 26 MRSA §685, sub-§2, ¶B,** as amended by PL 1989, c.
832, §12, is further amended to read:

28 B. Before taking any action described in paragraph A in the
30 case of an employee who receives an initial confirmed
positive result, an employer shall provide the employee with
32 an opportunity to participate for up to 6 months in a
rehabilitation program designed to enable the employee to
34 avoid future use of a substance of abuse and to participate
in an employee assistance program, if the employer has such
a program. The employer may take any action described in
36 paragraph A if the employee receives a subsequent confirmed
38 positive result from a test administered by the employer
under this subchapter.

40 **Sec. 9. 26 MRSA §686, sub-§3** is enacted to read:

42 **3. Selection of employees under random or arbitrary testing**
policy; fees. The department, upon receipt and approval of a
44 policy created pursuant to section 683, subsection 2-A, shall
participate in the selection of employees as required by section
46 683, subsection 2-A, paragraph C. The department shall assess
the employer a fee that offsets the cost to the department of
48 reviewing random or arbitrary testing policies and selecting
employees to be tested. The department shall set the fee by

2 routine technical rulemaking pursuant to Title 5, chapter 375,
3 subchapter 2-A.

4
6 **SUMMARY**

8 This bill amends the laws regarding substance abuse testing
9 of employees in the following ways.

10 1. It continues the discretion of the employer to require
11 random or arbitrary testing of employees but makes the following
12 changes:

14 A. If the employer has 50 or more employees and the
15 employer chooses to require random or arbitrary substance
16 abuse testing, then all employees of the employer who are
17 not covered under a collective bargaining agreement must be
18 subject to the random or arbitrary testing. Currently,
19 under the Maine Revised Statutes, Title 26, section 684,
20 subsection 3, only those employees who have bargained for
21 random or arbitrary substance abuse testing or those
22 employees who work "in a position the nature of which would
23 create an unreasonable threat to the health or safety of the
24 public or the employee's co-workers if the employee were
25 under the influence of a substance of abuse" are subject to
26 random or arbitrary testing. This provision remains true
27 for those employers with fewer than 50 employees;

28 B. For those employers with 50 or more employees, the
29 random or arbitrary substance abuse testing policy is
30 established by a committee consisting of at least 10
31 employees selected by the employer. The employees must be
32 from a cross-section of the positions employed by the
33 employer. The committee must have at least one member who
34 is a person in the medical profession, such as a physician
35 or nurse. If there is no such person employed by the
36 employer, then the employer must obtain the services of a
37 person in the medical profession to serve on the committee;

38 C. The committee establishes the frequency of testing and
39 the number of employees to be tested;

40 D. The Department of Labor chooses the employees to be
41 tested from a list of all employees provided by the
42 employer. The list provided to the department does not
43 contain any information that would allow the department to
44 identify a specific employee;

45 E. The policy must be submitted to the Department of Labor
46 and approved by the department prior to implementation; and
47
48
49
50

2 F. The Department of Labor is required to charge the
4 employer a fee to offset the costs of the department in
6 administering the random or arbitrary substance abuse
testing program.

8 2. It clarifies that an employee who fails a substance
10 abuse test for the first time can not be discharged but must be
given the opportunity to participate in the employee assistance
program, if there is one, and a rehabilitation program.