

MAINE STATE LEGISLATURE

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R. of S.

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L.D. 1870
(Filing No. S-225)

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STATE OF MAINE
SENATE
113TH LEGISLATURE
FIRST REGULAR SESSION

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SENATE AMENDMENT "A" to S.P. 642, L.D. 1870,
Bill, "AN ACT to Ensure Confidential and Reliable
Substance Abuse Testing of Employees and Applicants."

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Amend the Bill by striking out all of the title
and inserting in its place the following:

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'AN ACT to Ensure Confidential and Reliable Sub-
stance Abuse Testing of Employees.'

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Further amend the Bill by striking out everything
after the enacting clause and inserting in its place
the following:

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'26 MRSA §595 is enacted to read:

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§595. Substance abuse testing

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

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

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

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C. "Employer" means a person, partnership, cor-
poration, association or other legal entity, pub-
lic or private, which employs one or more employ-
ees.

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D. "Probable cause" means a reasonable ground

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1 for belief in the existence of facts which would
2 induce a person to believe that an employee may
3 be under the influence of a substance of abuse.

4 E. "Safety-sensitive position" means an employ-
5 ment position or work assignment which is desig-
6 nated by the Department of Labor in rules adopted
7 under Title 5, chapter 375, on or before December
8 31, 1987.

9 F. "Substance abuse test" means any test proce-
10 dure designed to take and analyze body fluids or
11 materials from the body for the purpose of de-
12 tecting the presence of substances of abuse. The
13 term does not include tests designed to determine
14 blood alcohol concentration levels from a sample
15 of an individual's breath.

16 (1) "Screening test" means a substance
17 abuse test that is reliable within known
18 tolerances and which is used as a prelimi-
19 nary step in detecting the presence of sub-
20 stances of abuse.

21 (2) "Confirmation test" means a 2nd sub-
22 stance abuse test performed through the use
23 of gas chromatography-mass spectrometry that
24 is used to verify the presence of a sub-
25 stance of abuse indicated by an initial pos-
26 itive screening test result.

27 G. "Substance of abuse" means any scheduled
28 drug, alcohol or other drug, or any of their
29 metabolites.

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

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

34 (3) "Scheduled drug" has the same meaning

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1 as found in Title 17-A, section 1101, sub-
2 section 11.

3 2. Testing procedures. No employer may require,
4 request or suggest that any employee submit to a sub-
5 stance abuse test unless the employee works in a
6 safety-sensitive position or the employer has proba-
7 ble cause to conduct the test.

8 3. Written policy. Before establishing any sub-
9 stance abuse testing program, an employer must devel-
10 op a written policy in compliance with this subchap-
11 ter providing for:

12 A. The conditions under which substance abuse
13 testing will be required, including, without lim-
14 itation, the procedures for the collection and
15 storage of samples, chain of custody of such sam-
16 ples, substances of abuse for which testing will
17 be required and cut-off levels;

18 B. Procedures to protect the confidentiality of
19 employee services to the highest practical de-
20 gree;

21 C. The procedure and consequences of an
22 employee's voluntary admission of a substance
23 abuse problem and any available assistance, in-
24 cluding the availability, when required, of the
25 employer's employee assistance program and any
26 applicable procedures thereunder;

27 D. The consequences of a confirmed positive test
28 result, including, for all jobs not classified as
29 safety-sensitive, a written policy establishing
30 the employee's right to participate in an employ-
31 ee assistance program after he receives a con-
32 firm positive test result; and

33 E. Any other desirable information.

34 The employer shall notify his employees about the

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1 written policy at least 30 days before the substance
2 abuse testing program is implemented. The employer
3 shall notify each new employee about the written pol-
4 icy at or before the time of hiring.

5 3. Use of test results. Any sample that receives
6 a positive screening test result must be submitted
7 for a confirmation test. No employer may take any fi-
8 nal action against an employee based upon any sub-
9 stance abuse test result other than a confirmed posi-
10 tive result.

11 4. Qualified testing laboratories required. No
12 employer may perform any substance abuse test admin-
13 istered to any of his employees or applicants. A sub-
14 stance abuse test administered under this subchapter
15 must be performed in a qualified testing laboratory
16 that complies with this subsection.

17 A. The director of the laboratory must be certi-
18 fied by the American Board of Forensic Toxicology
19 or the American Board of Clinical Chemistry in
20 Toxicological Chemistry.

21 B. The laboratory must have written testing pro-
22 cedures and procedures to ensure a clear chain of
23 custody.

24 C. The laboratory must demonstrate satisfactory
25 performance in the proficiency testing programs
26 of the National Institute on Drug Abuse, the Col-
27 lege of American Pathology or the American Asso-
28 ciation for Clinical Chemistry.

29 5. Confidentiality. This subsection governs the
30 use of information acquired by an employer in the
31 testing process.

32 A. Unless the employee or applicant consents,
33 all information acquired by an employer in the
34 testing process is confidential and may not be
35 released to any person other than the employee or

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- 1 applicant who is tested, any necessary personnel
2 of the employer and a provider of rehabilitation
3 or treatment services. This subsection does not
4 prevent:
- 5 (1) The release of this information when
6 required or permitted by state law or feder-
7 al law; or
- 8 (2) The use of this information in any
9 grievance procedure, administrative hearing
10 or civil action relating to the imposition
11 of the test.
- 12 B. Notwithstanding any other law, the results of
13 any substance abuse test required, requested or
14 suggested by any employer may not be used in any
15 criminal proceeding.
- 16 6. Home rule authority preempted. No municipali-
17 ty may enact any ordinance concerning an employer's
18 use of substance abuse tests.
- 19 7. Employer abuse prohibited. No employer may
20 use a testing program for the direct or indirect pur-
21 pose of harassing, coercing or intimidating any of
22 its employees.
- 23 8. Violation; penalty. Any employer who violates
24 this section commits a civil violation for which a
25 forfeiture of not less than \$100 nor more than \$500
26 may be adjudged.'

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STATEMENT OF FACT

2 This amendment restricts the scope of testing
3 permitted in order to reflect the proper balance be-
4 tween an individual worker's right to personal priva-
5 cy and the legitimate interests of the employer and
6 the public. This amendment restricts the use of ran-
7 dom or arbitrary testing to only those employment po-
8 sitions where the employee poses a substantial risk
9 of seriously injuring another person. In such a case,
10 the employee's right to personal privacy is clearly
11 outweighed by the potential for serious harm that may
12 occur to other persons if potentially dangerous con-
13 duct on the part of the employee cannot be detected
14 or deterred. In such a case, the employer and the
15 public cannot afford to wait until an employee begins
16 to show outward signs of a substance abuse problem.
17 At that point, it may well be too late to prevent the
18 harm to other persons.

19 When the employee works in a position that
20 presents little risk of harm to other persons, the
21 employee's privacy rights are protected in this
22 amendment by requiring an employer to have probable
23 cause in order to test that individual. While not
24 condoning substance abuse by employees, this amend-
25 ment recognizes that individuals have a right to
26 their personal privacy which may not be disturbed
27 without substantial justification.

