

# MAINE STATE LEGISLATURE

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(New Draft of S.P. 73, L.D. 156)  
(New Title)  
SECOND REGULAR SESSION

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ONE HUNDRED AND THIRTEENTH LEGISLATURE

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Legislative Document

No. 2589

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S.P. 975

In Senate, March 28, 1988

Reported by Senator DUTREMBLE of York for the Committee on LABOR and printed under Joint Rule 2. Original Bill reported pursuant to Resolves of 1985, Chapter 86.

JOY J. O'BRIEN, Secretary of the Senate

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STATE OF MAINE

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

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1           AN ACT to Ensure Confidential and Reliable  
2           Substance Abuse Testing of Employees and  
3           Applicants.  
4

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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  
8           to read:



1 employment contracts subject to the laws of this State  
2 shall include an agreement that this subchapter will  
3 apply to any employer who hires employees to work  
4 outside the State.

5 6. Medical examinations. This subchapter does  
6 not prevent an employer from requiring or performing  
7 medical examinations of or on employees or applicants  
8 or from conducting medical screenings to monitor  
9 exposure to toxic or other harmful substances in the  
10 workplace, provided that these examinations are not  
11 used to avoid the restrictions of this subchapter. No  
12 such examination may include the use of any substance  
13 abuse test except in compliance with this subchapter.

14 7. Other discipline unaffected. This subchapter  
15 does not prevent an employer from establishing rules  
16 related to the possession or use of substances of  
17 abuse by employees, including convictions for  
18 drug-related offenses, and taking action based upon a  
19 violation of any of those rules, except when a  
20 substance abuse test is required, requested or  
21 suggested by the employer or used as the basis for any  
22 disciplinary action.

23 8. Federal law. This subchapter does not preempt  
24 any federal law, rule or regulation.

25 §682. Definitions

26 As used in this subchapter, unless the context  
27 otherwise indicates, the following terms have the  
28 following meanings.

29 1. Applicant. "Applicant" means any person  
30 seeking employment from an employer. The term  
31 includes any person seeking to use an employment  
32 agency's services.

33 2. Employee. "Employee" means a person who is  
34 permitted, required or directed by any employer to  
35 engage in any employment for consideration of direct  
36 gain or profit.

37 3. Employer. "Employer" means any person,

1 partnership, corporation, association or other legal  
2 entity, public or private, that employs one or more  
3 employees. The term includes an employment agency.

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

6 A. A substance of abuse is not present in the  
7 tested sample; or

8 B. A substance of abuse is present in the tested  
9 sample in a concentration below the cutoff level.

10 5. Positive test result. "Positive test result"  
11 means a test result which indicates the presence of a  
12 substance of abuse in the tested sample above the  
13 cutoff level of the test.

14 A. "Confirmed positive result" means a  
15 confirmation test result which indicates the  
16 presence of a substance of abuse above the cutoff  
17 level in the tested sample.

18 6. Probable cause. "Probable cause" means a  
19 reasonable ground for belief in the existence of facts  
20 which would induce a person to believe that an  
21 employee may be under the influence of a substance of  
22 abuse, provided that the existence of probable cause  
23 may not be based on any of the following:

24 A. Information received from an anonymous  
25 informant;

26 B. Any information tending to indicate that an  
27 employee may have possessed or used a substance of  
28 abuse off duty, except when the employee is  
29 observed possessing or ingesting any substance of  
30 abuse either while on the employer's premises or  
31 in the proximity of the employer's premises during  
32 or immediately before the employee's working  
33 hours; or

34 C. A single work-related accident, unless other  
35 evidence provides probable cause as described in  
36 this subsection.

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

8           A. "Screening test" means an initial substance  
9 abuse test performed through the use of  
10 immunoassay technology, or a test technology of  
11 similar or greater accuracy and reliability  
12 approved by the Department of Human Services under  
13 rules adopted under section 686, and which is used  
14 as a preliminary step in detecting the presence of  
15 substances of abuse.

16           B. "Confirmation test" means a 2nd substance  
17 abuse test performed through the use of gas  
18 chromatography-mass spectrometry that is used to  
19 verify the presence of a substance of abuse  
20 indicated by an initial positive screening test  
21 result.

22           8. Substance of abuse. "Substance of abuse"  
23 means any scheduled drug, alcohol or other drug, or  
24 any of their metabolites.

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

27           B. "Drug" has the same meaning as found in Title  
28 32, section 2805, subsection 4.

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

31           §683. Testing procedures

32           No employer may require, request or suggest that  
33 any employee or applicant submit to a substance abuse  
34 test except in compliance with this section. All  
35 actions taken under a substance abuse testing program  
36 shall comply with this subchapter, rules adopted under

1 this subchapter and the employer's written policy  
2 developed under subsection 2.

3 1. Employee assistance program required. Before  
4 establishing any substance abuse testing program for  
5 employees, an employer must have a functioning  
6 employee assistance program. The employer may meet  
7 this requirement by participating in a cooperative  
8 employee assistance program that serves the employees  
9 of more than one employer. The employee assistance  
10 program must be certified by the Department of Human  
11 Services under rules adopted pursuant to section 686.  
12 The rules shall ensure that the employee assistance  
13 programs have the necessary personnel, facilities and  
14 procedures to meet minimum standards of  
15 professionalism and effectiveness in assisting  
16 employees.

17 2. Written policy. Before establishing any  
18 substance abuse testing program, an employer must  
19 develop a written policy in compliance with this  
20 subchapter providing for:

21 A. The procedure and consequences of an  
22 employee's voluntary admission of a substance  
23 abuse problem and any available assistance,  
24 including the availability and procedure of the  
25 employer's employee assistance program;

26 B. When substance abuse testing may occur,  
27 including:

28 (1) A description of which positions, if  
29 any, will be subject to testing, including  
30 any positions subject to random or arbitrary  
31 testing under section 684, subsection 3; and

32 (2) The procedure to be followed in  
33 selecting employees to be tested on a random  
34 or arbitrary basis under section 684,  
35 subsection 3;

36 C. The collection of samples.

37 (1) The collection of any sample for use in  
38 a substance abuse test must be conducted in a

1 medical facility and supervised by a  
2 physician licensed under Title 32, chapter 36  
3 or 48, or a nurse licensed under Title 32,  
4 chapter 31. A medical facility includes a  
5 first aid station located at the work site.

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

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

18 D. The storage of samples before testing  
19 sufficient to inhibit deterioration of the sample;

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

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

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

28 (1) Cutoff levels for confirmation tests for  
29 marijuana may not be lower than 50 nanograms  
30 of delta-9-tetrahydrocannabinol-9-carboxylic  
31 acid per milliliter for urine samples.

32 (2) The Department of Human Services shall  
33 adopt rules under section 686 regulating  
34 screening and confirmation cutoff levels for  
35 other substances of abuse, including those  
36 substances tested for in blood samples under



1           subsection 5, paragraph B, to ensure that  
2           levels are set within known tolerances of  
3           test methods and above mere trace amounts;

4           H. The consequences of a confirmed positive  
5           substance abuse test result;

6           I. The consequences for refusal to submit to a  
7           substance abuse test;

8           J. To what extent an employee or applicant who  
9           requests a sample to be tested independently must  
10           share the results of the test with the employer;

11           K. Opportunities and procedures for  
12           rehabilitation following a confirmed positive  
13           result;

14           L. A procedure under which an employee or  
15           applicant who receives a confirmed positive result  
16           may appeal and contest the accuracy of that  
17           result; and

18           M. Any other necessary or desirable matters.

19           An employer must consult with the employer's employees  
20           while developing a substance abuse testing policy  
21           under this subsection. The employer shall send a copy  
22           of the written policy to the Department of Labor  
23           immediately after it is adopted.

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

33           4. Consent forms prohibited. No employer may  
34           require, request or suggest that any employee or  
35           applicant sign or agree to any form or agreement that:

1 A. Provides that the employee or applicant  
2 voluntarily consents to a substance abuse test;

3 B. Attempts to absolve the employer from any  
4 potential liability arising out of the imposition  
5 of the substance abuse test; or

6 C. Attempts to waive an employee's or applicant's  
7 rights or eliminate or diminish an employer's  
8 obligations under this subchapter.

9 Any form or agreement prohibited by this subsection is  
10 void.

11 5. Right to obtain other samples. At the request  
12 of the employee or applicant at the time the test  
13 sample is taken, the employer shall, at that time:

14 A. Make available to the employee or applicant  
15 tested a portion or portions of the sample for  
16 that person's own testing. The employee or  
17 applicant shall pay the costs of these tests; and

18 B. In the case of an employee, have a blood  
19 sample taken from the employee by a licensed  
20 physician, registered physician's assistant,  
21 registered nurse or a person certified by the  
22 Department of Human Services to draw blood  
23 samples. The employer shall have this sample  
24 tested for the presence of alcohol or marijuana  
25 metabolites, if those substances are to be tested  
26 for under the employer's written policy. If the  
27 employee requests that a blood sample be taken  
28 under this paragraph, the employer may not test  
29 any other sample from the employee for the  
30 presence of these substances.

31 The Department of Human Services may identify, by  
32 rules adopted under section 686, other substances  
33 of abuse for which an employee may request a blood  
34 sample be tested instead of a urine sample if the  
35 department determines that a sufficient  
36 correlation exists between the presence of the  
37 substance in an individual's blood and its effect  
38 upon the individual's performance.

1 No employer may require, request or suggest that  
2 any employee or applicant provide a blood sample  
3 for substance abuse testing purposes nor may any  
4 employer conduct a substance abuse test upon a  
5 blood sample except as provided in this paragraph.

6 6. Qualified testing laboratories required. No  
7 employer may perform any substance abuse test  
8 administered to any of his employees or applicants. A  
9 substance abuse test administered under this  
10 subchapter must be performed in a qualified testing  
11 laboratory that complies with this subsection.

12 A. The director of the laboratory must be  
13 certified by the American Board of Forensic  
14 Toxicology or the American Board of Clinical  
15 Chemistry in Toxicological Chemistry.

16 B. The laboratory must have written testing  
17 procedures and procedures to ensure a clear chain  
18 of custody.

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

24 D. The laboratory must comply with rules adopted  
25 by the Department of Human Services under section  
26 686. These rules shall ensure that:

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

31 (2) The laboratory follows proper quality  
32 control procedures, including, but not  
33 limited to:

34 (a) The use of internal quality  
35 controls during each substance abuse  
36 test conducted under this subchapter,

1 including the use of blind samples and  
2 samples of known concentrations which  
3 are used to check the performance and  
4 calibration of testing equipment;

5 (b) The internal review and  
6 certification process for test results,  
7 including the qualifications of the  
8 person who performs that function in the  
9 testing laboratory; and

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

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

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

27 8. Laboratory report of test results. A  
28 laboratory report of test results shall, at a minimum,  
29 state:

30 A. The name of the laboratory that performed the  
31 test or tests;

32 B. Any confirmed positive results on any tested  
33 sample.

34 (1) No testing laboratory may communicate to  
35 the employer any test result other than a  
36 confirmed positive result. A testing  
37 laboratory and the employer must ensure that

1 an 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  
7 employer.

8 (2) Unless the employee or applicant  
9 consents, test results shall not be reported  
10 in numerical or quantitative form but shall  
11 state only that the test result was positive;

12 C. The sensitivity or cutoff level of the  
13 confirmation test; and

14 D. Any available information concerning the  
15 margin of accuracy and precision of the test  
16 methods employed.

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

24 9. Costs. The employer shall pay the costs of  
25 all substance abuse tests which the employer requires,  
26 requests or suggests that an employee or applicant  
27 submit. Except as provided in paragraph A, the  
28 employee or applicant shall pay the costs of any  
29 additional substance abuse tests.

30 Costs of a substance abuse test administered at the  
31 request of an employee under subsection 5, paragraph  
32 B, shall be paid:

33 A. By the employer if the test results are  
34 negative for all substances of abuse tested for;  
35 and

36 B. By the employee if the test results in a  
37 confirmed positive result for any of the

1 substances of abuse tested for.

2 10. Limitation on use of tests. An employer may  
3 administer substance abuse tests to employees or  
4 applicants only for the purpose of discovering the use  
5 of substances of abuse that are likely to cause  
6 impairment of the user. No employer may have  
7 substance abuse tests administered to an employee or  
8 applicant for the purpose of discovering any  
9 information unrelated to the use of substances of  
10 abuse that are likely to cause user impairment.

11 11. Rules. The Department of Human Services  
12 shall adopt any rules under section 686 regulating  
13 substance abuse testing procedures that it finds  
14 necessary or desirable to ensure accurate and reliable  
15 substance abuse testing and to protect the privacy  
16 rights of employees and applicants.

17 §684. Testing permitted

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

21 1. Testing of applicants. An employer may  
22 require, request or suggest that an applicant submit  
23 to a substance abuse test only if the applicant has  
24 been offered employment with the employer. The offer  
25 of employment may be conditioned upon the applicant  
26 receiving a negative test result.

27 2. Probable cause testing of employees. An  
28 employer may require, request or suggest that an  
29 employee submit to a substance abuse test if the  
30 employer has probable cause to test the employee. The  
31 employee's immediate supervisor, or other supervisory  
32 personnel familiar with the employee's past behavior  
33 and record, shall make the determination of probable  
34 cause. The supervisor or other person must state, in  
35 writing, the facts upon which this determination is  
36 based and provide a copy of the statement to the  
37 employee. Any witness to any fact relied upon in the  
38 determination of probable cause must be identified in

1 the statement.

2 3. Random or arbitrary testing of employees. In  
3 addition to testing employees on a probable cause  
4 basis under subsection 2, an employer may require,  
5 request or suggest that an employee submit to a  
6 substance abuse test on a random or arbitrary basis as  
7 provided in the employer's written policy under  
8 section 683, subsection 2, if at least one of the  
9 following conditions is met.

10 A. The employer and the employees have bargained  
11 for provisions in a collective bargaining  
12 agreement, either before or after the effective  
13 date of this subchapter, which provide for random  
14 or arbitrary testing of employees.

15 B. The employee works in an occupation or work  
16 assignment which is designated by the Department  
17 of Labor through rules adopted under the Maine  
18 Administrative Procedure Act, Title 5, chapter  
19 375. In adopting these rules, the department  
20 shall provide a procedure for designating those  
21 employment positions which meet the following  
22 minimum qualifications:

23 (1) The employee works at a nuclear  
24 electrical generating facility. As used in  
25 this subparagraph, employee includes an  
26 independent contractor and employees of an  
27 independent contractor who are working at the  
28 nuclear facility.

29 (2) The employee works in a position in  
30 which the employee would create a substantial  
31 risk of direct and immediate serious physical  
32 injury to the public or co-workers if the  
33 employee were under the influence of a  
34 substance of abuse.

35 In making a determination under this  
36 subparagraph, the Department of Labor shall  
37 not designate any position:

1                   (a) In which an employee is capable of  
2 being observed by the employer or an  
3 agent of the employer while the employee  
4 is working;

5                   (b) Which requires work to be performed  
6 primarily on the worksite at which the  
7 employee is employed, except on petition  
8 by an employer as provided in this  
9 paragraph; or

10                   (c) That requires an employee to  
11 operate a licensed motor vehicle in the  
12 normal course of employment solely  
13 because of that operation. In  
14 designating such a position under this  
15 subparagraph, the department shall  
16 consider, at a minimum, the following  
17 factors:

18                   (i) The nature of the motor  
19 vehicle being operated;

20                   (ii) Whether the motor vehicle is  
21 used to transport persons other  
22 than the employee in the normal  
23 course of employment;

24                   (iii) The type of cargo, if any,  
25 that the motor vehicle is used to  
26 transport and any particular safety  
27 hazards associated with that cargo;  
28 and

29                   (iv) The nature of the area in  
30 which the motor vehicle will be  
31 operated in the normal course of  
32 employment.

33                   The rules adopted by the department shall include  
34 a process under which an employer may petition the  
35 department to designate a position which is not on  
36 the list of positions established by the  
37 department under this paragraph. The rules shall  
38 include a procedure to notify employees of any



1 such petition by their employer. The employees  
2 may challenge the proposed designation of any  
3 position and offer evidence rebutting the  
4 employer's evidence supporting that designation.  
5 The employer has the burden of demonstrating that  
6 the position meets the requirements of this  
7 paragraph.

8 4. Testing while undergoing rehabilitation or  
9 treatment. While the employee is participating in a  
10 substance abuse rehabilitation program either as a  
11 result of voluntary contact with or mandatory referral  
12 to the employer's employee assistance program or after  
13 a confirmed positive result as provided in section  
14 685, subsection 2, paragraphs B and C, substance abuse  
15 testing may be conducted by the rehabilitation or  
16 treatment provider as required, requested or suggested  
17 by that provider.

18 A. Substance abuse testing conducted as part of  
19 such a rehabilitation or treatment program is not  
20 subject to the provisions of this subchapter  
21 regulating substance abuse testing.

22 B. An employer may not require, request or  
23 suggest that any substance abuse test be  
24 administered to any employee while the employee is  
25 undergoing such rehabilitation or treatment,  
26 except as provided in subsections 2 and 3.

27 C. The results of any substance abuse test  
28 administered to an employee as part of such a  
29 rehabilitation or treatment program may not be  
30 released to the employer.

31 §685. Action taken on substance abuse tests

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

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

1 employee's test results.

2       2. Use of confirmation test results. The  
3 following provisions govern an employer's use of  
4 confirmed positive results and an employee's or  
5 applicant's refusal to submit to a test requested or  
6 required by an employer in compliance with this  
7 subchapter.

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

13           (1) Refusal to hire an applicant for  
14 employment;

15           (2) Discharge of an employee;

16           (3) Discipline of an employee; or

17           (4) Change in the employee's work assignment.

18       B. Before taking any action described in  
19 paragraph A in the case of an employee who  
20 receives a confirmed positive result, an employer  
21 shall provide the employee with an opportunity to  
22 participate in a rehabilitation program designed  
23 to enable the employee to avoid future use of a  
24 substance of abuse, except when:

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

27           (2) The employee receives a subsequent  
28 confirmed positive result within one year  
29 after the rehabilitation or treatment  
30 provider indicates that the employee has  
31 successfully completed a rehabilitation  
32 program as provided in paragraph C,  
33 subparagraph (3).

34       C. If the employee chooses not to participate in  
35 a rehabilitation program under this subsection,

1 the employer may take any action described in  
2 paragraph A. If the employee chooses to  
3 participate in a rehabilitation program, the  
4 following provisions apply.

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

13 (a) Seek rehabilitation or counseling  
14 from another source recommended by the  
15 employee assistance counselor.

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

28 (ii) Notwithstanding subdivision  
29 (i), if the employer has 20 or  
30 fewer full-time employees, the  
31 employer is not required to pay for  
32 any rehabilitation or treatment  
33 under this division.

34 (iii) Notwithstanding subdivision  
35 (i), if the employer has between 21  
36 and 50 full-time employees and does  
37 not provide or participate in an  
38 employee group health benefit plan  
39 subject to Title 24, section 2329,

1 or Title 24-A, section 2842, the  
2 employer and the affected employee  
3 shall equally divide the costs of  
4 rehabilitation or treatment under  
5 this division; or

6 (b) Enter a public or private  
7 rehabilitation program of the employee's  
8 choice at the employee's expense, unless  
9 it is covered by a health insurance plan.

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

25 (3) Except as provided in division (a), upon  
26 successfully completing the rehabilitation  
27 program, as determined by the rehabilitation  
28 or treatment provider after consultation with  
29 the employer, the employee is entitled to  
30 return to the employee's previous job with  
31 full pay and benefits unless conditions  
32 unrelated to the employee's previous  
33 confirmed positive result make the employee's  
34 return impossible. If the rehabilitation or  
35 treatment provider determines that the  
36 employee has not successfully completed the  
37 rehabilitation program, the employer may take  
38 any action described in paragraph A.

39 (a) If the employee who has completed

1 rehabilitation previously worked in an  
2 employment position designated under  
3 section 684, subsection 3, paragraph B,  
4 the employer may refuse to allow the  
5 employee to return to the previous job  
6 if the employer believes that the  
7 employee may pose an unreasonable safety  
8 hazard because of the nature of the  
9 position. The employer shall attempt to  
10 find suitable work for the employee  
11 immediately after refusing the  
12 employee's return to the previous  
13 position. No reduction may be made in  
14 the employee's previous benefits or rate  
15 of pay while awaiting reassignment to  
16 work or while working in a position  
17 other than the previous job. The  
18 employee shall be reinstated to the  
19 previous position within 6 months after  
20 returning to work in any capacity with  
21 the employer unless the employee has  
22 received a subsequent confirmed positive  
23 result within that time from a test  
24 administered under this subchapter.

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

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

40 A. Unless the employee or applicant consents, all  
41 information acquired by an employer in the testing  
42 process is confidential and may not be released to

1           any person other than the employee or applicant  
2           who is tested, any necessary personnel of the  
3           employer and a provider of rehabilitation or  
4           treatment services under subsection 2, paragraph  
5           C. This paragraph does not prevent:

6                   (1) The release of this information when  
7                   required or permitted by state or federal  
8                   law; or

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

13                  B. Notwithstanding any other law, the results of  
14                  any substance abuse test required, requested or  
15                  suggested by any employer may not be used in any  
16                  criminal proceeding.

17           §686. Rulemaking

18                  The Department of Human Services shall adopt rules  
19                  under the Maine Administrative Procedure Act, Title 5,  
20                  chapter 375, to carry out the purposes of this  
21                  subchapter. The department shall consult with the  
22                  Department of Labor which shall assist in developing  
23                  these rules when necessary. The Department of Human  
24                  Services shall adopt initial rules before December 1,  
25                  1988.

26           §687. Substance abuse education

27                  All employers shall cooperate fully with the  
28                  Department of Labor, the Department of Human Services,  
29                  the Department of Public Safety and any other state  
30                  agency in programs designed to educate employees about  
31                  the dangers of substance abuse and about public and  
32                  private services available to employees who have a  
33                  substance abuse problem.

34           §688. Violation and remedies

35                  The following provisions govern the enforcement of  
36                  this subchapter.

1 1. Remedies. Any employer who violates this  
2 subchapter is liable to any employee subjected to  
3 discipline or discharge based on a violation of this  
4 subchapter for:

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

6 B. Reinstatement of the employee to the  
7 employee's job with full benefits;

8 C. Court costs; and

9 D. Reasonable attorneys' fees, as set by the  
10 court.

11 2. Breach of confidentiality. In addition to the  
12 liability imposed under subsection 1, any person who  
13 violates section 684, subsection 4, paragraph C, or  
14 section 685, subsection 3:

15 A. For the first offense, is subject to a civil  
16 penalty not to exceed \$1,000, payable to the  
17 affected employee, to be recovered in a civil  
18 action; and

19 B. For any subsequent offense, is guilty of a  
20 Class D crime.

21 3. Harassment. In addition to the liability  
22 imposed under subsection 1, any employer who requires  
23 or repeatedly attempts to require an employee or  
24 applicant to submit to a substance abuse test under  
25 conditions which would not justify the test under this  
26 subchapter or who without substantial justification  
27 repeatedly requires an employee to submit to a  
28 substance abuse test under section 684, subsection 3:

29 A. For the first offense, is subject to a civil  
30 penalty not to exceed \$1,000, payable to the  
31 affected employee, to be recovered in a civil  
32 action; and

33 B. For any subsequent offense against the same  
34 employee, is guilty of a Class D crime.

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

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

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

8    §689. Report

9           The Department of Labor shall report to the joint  
10 standing committee of the Legislature having  
11 jurisdiction over labor on February 1, 1989, and  
12 annually on that date thereafter. This report shall:

13           1.    List of employers.    List those employers who  
14 have filed copies of their substance abuse testing  
15 policies with the department, as required by section  
16 683, subsection 2;

17           2.    Persons tested.        Indicate whether those  
18 employers are testing applicants or employees, or  
19 both; and

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

23           Sec. 2. Review.    The joint standing committee  
24 of the Legislature having jurisdiction over labor  
25 shall review the implementation and effectiveness of  
26 this subchapter during the Second Regular Session of  
27 the 114th Legislature.

28           Sec. 3. Transition.   No employer may commence a  
29 workplace substance abuse testing program after the  
30 effective date of this Act until January 1, 1989. All  
31 workplace substance abuse testing programs in  
32 existence on the effective date of this Act shall stop  
33 any substance abuse testing of employees or  
34 applicants, except that any workplace substance abuse  
35 testing program that existed on January 1, 1988, may  
36 continue operation until January 1, 1989. All  
37 workplace substance abuse testing programs must comply



1 fully with this Act and rules adopted under this Act  
2 on January 1, 1989.

3 Sec. 4. Appropriation. The following funds are  
4 appropriated from the General Fund to carry out the  
5 purposes of this Act.

6 1988-89

7 HUMAN SERVICES,  
8 DEPARTMENT OF

9 Bureau of Health

10	Positions	(1/2)
11	Personal Services	\$13,832
12	All Other	5,000
13	Capital Expenditures	500

14 Provides funds for a  
15 half-time laboratory  
16 supervisor position to  
17 develop, adopt and  
18 monitor rules for  
19 substance abuse  
20 testing.

21 DEPARTMENT OF HUMAN SERVICES  
22 TOTAL

\$19,332

23 LABOR, DEPARTMENT OF

24 Regulation and Enforcement

25	Positions	(1)
26	Personal Services	\$19,373
27	All Other	3,500

28 Provides funds for a  
29 clerical-enforcement  
30 position and related  
31 expenses including the  
32 cost of a report.

1 DEPARTMENT OF LABOR  
2 TOTAL

\$22,873

3 STATEMENT OF FACT

4 This new draft attempts to reach a compromise  
5 position that allows random testing of certain  
6 employees with safeguards against any abuse of such  
7 testing. The Legislature acknowledges that substance  
8 abuse in the workplace may pose a safety threat and  
9 that substance abuse testing may help to identify  
10 substance abuse by employees in the workplace. At the  
11 same time, the Legislature recognizes that  
12 unrestricted workplace substance abuse testing  
13 programs pose grave risks of unduly infringing upon  
14 the privacy rights of employees, that such testing  
15 programs may be poorly conceived and implemented by  
16 some employers, and that these programs may be used  
17 for purposes beyond their legitimate scope. For these  
18 reasons, this new draft allows substance abuse testing  
19 programs to be employed in the workplace, but  
20 restricts their application and ensures that proper  
21 procedures and safeguards are implemented.

22 Although recognizing that constitutional  
23 protections do not extend to the private sphere, it is  
24 manifest that all individuals retain certain rights to  
25 their personal privacy which may not be infringed upon  
26 without substantial justification. For this reason,  
27 the new draft prohibits the use of random or arbitrary  
28 substance abuse testing of employees except for those  
29 employees who work in positions where it would be  
30 difficult to discover the symptoms of an individual's  
31 substance abuse problem and in which an impaired  
32 worker would pose a substantial threat of direct and  
33 immediate serious bodily harm to the public or co-  
34 workers.

35 The new draft allows an employer to require  
36 substance abuse testing of any employee when there is  
37 probable cause to impose the test. The concept of  
38 probable cause, as defined in the new draft, requires  
39 an employer to have reasonable grounds for believing  
40 that an employee is under the influence of a substance

1 of abuse before he may require a test. The purpose of  
2 this definition is to prevent an employer from  
3 imposing substance abuse tests upon an employee  
4 without reliable, objective information supporting the  
5 finding of probable cause.

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

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

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

14 The new draft also regulates discipline taken upon  
15 receipt of a positive test result. Recognizing that  
16 the prevention and deterrence of safety hazards caused  
17 by employee impairment in the workplace is the  
18 justification for testing programs, and not the  
19 identification and punishment of persons who suffer  
20 from the disease of substance abuse, this new draft  
21 attempts to provide minimum opportunities for a  
22 substance abusing employee to receive rehabilitation.  
23 An employer is not required to provide an opportunity  
24 for rehabilitation to a job applicant who receives a  
25 confirmed positive result. Any employer who  
26 establishes a testing program must first have a  
27 functioning employee assistance program. These  
28 programs have consistently demonstrated their ability  
29 to deal with a wide range of employee problems  
30 economically and effectively, including employee  
31 substance abuse. Once a testing program is  
32 established and an employee receives a confirmed  
33 positive test result, the employer is authorized to  
34 dismiss or discipline that employee unless the  
35 employee enters a substance abuse rehabilitation  
36 program. If the employee elects to undergo  
37 rehabilitation, he may be suspended with no reduction  
38 in pay, except that an employer is not required to pay  
39 the employee for any time during which the employee is  
40 unavailable for work for the purposes of  
41 rehabilitation. Upon successfully completing the  
42 rehabilitation program, the employee may return to his  
43 previous job. The employer is no longer required to  
44 offer the employee an opportunity to undergo  
45 rehabilitation if the employee has already tested  
46 positive at least twice before or if the

1 employee receives a confirmed positive result within  
2 one year of completing a previous rehabilitation  
3 program.

4 The new draft also includes a transition clause  
5 intended to define the permissible scope of substance  
6 abuse testing in the workplace during the interim  
7 period after passage of this new draft but before the  
8 rules required by this new draft are adopted. No  
9 employer may institute a substance abuse testing  
10 program in his workplace after the effective date of  
11 this new draft until January 1, 1989. All employers  
12 must stop any substance abuse testing of employees or  
13 applicants on the effective date of this new draft,  
14 except that any employer who was conducting a testing  
15 program on January 1, 1988, may continue to operate  
16 his program. As of January 1, 1989, all testing  
17 programs must comply with this new draft and the rules  
18 adopted under it.

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