

MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 5, 1983

Honorable Dennis L. Dutremble
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Dutremble:

You have asked whether Legislative Document No. 682 "AN ACT Relating to Payment by an Employer when a Physician's Certification of Illness is Required," of the 111th Legislature, which would require an employer to bear the expense of a "physician's certificate" which he may require of an employee in order that the employee may return to work, is necessary in light of 26 M.R.S.A. § 592. It is the opinion of this Department that 26 M.R.S.A. § 592 as currently written applies to any employee who may be required by the employer to undergo a physical examination for any purpose. The "examination" referred to in 26 M.R.S.A. § 592 must be read to include any sort of certificate of good health or physician's certificate which may be required by an employer for an employee to return to work.

26 M.R.S.A. § 592 currently provides,

"It shall be unlawful for any employer to require any employee or accepted applicant for employment to bear the medical expense of an examination when such examination is ordered or required by the employer."

The clear language of this section leaves no doubt that it applies both to newly hired employees and to any other employees who may be required by the employer to undergo a medical examination. The language of the section, "...any employee or accepted applicant...", could mean nothing other

than that the section applies to any employee whether newly hired or existing. The language also makes it clear that it is the fact that the employer "ordered or required" the examination which is relevant and not the purpose for which the examination is used.

Beyond this, an examination of the relevant legislative history of this section, though meager, removes any lingering doubt. The Legislative Record of the House, dated April 29, 1949, shows some debate on the bill entitled "AN ACT Forbidding Employers to charge a fee for a medical examination as condition of employment." Legislative Document No. 633, 94th Maine Legislature, which became 26 M.R.S.A. § 592. In that debate, Rep. Sharpe, of Anson, spoke against the bill on the ground that it would require expenses of employers which he thought would be better paid by employees. In response, Rep. Brown of Baileyville, who served on the Labor Committee from which the bill was reported, noted that the bill in no way compels an employer to require medical exams. After noting his opposition generally to requiring of such medical examinations, he stated specifically that:

"If an employer sees fit and wants his employees to be examined physically, whether it be on application for a job or at intervals while he is holding the job, then he should bear that responsibility." 1949 Maine Legislative Record at 1906-07.

It thus appears that the legislative intent behind 26 M.R.S.A. § 592 was consistent with its plain language: if employers require medical examinations to be given, they should bear the expense of such examinations both of new hires and of existing employees.

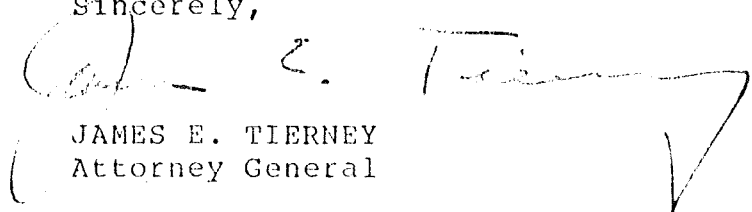
A comparison of similar statutes in other states confirms this conclusion. A similar statutory requirement is found in Massachusetts (M.G.L.A. c. 149, Sec. 158B) and New York (N.Y. Labor Law Sec. 201-6). The Massachusetts law is not substantially different from the language found in the Maine statute and was approved on the identical date that the legislative debate on the Maine statute quoted above occurred. The New York statute is specifically and clearly limited to the cost of medical examinations for new hires, and there is no question that it does not apply to medical examinations for continuing employees. The language specifically limiting the New York statute to new hires, however, is significantly absent from both the Massachusetts and the Maine statutes. Therefore, if the specific language of the New York statute is to be given any meaning, then the absence of such language in Maine and

Massachusetts statutes suggest that the latter statutes must be read to be broader than the New York statute and encompass examinations of existing employees as well as new hires.

The only remaining question is your concern that the word "examination" may not encompass a physician's certificate which an employer may require. Such a distinction would fly in the face of common sense. Any writing by a physician to certify the health of an employee has to be based on at least a cursory examination of some sort. Because 26 M.R.S.A. § 592 specifies that the cost of an examination must be borne by the employer if the employer requires the examination, a physician's certification of the employee's health would come within the scope of the statute. It is noteworthy that 26 M.R.S.A. § 592 does not indicate the extent of the examination and therefore applies to any examination conducted by a physician. Therefore, since a physician could not render a certificate which was not based on an examination without committing some sort of malfeasance,^{1/} the cost of obtaining such a certificate must, under the statute, fall on the employer.

I hope the foregoing answers your questions. Please feel free to inquire again if further clarification is necessary.

Sincerely,


JAMES E. TIERNEY
Attorney General

JET/cl

^{1/} To quote Justice Cardozo:

"It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275, 276 (1922).