

MAINE STATE LEGISLATURE

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(EMERGENCY)
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(New Title)
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No. 1400

S.P. 457

In Senate, April 30, 1987

Reported by Report A for the Committee on Labor and printed under Joint Rule 2. Original Bill submitted by the Maine Commission to Examine Chemical Testing of Employees pursuant to Resolves of 1985, c. 86.

JOY J. O'BRIEN, Secretary of the Senate

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-SEVEN

1 **AN ACT to Ensure Confidential and Reliable**
2 **Substance Abuse Testing of Employees**
3 **and Applicants and the Rehabilitation**
4 **of Substance Abusing Employees.**
5

6 **Emergency preamble.** Whereas, Acts of the Legis-
7 lature do not become effective until 90 days after
8 adjournment unless enacted as emergencies; and

9 Whereas, many employers in the State have already
10 instituted substance abuse testing programs in their
11 workplaces and many others are apparently planning to
12 begin such testing in the near future; and

1 Whereas, workplace substance abuse testing pro-
2 grams raise grave concerns over the potential inva-
3 sion of workers' rights to personal privacy and con-
4 cerns have also been raised over the the efficacy of
5 testing programs in reducing safety hazards in the
6 workplace, the accuracy of the test methods employed
7 and the legitimate goals of workplace substance abuse
8 testing programs; and

9 Whereas, the employees of this State require im-
10 mediate action to prevent ill-conceived testing pro-
11 grams from being instituted to their detriment; and

12 Whereas, in the judgment of the Legislature,
13 these facts create an emergency within the meaning of
14 the Constitution of Maine and require the following
15 legislation as immediately necessary for the preser-
16 vation of the public peace, health and safety; now,
17 therefore,

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

20 Sec. 1. 26 MRS A c. 7, sub-c. III-A is enacted to
21 read:

22 SUBCHAPTER III-A

23 SUBSTANCE ABUSE TESTING

24 §681. Purpose; applicability

25 1. Purpose. This subchapter is intended to:

26 A. Protect the privacy rights of individual em-
27 ployees in the State from undue invasion by em-
28 ployers through the use of substance abuse tests
29 while allowing the use of tests where the employ-
30 er has a legitimate reason to suspect that an em-
31 ployee may be working while under the influence
32 of a substance of abuse;

33 B. Ensure that when substance abuse tests are
34 used, proper test procedures are employed to pro-
35 tect the privacy rights of employees and appli-
36 cants and to achieve reliable and accurate re-
37 sults; and

1 C. Ensure that employees with a substance abuse
2 problem receive an opportunity for rehabilitation
3 and treatment of their disease and will return to
4 work as quickly as possible.

5 2. Employer discretion. This subchapter does
6 not require or encourage employers to conduct sub-
7 stance abuse testing of their employees or appli-
8 cants. An employer who chooses to conduct such test-
9 ing is limited by this subchapter, but may establish
10 his own policies which are supplemental to and not
11 inconsistent with this subchapter.

12 3. Collective bargaining agreements. This sub-
13 chapter does not prevent the negotiation of collec-
14 tive bargaining agreements that provide greater pro-
15 tection to employees or applicants than is provided
16 by this subchapter.

17 4. Home rule authority preempted. No municipal-
18 ity may enact any ordinance under its home-rule au-
19 thority concerning an employer's use of substance
20 abuse tests.

21 5. Contracts for work out of state. All employ-
22 ment contracts subject to the laws of this State when
23 entered into shall include an agreement that this
24 subchapter will apply to any employer who hires em-
25 ployees to work outside the State.

26 6. Medical exams unaffected. This subchapter
27 does not prevent an employer from requiring or per-
28 forming medical examinations of employees or appli-
29 cants or from conducting medical screenings to moni-
30 tor exposure to toxic or other harmful substances in
31 the workplace, provided that these examinations are
32 not used to avoid the restrictions of this subchap-
33 ter. No such examination may include the use of any
34 substance abuse test except in compliance with this
35 subchapter.

36 7. Other discipline unaffected. This subchapter
37 does not prevent an employer from establishing rules
38 related to his employees' possession or use of sub-
39 stances of abuse, including convictions for
40 drug-related offenses, and taking action based upon a
41 violation of any of those rules, except where a sub-

1 stance abuse test is required, requested or suggested
2 by the employer or used as the basis for any disci-
3 plinary action.

4 8. Federal regulation of nuclear power industry.
5 This subchapter does not apply to the extent it is
6 inconsistent with any regulation of the United States
7 Nuclear Regulatory Commission involving substance
8 abuse testing at any nuclear power plant.

9 §682. Definitions

10 As used in this subchapter, unless the context
11 otherwise indicates, the following terms have the
12 following meanings.

13 1. Applicant. "Applicant" means a person seek-
14 ing employment from an employer. The term includes a
15 person seeking to use an employment agency's ser-
16 vices.

17 2. Employee. "Employee" means a person who is
18 permitted, required or directed by an employer to en-
19 gage in any employment for consideration of direct
20 gain or profit.

21 3. Employer. "Employer" means a person, part-
22 nership, corporation, association or other legal en-
23 tity, public or private, which employs one or more
24 employees. The term includes an employment agency.

25 4. Negative test result. "Negative test result"
26 means a test result which indicates that:

27 A. A substance of abuse is not present in the
28 tested sample; or

29 B. A substance of abuse is present in the tested
30 sample in a concentration below the cut-off lev-
31 el.

32 5. Positive test result. "Positive test result"
33 means a test result which indicates the presence of a
34 substance of abuse in the tested sample above the
35 cut-off level of the test.

1 A. "Confirmed positive result" means a confirma-
2 tion test result which indicates the presence of
3 a substance of abuse above the cut-off level in
4 the tested sample.

5 6. Probable cause. "Probable cause" has the
6 following meaning.

7 A. "Probable cause" means:

8 (1) An employee is observed to exhibit so-
9 cial or emotional behavior in the workplace
10 clearly aberrant as compared to his usual
11 behavior;

12 (2) An employee is observed to exhibit
13 sensory, motor or intellectual abilities in
14 the workplace clearly impaired or aberrant
15 as compared to his usual capabilities;

16 (3) An employee is found by a physician,
17 after examination, to exhibit physiological
18 symptoms characteristic of the use of any
19 substance of abuse;

20 (4) An employee is observed possessing or
21 ingesting any substance of abuse either
22 while on the job or on the employer's
23 premises;

24 (5) There exists a documented and severe
25 decline in the quantity or quality of the
26 employee's work that is not reasonably ex-
27 plained by the employee;

28 (6) There exists a documented history of
29 repeated lateness or absence from work that
30 is not reasonably explained by the employee;
31 or

32 (7) There exists a documented history of
33 work-related accidents that greatly exceeds
34 the average accident rate for
35 similarly-situated employees of that employ-
36 er.

37 B. "Probable cause" does not include:

1 (1) Information received from an anonymous
2 informant;

3 (2) Any information tending to indicate
4 that an employee may have possessed or used
5 a substance of abuse off duty, except as
6 provided in paragraph A, subparagraph (4);
7 and

8 (3) A single work-related accident, unless
9 other evidence provides probable cause as
10 described in this subsection.

11 7. Substance abuse test. "Substance abuse
12 test" means any test procedure designed to take and
13 analyze body fluids or materials from the body for
14 the purpose of detecting the presence of substances
15 of abuse. The term does not include tests designed
16 to determine blood-alcohol concentration levels from
17 a sample of an individual's breath.

18 A. "Screening test" means an initial substance
19 abuse test performed through the use of
20 immunoassay technology and which is used as a
21 preliminary step in detecting the presence of
22 substances of abuse.

23 B. "Confirmation test" means a 2nd substance
24 abuse test performed through the use of gas
25 chromatography-mass spectrometry that is used to
26 verify the presence of a substance of abuse indi-
27 cated by an initial positive screening test re-
28 sult.

29 8. Substance of abuse. "Substance of abuse"
30 means any scheduled drug, alcohol or other drug, or
31 any of their metabolites.

32 A. "Alcohol" has the same meaning as found in
33 Title 28-A, section 2, subsection 2.

34 B. "Drug" has the same meaning as found in Title
35 32, section 2805, subsection 4.

36 C. "Scheduled drug" has the same meaning as
37 found in Title 17-A, section 1101, subsection 11.

1 §683. Testing procedures

2 No employer may require, request or suggest that
3 any employee or applicant submit to a substance abuse
4 test, except as provided in this section. All actions
5 taken under a substance abuse testing program
6 must comply with this subchapter, rules adopted under
7 this subchapter and the employer's written policy de-
8 veloped under subsection 2.

9 1. Employee assistance program required. Before
10 establishing any substance abuse testing program, an
11 employer must have a functioning employee assistance
12 program. The employer may meet this requirement by
13 participating in a cooperative employee assistance
14 program that serves the employees of more than one
15 employer. The employee assistance program must:

16 A. Meet the program standards set by the Associ-
17 ation of Labor-Management Administrators and Con-
18 sultants on Alcoholism;

19 B. Provide substance abuse counseling or refer-
20 ral to substance abuse counselors; and

21 C. Provide services with the highest possible
22 degree of confidentiality.

23 2. Written policy. Before establishing any sub-
24 stance abuse testing program, an employer must devel-
25 op a written policy in compliance with this subchap-
26 ter providing for:

27 A. The procedure and consequences of an
28 employee's voluntary admission of a substance
29 abuse problem and any available assistance, in-
30 cluding the availability and procedure of the em-
31 ployer's employee assistance program;

32 B. When substance abuse testing may occur, in-
33 cluding a description of which positions, if any,
34 will be subject to testing;

35 C. The selection of review panel members and the
36 review procedure to be followed under subsection
37 7;

1 D. The collection of samples:

2 (1) The collection of any sample for use in
3 a substance abuse test must be conducted in
4 a medical facility and be supervised by med-
5 ical personnel;

6 (2) An employer may not require an employee
7 or applicant to remove any clothing for the
8 purpose of collecting a sample, except that
9 an employer may require that an employee or
10 applicant leave any personal belongings oth-
11 er than clothing and any unnecessary coat,
12 jacket or similar outer garments outside of
13 the collection area; and

14 (3) No employee or applicant may be re-
15 quired to provide a urine sample while being
16 observed, directly or indirectly, by another
17 individual;

18 E. The storage of samples before testing suffi-
19 cient to avoid deterioration of the sample;

20 F. The chain of custody of samples sufficient to
21 protect the sample from tampering and to verify
22 the identity of each sample and test results;

23 G. The substances of abuse to be tested for;

24 H. The cut-off levels for both screening and
25 confirmation tests at which the presence of a
26 substance of abuse in a sample is considered a
27 positive test result;

28 (1) Cut-off levels for confirmation tests
29 for marijuana may not be lower than 10
30 nanograms of delta-9 tetrahydrocannabinol
31 per milliliter for blood, serum or plasma sam-
32 ples and 50 nanograms of del-
33 ta-9-tetrahydrocannabinol-9-carboxylic acid
34 per milliliter for urine samples; and

35 (2) The Department of Human Services shall
36 adopt rules under section 685 regulating
37 screening and confirmation cut-off levels
38 for other substances of abuse to ensure that

1 levels are set within known tolerances of
2 test methods and above mere trace amounts;

3 I. The consequences of a confirmed positive re-
4 sult;

5 J. The consequences for refusal to submit to a
6 substance abuse test;

7 K. To what extent an employee or applicant who
8 requests a sample to be tested on his own must
9 share the results of the test with the employer;

10 L. Opportunities and procedures for rehabilita-
11 tion following a confirmed positive result;

12 M. A procedure under which an employee or appli-
13 cant who receives a confirmed positive result may
14 appeal and contest the accuracy of that result;
15 and

16 N. Any other necessary or desirable matters.

17 An employer must consult with his employees while de-
18 veloping a substance abuse testing policy under this
19 subsection. The employer shall send a copy of his
20 written policy to the Department of Labor immediately
21 after it is adopted.

22 3. Copies to employees and applicants. The em-
23 ployer shall provide each employee with a copy of the
24 written policy under subsection 2 and a copy of this
25 subchapter at least 60 days before the policy takes
26 effect. If applicants are subject to testing under
27 the written policy, the employer shall provide each
28 applicant with a copy of the written policy under
29 subsection 2 and a copy of this subchapter before ad-
30 ministering a substance abuse test to the applicant.

31 4. Consent forms prohibited. No employer may
32 require, request or suggest that any employee or ap-
33 plicant sign or agree to any form or agreement that:

34 A. Provides that the employee or applicant vol-
35 untarily consents to a substance abuse test;

1 B. Attempts to absolve the employer from any po-
2 tential liability arising out of the imposition
3 of the substance abuse test; or

4 C. Attempts to waive an employee's or appli-
5 cant's rights or eliminate or diminish an employ-
6 er's obligations under this subchapter.

7 Any form or agreement prohibited by this subsection
8 is void.

9 5. Testing of Applicants. An employer may re-
10 quire, request or suggest that an applicant submit to
11 a substance abuse test only if the applicant has been
12 offered employment with the employer. The offer of
13 employment may be conditioned upon the applicant re-
14 ceiving a negative test result.

15 6. Probable cause testing of employees. Except
16 as provided in subsection 8, paragraph A, an employer
17 may require, request or suggest that an employee sub-
18 mit to a substance abuse test only if the employer
19 has probable cause to test the employee. Probable
20 cause shall be determined as provided in subsection
21 7.

22 7. Determination of probable cause. Except as
23 provided in section 682, subsection 6, paragraph A,
24 subparagraph (3), the employee's immediate supervi-
25 sor, or other supervisory personnel familiar with the
26 employee's past behavior and record, shall make the
27 determination of probable cause in the first in-
28 stance. The supervisor or other person must state,
29 in writing, the facts upon which this determination
30 is based.

31 If an employee disputes the existance of probable
32 cause, a sample may be taken at that time, but no
33 test may be performed on that sample until after the
34 existence of probable cause is confirmed. The basis
35 for the initial determination of probable cause shall
36 be reviewed by a panel composed as provided in para-
37 graph A or B.

38 A. If the employee works under a collective bar-
39 gaining agreement, the employee may choose to
40 have the review conducted by a panel consisting
41 of 3 members, including:

- 1 (1) One person selected by the employer;
- 2 (2) One employee selected by the employees
- 3 of the employer; and
- 4 (3) A 3rd person selected jointly by the
- 5 members described in subparagraphs (1) and
- 6 (2) from a list of persons acceptable to
- 7 both the employer and the employees of that
- 8 employer.

9 No person who was involved in any manner with the
10 initial determination of probable cause may serve
11 on the review panel.

12 B. If the employee is not governed by a collec-
13 tive bargaining agreement, the employee may
14 choose to have the review conducted by either the
15 director or coordinator of the employer's employ-
16 ee assistance program or a physician selected and
17 paid by the employer. When the employee requests
18 a review under this subsection, the employer
19 shall provide the employee with the names of the
20 persons who may constitute the review panel under
21 this paragraph. At that time the employee who
22 requests the review shall choose which of these 2
23 persons will serve as the review panel. No per-
24 son who was involved in any manner with the ini-
25 tial determination of probable cause may serve on
26 the review panel.

27 The employee bears the burden of proving that proba-
28 ble cause did not exist. The employee has the right
29 to confront and cross-examine any witness to any fact
30 relied upon in the determination of probable cause.
31 The review panel shall hear the appeal and render a
32 decision within 2 working days after the sample is
33 collected. If the review panel upholds the initial
34 determination, the test shall be conducted without
35 delay. If the review panel determines that probable
36 cause did not exist, the sample shall be disposed of
37 without testing. Pending the decision of the review
38 panel, the employee may be removed from work as pro-
39 vided in section 684, subsection 1.

40 8. Random or mandatory testing of employees.
41 Random or mandatory substance abuse testing of em-

1 ployees may be conducted only as provided in this
2 subsection.

3 A. An employer may require an employee who has
4 received a confirmed positive result to submit to
5 up to 4 subsequent substance abuse tests per-
6 formed at randomly selected times over a one-year
7 period as a condition of continued employment if
8 the employee chooses not to undergo rehabilita-
9 tion under section 684, subsection 2, paragraphs
10 B and C.

11 B. While the employee is participating in a sub-
12 stance abuse rehabilitation program either as a
13 result of voluntary contact with or mandatory re-
14 ferred to the employer's employee assistance pro-
15 gram or after a confirmed positive result as pro-
16 vided in section 684, subsection 2, paragraphs B
17 and C, substance abuse testing may be conducted
18 by the rehabilitation or treatment provider as
19 required, requested or suggested by that
20 provider.

21 (1) Substance abuse testing conducted as
22 part of such a rehabilitation or treatment
23 program is not subject to the provisions of
24 this subchapter regulating substance abuse
25 testing.

26 (2) An employer may not require, request or
27 suggest that any substance abuse test be ad-
28 ministered to any employee while the employ-
29 ee is undergoing such rehabilitation or
30 treatment, except as provided in subsection
31 6.

32 (3) The results of any substance abuse test
33 administered to an employee as part of such
34 a rehabilitation or treatment program may
35 not be released to his employer.

36 9. Right to obtain other samples. At the re-
37 quest of the employee or applicant at the time the
38 test sample is taken, the employer shall, at that
39 time:

1 A. Make available to the employee or applicant
2 tested a portion or portions of the sample for
3 that person's own testing. The employee or ap-
4 PLICANT shall pay the costs of these tests; and

5 B. In the case of an employee, have a blood sam-
6 ple taken from the employee by a licensed physi-
7 cian, registered physician's assistant, regis-
8 tered nurse or a person certified by the Depart-
9 ment of Human Services to draw blood samples.
10 The employer shall have this sample tested, at
11 the employer's expense, for the presence of any
12 substance of abuse. If the employee requests
13 that a blood sample be taken under this para-
14 graph, the employer may not collect or test any
15 other sample from the employee.

16 No employer may require, request or suggest that
17 any employee or applicant provide a blood sample
18 for substance abuse testing purposes nor may any
19 employer conduct a substance abuse test upon a
20 blood sample, except as provided in this para-
21 graph.

22 10. Qualified testing laboratories required. No
23 employer may perform any substance abuse test admin-
24 istered to any of his employees or applicants. A
25 substance abuse test administered under this subchap-
26 ter must be performed in a qualified testing labora-
27 tory that complies with this subsection.

28 A. The director of the laboratory must:

29 (1) Possess a doctoral degree in pharmacol-
30 ogy, toxicology or analytical chemistry or
31 be certified by the state in which the labo-
32 ratory is located as a laboratory director
33 in forensic or toxicological analysis;

34 (2) Have at least 2 years experience in an
35 analytical toxicology laboratory; and

36 (3) Be certified by the American Board of
37 Forensic Toxicology or the American Board of
38 Clinical Chemistry in Toxicological Chemis-
39 try.

1 B. The laboratory must have written testing pro-
2 cedures and procedures to ensure a clear chain of
3 custody.

4 C. The laboratory must demonstrate satisfactory
5 performance in the proficiency testing program of
6 the National Institute on Drug Abuse, the College
7 of American Pathology or the American Association
8 for Clinical Chemistry.

9 D. The laboratory must comply with rules adopted
10 by the Department of Human Services under section
11 685. These rules shall ensure that:

12 (1) The laboratory possesses all licenses
13 or certifications that the department finds
14 necessary or desirable to ensure reliable
15 and accurate tests results;

16 (2) The laboratory follows proper quality
17 control procedures, including, but not lim-
18 ited to:

19 (a) The use of internal quality con-
20 trols during each substance abuse test
21 conducted under this subchapter, in-
22 cluding the use of blind samples and
23 samples of known concentrations which
24 are used to check the performance and
25 calibration of testing equipment;

26 (b) The internal review and certifica-
27 tion process for test results, includ-
28 ing the qualifications of the person
29 who performs that function in the test-
30 ing laboratory; and

31 (c) Security measures implemented by
32 the testing laboratory; and

33 (3) Other necessary and proper actions are
34 taken to ensure reliable and accurate test
35 results.

36 11. Testing procedure. The testing laboratory
37 shall perform a screening test on each sample submit-
38 ted to it by the employer for only those substances

1 of abuse that the employer requests to be identified.
2 If the screening test result is negative, no further
3 test may be conducted on that sample. If the screen-
4 ing test result is positive, the testing laboratory
5 shall perform a confirmation test on that sample.
6 The testing laboratory shall retain all confirmed
7 positive samples for one year in a manner that will
8 inhibit deterioration of the samples and allow subse-
9 quent retesting. All other samples shall be disposed
10 of immediately after testing.

11 12. Laboratory report of test results. The lab-
12 oratory report of test results shall, at a minimum,
13 state:

14 A. The name of the laboratory that performed the
15 test or tests;

16 B. Any confirmed positive results on any tested
17 sample:

18 (1) No testing laboratory may communicate
19 to the employer any test result other than a
20 confirmed positive result. The testing labo-
21 rary and the employer must ensure that an
22 unconfirmed positive screening test result
23 cannot be determined by an employer in any
24 manner, including, but not limited to, the
25 method of billing the employer for the tests
26 performed by the laboratory and the time
27 within which results are provided to the em-
28 ployer; and

29 (2) Unless the employee or applicant con-
30 sents, test results shall not be reported in
31 numerical or quantitative form, but shall
32 state only that the test result was posi-
33 tive;

34 C. The sensitivity or cut-off level of the con-
35 firmation test; and

36 D. Any available information concerning the mar-
37 gin of accuracy and precision of the test methods
38 employed.

1 The report shall not disclose the presence or absence
2 of evidence of any physical or mental condition or of
3 any substance other than the specific substances of
4 abuse that the employer requests to be identified.
5 The employer shall promptly provide a legible copy of
6 the laboratory report to the employee or applicant
7 tested.

8 13. Costs. The employer shall pay the costs of
9 all substance abuse tests to which he requires, re-
10 quests or suggests an employee or applicant submit,
11 including the cost of any substance abuse test con-
12 ducted under subsection 9, paragraph B. The employee
13 or applicant shall pay the costs of any additional
14 substance abuse tests.

15 14. Limitation on use of tests. An employer may
16 administer substance abuse tests to his employees or
17 applicants only for the purpose of discovering the
18 use of substances of abuse that are likely to cause
19 impairment of the user. No employer may have sub-
20 stance abuse tests administered to an employee or ap-
21 plicant for the purpose of discovering any informa-
22 tion unrelated to the use of substances of abuse that
23 are likely to cause user impairment.

24 15. Rules. The Department of Human Services
25 shall adopt any rules under section 685 regulating
26 substance abuse testing procedures that it finds nec-
27 essary or desirable to ensure accurate and reliable
28 substance abuse testing and to protect the privacy
29 rights of employees and applicants.

30 §684. Action taken on substance abuse tests

31 Action taken by an employer on the basis of a
32 substance abuse test is limited as provided in this
33 section.

34 1. Before receipt of test results. An employer
35 may suspend an employee with full pay and benefits or
36 may transfer the employee to another position with no
37 reduction in pay or benefits:

38 A. While awaiting the result of an appeal of the
39 initial determination of probable cause under
40 section 683, subsection 7; and

1 B. While awaiting an employee's test results.

2 2. Use of confirmation test results. The fol-
3 lowing provisions govern an employer's use of con-
4 firm positive results and an employee's or appli-
5 cant's refusal to submit to a test requested or re-
6 quired by an employer in compliance with this sub-
7 chapter.

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

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

15 (2) Discharge of an employee;

16 (3) Discipline of an employee; or

17 (4) Change in the employee's work assign-
18 ment.

19 B. Before taking any action described in para-
20 graph A, in the case of an employee who receives
21 a confirmed positive result, an employer must
22 provide the employee with an opportunity to par-
23 ticipate in a rehabilitation program designed to
24 enable the employee to avoid future use of a sub-
25 stance of abuse, except where:

26 (1) The employee has previously received 2
27 confirmed positive results; or

28 (2) The employee receives a subsequent con-
29 firm positive result within one year after
30 his rehabilitation or treatment provider in-
31 dicates that the employee has successfully
32 completed a rehabilitation program as pro-
33 vided in paragraph C, subparagraph (3).

34 C. If the employee chooses not to participate in
35 a rehabilitation program under this subsection,
36 the employer may take any action described in
37 paragraph A. If the employee chooses to partici-

1 pate in a rehabilitation program, the following
2 provisions apply.

3 (1) If the employer's employee assistance
4 program offers counseling or rehabilitation
5 services, the employee may choose to enter
6 that program at the employer's expense. If
7 no such services are offered by the employ-
8 er's employee assistance program or if the
9 employee chooses not to participate in such
10 a program, the employee may:

11 (a) Seek rehabilitation or counseling
12 from another source recommended by the
13 employee assistance counselor. Unless
14 it is covered by a group health insur-
15 ance plan, the employer shall pay the
16 costs of rehabilitation, provided that
17 the employer is not required to pay for
18 any residential treatment that extends
19 beyond 28 days. For the purposes of
20 this division, "residential treatment"
21 has the same meaning as found in Title
22 24, section 2329, subsection 2, para-
23 graph B; or.

24 (b) Enter a rehabilitation program of
25 his own choice at his own expense, un-
26 less it is covered by a health insur-
27 ance plan.

28 (2) No employer may take any action de-
29 scribed in paragraph A, while an employee is
30 participating in a rehabilitation program,
31 except that an employer may change the
32 employee's work assignment or suspend the
33 employee from active duty to reduce any pos-
34 sible safety hazard. No reduction in pay or
35 benefits may be made while an employee is
36 participating in a rehabilitation program,
37 provided that the employer is not required
38 to pay the employee for periods in which the
39 employee is unavailable for work for the
40 purposes of rehabilitation. The employee
41 may apply normal sick leave and vacation
42 time, if any, for these periods.

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(3) Upon successfully completing the rehabilitation program, as determined by his rehabilitation or treatment provider, the employee is entitled to return to his previous job with full pay and benefits, unless conditions unrelated to his previous confirmed positive result make his return impossible. If the rehabilitation or treatment provider determines that the employee has not successfully completed the rehabilitation program, the employer may take any action described in paragraph A.

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D. This subsection does not require an employer to take any disciplinary action against an employee who refuses to submit to a test, who receives a single or repeated confirmed positive results or who does not choose to participate in a rehabilitation program. This subsection is intended to set minimum opportunities for an employee with a substance abuse problem to address his problem through rehabilitation. An employer may offer additional opportunities, not otherwise in violation of this subchapter, for rehabilitation or continued employment without rehabilitation.

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3. Confidentiality. This subsection governs the use of information acquired by an employer in the testing process.

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A. Unless the employee or applicant consents, all information acquired by an employer in the testing process is confidential and may not be released to any person other than the employee or applicant who is tested, any necessary personnel of the employer and a provider or rehabilitation or treatment services under subsection 2, paragraph C. This paragraph does not prevent:

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(1) The release of this information where required or permitted by state law or federal law; or

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(2) The use of this information in any grievance procedure, administrative hearing or civil action relating to the imposition of the test.

1 B. Notwithstanding any other law, the results of
2 any substance abuse test required, requested or
3 suggested by any employer may not be used in any
4 criminal proceeding.

5 §685. Rulemaking

6 The Department of Human Services shall adopt
7 rules under Title 5, chapter 375, to carry out the
8 purposes of this Act. The Department of Human Ser-
9 vices shall consult with the Department of Labor in
10 developing these rules when necessary. The Depart-
11 ment of Human Services shall adopt initial rules be-
12 fore December 1, 1987.

13 §686. Substance abuse education

14 All employers shall cooperate fully with the De-
15 partment of Labor, the Department of Human Services,
16 the Department of Public Safety and any other state
17 agency in programs designed to educate employees
18 about the dangers of substance abuse and about public
19 and private services available to employees who have
20 a substance abuse problem.

21 §687. Violation and remedies

22 The following provisions govern the enforcement
23 of this subchapter.

24 1. Remedies. Any employer who violates this
25 subchapter:

26 A. Commits a civil violation for which a forfei-
27 ture of not less than \$100 nor more than \$500 may
28 be adjudged; and

29 B. Is liable to any employee subjected to disci-
30 pline or discharge based on a violation of this
31 subchapter for:

32 (1) An amount equal to 3 times any lost
33 wages;

34 (2) Reinstatement of the employee to his
35 job with full benefits;

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(3) Court costs; and

(4) Reasonable attorneys fees, as set by the court.

2. Breach of confidentiality. In addition to the liability imposed under subsection 1, any person who violates section 683, subsection 8, paragraph B, subparagraph (3), or section 684, subsection 3, is guilty of a Class D crime.

3. Enforcement. The Department of Labor or the affected employee or employees may enforce this subchapter. The Department of Labor may:

A. Collect the judgment on behalf of the employee or employees;

B. Supervise the payment of the judgment and the reinstatement of the employee or employees; and

C. Collect fines insured through violation of this subchapter.

§688. Severability

The finding of any court that any provision of this Act is unconstitutional as applied does not affect the validity of the remaining provisions or the validity of the offending provision as applied in a different situation.

Sec. 2. Report. The Department of Labor shall report to the joint standing committee of the Legislature having jurisdiction over labor on February 1, 1988. This report shall:

1. List those employers who have filed copies of their substance abuse testing policies with the department, as required by the Maine Revised Statutes, Title 26, section 683, subsection 2;

2. Indicate whether those employers are testing applicants, employees or both; and

3. Briefly describe the general scope and practice of workplace substance abuse testing in the State.

1 random or periodic substance abuse tests by an em-
2 ployer and allows an employer to require substance
3 abuse testing of employees only when he has probable
4 cause to impose the test, except where an employee
5 refuses to undergo rehabilitation after receiving a
6 positive test result. The concept of probable cause
7 is defined in the new draft to include only those
8 recognized symptoms or behavior often associated with
9 the use of a substance of abuse. The purpose of this
10 definition is to prevent an employer from imposing
11 substance abuse tests upon an employee without reli-
12 able, objective information supporting the finding of
13 probable cause. Additional protection is provided to
14 the employee through an appeal process in which the
15 employee may have an impartial panel review the ini-
16 tial determination of probable cause. The employee
17 has the right to confront and cross-examine any wit-
18 nesses to any fact relied upon in the determination
19 of probable cause and may present his arguments to
20 the review panel.

21 Probable cause is not required for the testing of
22 applicants for employment. This was done to reflect
23 the fact that applicants are voluntarily seeking em-
24 ployment from an employer with full knowledge that
25 they may be subjected to a substance abuse test.
26 However, to prevent unjustified "fishing expeditions"
27 by an employer, the employer may only test an appli-
28 cant after he has selected that person for employ-
29 ment. In other words, an employer cannot screen all
30 job applicants, but can only make his actual job of-
31 fer conditional on the applicant's passing a sub-
32 stance abuse test.

33 The new draft also regulates the actual testing
34 process to ensure that proper testing procedures are
35 followed and that an employee's privacy rights are
36 protected from undue intrusion. The new draft re-
37 quires a testing program to be conducted pursuant to
38 a written policy developed by the employer in consul-
39 tation with his employees. Certain testing proce-
40 dures are also regulated. Strict confidentiality of
41 any information acquired through the testing process
42 is required. Blood testing is prohibited except upon
43 request of the employee. A test sample must be col-
44 lected in a medical facility and be supervised by
45 medical personnel. The test subject may remain.

1 clothed and free from observation by any other indi-
2 vidual when a urine sample is collected. The test
3 subject may request a portion of the sample for his
4 own testing as a check on the accuracy of the testing
5 laboratory used by the employer. Only immunoassay
6 tests may be used for screening purposes and all posi-
7 tive screening test results must be confirmed by gas
8 chromatography-mass spectrometry, which is the most
9 accurate test currently available. No employer may
10 perform a substance abuse test for any of his employ-
11 ees or applicants; all tests must be performed by a
12 qualified testing laboratory. The Department of Hu-
13 man Services is directed to adopt rules to ensure
14 that all testing procedures are regulated where nec-
15 essary to protect an individual's privacy rights or
16 to ensure accurate testing. Finally, employers are
17 prohibited from using substance abuse tests to dis-
18 cover any information that does not relate to an
19 individual's use of a substance of abuse that is
20 likely to cause impairment of the user. Further,
21 testing laboratories are prohibited from reporting
22 such information to the employer. These provisions
23 ensure that testing programs will not be used to dis-
24 cover personal information that the employer has no
25 legitimate interest in, such as pregnancy or mental
26 or physical illness that does not affect work per-
27 formance.

28 The new draft also regulates discipline taken
29 upon receipt of a positive test result. Recognizing
30 that the prevention and deterrence of safety hazards
31 caused by employee impairment in the workplace is the
32 justification for testing programs, and not the iden-
33 tification and punishment of persons who suffer from
34 the disease of substance abuse, this new draft at-
35 tempts to provide minimum opportunities for a sub-
36 stance abusing employee to receive rehabilitation.
37 Any employer who establishes a testing program must
38 first have a functioning employee assistance program.
39 These programs have consistently demonstrated their
40 ability to deal with a wide range of employee prob-
41 lems, including employee substance abuse, economical-
42 ly and effectively. Once a testing program is estab-
43 lished, and an employee receives a confirmed positive
44 test result, the employer is authorized to dismiss or
45 discipline that employee unless the employee enters a
46 substance abuse rehabilitation program. If the em-

1 ployee elects to undergo rehabilitation, he may be
2 suspended with no reduction in pay, except that an
3 employer is not required to pay the employee for any
4 time during which the employee is unavailable for
5 work for the purposes of rehabilitation. Upon suc-
6 cessfully completing the rehabilitation program, the
7 employee may return to his previous job. The employ-
8 er is no longer required to offer the employee an op-
9 portunity to undergo rehabilitation if the employee
10 has already tested positive at least twice before or
11 if the employee receives a confirmed positive result
12 within one year of completing a previous rehabilita-
13 tion program.

14 This new draft attempts to strike a reasonable
15 balance between the interests of the employer, his
16 employees and the general public to be free from
17 safety hazards in the workplace caused by impaired
18 workers, and the rights of all individuals to be free
19 from unnecessary intrusions into their personal pri-
20 vacy. In order to accomplish this goal, certain as-
21 pects of the substance abuse testing process are reg-
22 ulated in order to prevent abuses of the process.
23 Many of these restrictions establish only minimum re-
24 quirements, while many other aspects of the testing
25 process are left entirely unregulated. It is the
26 intent of this new draft that an employer is free to
27 develop his own policies in these areas, in consulta-
28 tion with his employees. This new draft is intended
29 to establish minimum requirements for a fair and ef-
30 fective substance abuse testing program. It is hoped
31 that employers and employees will work together to go
32 beyond these bare requirements to provide the most
33 effective means of assistance possible for those per-
34 sons suffering from the disease of substance abuse.

35 The new draft also includes a transition clause
36 intended to define the permissible scope of substance
37 abuse testing in the workplace during the interim pe-
38 riod after passage of this new draft, but before the
39 rules required by this new draft are adopted. No em-
40 ployer may institute a substance abuse testing pro-
41 gram in his workplace after the effective date of
42 this new draft until January 1, 1988. Any employer
43 who is conducting a testing program on the effective
44 date of this new draft may continue to operate his
45 program as it is constituted on that date, however,

1 as of January 1, 1988, all testing programs must com-
2 ply with this new draft and the rules adopted under
3 it.

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