

# MAINE STATE LEGISLATURE

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1 FIRST REGULAR SESSION  
2

3 ONE HUNDRED AND THIRTEENTH LEGISLATURE  
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5 Legislative Document

No. 105  
6

7 S.P. 54

In Senate, January 27, 1987  
8

9 Reported by Senator TUTTLE of York for the Maine  
Commission to Examine Chemical Testing of Employees pursuant to  
10 Resolves of 1985, c. 86 and Ordered Printed pursuant to Joint  
Rule 18.

JOY J. O'BRIEN, Secretary of the Senate

11  
12 STATE OF MAINE  
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14 IN THE YEAR OF OUR LORD  
15 NINETEEN HUNDRED AND EIGHTY-SEVEN  
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17 AN ACT to Ensure Confidential and Reliable  
18 Substance Abuse Testing of Employees.  
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20 Be it enacted by the People of the State of Maine as  
21 follows:

22 26 MRSA §595 is enacted to read:

23 §595. Substance abuse testing of employees

24 1. Definitions. As used in this section, unless  
25 the context otherwise indicates, the following terms  
26 have the following meanings.

27 A. "Applicant" means a person seeking employment  
28 from an employer. The term includes a person  
29 seeking to use an employment agency's services.

1 B. "Employee" means a person who is permitted,  
2 required or directed by an employer to engage in  
3 any employment for direct gain or profit.

4 C. "Employer" means a person, partnership, cor-  
5 poration, association or other legal entity, pub-  
6 lic or private, which employs one or more employ-  
7 ees. The term includes an employment agency.

8 D. "Law enforcement agency" has the same meaning  
9 as found in Title 25, section 3701, subsection 1.

10 E. "Negative test result" means a test result  
11 which indicates that:

12 (1) A substance of abuse is not present in  
13 the tested sample; or

14 (2) A substance of abuse is present in the  
15 tested sample in a concentration below the  
16 cut-off level.

17 F. "Positive test result" means a test result  
18 which indicates the presence of a substance of  
19 abuse in the tested sample above the cut-off lev-  
20 el of the test.

21 (1) "Confirmed positive result" means a  
22 confirmation test result which indicates the  
23 presence of a substance of abuse above the  
24 cut-off level in the tested sample.

25 G. "Substance abuse test" means any test proce-  
26 dure designed to take and analyze body fluids or  
27 materials from the body for the purpose of de-  
28 tecting the presence of substances of abuse. The  
29 term does not include tests designed to determine  
30 blood-alcohol concentration levels from a sample  
31 of an individual's breath.

32 (1) "Screening test" means a substance  
33 abuse test that is reliable within known  
34 tolerances and which is used as a prelimi-  
35 nary step in detecting the presence of sub-  
36 stances of abuse.

1                   (2) "Confirmation test" means a substance  
2                   abuse test that uses a  
3                   scientifically-recognized method capable of  
4                   providing quantitative data specific to the  
5                   substance of abuse detected. A confirmation  
6                   test used on a sample which resulted in a  
7                   positive screening test result must use a  
8                   method more reliable than the screening test  
9                   used to test that sample.

10                   H. "Substance of abuse" means any scheduled  
11                   drug, alcohol or other drug, or any of their  
12                   metabolites.

13                   (1) "Alcohol" has the same meaning as found  
14                   in Title 28, section 2, subsection 1.

15                   (2) "Drug" has the same meaning as found in  
16                   Title 32, section 2805, subsection 4.

17                   (3) "Scheduled drug" has the same meaning  
18                   as found in Title 17-A, section 1101, sub-  
19                   section 11.

20                   2. Testing procedures. No employer may require,  
21                   request or suggest that any employee or applicant  
22                   submit to a substance abuse test, except as provided  
23                   in this subsection.

24                   A. Before establishing any substance abuse test-  
25                   ing program, an employer must develop a written  
26                   policy governing the following:

27                   (1) When substance abuse testing may occur;

28                   (2) Collection of samples;

29                   (3) Chain of custody of samples sufficient  
30                   to protect the sample from being tampered  
31                   with and to verify the identity of each sam-  
32                   ple and test result;

33                   (4) The cut-off level at which the presence  
34                   of a substance of abuse in a sample is con-  
35                   sidered a positive test result;

36                   (5) Consequences of a confirmed positive  
37                   result;

1                   (6) Consequences for refusal to submit to a  
2                   substance abuse test; and

3                   (7) To what extent an employee or applicant  
4                   who requests a sample to be tested on his  
5                   own must share the results of the test with  
6                   the employer.

7                   B. The employer shall provide each employee and  
8                   applicant with a copy of the written policy under  
9                   paragraph A.

10                  C. The employer shall obtain and handle samples  
11                  according to the written policy under paragraph  
12                  A.

13                  D. At the request of the employee or applicant  
14                  at the time the test sample is taken, the employ-  
15                  er shall make available to the employee or appli-  
16                  cant tested a portion or portions of the sample  
17                  for that person's own testing. The employee or  
18                  applicant shall pay the costs of the additional  
19                  test.

20                  E. The employer shall promptly provide a legible  
21                  copy of the laboratory report to the employee or  
22                  applicant tested. The laboratory report shall,  
23                  at a minimum, state:

24                   (1) The name of the laboratory which con-  
25                   ducted the test or tests;

26                   (2) The type or types of test conducted,  
27                   both for screening and for confirmation;

28                   (3) The results of each test;

29                   (4) The sensitivity or cut-off level of the  
30                   confirmation test; and

31                   (5) Any available information concerning  
32                   the margin of accuracy and precision of the  
33                   quantitative data reported for the confirma-  
34                   tion test.

35                  In the case of a negative test result, the report  
36                  shall specify only that the test was negative for  
37                  the particular substance.

1 F. The employer shall pay the costs of all sub-  
2 stance abuse tests to which he requires, requests  
3 or suggests an employee or applicant to submit.  
4 The employee or applicant shall pay the costs of  
5 any additional substance abuse tests.

6 3. Use of test results. An employer's use of  
7 substance abuse test results is limited as provided  
8 in this subsection.

9 A. Only a confirmed positive result may be used  
10 by an employer who desires to use the results of  
11 a substance abuse test as a factor in any of the  
12 following decisions:

13 (1) Refusal to hire an applicant for em-  
14 ployment;

15 (2) Discharge of a current employee;

16 (3) Discipline of a current employee;

17 (4) Determination of qualification for a  
18 promotion or change in work assignment; or

19 (5) Determination of qualification to re-  
20 ceive any employment benefit.

21 B. An employer may not convey the results of any  
22 substance abuse test to any law enforcement agen-  
23 cy.

24 4. Home rule authority preempted. No municipal-  
25 ity may enact any ordinance concerning an employer's  
26 use of substance abuse tests.

27 5. Violation; penalty. Any employer who vio-  
28 lates this section commits a civil violation for  
29 which a forfeiture of not less than \$100 nor more  
30 than \$500 may be adjudged.

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STATEMENT OF FACT

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This bill is the legislation suggested by the Minority of the Maine Commission to Examine Chemical Testing of Employees, created by Resolves 1985, chapter 86. The reasons for the introduction of this bill, as well as the text of the entire Minority Report, are found in the Report of the Maine Commission to Examine Chemical Testing of Employees.

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The bill permits employers to use substance abuse testing provided that they follow certain safeguards that guarantee, to the greatest extent possible, accuracy and confidentiality.

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"Substance of abuse" is defined as including alcohol, scheduled drugs and other drugs, as well as their metabolites.

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The bill defines "substance abuse test" as a procedure that analyzes fluids or other materials from the body to determine if substances of abuse are present in the body of the person tested, indicating that the person used that substance sometime in the past. The term does not include breathalyzers or other tests used to determine blood-alcohol concentration levels from a sample of an individual's breath. This is because the breath tests are universally recognized as an accurate and noninvasive means of testing present alcohol impairment. The bill recognizes 2 levels of substance abuse tests: "Screening tests" and "confirmation tests." A screening test must be accurate within a known margin of error. It is usually used as a preliminary step in testing for substances. An employer may not use the result of a screening test as a factor in certain employment decisions. A confirmation test is usually performed on the sample after the screening test has indicated a positive result. A confirmation test must use a scientifically-recognized method capable of providing quantitative data about the specific substance tested for. That is, the confirmation test must be of higher accuracy than the screening test, and must be able to indicate specific levels of the substance of abuse in the sample.

1           In order to clarify when a substance abuse test  
2 result may be used for an employment decision, the  
3 bill clearly defines both "positive test result" and  
4 "negative test result." A negative test result oc-  
5 curs when the test shows that the sample contains  
6 none of the substance tested for, or an amount of  
7 that substance below the cut-off level set by the em-  
8 ployer or testing laboratory. A positive test result  
9 indicates that the substance is present in the sample  
10 above the cut-off level. A "confirmed positive re-  
11 sult" means that the sample was subjected to a con-  
12 firmation test, which also produced a positive re-  
13 sult.

14           The bill allows the use of substance abuse tests  
15 if the employer develops a written policy concerning  
16 specific aspects of testing. The required aspects of  
17 the policy are intended to enhance the accuracy and  
18 fairness of a workplace testing program. The policy  
19 must specify when testing may occur, such as "for  
20 cause," at random, periodically, workforce-wide,  
21 preemployment, etc. The policy must describe how sam-  
22 ples will be collected, including when an observer  
23 will be required to eliminate the possibility of tam-  
24 pering or diluting samples. The policy must indicate  
25 how the employer, and any laboratory used by the em-  
26 ployer, protects each sample from tampering and en-  
27 sures the identity of each sample. The employer must  
28 state in the policy at what level the cut-off point  
29 is set to determine when a sample is positive. If a  
30 laboratory is used, the laboratory may set the cut-  
31 off level, but the employer must provide that infor-  
32 mation in the policy. Too high a cut-off level will  
33 allow true positive results to be treated as negative  
34 results, while a cut-off level that is too low will  
35 include some true negatives to be considered as posi-  
36 tive results.

37           The employer's policy must explain what may or  
38 will happen when an employee or applicant tests posi-  
39 tive in a confirmation test. If discretion will be  
40 used in each case, the policy must state that fact.  
41 The policy must also indicate the consequences that  
42 an employee or applicant faces when he refuses to  
43 submit to a substance abuse test.



1           The employer's policy must also describe the extent to which an employee or applicant must share the results of a test he has commissioned with the portion of the sample provided by the employer. The policy may require documentation and chain of custody as required when the employer is responsible for the testing.

8           The employer must provide a copy of the written policy to every employee and applicant.

11          If the employee or applicant requests, at the time the sample is to be taken, the employer shall make available to the employee one or more portions of the sample to be tested so that the employee or applicant can have his own tests made. Any tests run on a sample provided to the employee or applicant shall be paid for by the employee or applicant. The employer shall bear the costs of all tests to which he requires, requests or suggests an employee submit, as a condition considered in certain employment decisions. The bill requires that the employer promptly provide a detailed copy of the test results to the employee or applicant tested so that the employee or applicant will know all the substance abuse test evidence on which the employer may base an employment decision.

26          An employer may use the results of substance abuse tests as factors in employment decisions. The test result used must be a confirmed positive result when the employment decision made by the employer is:

- 30           1. Refusal to hire an applicant;
- 31           2. Discharge of a current employee;
- 32           3. Discipline of a current employee;
- 33           4. Determination of qualification for a promotion or change in work assignment; or
- 34           5. Determination of qualification to receive any employment benefit.

37          Because the decisions are so important, the accuracy of the test result must be as high as possible.

1 If a test result is used, it must be confirmed so  
2 that it satisfies that need.

3 Because confidentiality is very important in sub-  
4 stance abuse programs, the bill prohibits employers  
5 from conveying substance abuse test results to any  
6 law enforcement agency. This will ensure that the  
7 employer does not operate in the sphere of law en-  
8 forcement.

9 The bill provides that a municipality may not  
10 adopt an ordinance governing substance abuse testing,  
11 whether it be stricter or more lax than this law.

12 An employer who violates this section is civilly  
13 liable and the forfeiture may range from \$100 to  
14 \$500.

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