

MAINE STATE LEGISLATURE

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(After Deadline)
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 1788

H.P. 1310 House of Representatives, June 9, 1987
Approved for introduction by a majority of the
Legislative Council pursuant to Joint Rule 27.
Reference to the Committee on Labor suggested and ordered
printed.

EDWIN H. PERT, Clerk

Presented by Representative MCHENRY of Madawaska.
Cosponsored by Senator DUTREMBLE of York,
Representatives JOSEPH of Waterville and RUHLIN of Brewer.

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.
4

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

7 Sec. 1. 26 MRSA c. 7, sub-c. III-A is enacted to
8 read:

9 SUBCHAPTER III-A

10 SUBSTANCE ABUSE TESTING

11 §681. Purpose; applicability

12 1. Purpose. This subchapter is intended to:

1 A. Protect the privacy rights of individual em-
2 ployees in the State from undue invasion by em-
3 ployers through the use of substance abuse tests
4 while allowing the use of tests where the employ-
5 er has a legitimate reason to suspect that an em-
6 ployee may be working while under the influence
7 of a substance of abuse;

8 B. Ensure that when substance abuse tests are
9 used, proper test procedures are employed to pro-
10 tect the privacy rights of employees and appli-
11 cants and to achieve reliable and accurate re-
12 sults; and

13 C. Ensure that employees with a substance abuse
14 problem receive an opportunity for rehabilitation
15 and treatment of their disease and will return to
16 work as quickly as possible.

17 2. Employer discretion. This subchapter does
18 not require or encourage employers to conduct sub-
19 stance abuse testing of their employees or appli-
20 cants. An employer who chooses to conduct such test-
21 ing is limited by this subchapter, but may establish
22 his own policies which are supplemental to and not
23 inconsistent with this subchapter.

24 3. Collective bargaining agreements. This sub-
25 chapter does not prevent the negotiation of collec-
26 tive bargaining agreements that provide greater pro-
27 tection to employees or applicants than is provided
28 by this subchapter.

29 4. Home rule authority preempted. No municipal-
30 ity may enact any ordinance under its home-rule au-
31 thority concerning an employer's use of substance
32 abuse tests.

33 5. Contracts for work out of state. All employ-
34 ment contracts subject to the laws of this State when
35 entered into shall include an agreement that this
36 subchapter will apply to any employer who hires em-
37 ployees to work outside the State.

38 6. Medical exams unaffected. This subchapter
39 does not prevent an employer from requiring or per-
40 forming medical examinations of employees or appli-

1 cants or from conducting medical screenings to moni-
2 tor exposure to toxic or other harmful substances in
3 the workplace, provided that these examinations are
4 not used to avoid the restrictions of this subchap-
5 ter. No such examination may include the use of any
6 substance abuse test except in compliance with this
7 subchapter.

8 7. Other discipline unaffected. This subchapter
9 does not prevent an employer from establishing rules
10 related to his employees' possession or use of sub-
11 stances of abuse, including convictions for
12 drug-related offenses, and taking action based upon a
13 violation of any of those rules, except where a sub-
14 stance abuse test is required, requested or suggested
15 by the employer or used as the basis for any disci-
16 plinary action.

17 §682. Definitions

18 As used in this subchapter, unless the context
19 otherwise indicates, the following terms have the
20 following meanings.

21 1. Applicant. "Applicant" means a person seek-
22 ing employment from an employer. The term includes a
23 person seeking to use an employment agency's ser-
24 vices.

25 2. Employee. "Employee" means a person who is
26 permitted, required or directed by an employer to en-
27 gage in any employment for consideration of direct
28 gain or profit.

29 3. Employer. "Employer" means a person, part-
30 nership, corporation, association or other legal en-
31 tity, public or private, which employs one or more
32 employees. The term includes an employment agency.

33 4. Negative test result. "Negative test result"
34 means a test result which indicates that:

35 A. A substance of abuse is not present in the
36 tested sample; or

37 B. A substance of abuse is present in the tested
38 sample in a concentration below the cut-off lev-
39 el.

1 5. Positive test result. "Positive test result"
2 means a test result which indicates the presence of a
3 substance of abuse in the tested sample above the
4 cut-off level of the test.

5 A. "Confirmed positive result" means a confirma-
6 tion test result which indicates the presence of
7 a substance of abuse above the cut-off level in
8 the tested sample.

9 6. Probable cause. "Probable cause" means a
10 reasonable ground for belief in the existence of
11 facts which will induce a person to believe that an
12 employee may be under the influence of a substance of
13 abuse, provided that the existence of probable cause
14 may not be based on any of the following:

15 A. Information received from an anonymous in-
16 formant;

17 B. Any information tending to indicate that an
18 employee may have possessed or used a substance
19 of abuse off duty, except when the employee is
20 observed possessing or ingesting any substance of
21 abuse either while on the employer's premises or
22 in the proximity of the employer's premises dur-
23 ing or immediately before the employee's working
24 hours; or

25 C. A single work-related accident, unless other
26 evidence provides probable cause as described in
27 this subsection.

28 7. Substance abuse test. "Substance abuse test"
29 means any test procedure designed to take and analyze
30 body fluids or materials from the body for the pur-
31 pose of detecting the presence of substances of
32 abuse. The term does not include tests designed to
33 determine blood-alcohol concentration levels from a
34 sample of an individual's breath.

35 A. "Screening test" means an initial substance
36 abuse test performed through the use of
37 immunoassay technology or a test technology of
38 similar or greater accuracy and reliability ap-
39 proved by the Department of Human Services as
40 provided under section 686 and which is used as a

1 preliminary step in detecting the presence of
2 substances of abuse.

3 B. "Confirmation test" means a 2nd substance
4 abuse test performed through the use of gas
5 chromatography-mass spectrometry that is used to
6 verify the presence of a substance of abuse indi-
7 cated by an initial positive screening test re-
8 sult.

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

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

14 B. "Drug" has the same meaning as found in Title
15 32, section 2805, subsection 4.

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

18 §683. Testing procedures

19 No employer may require, request or suggest that
20 any employee or applicant submit to a substance abuse
21 test, except as provided in this section. All ac-
22 tions taken under a substance abuse testing program
23 must comply with this subchapter, rules adopted under
24 this subchapter and the employer's written policy de-
25 veloped under subsection 2.

26 1. Employee assistance program required. Before
27 establishing any substance abuse testing program, an
28 employer must have a functioning employee assistance
29 program. The employer may meet this requirement by
30 participating in a cooperative employee assistance
31 program that serves the employees of more than one
32 employer. The employee assistance program must be
33 certified by the Department of Human Services under
34 rules adopted pursuant to section 686. The rules
35 shall ensure that the employee assistance programs
36 have the necessary facilities and procedures to meet
37 minimum standards of professionalism and effective-
38 ness, including, but not limited to:

1 A. A mechanism to periodically assess the needs
2 for employee assistance with deleterious condi-
3 tions in the workplace performance;

4 B. A mechanism to ensure input and advice from
5 both management and employees;

6 C. Procedures and qualified personnel to ensure
7 the provision of comprehensive high quality clin-
8 ical services, supervisory training, management
9 consultation and preventive health education and
10 health promotion services appropriate to the
11 needs of the employer and his employees, includ-
12 ing the evaluation and treatment or assistance in
13 obtaining treatment of employees with substance
14 abuse problems;

15 D. Sufficient personnel and physical resources
16 to accommodate the needs of the employer and his
17 employees;

18 E. Review procedures to periodically evaluate
19 the appropriateness, effectiveness and efficiency
20 of the delivery of services and program integra-
21 tion; and

22 F. Procedures to protect the confidentiality of
23 employee services to the highest degree possible.

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

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

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

36 C. The collection of samples:

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

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

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

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

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

22 F. The substances of abuse to be tested for;

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

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

34 (2) The Department of Human Services shall
35 adopt rules under section 686 regulating
36 screening and confirmation cut-off levels
37 for other substances of abuse to ensure that
38 levels are set within known tolerances of
39 test methods and above mere trace amounts;

1 H. The consequences of a confirmed positive re-
2 sult;

3 I. The consequences for refusal to submit to a
4 substance abuse test;

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

8 K. Opportunities and procedures for rehabilita-
9 tion following a confirmed positive result;

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

14 M. Any other necessary or desirable matters.

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

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

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

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

34 B. Attempts to absolve the employer from any po-
35 tential liability arising out of the imposition
36 of the substance abuse test; or

1 C. Attempts to waive an employee's or applic-
2 ant's rights or eliminate or diminish an employ-
3 er's obligations under this subchapter.

4 Any form or agreement prohibited by this subsection
5 is void.

6 5. Right to obtain other samples. At the re-
7 quest of the employee or applicant at the time the
8 test sample is taken, the employer shall, at that
9 time:

10 A. Make available to the employee or applicant
11 tested a portion or portions of the sample for
12 that person's own testing. The employee or ap-
13 plicant shall pay the costs of these tests; and

14 B. In the case of an employee, have a blood sam-
15 ple taken from the employee by a licensed physi-
16 cian, registered physician's assistant, regis-
17 tered nurse or a person certified by the Depart-
18 ment of Human Services to draw blood samples.
19 The employer shall have this sample tested, at
20 the employer's expense, for the presence of any
21 substance of abuse. If the employee requests
22 that a blood sample be taken under this para-
23 graph, the employer may not collect or test any
24 other sample from the employee.

25 No employer may require, request or suggest that
26 any employee or applicant provide a blood sample
27 for substance abuse testing purposes nor may any
28 employer conduct a substance abuse test upon a
29 blood sample, except as provided in this para-
30 graph.

31 6. Qualified testing laboratories required. No
32 employer may perform any substance abuse test admin-
33 istered to any of his employees or applicants. A
34 substance abuse test administered under this subchap-
35 ter must be performed in a qualified testing labora-
36 tory that complies with this subsection.

37 A. The director of the laboratory must be certi-
38 fied by the American Board of Forensic Toxicology
39 or the American Board of Clinical Chemistry in
40 Toxicological Chemistry.

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
11 686. 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 test 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 7. 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 8. Laboratory report of test results. The labo-
12 ratory 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 ratory 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 9. 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 5, paragraph B. The employee
13 or applicant shall pay the costs of any additional
14 substance abuse tests.

15 10. 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 11. Rules. The Department of Human Services
25 shall adopt any rules under section 686 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. Testing permitted

31 An employer may require, request or suggest that
32 an employee or applicant submit to a substance abuse
33 test only as provided in this section.

34 1. Testing of applicants. An employer may re-
35 quire, request or suggest that an applicant submit to
36 a substance abuse test only if the applicant has been
37 offered employment with the employer. The offer of
38 employment may be conditioned upon the applicant re-
39 ceiving a negative test result.

1 2. Probable cause testing of employees. An em-
2 ployer may require, request or suggest that an em-
3 ployee submit to a substance abuse test if the em-
4 ployer has probable cause to test the employee. The
5 employee's immediate supervisor, or other supervisory
6 personnel familiar with the employee's past behavior
7 and record, shall make the determination of probable
8 cause in the first instance. The supervisor or other
9 person must state, in writing, the facts upon which
10 this determination is based and provide a copy of the
11 statement to the employee. Any witness to any fact
12 relied upon in the determination of probable cause
13 must be identified in the statement.

14 3. Testing of an employee after a confirmed posi-
15 itive result. In addition to testing an employee on
16 a probable cause basis under subsection 2, an employ-
17 er may require an employee who has received a con-
18 firmed positive result to submit to up to 4 subse-
19 quent substance abuse tests performed at arbitrarily
20 selected times over a one-year period as a condition
21 of continued employment if the employee chooses not
22 to undergo rehabilitation under section 685, subsec-
23 tion 2, paragraphs B and C.

24 4. Testing while undergoing rehabilitation or
25 treatment. While the employee is participating in a
26 substance abuse rehabilitation program either as a
27 result of voluntary contact with or mandatory refer-
28 ral to the employer's employee assistance program or
29 after a confirmed positive result as provided in sec-
30 tion 685, subsection 2, paragraphs B and C, substance
31 abuse testing may be conducted by the rehabilitation
32 or treatment provider as required, requested or sug-
33 gested by that provider.

34 A. Substance abuse testing conducted as part of
35 such a rehabilitation or treatment program is not
36 subject to the provisions of this subchapter reg-
37 ulating substance abuse testing.

38 B. An employer may not require, request or sug-
39 gest that any substance abuse test be adminis-
40 tered to any employee while the employee is un-
41 dergoing such rehabilitation or treatment, except
42 as provided in subsection 2.

1 C. The results of any substance abuse test ad-
2 ministered to an employee as part of such a reha-
3 bilitation or treatment program may not be re-
4 leased to his employer.

5 §685. Action taken on substance abuse tests

6 Action taken by an employer on the basis of a
7 substance abuse test is limited as provided in this
8 section.

9 1. Before receipt of test results. An employer
10 may suspend an employee with full pay and benefits or
11 may transfer the employee to another position with no
12 reduction in pay or benefits while awaiting an
13 employee's test results.

14 2. Use of confirmation test results. The fol-
15 lowing provisions govern an employer's use of con-
16 firmed positive results and an employee's or appli-
17 cant's refusal to submit to a test requested or re-
18 quired by an employer in compliance with this sub-
19 chapter.

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

25 (1) Refusal to hire an applicant for em-
26 ployment;

27 (2) Discharge of an employee;

28 (3) Discipline of an employee; or

29 (4) Change in the employee's work assign-
30 ment.

31 B. Before taking any action described in para-
32 graph A, in the case of an employee who receives
33 a confirmed positive result, an employer must
34 provide the employee with an opportunity to par-
35 ticipate in a rehabilitation program designed to
36 enable the employee to avoid future use of a sub-
37 stance of abuse, except where:

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

3 (2) The employee receives a subsequent con-
4 firmed positive result within one year after
5 his rehabilitation or treatment provider in-
6 dicates that the employee has successfully
7 completed a rehabilitation program as pro-
8 vided in paragraph C, subparagraph (3).

9 C. If the employee chooses not to participate in
10 a rehabilitation program under this subsection,
11 the employer may take any action described in
12 paragraph A. If the employee chooses to partici-
13 pate in a rehabilitation program, the following
14 provisions apply.

15 (1) If the employer's employee assistance
16 program offers counseling or rehabilitation
17 services, the employee may choose to enter
18 that program at the employer's expense. If
19 no such services are offered by the employ-
20 er's employee assistance program or if the
21 employee chooses not to participate in such
22 a program, the employee may:

23 (a) Seek rehabilitation or counseling
24 from another source recommended by the
25 employee assistance counselor.

26 (i) Unless it is covered by a
27 group health insurance plan, the
28 employer shall pay the costs of
29 rehabilitation under this divi-
30 sion, provided that the employer
31 is not required to pay for any
32 residential treatment that extends
33 beyond 28 days. For the purposes
34 of this subdivision, "residential
35 treatment" has the same meaning as
36 found in Title 24, section 2329,
37 subsection 2, paragraph B.

38 (ii) Notwithstanding subdivision
39 (i), if the employer has 20 or
40 fewer full-time employees, the em-
41 ployer is not required to pay for

1 any rehabilitation or treatment
2 under this division.

3 (iii) Notwithstanding subdivision
4 (i), if the employer has between
5 20 and 50 full-time employees and
6 does not provide or participate in
7 an employee group health benefit
8 plan subject to Title 24, section
9 2329, or Title 24-A, section 2842,
10 the employer and the affected em-
11 ployee shall equally divide the
12 costs of rehabilitation or treat-
13 ment under this division; or

14 (b) Enter a public or private rehabil-
15 itation program of his own choice at
16 his own expense, unless it is covered
17 by a health insurance plan.

18 (2) No employer may take any action de-
19 scribed in paragraph A, while an employee is
20 participating in a rehabilitation program,
21 except that an employer may change the
22 employee's work assignment or suspend the
23 employee from active duty to reduce any pos-
24 sible safety hazard. No reduction in pay or
25 benefits may be made while an employee is
26 participating in a rehabilitation program,
27 provided that the employer is not required
28 to pay the employee for periods in which the
29 employee is unavailable for work for the
30 purposes of rehabilitation. The employee
31 may apply normal sick leave and vacation
32 time, if any, for these periods.

33 (3) Upon successfully completing the reha-
34 bilitation program, as determined by his re-
35 habilitation or treatment provider, the em-
36 ployee is entitled to return to his previous
37 job with full pay and benefits, unless con-
38 ditions unrelated to his previous confirmed
39 positive result make his return impossible.
40 If the rehabilitation or treatment provider
41 determines that the employee has not suc-
42 cessfully completed the rehabilitation pro-
43 gram, the employer may take any action de-
44 scribed in paragraph A.

1 D. This subsection does not require an employer
2 to take any disciplinary action against an em-
3 ployee who refuses to submit to a test, who re-
4 ceives a single or repeated confirmed positive
5 results or who does not choose to participate in
6 a rehabilitation program. This subsection is in-
7 tended to set minimum opportunities for an em-
8 ployee with a substance abuse problem to address
9 his problem through rehabilitation. An employer
10 may offer additional opportunities, not otherwise
11 in violation of this subchapter, for rehabilita-
12 tion or continued employment without rehabilita-
13 tion.

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

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

25 (1) The release of this information where
26 required or permitted by state law or feder-
27 al law; or

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

32 B. Notwithstanding any other law, the results of
33 any substance abuse test required, requested or
34 suggested by any employer may not be used in any
35 criminal proceeding.

36 §686. Rulemaking

37 The Department of Human Services shall adopt
38 rules under Title 5, chapter 375, to carry out the
39 purposes of this Act. The Department of Human Ser-
40 vices shall consult with the Department of Labor

1 which shall assist in developing these rules when
2 necessary. The Department of Human Services shall
3 adopt initial rules before December 1, 1987.

4 §687. Substance abuse education

5 All employers shall cooperate fully with the De-
6 partment of Labor, the Department of Human Services,
7 the Department of Public Safety and any other state
8 agency in programs designed to educate employees
9 about the dangers of substance abuse and about public
10 and private services available to employees who have
11 a substance abuse problem.

12 §688. Violation and remedies

13 The following provisions govern the enforcement
14 of this subchapter.

15 1. Remedies. Any employer who violates this
16 subchapter:

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

20 B. Is liable to any employee subjected to disci-
21 pline or discharge based on a violation of this
22 subchapter for:

23 (1) An amount equal to 3 times any lost
24 wages;

25 (2) Reinstatement of the employee to his
26 job with full benefits;

27 (3) Court costs; and

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

30 2. Breach of confidentiality. In addition to
31 the liability imposed under subsection 1, any person
32 who violates section 684, subsection 4, paragraph C,
33 or section 685, subsection 3, is subject to a civil
34 penalty not to exceed \$1,000, payable to the affected
35 employee, to be recovered in a civil action.

1 3. Enforcement. The Department of Labor or the
2 affected employee or employees may enforce this sub-
3 chapter. The Department of Labor may:

4 A. Collect the judgment on behalf of the employ-
5 ee or employees;

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

8 C. Collect fines insured through violation of
9 this subchapter.

10 §689. Severability

11 The finding of any court that any provision of
12 this Act is unconstitutional as applied does not af-
13 fect the validity of the remaining provisions or the
14 validity of the offending provision as applied in a
15 different situation.

16 §690. Review

17 The joint standing committee of the Legislature
18 having jurisdiction over labor shall review the im-
19 plementation and effectiveness of this Act during the
20 First Regular Session of the 114th Legislature.

21 Sec. 2. Report. The Department of Labor shall
22 report to the joint standing committee of the Legis-
23 lature having jurisdiction over labor on February 1,
24 1988, and annually on that date thereafter. This re-
25 port shall:

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

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

32 3. Briefly describe the general scope and prac-
33 tice of workplace substance abuse testing in the
34 State.

1 to 4 arbitrary tests in a year are permitted for in-
2 dividuals who test positive and who do not enter a
3 rehabilitation program, but continue working for the
4 employer.

5 The bill allows an employer to require substance
6 abuse testing of any employee only when he has proba-
7 ble cause to impose the test. The concept of proba-
8 ble cause is defined in the bill to require an em-
9 ployer to have reasonable grounds for believing that
10 an employee is under the influence of a substance of
11 abuse before he may require a test. The purpose of
12 this definition is to prevent an employer from impos-
13 ing substance abuse tests upon an employee without
14 reliable, objective information supporting the find-
15 ing of probable cause.

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

28 The bill also regulates the actual testing pro-
29 cess to ensure that proper testing procedures are
30 followed and that an employee's privacy rights are
31 protected from undue intrusion. The bill requires a
32 testing program to be conducted pursuant to a written
33 policy developed by the employer in consultation with
34 his employees. Certain testing procedures are also
35 regulated. Strict confidentiality of any information
36 acquired through the testing process is required.
37 Blood testing is prohibited except upon request of
38 the employee. A test sample must be collected in a
39 medical facility and be supervised by medical person-
40 nel. The test subject may remain clothed and free
41 from observation by any other individual when a urine
42 sample is collected. The test subject may request a
43 portion of the sample for his own testing as a check
44 on the accuracy of the testing laboratory used by the

1 employer. Only immunoassay tests may be used for
2 screening purposes and all positive screening test
3 results must be confirmed by gas chromatography-mass
4 spectrometry, which is the most accurate test cur-
5 rently available. No employer may perform a sub-
6 stance abuse test for any of his employees or appli-
7 cants; all tests must be performed by a qualified
8 testing laboratory. The Department of Human Services
9 is directed to adopt rules to ensure that all testing
10 procedures are regulated where necessary to protect
11 an individual's privacy rights or to ensure accurate
12 testing. Finally, employers are prohibited from
13 using substance abuse tests to discover any informa-
14 tion that does not relate to an individual's use of a
15 substance of abuse that is likely to cause impairment
16 of the user. Further, testing laboratories are pro-
17 hibited from reporting such information to the em-
18 ployer. These provisions ensure that testing pro-
19 grams will not be used to discover personal informa-
20 tion that the employer has no legitimate interest in,
21 such as pregnancy or mental or physical illness that
22 does not affect work performance.

23 The bill also regulates discipline taken upon re-
24 ceipt of a positive test result. Recognizing that
25 the prevention and deterrence of safety hazards
26 caused by employee impairment in the workplace is the
27 justification for testing programs, and not the iden-
28 tification and punishment of persons who suffer from
29 the disease of substance abuse, this bill attempts to
30 provide minimum opportunities for a substance abusing
31 employee to receive rehabilitation. Any employer who
32 establishes a testing program must first have a func-
33 tioning employee assistance program. These programs
34 have consistently demonstrated their ability to deal
35 with a wide range of employee problems, including em-
36 ployee substance abuse, economically and effectively.
37 Once a testing program is established, and an employ-
38 ee receives a confirmed positive test result, the em-
39 ployer is authorized to dismiss or discipline that
40 employee unless the employee enters a substance abuse
41 rehabilitation program. If the employee elects to
42 undergo rehabilitation, he may be suspended with no
43 reduction in pay, except that an employer is not re-
44 quired to pay the employee for any time during which
45 the employee is unavailable for work for the purposes
46 of rehabilitation. Upon successfully completing the

1 rehabilitation program, the employee may return to
2 his previous job. The employer is no longer required
3 to offer the employee an opportunity to undergo reha-
4 bilitation if the employee has already tested posi-
5 tive at least twice before or if the employee re-
6 ceives a confirmed positive result within one year of
7 completing a previous rehabilitation program.

8 This bill attempts to strike a reasonable balance
9 between the interests of the employer, his employees
10 and the general public to be free from safety hazards
11 in the workplace caused by impaired workers, and the
12 rights of all individuals to be free from unnecessary
13 intrusions into their personal privacy. In order to
14 accomplish this goal, certain aspects of the sub-
15 stance abuse testing process are regulated in order
16 to prevent abuses of the process. Many of these re-
17 strictions establish only minimum requirements, while
18 many other aspects of the testing process are left
19 entirely unregulated. It is the intent of this bill
20 that an employer is free to develop his own policies
21 in these areas, in consultation with his employees.
22 This new draft is intended to establish minimum re-
23 quirements for a fair and effective substance abuse
24 testing program. It is hoped that employers and em-
25 ployees will work together to go beyond these bare
26 requirements to provide the most effective means of
27 assistance possible for those persons suffering from
28 the disease of substance abuse.

1 The bill also includes a transition clause in-
2 tended to define the permissible scope of substance
3 abuse testing in the workplace during the interim pe-
4 riod after passage of this bill, but before the rules
5 required by this bill are adopted. No employer may
6 institute a substance abuse testing program in his
7 workplace after the effective date of this new draft
8 until January 1, 1988. All employers must stop any
9 substance abuse testing of employees or applicants on
10 the effective date of this bill, except that any em-
11 ployer who was conducting a testing program on Janu-
12 ary 1, 1987, may continue to operate his program,
13 however, as of January 1, 1988, all testing programs
14 must comply with this bill and the rules adopted un-
15 der it.

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