

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

R. of S.

1
2

3
4
5
6

7
8
9

10
11
12

13
14

15
16

17
18

19
20
21
22
23
24
25
26
27

28
29
30
31
32

L.D. 1870

(Filing No. S-226)

STATE OF MAINE
SENATE
113TH LEGISLATURE
FIRST REGULAR SESSION

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

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

'Sec. 1. 5 MRSA §12004, sub-§10, ¶A, sub-§49-A
is enacted to read:

49-A. Labor Safety-Sensitive Expenses Only 26 MRSA
Review Board §682

Sec. 2. 26 MRSA c. 7, sub-c. III-A is enacted to
read:

SUBCHAPTER III-A

SUBSTANCE ABUSE TESTING

§681. Purpose; applicability

- 1. Purpose. This subchapter is intended to:
 - A. Protect the privacy rights of individual employees in the State from undue invasion of employers through the use of substance abuse tests while allowing the use of tests when the employer has a compelling reason to administer a test;
 - B. Ensure that when substance abuse tests are used, proper test procedures are employed to protect the privacy rights of employees and applicants and to achieve reliable and accurate results; and

R. of S.

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

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.

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

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

10 §682. Definitions

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

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

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

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

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

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

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

33 5. Positive test result. "Positive test result"

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

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

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

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

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

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

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

27 7. Safety-sensitive position. "Safety-sensitive
28 positions" means an employment position or work as-
29 signment which is designated by the Department of La-
30 bor in rules adopted under the following procedure.

31 A. The Safety-Sensitive Review Board, as estab-
32 lished by Title 5, chapter 379, shall be composed
33 of 6 members. The Governor shall appoint 2 mem-
34 bers; the President of the Senate shall appoint 2
35 members; and the Speaker of the House shall ap-

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 point 2 members. The members shall select one
2 member by majority vote to serve as chairman.
3 Members shall be compensated as provided in Title
4 5, chapter 379. The Bureau of Labor Standards
5 shall provide all necessary staff assistance to
6 the board and all departments and agencies of
7 State Government shall cooperate with the board
8 upon request. The Safety-Sensitive Review Board
9 shall review and study the following:

10 (1) The effects of various substances of
11 abuse upon the user;

12 (2) Potential occupations and work assign-
13 ments that may be designated as
14 safety-sensitive in the rules adopted by the
15 Department of Labor;

16 (3) How the use of substances of abuse may
17 cause a safety hazard in the occupations and
18 work assignments studied; and

19 (4) Possible methods of determining those
20 employment positions in which the use of a
21 substance of abuse would create a safety
22 risk as described in paragraph B, subpara-
23 graph (1).

24 The Safety-Sensitive Review Board shall make its
25 findings and recommend to the Department of Labor
26 a method of determining when an occupation or
27 work assignment qualifies as a safety-sensitive
28 position under this subsection. The board shall
29 make its recommendations to the department before
30 January 1, 1988.

31 B. The Department of Labor shall consider the
32 recommendations of the Safety-Sensitive Review
33 Board in adopting rules under Title 5, chapter
34 375, to carry out the purposes of this subsec-
35 tion. These rules shall be adopted before March
36 30, 1988, and shall provide for:

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 (1) The designation of those employment po-
2 sitions which would create a substantial
3 risk of serious bodily harm to the general
4 public or coworkers if an employee under the
5 influence of a substance of abuse was per-
6 forming in that position;

7 (2) A process under which an employer may
8 petition the department to designate as
9 safety-sensitive a position which is not
10 designated in the list of positions estab-
11 lished under subparagraph (1); and

12 (3) A procedure for notifying the employees
13 of any employer who petitions the department
14 under subparagraph (2) and a process under
15 which the employees may challenge the pro-
16 posed designation of any position as
17 safety-sensitive and offer evidence rebut-
18 ting the employer's evidence supporting that
19 designation.

20 8. Substance abuse test. "Substance abuse test"
21 means any test procedure designed to take and analyze
22 body fluids or materials from the body for the pur-
23 pose of detecting the presence of substances of
24 abuse. The term does not include tests designed to
25 determine blood-alcohol concentration levels from a
26 sample of an individual's breath.

27 A. "Screening test" means an initial substance
28 abuse test performed through the use of
29 immunoassay technology or a test technology of
30 similar or greater accuracy and reliability ap-
31 proved by the Department of Human Services as
32 provided under section 686 and which is used as a
33 preliminary step in detecting the presence of
34 substances of abuse.

35 B. "Confirmation test" means a 2nd substance
36 abuse test performed through the use of gas

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 chromatography-mass spectrometry that is used to
2 verify the presence of a substance of abuse indi-
3 cated by an initial positive screening test re-
4 sult.

5 9. Substance of abuse. "Substance of abuse"
6 means any scheduled drug, alcohol or other drug, or
7 any of their metabolites.

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

10 B. "Drug" has the same meaning as found in Title
11 32, section 2805, subsection 4.

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

14 §683. Testing procedures

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

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

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

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:

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 (1) A description of which positions, if
2 any, will be subject to testing, including
3 any positions subject to random testing un-
4 der section 684, subsection 3; and

5 (2) A Procedure for selecting employees to
6 be tested on a random basis under section 684,
7 subsection 3. This procedure must ensure that
8 employees are selected on an indisputably random
9 basis.

10 C. The collection of samples:

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

15 (2) An employer may not require an employee
16 or applicant to remove any clothing for the
17 purpose of collecting a sample, except that
18 an employer may require that an employee or
19 applicant leave any personal belongings oth-
20 er than clothing and any unnecessary coat,
21 jacket or similar outer garments outside of
22 the collection area; and

23 (3) No employee or applicant may be re-
24 quired to provide a urine sample while being
25 observed, directly or indirectly, by another
26 individual;

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

29 E. The chain of custody of samples sufficient to
30 protect the sample from tampering and to verify
31 the identity of each sample and test results;

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

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 G. The cut-off levels for both screening and
2 confirmation tests at which the presence of a
3 substance of abuse in a sample is considered a
4 positive test result:

5 (1) Cut-off levels for confirmation tests
6 for marijuana may not be lower than 10
7 nanograms of delta-9 tetrahydrocannabinol
8 per milliliter for blood, serum or plasma
9 samples and 50 nanograms of del-
10 ta-9-tetrahydrocannabinol-9-carboxylic acid
11 per milliliter for urine samples; and

12 (2) The Department of Human Services shall
13 adopt rules under section 686 regulating
14 screening and confirmation cut-off levels
15 for other substances of abuse to ensure that
16 levels are set within known tolerances of
17 test methods and above mere trace amounts;

18 H. The consequences of a confirmed positive re-
19 sult;

20 I. The consequences for refusal to submit to a
21 substance abuse test;

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

25 K. Opportunities and procedures for rehabilita-
26 tion following a confirmed positive result;

27 L. A procedure under which an employee or appli-
28 cant who receives a confirmed positive result may
29 appeal and contest the accuracy of that result;
30 and

31 M. Any other necessary or desirable matters.

32 An employer must consult with his employees while de-
33 veloping a substance abuse testing policy under this

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 subsection. The employer shall send a copy of his
2 written policy to the Department of Labor immediately
3 after it is adopted.

4 3. Copies to employees and applicants. The em-
5 ployer shall provide each employee with a copy of the
6 written policy under subsection 2 and a copy of this
7 subchapter at least 60 days before the policy takes
8 effect. If applicants are subject to testing under
9 the written policy, the employer shall provide each
10 applicant with a copy of the written policy under
11 subsection 2 and a copy of this subchapter before ad-
12 ministering a substance abuse test to the applicant.

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

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

18 B. Attempts to absolve the employer from any po-
19 tential liability arising out of the imposition
20 of the substance abuse test; or

21 C. Attempts to waive an employee's or appli-
22 cant's rights or eliminate or diminish an employ-
23 er's obligations under this subchapter.

24 Any form or agreement prohibited by this subsection
25 is void.

26 5. Right to obtain other samples. At the re-
27 quest of the employee or applicant at the time the
28 test sample is taken, the employer shall, at that
29 time:

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

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

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

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

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

24 A. The director of the laboratory must be certi-
25 fied by the American Board of Forensic Toxicology
26 or the American Board of Clinical Chemistry in
27 Toxicological Chemistry.

28 B. The laboratory must have written testing pro-
29 cedures and procedures to ensure a clear chain of
30 custody.

31 C. The laboratory must demonstrate satisfactory
32 performance in the proficiency testing program of
33 the National Institute on Drug Abuse, the College
34 of American Pathology or the American Association
35 for Clinical Chemistry.

36 D. The laboratory must comply with rules adopted

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 by the Department of Human Services under section
2 686. These rules shall ensure that:

3 (1) The laboratory possesses all licenses
4 or certifications that the department finds
5 necessary or desirable to ensure reliable
6 and accurate test results;

7 (2) The laboratory follows proper quality
8 control procedures, including, but not lim-
9 ited to:

10 (a) The use of internal quality con-
11 trols during each substance abuse test
12 conducted under this subchapter, in-
13 cluding the use of blind samples and
14 samples of known concentrations which
15 are used to check the performance and
16 calibration of testing equipment;

17 (b) The internal review and certifica-
18 tion process for test results, includ-
19 ing the qualifications of the person
20 who performs that function in the test-
21 ing laboratory; and

22 (c) Security measures implemented by
23 the testing laboratory; and

24 (3) Other necessary and proper actions are
25 taken to ensure reliable and accurate test
26 results.

27 7. Testing procedure. The testing laboratory
28 shall perform a screening test on each sample submit-
29 ted to it by the employer for only those substances
30 of abuse that the employer requests to be identified.
31 If the screening test result is negative, no further
32 test may be conducted on that sample. If the screen-
33 ing test result is positive, the testing laboratory
34 shall perform a confirmation test on that sample.
35 The testing laboratory shall retain all confirmed

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 positive samples for one year in a manner that will
2 inhibit deterioration of the samples and allow subse-
3 quent retesting. All other samples shall be disposed
4 of immediately after testing.

5 8. Laboratory report of test results. The labo-
6 ratory report of test results shall, at a minimum,
7 state:

8 A. The name of the laboratory that performed the
9 test or tests;

10 B. Any confirmed positive results on any tested
11 sample:

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

23 (2) Unless the employee or applicant con-
24 sents, test results shall not be reported in
25 numerical or quantitative form, but shall
26 state only that the test result was posi-
27 tive;

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

30 D. Any available information concerning the mar-
31 gin of accuracy and precision of the test methods
32 employed.

33 The report shall not disclose the presence or absence
34 of evidence of any physical or mental condition or of

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 any substance other than the specific substances of
2 abuse that the employer requests to be identified.
3 The employer shall promptly provide a legible copy of
4 the laboratory report to the employee or applicant
5 tested.

6 9. Costs. The employer shall pay the costs of
7 all substance abuse tests to which he requires, re-
8 quests or suggests an employee or applicant submit,
9 including the cost of any substance abuse test con-
10 ducted under subsection 5, paragraph B. The employee
11 or applicant shall pay the costs of any additional
12 substance abuse tests.

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

22 11. Rules. The Department of Human Services
23 shall adopt any rules under section 686 regulating
24 substance abuse testing procedures that it finds nec-
25 essary or desirable to ensure accurate and reliable
26 substance abuse testing and to protect the privacy
27 rights of employees and applicants.

28 §684. Testing permitted

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

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

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 ceiving a negative test result.

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

15 3. Random testing for safety-sensitive posi-
16 tions. In addition to testing employees on a proba-
17 ble cause basis under subsection 2, an employer may
18 require, request or suggest that an employee submit
19 to a substance abuse test on a random basis if the
20 employee is working in a safety-sensitive position
21 when the employer requires, requests or suggests that
22 the employee submit to the test. The procedure for
23 selecting employees in safety-sensitive positions for
24 testing must comply with section 683, subsection 2,
25 paragraph B, subparagraph (2).

26 A. Before an employer conducts any substance
27 abuse testing under this subsection, he must
28 have:

29 (1) Obtained a complete safety and health
30 inspection of his entire work site where
31 substance abuse testing under this subsec-
32 tion will be conducted within 24 months be-
33 fore testing begins and at least once every
34 3 years thereafter for as long as the test-
35 ing program continues. Employers whose
36 business requires their employees to work at
37 changing work locations must obtain an in-
38 spection of only a single work site within

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 the time periods prescribed. These inspec-
2 tions must be performed by the Federal Occu-
3 ptional Safety and Health Administration or
4 by the State Bureau of Labor Standards. An
5 employer may meet this requirement by ob-
6 taining a similar inspection performed
7 through a safety consultation program of the
8 Bureau of Labor Standards; and

9 (2) Successfully passed the inspection or
10 completely abated any violations or safety
11 deficiencies cited or noted during the in-
12 spection.

13 B. An employer who had a substance abuse testing
14 program on January 1, 1987, that included random,
15 arbitrary or periodic testing of employees work-
16 ing as a nuclear power plant operator, bus driver
17 or commercial truck driver, may continue to test
18 those employees randomly, arbitrarily or periodi-
19 cally until September 1, 1988. As of that date,
20 all substance abuse testing of those employees
21 must comply with this subchapter.

22 4. Testing of an employee after a confirmed posi-
23 tive result. In addition to testing an employee on
24 a probable cause basis under subsection 2, or on a
25 random basis under subsection 3, an employer may re-
26 quire an employee who has received a confirmed posi-
27 tive result to submit to up to 4 subsequent substance
28 abuse tests performed at arbitrarily selected times
29 over a one-year period as a condition of continued
30 employment if the employee chooses not to undergo re-
31 habilitation under section 685, subsection 2, para-
32 graphs B and C.

33 5. Testing while undergoing rehabilitation or
34 treatment. While the employee is participating in a
35 substance abuse rehabilitation program either as a
36 result of voluntary contact with or mandatory refer-
37 ral to the employer's employee assistance program or
38 after a confirmed positive result as provided in sec-

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 tion 685, subsection 2, paragraphs B and C, substance
2 abuse testing may be conducted by the rehabilitation
3 or treatment provider as required, requested or sug-
4 gested by that provider.

5 A. Substance abuse testing conducted as part of
6 such a rehabilitation or treatment program is not
7 subject to the provisions of this subchapter reg-
8 ulating substance abuse testing.

9 B. An employer may not require, request or sug-
10 gest that any substance abuse test be adminis-
11 tered to any employee while the employee is un-
12 dergoing such rehabilitation or treatment, except
13 as provided in subsection 2.

14 C. The results of any substance abuse test ad-
15 ministered to an employee as part of such a reha-
16 bilitation or treatment program may not be re-
17 leased to his employer.

18 §685. Action taken on substance abuse tests

19 Action taken by an employer on the basis of a
20 substance abuse test is limited as provided in this
21 section.

22 1. Before receipt of test results. An employer
23 may suspend an employee with full pay and benefits or
24 may transfer the employee to another position with no
25 reduction in pay or benefits while awaiting an
26 employee's test results.

27 2. Use of confirmation test results. The fol-
28 lowing provisions govern an employer's use of con-
29 firm positive results and an employee's or appli-
30 cant's refusal to submit to a test requested or re-
31 quired by an employer in compliance with this sub-
32 chapter.

33 A. Subject to any limitation of the Maine Human
34 Rights Act or any other state law or federal law,

R. of S.

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 an employer may use a confirmed positive result
2 or refusal to submit to a test as a factor in any
3 of the following decisions:

4 (1) Refusal to hire an applicant for em-
5 ployment;

6 (2) Discharge of an employee;

7 (3) Discipline of an employee; or

8 (4) Change in the employee's work assign-
9 ment.

10 B. Before taking any action described in para-
11 graph A, in the case of an employee who receives
12 a confirmed positive result, an employer must
13 provide the employee with an opportunity to par-
14 ticipate in a rehabilitation program designed to
15 enable the employee to avoid future use of a sub-
16 stance of abuse, except where:

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

19 (2) The employee receives a subsequent con-
20 firmed positive result within one year after
21 his rehabilitation or treatment provider in-
22 dicates that the employee has successfully
23 completed a rehabilitation program as pro-
24 vided in paragraph C, subparagraph (3).

25 C. If the employee chooses not to participate in
26 a rehabilitation program under this subsection,
27 the employer may take any action described in
28 paragraph A. If the employee chooses to partici-
29 pate in a rehabilitation program, the following
30 provisions apply.

31 (1) If the employer's employee assistance
32 program offers counseling or rehabilitation
33 services, the employee may choose to enter

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 that program at the employer's expense. If
2 no such services are offered by the employ-
3 er's employee assistance program or if the
4 employee chooses not to participate in such
5 a program, the employee may:

6 (a) Seek rehabilitation or counseling
7 from another source recommended by the
8 employee assistance counselor.

9 (i) Unless it is covered by a
10 group health insurance plan, the
11 employer shall pay the costs of
12 rehabilitation under this divi-
13 sion, provided that the employer
14 is not required to pay for any
15 residential treatment that extends
16 beyond 28 days. For the purposes
17 of this subdivision, "residential
18 treatment" has the same meaning as
19 found in Title 24, section 2329,
20 subsection 2, paragraph B.

21 (ii) Notwithstanding subdivision
22 (i), if the employer has 20 or
23 fewer full-time employees, the em-
24 ployer is not required to pay for
25 any rehabilitation or treatment
26 under this division.

27 (iii) Notwithstanding subdivision
28 (i), if the employer has between
29 20 and 50 full-time employees and
30 does not provide or participate in
31 an employee group health benefit
32 plan subject to Title 24, section
33 2329, or Title 24-A, section 2842,
34 the employer and the affected em-
35 ployee shall equally divide the
36 costs of rehabilitation or treat-
37 ment under this division; or

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 (b) Enter a public or private rehabil-
2 itation program of his own choice at
3 his own expense, unless it is covered
4 by a health insurance plan.

5 (2) No employer may take any action de-
6 scribed in paragraph A, while an employee is
7 participating in a rehabilitation program,
8 except that an employer may change the
9 employee's work assignment or suspend the
10 employee from active duty to reduce any pos-
11 sible safety hazard. No reduction in pay or
12 benefits may be made while an employee is
13 participating in a rehabilitation program,
14 provided that the employer is not required
15 to pay the employee for periods in which the
16 employee is unavailable for work for the
17 purposes of rehabilitation. The employee
18 may apply normal sick leave and vacation
19 time, if any, for these periods.

20 (3) Upon successfully completing the reha-
21 bilitation program, as determined by his re-
22 habilitation or treatment provider, the em-
23 ployee is entitled to return to his previous
24 job with full pay and benefits, unless con-
25 ditions unrelated to his previous confirmed
26 positive result make his return impossible.
27 If the rehabilitation or treatment provider
28 determines that the employee has not suc-
29 cessfully completed the rehabilitation pro-
30 gram, the employer may take any action de-
31 scribed in paragraph A.

32 D. This subsection does not require an employer
33 to take any disciplinary action against an em-
34 ployee who refuses to submit to a test, who re-
35 ceives a single or repeated confirmed positive
36 results or who does not choose to participate in
37 a rehabilitation program. This subsection is in-
38 tended to set minimum opportunities for an em-
39 ployee with a substance abuse problem to address

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 his problem through rehabilitation. An employer
2 may offer additional opportunities, not otherwise
3 in violation of this subchapter, for rehabilita-
4 tion or continued employment without rehabilita-
5 tion.

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

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

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

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

24 B. Notwithstanding any other law, the results of
25 any substance abuse test required, requested or
26 suggested by any employer may not be used in any
27 criminal proceeding.

28 §686. Rulemaking

29 The Department of Human Services shall adopt
30 rules under Title 5, chapter 375, to carry out the
31 purposes of this Act. The Department of Human Ser-
32 vices shall consult with the Department of Labor
33 which shall assist in developing these rules when
34 necessary. The Department of Human Services shall
35 adopt initial rules before December 1, 1987.

R of S

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 §687. Substance abuse education

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

9 §688. Violation and remedies

10 The following provisions govern the enforcement
11 of this subchapter.

12 1. Remedies. Any employer who violates this
13 subchapter is liable to any employee subjected to
14 discipline or discharge based on a violation of this
15 subchapter for:

16 A. An amount equal to 3 times any lost wages;

17 B. Reinstatement of the employee to his job with
18 full benefits;

19 C. Court costs; and

20 D. Reasonable attorneys fees, as set by the
21 court.

22 2. Breach of confidentiality. In addition to
23 the liability imposed under subsection 1, any person
24 who violates section 684, subsection 5, paragraph C,
25 or section 685, subsection 3:

26 A. For the first offense, is subject to a civil
27 penalty not to exceed \$1,000, payable to the af-
28 ected employee, to be recovered in a civil ac-
29 tion; and

30 B. For any subsequent offense, is guilty of a

R. of S.

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 Class D crime.

2 3. Harassment. In addition to the liability im-
3 posed under subsection 1, any employer who requires
4 or attempts to require an employee or applicant to
5 submit to a substance abuse test under conditions
6 which would not justify the test under this subchap-
7 ter:

8 A. For the first offense, is subject to a civil
9 penalty not to exceed \$1,000, payable to the af-
10 ected employee, to be recovered in a civil ac-
11 tion; and

12 B. For any subsequent offense, is guilty of a
13 Class D crime.

14 4. Enforcement. The Department of Labor or the
15 affected employee or employees may enforce this sub-
16 chapter. The Department of Labor may:

17 A. Collect the judgment on behalf of the employ-
18 ee or employees; and

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

21 §689. Severability

22 The finding of any court that any provision of
23 this Act is unconstitutional as applied does not af-
24 fect the validity of the remaining provisions or the
25 validity of the offending provision as applied in a
26 different situation.

27 §690. Report

28 The Department of Labor shall report to the joint
29 standing committee of the Legislature having juris-
30 isdiction over labor on February 1, 1988, and annually
31 on that date thereafter. This report shall:

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 abuse problem exists in the State, that employees may
2 be using substances of abuse while in the workplace,
3 that such use may pose a threat to the safety of other
4 employees and the public and that substance abuse
5 testing may serve as a reliable and important tool
6 in identifying substance abusing employees in the
7 workplace. At the same time, the Legislature recognizes
8 that unrestricted workplace substance abuse
9 testing programs pose grave risks of unduly
10 infringing upon the privacy rights of employees, that
11 such testing programs may be poorly conceived and im-
12 plemented by some employers and that these programs
13 may be used for purposes beyond their legitimate
14 scope. For these reasons, this amendment allows sub-
15 stance abuse testing programs to be employed in the
16 workplace, but restricts their application and en-
17 sures that proper procedures and safeguards are im-
18 plemented.

19 Although recognizing that constitutional
20 protections do not extend to the private sphere, it
21 is manifest that all individuals retain certain
22 rights to their personal privacy which may not be in-
23 fringed upon without substantial justification. For
24 this reason, the amendment prohibits the use of ran-
25 dom substance abuse testing of employees, except for
26 those employees who occupy safety-sensitive posi-
27 tions. A safety-sensitive position is defined as a
28 work assignment in which an individual under the in-
29 fluence of a substance of abuse would create a sub-
30 stantial risk of causing severe bodily injury to the
31 public or his coworkers.

32 The amendment also allows an employer to require sub-
33 stance abuse testing of any employee when he has
34 probable cause to impose the test. The concept of
35 probable cause is defined in the bill to require an
36 employer to have reasonable grounds for believing
37 that an employee is under the influence of a sub-
38 stance of abuse before he may require a test. The
39 purpose of this definition is to prevent an employer
40 from imposing substance abuse tests upon an employee

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 without reliable, objective information supporting
2 the finding of probable cause.

3 Probable cause is not required for the testing of
4 applicants for employment. This was done to reflect
5 the fact that applicants are voluntarily seeking em-
6 ployment from an employer with full knowledge that
7 they may be subjected to a substance abuse test.
8 However, to prevent unjustified "fishing expeditions"
9 by an employer, the employer may only test an appli-
10 cant after he has selected that person for employ-
11 ment. In other words, an employer cannot screen all
12 job applicants, but can only make his actual job of-
13 fer conditional on the applicant's passing a sub-
14 stance abuse test.

15 The amendment also regulates the actual testing
16 process to ensure that proper testing procedures are
17 followed and that an employee's privacy rights are
18 protected from undue intrusion. The bill requires a
19 testing program to be conducted pursuant to a written
20 policy developed by the employer in consultation with
21 his employees. Certain testing procedures are also
22 regulated. Strict confidentiality of any information
23 acquired through the testing process is required.
24 Blood testing is prohibited except upon request of
25 the employee. A test sample must be collected in a
26 medical facility and be supervised by medical person-
27 nel. The test subject may remain clothed and free
28 from observation by any other individual when a urine
29 sample is collected. The test subject may request a
30 portion of the sample for his own testing as a check
31 on the accuracy of the testing laboratory used by the
32 employer. Only immunoassay tests may be used for
33 screening purposes and all positive screening test
34 results must be confirmed by gas chromatography-mass
35 spectrometry, which is the most accurate test cur-
36 rently available. No employer may perform a sub-
37 stance abuse test for any of his employees or appli-
38 cants; all tests must be performed by a qualified
39 testing laboratory. The Department of Human Services
40 is directed to adopt rules to ensure that all testing

SENATE AMENDMENT "B" to S.P. 642, L.D. 1870

1 procedures are regulated where necessary to protect
2 an individual's privacy rights or to ensure accurate
3 testing. Finally, employers are prohibited from
4 using substance abuse tests to discover any informa-
5 tion that does not relate to an individual's use of a
6 substance of abuse that is likely to cause impairment
7 of the user. Further, testing laboratories are pro-
8 hibited from reporting such information to the em-
9 ployer. These provisions ensure that testing pro-
10 grams will not be used to discover personal informa-
11 tion that the employer has no legitimate interest in,
12 such as pregnancy or mental or physical illness that
13 does not affect work performance.

14 The amendment also regulates discipline taken
15 upon receipt of a positive test result. Recognizing
16 that the prevention and deterrence of safety hazards
17 caused by employee impairment in the workplace is the
18 justification for testing programs, and not the iden-
19 tification and punishment of persons who suffer from
20 the disease of substance abuse, this amendment at-
21 tempts to provide minimum opportunities for a sub-
22 stance abusing employee to receive rehabilitation.
23 Any employer who establishes a testing program must
24 first have a functioning employee assistance program.
25 These programs have consistently demonstrated their
26 ability to deal with a wide range of employee prob-
27 lems, including employee substance abuse, economical-
28 ly and effectively. Once a testing program is estab-
29 lished, and an employee receives a confirmed positive
30 test result, the employer is authorized to dismiss or
31 discipline that employee unless the employee enters a
32 substance abuse rehabilitation program. If the em-
33 ployee elects to undergo rehabilitation, he may be
34 suspended with no reduction in pay, except that an
35 employer is not required to pay the employee for any
36 time during which the employee is unavailable for
37 work for the purposes of rehabilitation. Upon suc-
38 cessfully completing the rehabilitation program, the
39 employee may return to his previous job. The employ-
40 er is no longer required to offer the employee an op-
41 portunity to undergo rehabilitation if the employee

R. of S

SENATE AMENDMENT " B " to S.P. 642, L.D. 1870

1 has already tested positive at least twice before or
2 if the employee receives a confirmed positive result
3 within one year of completing a previous rehabilita-
4 tion program.

5 This amendment also includes a transition clause
6 intended to define the permissible scope of substance
7 abuse testing in the workplace during the interim pe-
8 riod after passage of this bill, but before the rules
9 required by this amendment are adopted. No employer
10 may institute a substance abuse testing program in his
11 workplace after the effective date of this bill until
12 January 1, 1988. All employers must stop any sub-
13 stance abuse testing of employees or applicants on
14 the effective date of this amendment, except that any
15 employer who was conducting a testing program on Jan-
16 uary 1, 1987, may continue to operate his program;
17 however, as of January 1, 1988, all testing programs
18 must comply with this amendment and the rules adopted
19 under it. The only exception to this provision is
20 that employers who operated a substance abuse testing
21 program on January 1, 1987, that included random, ar-
22 bitrary or periodic testing of employees who worked
23 as a nuclear power plant operator, bus driver or com-
24 mercial truck driver, may continue to test those em-
25 ployees on a random, arbitrary or periodic basis un-
26 til September 1, 1989.

27

3580061687

28

(Sen. Dutremble)

29

SPONSORED BY:



30

COUNTY: York

Reproduced and Distributed Pursuant to Senate Rule 12.
6-16-87

(Filing Number S-226)