

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

FIRST REGULAR SESSION - 1989

Legislative Document

No. 537

S.P. 221

In Senate, March 3, 1989

Reference to the Committee on Labor suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator MATTHEWS of Kennebec.
Cosponsored by Representative McHENRY of Madawaska.

STATE OF MAINE

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

An Act to Prevent Arbitrary Dismissal of Employees Based on Results of
Substance Abuse Testing.



1 **Be it enacted by the People of the State of Maine as follows:**

3 **Sec. 1. 24-A MRSA §2364, sub-§4, ¶C-1 is enacted to read:**

5 C-1. An experience or merit rating plan shall provide for
7 premium reductions for any employer:

9 (1) With an employee assistance program which meets
11 the requirements of Title 26, section 683, subsection
13 1, paragraph A, subparagraphs (2) to (4) and which has
15 been in place for at least 2 years prior to the
17 reduction; and

19 (2) Who has shown a significant reduction in the
21 number of claims since the implementation of the
23 employee assistance program.

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

27 **SUBCHAPTER III-A**

29 **SUBSTANCE ABUSE TESTING**

31 **§681. Definitions**

33 As used in this subchapter, unless the context otherwise
35 indicates, the following terms have the following meanings.

37 1. Confirmed positive result. "Confirmed positive result"
39 means a confirmation test result which indicates the presence of
41 a substance of abuse above the cut-off level of the test in the
43 tested sample.

45 2. Discipline of an employee. "Discipline of an employee"
47 means the discharge or discipline of an employee or a change in
49 an employee's work assignment.

51 3. Employee. "Employee" means a person who is permitted,
53 required or directed by an employer to engage in any employment
55 for consideration of direct gain or profit.

57 4. Employer. "Employer" means a person, partnership,
59 corporation, association or other legal entity, public or
61 private, which employs one or more employees. The term includes
63 an employment agency.

65 5. Positive test result. "Positive test result" means a
67 test result which indicates the presence of a substance of abuse
69 in the tested sample above the cut-off level of the test.

71 6. Substance abuse test. "Substance abuse test" means any
73 test procedure designed to take and analyze body fluids or

1 materials from the body for the purpose of detecting the presence
2 of substances of abuse. The term does not include tests designed
3 to determine blood-alcohol concentration levels from a sample of
4 an individual's breath.

5
6 A. "Confirmation test" means a subsequent substance abuse
7 test performed through the use of gas chromatography-mass
8 spectrometry that is used to verify the presence of a
9 substance of abuse indicated by an initial positive
10 screening test result.

11
12 B. "Screening test" means an initial substance abuse test
13 performed through the use of immunoassay technology and
14 which is used as a preliminary step in detecting the
15 presence of substances of abuse.

16
17 7. Substance of abuse. "Substance of abuse" means any
18 scheduled drug, alcohol or other drug, or any of their
19 metabolites.

20
21 A. "Alcohol" has the same meaning as found in Title 28-A,
22 section 2, subsection 2.

23
24 B. "Drug" has the same meaning as found in Title 32,
25 section 13702, subsection 9.

26
27 C. "Scheduled drug" has the same meaning as found in Title
28 17-A, section 1101, subsection 11.

29
30 **§682. Testing procedure**

31
32 In order to use a substance abuse test in the discipline of
33 an employee, the following requirements must be met.

34
35 1. Confirmed positive result. The test result must be a
36 confirmed positive test result.

37
38 2. Cut-off level. The cut-off level for the screening and
39 confirmation tests at which the presence of a substance of abuse
40 in a sample is considered a positive test result must have been
41 established by the employer and communicated to the employee
42 before the test was administered. Cut-off levels are subject to
43 the following.

44
45 A. Cut-off levels for confirmation tests for marijuana may
46 not be lower than 10 nanograms of delta-9
47 tetrahydrocannabinol per milliliter for blood, serum or
48 plasma samples and 50 nanograms of
49 delta-9-tetrahydrocannabinol-9-carboxylic acid per
50 milliliter for urine samples.

1 B. The Department of Human Services shall adopt rules
3 pursuant to the Maine Administrative Procedure Act, Title 5,
5 chapter 375, regulating screening and confirmation cut-off
7 levels for other substances of abuse to ensure that levels
9 are set within known tolerances of test methods and above
11 mere trace amounts.

13 3. Collection of samples. Samples shall be collected as
15 follows.

17 A. The collection of any sample for use in a substance
19 abuse test must be conducted in a medical facility and be
21 supervised by medical personnel.

23 B. An employer may not require an employee to remove any
25 clothing for the purpose of collecting a sample, except that
27 an employer may require that an employee leave any personal
29 belongings other than clothing and any unnecessary coat,
31 jacket or similar outer garments outside of the collection
33 area.

35 C. No employee may be required to provide a urine sample
37 while being observed, directly or indirectly, by another
39 individual.

41 4. Sample storage. The storage of samples before testing
43 must be sufficient to avoid deterioration of the samples.

45 5. Chain of custody. The chain of custody of samples must
47 be sufficient to protect the samples from tampering and to verify
49 the identity of each sample and test results.

51 6. Qualified laboratories. The test must be performed in a
53 qualified testing laboratory that complies with this subsection.

55 A. The director of the laboratory must:

57 (1) Possess a doctoral degree in pharmacology,
59 toxicology or analytical chemistry or be certified by
61 the state in which the laboratory is located as a
63 laboratory director in forensic or toxicological
65 analysis;

67 (2) Have at least 2 years' experience in an analytical
69 toxicology laboratory; and

71 (3) Be certified by the American Board of Forensic
73 Toxicology or the American Board of Clinical Chemistry
75 in Toxicological Chemistry.

77 B. The laboratory must have written testing procedures and
79 procedures to ensure a clear chain of custody.

1
3 C. The laboratory must demonstrate satisfactory performance
5 in the proficiency testing program of the National Institute
on Drug Abuse, the College of American Pathology or the
American Association for Clinical Chemistry.

7 D. The laboratory must comply with rules adopted by the
9 Department of Human Services pursuant to the Maine
Administrative Procedure Act, Title 5, chapter 375. These
rules shall ensure that:

11 (1) The laboratory possesses all licenses or
13 certifications that the Department of Human Services
15 finds necessary or desirable to ensure reliable and
accurate test results;

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

19 (a) The use of internal quality controls during
21 each substance abuse test conducted under this
23 subchapter, including the use of blind samples and
25 samples of known concentrations which are used to
check the performance and calibration of testing
equipment;

27 (b) The internal review and certification process
29 for test results, including the qualifications of
the person who performs that function in the
testing laboratory; and

31 (c) Security measures implemented by the testing
33 laboratory; and

35 (3) Other necessary and proper actions are taken to
37 ensure reliable and accurate test results.

39 7. Laboratory testing. The testing laboratory shall
41 perform a screening test on each sample submitted to it by the
43 employer for only those substances of abuse that the employer
45 requests to be identified. If the screening test result is
47 negative, no further test may be conducted on that sample. If
the screening test result is positive, the testing laboratory
shall perform a confirmation test on that sample. The testing
laboratory shall retain all confirmed positive samples for one
year in a manner that will inhibit deterioration of the samples
and allow subsequent retesting. All other samples shall be
disposed of immediately after testing.

49 8. Laboratory report. The laboratory report of test
51 results must, at a minimum, state:

1 A. The name of the laboratory that performed the test or
2 tests;

3 B. Any confirmed positive results on any tested sample.

4 (1) No testing laboratory may communicate to the
5 employer any test result other than a confirmed
6 positive result. The testing laboratory and the
7 employer must ensure that an unconfirmed positive
8 screening test result cannot be determined by an
9 employer in any manner, including, but not limited to,
10 the method of billing the employer for the tests
11 performed by the laboratory and the time within which
12 results are provided to the employer.

13 (2) Unless the employee consents, test results may not
14 be reported in numerical or quantitative form, but
15 shall state only that the test result was positive;

16 C. The sensitivity or cut-off level of the confirmation
17 test; and

18 D. Any available information concerning the margin of
19 accuracy and precision of the test methods employed.

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

25 9. Confidentiality. This subsection governs the use of
26 information acquired by an employer in the testing process.

27 A. Unless the employee consents, all information acquired
28 by an employer in the testing process is confidential and
29 may not be released to any person other than the employee
30 who is tested, any necessary personnel of the employer and a
31 provider of rehabilitation or treatment services. This
32 paragraph does not prevent:

33 (1) The release of this information when required or
34 permitted by state or federal law; or

35 (2) The use of this information in any grievance
36 procedure, administrative hearing or civil action
37 relating to the imposition of the test.

38 B. Notwithstanding any other law, the results of any
39 substance abuse test required, requested or suggested by any
40 employer may not be used in any criminal proceeding.

1 10. Costs. When the employer requires, requests or
2 suggests that an employee submit to a substance abuse test, the
3 employer must pay all costs.

5 §683. Use of test; employers of 20 or more employees

7 1. Employee assistance program; insurance. An employer
8 with 20 or more employees may not use a substance abuse test as a
9 factor in the discipline of an employee unless the test meets the
10 requirements of section 682 and unless:

11 A. The employer has insurance which will provide a
12 rehabilitation program, treatment or counseling services to
13 the employee or has an employee assistance program which:

14 (1) Was in place prior to the administration of the
15 substance abuse test;

16 (2) Meets the program standards set by the
17 Association of Labor-Management Administrators and
18 Consultants on Alcoholism;

19 (3) Provides substance abuse counseling or referral to
20 substance abuse counselors; and

21 (4) Provides services with the highest possible degree
22 of confidentiality;

23 B. The employer bears the cost of providing any services to
24 the employee under paragraph A; and

25 C. The employer has given the employee the opportunity to
26 participate in a program or seek services under paragraph A.

27 2. Disciplinary action. An employer may use a substance
28 abuse test result as a factor in the discipline of an employee if
29 the requirements of subsection 1 are met only if:

30 A. The employee refuses to participate in an employee
31 assistance program or to seek rehabilitation treatment or
32 counseling services; or

33 B. The employee receives a subsequent confirmed positive
34 substance abuse test result within one year after that
35 employee's rehabilitation or a treatment provider indicates
36 that the employee has successfully completed a
37 rehabilitation program.

38 §684. Use of test; employers of less than 20 employees

39 1. Opportunity for treatment. An employer with less than
40 20 employees may not use a substance abuse test as a factor in

1 the discipline of an employee unless the test meets the
2 requirements of section 682 and the employer has allowed the
3 employee to seek rehabilitation, treatment or counseling services
4 either through an existing employer's insurance program or at the
5 employee's cost.

7 2. Disciplinary action. The employer may use a substance
8 abuse test result as a factor in the discipline of an employee if
9 the test meets the requirements of section 682 and:

11 A. The employee refuses to seek rehabilitation, treatment
12 or counseling services; or

13 B. The employee receives a subsequent confirmed positive
14 substance abuse test result within one year after that
15 employee's rehabilitation or a treatment provider indicates
16 that the employee has successfully completed a
17 rehabilitation program.

19 **§685. Refusal to submit to test**

21 An employer may use an employee's refusal to submit to a
22 substance abuse test in the discipline of an employee.

25 **§686. Effect on collective bargaining**

27 This subchapter does not prevent the negotiation of
28 collective bargaining agreements that provide greater protection
29 to employees than is provided in this subchapter.

31

STATEMENT OF FACT

33

35 This bill, in an attempt to reach a compromise between the
36 positions held on random substance abuse testing by employers,
37 provides mechanisms to ensure that proper test procedures are
38 used and confidentiality is maintained and promotes the State's
39 interest in ensuring that employees with substance abuse problems
40 receive adequate opportunity for rehabilitation and treatment of
41 their disease and return to work as healthy, productive employees
42 as quickly as possible. Encouragement to work for these same
43 goals is given to employers under this bill by providing for a
44 reduction in workers' compensation premium rates for those
45 employers with employee assistance programs which meet the
46 Association of Labor-Management Administrators and Consultants on
47 Alcoholism standards and have a proven track record of fewer
48 claims and injuries.

49 This bill allows an employer to use a confirmed positive
50 substance abuse test result as a factor in the discharge or
51 discipline of an employee only if the procedural safeguards for
testing have been followed and an employee has refused treatment,

1 counseling or rehabilitation services or the test result occurs within one year of the employee receiving such services.