

MAINE STATE LEGISLATURE

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(After Deadline)
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No. 1870

S.P. 642 In Senate, June 16, 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.

JOY J. O'BRIEN, Secretary of the Senate

Presented by Senator DUTREMBLE of York.

Cosponsored by President PRAY of Penobscot, Representative
MCHENRY of Madawaska, Representative 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. Ensure that when substance abuse tests are
2 used, proper test procedures are employed to pro-
3 tect the privacy rights of employees and appli-
4 cants and to achieve reliable and accurate re-
5 sults; and

6 B. Ensure that employees with a substance abuse
7 problem receive an opportunity for rehabilitation
8 and treatment of their disease and will return to
9 work as quickly as possible.

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

17 3. Collective bargaining agreements. This sub-
18 chapter does not prevent the negotiation of collec-
19 tive bargaining agreements that provide greater pro-
20 tection to employees or applicants than is provided
21 by this subchapter.

22 4. Home rule authority preempted. No municipal-
23 ity may enact any ordinance under its home-rule au-
24 thority concerning an employer's use of substance
25 abuse tests.

26 5. Contracts for work out of state. All employ-
27 ment contracts subject to the laws of this State when
28 entered into shall include an agreement that this
29 subchapter will apply to any employer who hires em-
30 ployees to work outside the State.

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

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

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

5 6. Substance abuse test. "Substance abuse test"
6 means any test procedure designed to take and analyze
7 body fluids or materials from the body for the pur-
8 pose of detecting the presence of substances of
9 abuse. The term does not include tests designed to
10 determine blood-alcohol concentration levels from a
11 sample of an individual's breath.

12 A. "Screening test" means an initial substance
13 abuse test performed through the use of
14 immunoassay technology or a test technology of
15 similar or greater accuracy and reliability ap-
16 proved by the Department of Human Services as
17 provided under section 686 and which is used as a
18 preliminary step in detecting the presence of
19 substances of abuse.

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

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

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

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

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

35 §683. Testing procedures

36 No employer may require, request or suggest that
37 any employee or applicant submit to a substance abuse
38 test, except as provided in this section. All ac-

1 tions taken under a substance abuse testing program
2 must comply with this subchapter, rules adopted under
3 this subchapter and the employer's written policy de-
4 veloped under subsection 2.

5 1. Employee assistance program required. Before
6 establishing any substance abuse testing program, an
7 employer must have a functioning employee assistance
8 program. The employer may meet this requirement by
9 participating in a cooperative employee assistance
10 program that serves the employees of more than one
11 employer. The employee assistance program must be
12 certified by the Department of Human Services under
13 rules adopted pursuant to section 686. The rules
14 shall ensure that the employee assistance programs
15 have the necessary facilities and procedures to meet
16 minimum standards of professionalism and effective-
17 ness, including, but not limited to:

18 A. A mechanism to periodically assess the needs
19 for employee assistance with deleterious condi-
20 tions in the workplace performance;

21 B. A mechanism to ensure input and advice from
22 both management and employees;

23 C. Procedures and qualified personnel to ensure
24 the provision of comprehensive high quality clin-
25 ical services, supervisory training, management
26 consultation and preventive health education and
27 health promotion services appropriate to the
28 needs of the employer and his employees, includ-
29 ing the evaluation and treatment or assistance in
30 obtaining treatment of employees with substance
31 abuse problems;

32 D. Sufficient personnel and physical resources
33 to accommodate the needs of the employer and his
34 employees;

35 E. Review procedures to periodically evaluate
36 the appropriateness, effectiveness and efficiency
37 of the delivery of services and program integra-
38 tion; and

39 F. Procedures to protect the confidentiality of
40 employee services to the highest degree possible.

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

5 A. The procedure and consequences of an
6 employee's voluntary admission of a substance
7 abuse problem and any available assistance, in-
8 cluding the availability and procedure of the em-
9 ployer's employee assistance program;

10 B. When substance abuse testing may occur, in-
11 cluding a description of which positions, if any,
12 will be subject to testing and under what condi-
13 tions;

14 C. The collection of samples:

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

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

27 (3) No employee or applicant may be re-
28 quired to provide a urine sample while being
29 observed, directly or indirectly, by another
30 individual;

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

33 E. The chain of custody of samples sufficient to
34 protect the sample from tampering and to verify
35 the identity of each sample and test results;

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

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
34 subsection. The employer shall send a copy of his
35 written policy to the Department of Labor immediately
36 after it is adopted.

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

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

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

15 B. Attempts to absolve the employer from any po-
16 tential liability arising out of the imposition
17 of the substance abuse test; or

18 C. Attempts to waive an employee's or appli-
19 cant's rights or eliminate or diminish an employ-
20 er's obligations under this subchapter.

21 Any form or agreement prohibited by this subsection
22 is void.

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

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

31 B. In the case of an employee, have a blood sam-
32 ple taken from the employee by a licensed physi-
33 cian, registered physician's assistant, regis-
34 tered nurse or a person certified by the Depart-
35 ment of Human Services to draw blood samples.
36 The employer shall have this sample tested, at
37 the employer's expense, for the presence of any
38 substance of abuse. If the employee requests
39 that a blood sample be taken under this para-

1 graph, the employer may not collect or test any
2 other sample from the employee.

3 No employer may require, request or suggest that
4 any employee or applicant provide a blood sample
5 for substance abuse testing purposes nor may any
6 employer conduct a substance abuse test upon a
7 blood sample, except as provided in this para-
8 graph.

9 6. Qualified testing laboratories required. No
10 employer may perform any substance abuse test admin-
11 istered to any of his employees or applicants. A
12 substance abuse test administered under this subchap-
13 ter must be performed in a qualified testing labora-
14 tory that complies with this subsection.

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

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

22 C. The laboratory must demonstrate satisfactory
23 performance in the proficiency testing program of
24 the National Institute on Drug Abuse, the College
25 of American Pathology or the American Association
26 for Clinical Chemistry.

27 D. The laboratory must comply with rules adopted
28 by the Department of Human Services under section
29 686. These rules shall ensure that:

30 (1) The laboratory possesses all licenses
31 or certifications that the department finds
32 necessary or desirable to ensure reliable
33 and accurate test results;

34 (2) The laboratory follows proper quality
35 control procedures, including, but not lim-
36 ited to:

37 (a) The use of internal quality con-
38 trols during each substance abuse test

1 conducted under this subchapter, in-
2 cluding the use of blind samples and
3 samples of known concentrations which
4 are used to check the performance and
5 calibration of testing equipment;

6 (b) The internal review and certifica-
7 tion process for test results, includ-
8 ing the qualifications of the person
9 who performs that function in the test-
10 ing laboratory; and

11 (c) Security measures implemented by
12 the testing laboratory; and

13 (3) Other necessary and proper actions are
14 taken to ensure reliable and accurate test
15 results.

16 7. Testing procedure. The testing laboratory
17 shall perform a screening test on each sample submit-
18 ted to it by the employer for only those substances
19 of abuse that the employer requests to be identified.
20 If the screening test result is negative, no further
21 test may be conducted on that sample. If the screen-
22 ing test result is positive, the testing laboratory
23 shall perform a confirmation test on that sample.
24 The testing laboratory shall retain all confirmed
25 positive samples for one year in a manner that will
26 inhibit deterioration of the samples and allow subse-
27 quent retesting. All other samples shall be disposed
28 of immediately after testing.

29 8. Laboratory report of test results. The labo-
30 ratory report of test results shall, at a minimum,
31 state:

32 A. The name of the laboratory that performed the
33 test or tests;

34 B. Any confirmed positive results on any tested
35 sample:

36 (1) No testing laboratory may communicate
37 to the employer any test result other than a
38 confirmed positive result. The testing labo-
39 ratory and the employer must ensure that an

1 unconfirmed positive screening test result
2 cannot be determined by an employer in any
3 manner, including, but not limited to, the
4 method of billing the employer for the tests
5 performed by the laboratory and the time
6 within which results are provided to the em-
7 ployer; and

8 (2) Unless the employee or applicant con-
9 sents, test results shall not be reported in
10 numerical or quantitative form, but shall
11 state only that the test result was posi-
12 tive;

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

15 D. Any available information concerning the mar-
16 gin of accuracy and precision of the test methods
17 employed.

18 The report shall not disclose the presence or absence
19 of evidence of any physical or mental condition or of
20 any substance other than the specific substances of
21 abuse that the employer requests to be identified.
22 The employer shall promptly provide a legible copy of
23 the laboratory report to the employee or applicant
24 tested.

25 9. Costs. The employer shall pay the costs of
26 all substance abuse tests to which he requires, re-
27 quests or suggests an employee or applicant submit,
28 including the cost of any substance abuse test con-
29 ducted under subsection 5, paragraph B. The employee
30 or applicant shall pay the costs of any additional
31 substance abuse tests.

32 10. Limitation on use of tests. An employer may
33 administer substance abuse tests to his employees or
34 applicants only for the purpose of discovering the
35 use of substances of abuse that are likely to cause
36 impairment of the user. No employer may have sub-
37 stance abuse tests administered to an employee or ap-
38 plicant for the purpose of discovering any informa-
39 tion unrelated to the use of substances of abuse that
40 are likely to cause user impairment.

1 11. Rules. The Department of Human Services
2 shall adopt any rules under section 686 regulating
3 substance abuse testing procedures that it finds nec-
4 essary or desirable to ensure accurate and reliable
5 substance abuse testing and to protect the privacy
6 rights of employees and applicants.

7 §684. Testing permitted

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

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

17 2. Testing of employees. An employer may re-
18 quire, request or suggest that an employee submit to
19 a substance abuse test in compliance with the employ-
20 er's written policy under section 683, subsection 2.

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

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

35 B. The results of any substance abuse test ad-
36 ministered to an employee as part of such a reha-
37 ilitation or treatment program may not be re-
38 leased to his employer.

39 §685. Action taken on substance abuse tests

1 Action taken by an employer on the basis of a
2 substance abuse test is limited as provided in this
3 section.

4 1. Before receipt of test results. An employer
5 may suspend an employee with full pay and benefits or
6 may transfer the employee to another position with no
7 reduction in pay or benefits while awaiting an
8 employee's test results.

9 2. Use of confirmation test results. The fol-
10 lowing provisions govern an employer's use of con-
11 firm positive results and an employee's or appli-
12 cant's refusal to submit to a test requested or re-
13 quired by an employer in compliance with this sub-
14 chapter.

15 A. Subject to any limitation of the Maine Human
16 Rights Act or any other state law or federal law,
17 an employer may use a confirmed positive result
18 or refusal to submit to a test as a factor in any
19 of the following decisions:

20 (1) Refusal to hire an applicant for em-
21 ployment;

22 (2) Discharge of an employee;

23 (3) Discipline of an employee; or

24 (4) Change in the employee's work assign-
25 ment.

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

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

35 (2) The employee receives a subsequent con-
36 firm positive result within one year after
37 his rehabilitation or treatment provider in-

1 dicates that the employee has successfully
2 completed a rehabilitation program as pro-
3 vided in paragraph C, subparagraph (3).

4 C. If the employee chooses not to participate in
5 a rehabilitation program under this subsection,
6 the employer may take any action described in
7 paragraph A. If the employee chooses to partici-
8 partate in a rehabilitation program, the following
9 provisions apply.

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

18 (a) Seek rehabilitation or counseling
19 from another source recommended by the
20 employee assistance counselor.

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

33 (ii) Notwithstanding subdivision
34 (i), if the employer has 20 or
35 fewer full-time employees, the em-
36 ployer is not required to pay for
37 any rehabilitation or treatment
38 under this division.

39 (iii) Notwithstanding subdivision
40 (i), if the employer has between
41 20 and 50 full-time employees and

1 does not provide or participate in
2 an employee group health benefit
3 plan subject to Title 24, section
4 2329, or Title 24-A, section 2842,
5 the employer and the affected em-
6 ployee shall equally divide the
7 costs of rehabilitation or treat-
8 ment under this division; or

9 (b) Enter a public or private rehabil-
10 itation program of his own choice at
11 his own expense, unless it is covered
12 by a health insurance plan.

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

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

40 D. This subsection does not require an employer
41 to take any disciplinary action against an em-
42 ployee who refuses to submit to a test, who re-
43 ceives a single or repeated confirmed positive

1 results or who does not choose to participate in
2 a rehabilitation program. This subsection is in-
3 tended to set minimum opportunities for an em-
4 ployee with a substance abuse problem to address
5 his problem through rehabilitation. An employer
6 may offer additional opportunities, not otherwise
7 in violation of this subchapter, for rehabilita-
8 tion or continued employment without rehabilita-
9 tion.

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

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

21 (1) The release of this information where
22 required or permitted by state law or feder-
23 al law; or

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

28 B. Notwithstanding any other law, the results of
29 any substance abuse test required, requested or
30 suggested by any employer may not be used in any
31 criminal proceeding.

32 §686. Rulemaking

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

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:

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

17 B. Is liable to any employee subjected to disci-
18 pline or discharge based on a violation of this
19 subchapter for:

20 (1) An amount equal to 3 times any lost
21 wages;

22 (2) Reinstatement of the employee to his
23 job with full benefits;

24 (3) Court costs; and

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

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

33 3. Enforcement. The Department of Labor or the
34 affected employee or employees may enforce this sub-
35 chapter. The Department of Labor may:

1 A. Collect the judgment on behalf of the employ-
2 ee or employees;

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

5 C. Collect fines insured through violation of
6 this subchapter.

7 §689. Severability

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

13 §690. Review

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

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

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

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

29 3. Briefly describe the general scope and prac-
30 tice of workplace substance abuse testing in the
31 State.

32 **Sec. 3. Transition.** No employer may commence a
33 workplace substance abuse testing program after the
34 effective date of this Act until January 1, 1988.
35 All workplace substance abuse testing programs in ex-
36 istence on the effective date of this Act shall stop

1 any substance abuse testing of employees or appli-
2 cants, except that any workplace substance abuse
3 testing program that existed on January 1, 1987, may
4 continue operation until January 1, 1988. All
5 workplace substance abuse testing programs must com-
6 pply fully with this Act and rules adopted under this
7 Act on January 1, 1988.

8

STATEMENT OF FACT

9 This bill regulates the procedures used by em-
10 ployers in conducting workplace substance abuse test-
11 ing programs and limits the use of test results in
12 the employment context. The bill attempts to ensure
13 that proper testing procedures are followed and that
14 an employee's privacy rights are protected from undue
15 intrusion. With the exception of applicant testing,
16 this bill does not regulate when substance abuse
17 tests may be required by an employer, but only regu-
18 lates the actual test process and actions taken on
19 the basis of the tests. Under the bill, an employer
20 may test a job applicant only when he is prepared to
21 offer that individual a job. That offer may be con-
22 ditioned upon the applicant receiving a negative test
23 result. Under the bill, an employer is free to de-
24 cide on his own, after consulting with his employees,
25 under what circumstances tests will be required in
26 the case of an employee. The only limitation in the
27 bill on when tests may be required for employees is
28 that any such test must be requested in compliance
29 with the employer's written substance abuse testing
30 policy.

31 The bill requires a testing program to be con-
32 ducted pursuant to a written policy developed by the
33 employer in consultation with his employees. Certain
34 testing procedures are also regulated. Strict confi-
35 dentiality of any information acquired through the
36 testing process is required. Blood testing is pro-
37 hibited except upon request of the employee. A test
38 sample must be collected in a medical facility and be
39 supervised by medical personnel. The test subject
40 may remain clothed and free from observation by any
41 other individual when a urine sample is collected.
42 The test subject may request a portion of the sample

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

24 The bill also regulates discipline taken upon re-
25 ceipt of a positive test result. Recognizing that
26 the prevention and deterrance of safety hazards
27 caused by employee impairment in the workplace is the
28 justification for testing programs, and not the iden-
29 tification and punishment of persons who suffer from
30 the disease of substance abuse, this bill attempts to
31 provide minimum opportunities for a substance abusing
32 employee to receive rehabilitation. An employer is
33 not required to provide an opportunity for rehabili-
34 tation to a job applicant who receives a confirmed
35 positive result. Any employer who establishes a
36 testing program must first have a functioning employ-
37 ee assistance program. These programs have consist-
38 ently demonstrated their ability to deal with a wide
39 range of employee problems, including employee sub-
40 stance abuse, economically and effectively. Once a
41 testing program is established, and an employee re-
42 ceives a confirmed positive test result, the employer
43 is authorized to dismiss or discipline that employee
44 unless the employee enters a substance abuse rehabil-
45 itation program. If the employee elects to undergo
46 rehabilitation, he may be suspended with no reduction

1 in pay, except that an employer is not required to
2 pay the employee for any time during which the em-
3 ployee is unavailable for work for the purposes of
4 rehabilitation. Upon successfully completing the re-
5 habilitation program, the employee may return to his
6 previous job. The employer is no longer required to
7 offer the employee an opportunity to undergo rehabil-
8 itation if the employee has already tested positive
9 at least twice before or if the employee receives a
10 confirmed positive result within one year of complet-
11 ing a previous rehabilitation program.

12 The bill also includes a transition clause in-
13 tended to define the permissible scope of substance
14 abuse testing in the workplace during the interim pe-
15 riod after passage of this bill, but before the rules
16 required by this bill are adopted. No employer may
17 institute a substance abuse testing program in his
18 workplace after the effective date of this bill until
19 January 1, 1988. All employers must stop any sub-
20 stance abuse testing of employees or applicants on
21 the effective date of this bill, except that any em-
22 ployer who was conducting a testing program on Janu-
23 ary 1, 1987, may continue to operate his program,
24 however, as of January 1, 1988, all testing programs
25 must comply with this bill and the rules adopted un-
26 der it.