

MAINE STATE LEGISLATURE

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
114TH LEGISLATURE
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 609, L.D. 833, Bill, "An Act Relating to Drug Testing"

Amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

Sec. 1. 26 MRSA c. 7, sub-c. III-A is enacted to read:

SUBCHAPTER III-A

SUBSTANCE ABUSE TESTING

§681. Purpose; applicability

1. Purpose. This subchapter is intended to:

A. Protect the privacy rights of individual employees in the State from undue invasion by employers through the use of substance abuse tests while allowing the use of tests when the employer has a compelling reason to administer a test;

B. Ensure that, when substance abuse tests are used, proper test procedures are employed to protect the privacy rights of employees and applicants and to achieve reliable and accurate results; and

C. Ensure that an employee with a substance abuse problem receives an opportunity for rehabilitation and treatment of the disease and returns to work as quickly as possible.

2. Employer discretion. This subchapter does not require or encourage employers to conduct substance abuse testing of employees or applicants. An employer who chooses to conduct such

1 testing is limited by this subchapter, but may establish policies
3 which are supplemental to and not inconsistent with this
subchapter.

5 3. Collective bargaining agreements. This subchapter does
7 not prevent the negotiation of collective bargaining agreements
9 that provide greater protection to employees or applicants than
is provided by this subchapter.

11 4. Home rule authority preempted. No municipality may
13 enact any ordinance under its home rule authority regulating an
employer's use of substance abuse tests.

15 5. Contracts for work out of State. All employment
17 contracts subject to the laws of this State shall include an
agreement that this subchapter will apply to any employer who
hires employees to work outside the State.

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

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

35 8. Federal law; exceptions. This subchapter does not apply
37 to the extent it is preempted by any federal law, rule or
39 regulation. This subchapter does not apply in any way to:

41 A. Nuclear electrical generating facilities and their
43 employees, including independent contractors and employees
of independent contractors who are working at nuclear
electrical generating facilities; and

45 B. Intrastate motor carriers subject to rules adopted under
47 Title 29, section 2707, provided that the carrier's use of
49 substance abuse tests is conducted in compliance with the 49
Code of Federal Regulations, Subtitle A, Part 40, governing
the use of substance abuse tests by interstate motor
carriers.

51 §682. Definitions

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

5 1. Applicant. "Applicant" means any person seeking
employment from an employer. The term includes any person using
7 an employment agency's services.

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

13 3. Employer. "Employer" means any person, partnership,
corporation, association or other legal entity, public or
15 private, that employs one or more employees. The term also
17 includes an employment agency.

19 4. Negative test result. "Negative test result" means a
test result that indicates that:

21 A. A substance of abuse is not present in the tested
23 sample; or

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

27 5. Positive test result. "Positive test result" means a
test result that indicates the presence of a substance of abuse
29 in the tested sample above the cutoff level of the test.

31 A. "Confirmed positive result" means a confirmation test
result that indicates the presence of a substance of abuse
33 above the cutoff level in the tested sample.

35 6. Probable cause. "Probable cause" means a reasonable
ground for belief in the existence of facts that induce a person
37 to believe that an employee may be under the influence of a
substance of abuse, provided that the existence of probable cause
39 may not be based exclusively on any of the following:

41 A. Information received from an anonymous informant;

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

49 C. A single work-related accident.
51

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

7
8 A. "Screening test" means an initial substance abuse test
9 performed through the use of immunoassay technology, or a
10 test technology of similar or greater accuracy and
11 reliability approved by the Department of Human Services
12 under rules adopted under section 687, and which is used as
13 a preliminary step in detecting the presence of substances
14 of abuse.

15
16 B. "Confirmation test" means a 2nd substance abuse test
17 performed through the use of gas chromatography-mass
18 spectrometry that is used to verify the presence of a
19 substance of abuse indicated by an initial positive
20 screening test result.

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

24
25 A. "Alcohol" has the same meaning as found in Title 28-A,
26 section 2, subsection 2.

27
28 B. "Drug" has the same meaning as found in Title 32,
29 section 13702, subsection 9.

30
31 C. "Scheduled drug" has the same meaning as found in Title
32 17-A, section 1101, subsection 11.

33
34 §683. Testing procedures

35
36 No employer may require, request or suggest that any
37 employee or applicant submit to a substance abuse test except in
38 compliance with this section. All actions taken under a
39 substance abuse testing program shall comply with this
40 subchapter, rules adopted under this subchapter and the
41 employer's written policy approved under section 686.

42
43 1. Employee assistance program required. Before
44 establishing any substance abuse testing program for employees,
45 an employer with over 20 full-time employees must have a
46 functioning employee assistance program.

47
48 A. The employer may meet this requirement by participating
49 in a cooperative employee assistance program that serves the
50 employees of more than one employer.

1 B. The employee assistance program must be certified by the
2 Department of Human Services under rules adopted pursuant to
3 section 687. The rules shall ensure that the employee
4 assistance programs have the necessary personnel, facilities
5 and procedures to meet minimum standards of professionalism
6 and effectiveness in assisting employees.

7
8 2. Written policy. Before establishing any substance abuse
9 testing program, an employer must develop a written policy in
10 compliance with this subchapter providing for, at a minimum:

11 A. The procedure and consequences of an employee's
12 voluntary admission of a substance abuse problem and any
13 available assistance, including the availability and
14 procedure of the employer's employee assistance program;

15 B. When substance abuse testing may occur, including:

16 (1) A description of which positions, if any, will be
17 subject to testing, including any positions subject to
18 random or arbitrary testing under section 684,
19 subsection 3; and

20 (2) The procedure to be followed in selecting
21 employees to be tested on a random or arbitrary basis
22 under section 684, subsection 3;

23 C. The collection of samples.

24 (1) The collection of any sample for use in a
25 substance abuse test must be conducted in a medical
26 facility and supervised by a physician licensed under
27 Title 32, chapter 36 or 48, or a nurse licensed under
28 Title 32, chapter 31. A medical facility includes a
29 first aid station located at the work site.

30 (2) An employer may not require an employee or
31 applicant to remove any clothing for the purpose of
32 collecting a urine sample, except that:

33 (a) An employer may require that an employee or
34 applicant leave any personal belongings other than
35 clothing and any unnecessary coat, jacket or
36 similar outer garments outside the collection
37 area; or

38 (b) If it is the standard practice of an off-site
39 medical facility to require the removal of
40 clothing when collecting a urine sample for any
41 purpose, the physician or nurse supervising the
42 collection of the sample in that facility may

1 require the employee or applicant to remove their
2 clothing.

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

6 D. The storage of samples before testing sufficient to
7 inhibit deterioration of the sample;

8 E. The chain of custody of samples sufficient to protect
9 the sample from tampering and to verify the identity of each
10 sample and test result;

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

12 G. The cutoff levels for both screening and confirmation
13 tests at which the presence of a substance of abuse in a
14 sample is considered a positive test result.

15 (1) Cutoff levels for confirmation tests for marijuana
16 may not be lower than 20 nanograms of
17 delta-9-tetrahydrocannabinol-9-carboxylic acid per
18 milliliter for urine samples.

19 (2) The Department of Human Services shall adopt rules
20 under section 687 regulating screening and confirmation
21 cutoff levels for other substances of abuse, including
22 those substances tested for in blood samples under
23 subsection 5, paragraph B, to ensure that levels are
24 set within known tolerances of test methods and above
25 mere trace amounts;

26 H. The consequences of a confirmed positive substance abuse
27 test result;

28 I. The consequences for refusal to submit to a substance
29 abuse test;

30 J. Opportunities and procedures for rehabilitation
31 following a confirmed positive result;

32 K. A procedure under which an employee or applicant who
33 receives a confirmed positive result may appeal and contest
34 the accuracy of that result; and

35 L. Any other matters required by rules adopted by the
36 Department of Labor under section 687.

37 An employer must consult with the employer's employees in the
38 development of a substance abuse testing policy under this
39 subsection. The employer shall send a copy of the final written

1 policy to the Department of Labor for review under section 686.
2 The employer may not implement the policy until the Department of
3 Labor approves the policy. The employer shall send a copy of any
4 proposed change in an approved written policy to the Department
5 of Labor for review under section 686. The employer may not
6 implement the change until the Department of Labor approves the
7 change.

9 3. Copies to employees and applicants. The employer shall
10 provide each employee with a copy of the written policy approved
11 by the Department of Labor under section 686 and a copy of this
12 subchapter at least 60 days before the policy takes effect. The
13 employer shall provide each employee with a copy of any change in
14 a written policy approved by the Department of Labor under
15 section 686 at least 60 days before the change takes effect. If
16 applicants are subject to testing under the written policy, the
17 employer shall provide each applicant with a copy of the written
18 policy under subsection 2 and a copy of this subchapter before
19 administering a substance abuse test to the applicant.

21 4. Consent forms prohibited. No employer may require,
22 request or suggest that any employee or applicant sign or agree
23 to any form or agreement that attempts to:

25 A. Absolve the employer from any potential liability
26 arising out of the imposition of the substance abuse test; or

27 B. Waive an employee's or applicant's rights or eliminate
28 or diminish an employer's obligations under this subchapter.

31 Any form or agreement prohibited by this subsection is void.

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

37 A. Segregate a portion of the sample for that person's own
38 testing. Within 5 days after the sample is collected, the
39 employee or applicant shall notify the employer of the
40 testing laboratory selected by the employee or applicant.
41 This laboratory must comply with the requirements of this
42 section related to testing laboratories. When the employer
43 receives notice of the employee or applicant's selection,
44 the employer shall promptly send the segregated portion of
45 the sample to the named testing laboratory, subject to the
46 same chain of custody requirements applicable to testing of
47 the employer's portion of the sample. The employee or
48 applicant shall pay the costs of these tests; and

49 B. In the case of an employee, have a blood sample taken
50 from the employee by a licensed physician, registered
51 physician's assistant, registered nurse or a person

1 certified by the Department of Human Services to draw blood
2 samples. The employer shall have this sample tested for the
3 presence of alcohol or marijuana metabolites, if those
4 substances are to be tested for under the employer's written
5 policy. If the employee requests that a blood sample be
6 taken as provided in this paragraph, the employer may not
7 test any other sample from the employee for the presence of
8 these substances.

9
10 (1) The Department of Human Services may identify, by
11 rules adopted under section 687, other substances of
12 abuse for which an employee may request a blood sample
13 be tested instead of a urine sample if the department
14 determines that a sufficient correlation exists between
15 the presence of the substance in an individual's blood
16 and its effect upon the individual's performance.

17
18 (2) No employer may require, request or suggest that
19 any employee or applicant provide a blood sample for
20 substance abuse testing purposes nor may any employer
21 conduct a substance abuse test upon a blood sample
22 except as provided in this paragraph.

23
24 (3) Applicants do not have the right to require the
25 employer to test a blood sample as provided in this
26 paragraph.

27
28 6. Qualified testing laboratories required. No employer
29 may perform any substance abuse test administered to any of that
30 employer's employees. An employer may perform screening tests
31 administered to applicants if the employer's testing facilities
32 comply with the requirements for testing laboratories under this
33 subsection, except that the employer's testing facilities do not
34 have to comply with paragraph A. Any substance abuse test
35 administered under this subchapter must be performed in a
36 qualified testing laboratory that complies with this subsection.

37
38 A. The director of the laboratory must be certified by the
39 American Board of Forensic Toxicology or the American Board
40 of Clinical Chemistry in Toxicological Chemistry.

41
42 B. The laboratory must have written testing procedures and
43 procedures to ensure a clear chain of custody.

44
45 C. The laboratory must demonstrate satisfactory performance
46 in the proficiency testing program of the National Institute
47 on Drug Abuse, the College of American Pathology or the
48 American Association for Clinical Chemistry.

49
50 D. The laboratory must comply with rules adopted by the
51 Department of Human Services under section 687. These rules
shall ensure that:

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

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

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

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

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

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

7. Testing procedure. A testing laboratory shall perform a screening test on each sample submitted by the employer for only those substances of abuse that the employer requests to be identified. If a screening test result is negative, no further test may be conducted on that sample. If a screening test result is positive, a confirmation test shall be performed on that sample. A 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.

8. Laboratory report of test results. This subsection governs the reporting of test results.

A. A laboratory report of test results shall, at a minimum, state:

(1) The name of the laboratory that performed the test or tests;

(2) Any confirmed positive results on any tested sample.

(a) Unless the employee or applicant consents, test results shall not be reported in numerical or

1 quantitative form but shall state only that the
2 test result was positive or negative.

3 (b) A testing laboratory and the employer must
4 ensure that an employee's unconfirmed positive
5 screening test result cannot be determined by the
6 employer in any manner, including, but not limited
7 to, the method of billing the employer for the
8 tests performed by the laboratory and the time
9 within which results are provided to the
10 employer. This division does not apply to test
11 results for applicants;

12 (3) The sensitivity or cutoff level of the
13 confirmation test; and

14 (4) Any available information concerning the margin of
15 accuracy and precision of the test methods employed.

16 The report shall not disclose the presence or absence of
17 evidence of any physical or mental condition or of any
18 substance other than the specific substances of abuse that
19 the employer requested to be identified.

20 B. The employer shall promptly notify the employee or
21 applicant tested of the test result. Upon request of an
22 employee or applicant, the employer shall promptly provide a
23 legible copy of the laboratory report to the employee or
24 applicant.

25 C. The testing laboratory shall send test reports for
26 samples segregated at an employee's or applicant's request
27 under subsection 5, paragraph A, to both the employer and
28 the employee or applicant tested.

29 D. Every employer whose policy is approved by the
30 Department of Labor under section 686 shall annually send to
31 the department a compilation of the results of all substance
32 abuse tests administered by that employer in the previous
33 calendar year. This report shall provide separate
34 categories for employees and applicants and shall be
35 presented in statistical form so that no person who was
36 tested by that employer can be identified from the report.
37 The report shall include a separate category for any tests
38 conducted on a random or arbitrary basis under section 684,
39 subsection 3.

40 9. Costs. The employer shall pay the costs of all
41 substance abuse tests which the employer requires, requests or
42 suggests that an employee or applicant submit. Except as
43 provided in paragraph A, the employee or applicant shall pay the
44 costs of any additional substance abuse tests.

1
2 Costs of a substance abuse test administered at the request of an
3 employee under subsection 5, paragraph B, shall be paid:

4 A. By the employer if the test results are negative for all
5 substances of abuse tested for in the sample; and
6

7 B. By the employee if the test results in a confirmed
8 positive result for any of the substances of abuse tested
9 for in the sample.

10 10. Limitation on use of tests. An employer may administer
11 substance abuse tests to employees or applicants only for the
12 purpose of discovering the use of any substance of abuse likely
13 to cause impairment of the user or the use of any scheduled
14 drug. No employer may have substance abuse tests administered to
15 an employee or applicant for the purpose of discovering any other
16 information.

17
18 11. Rules. The Department of Human Services shall adopt
19 any rules under section 687 regulating substance abuse testing
20 procedures that it finds necessary or desirable to ensure
21 accurate and reliable substance abuse testing and to protect the
22 privacy rights of employees and applicants.

23 §684. Imposition of tests
24

25 1. Testing of applicants. An employer may require, request
26 or suggest that an applicant submit to a substance abuse test
27 only if:

28 A. The applicant has been offered employment with the
29 employer; or

30 B. The applicant has been offered a position on a roster of
31 eligibility from which applicants will be selected for
32 employment. The number of persons on this roster of
33 eligibility may not exceed the number of applicants hired by
34 that employer in the preceding 6 months.

35 The offer of employment or offer of a position on a roster of
36 eligibility may be conditioned on the applicant receiving a
37 negative test result.

38 2. Probable cause testing of employees. An employer may
39 require, request or suggest that an employee submit to a
40 substance abuse test if the employer has probable cause to test
41 the employee.

42 A. The employee's immediate supervisor, other supervisory
43 personnel or the employer's security personnel shall make
44 the determination of probable cause.

1
2 B. The supervisor or other person must state, in writing,
3 the facts upon which this determination is based and provide
4 a copy of the statement to the employee.

5
6 3. Random or arbitrary testing of employees. In addition
7 to testing employees on a probable cause basis under subsection
8 2, an employer may require, request or suggest that an employee
9 submit to a substance abuse test on a random or arbitrary basis
10 if at least one of the following conditions is met:

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

16
17 B. The employee works in a position the nature of which
18 would create an unreasonable threat to the health or safety
19 of the public or the employee's co-workers if the employee
20 were under the influence of a substance of abuse. It is the
21 intent of the Legislature that the requirements of this
22 paragraph be narrowly construed.

23
24 4. Testing while undergoing rehabilitation or treatment.
25 While the employee is participating in a substance abuse
26 rehabilitation program either as a result of voluntary contact
27 with or mandatory referral to the employer's employee assistance
28 program or after a confirmed positive result as provided in
29 section 685, subsection 2, paragraphs B and C, substance abuse
30 testing may be conducted by the rehabilitation or treatment
31 provider as required, requested or suggested by that provider.

32
33 A. Substance abuse testing conducted as part of such a
34 rehabilitation or treatment program is not subject to the
35 provisions of this subchapter regulating substance abuse
36 testing.

37
38 B. An employer may not require, request or suggest that any
39 substance abuse test be administered to any employee while
40 the employee is undergoing such rehabilitation or treatment,
41 except as provided in subsections 2 and 3.

42
43 C. The results of any substance abuse test administered to
44 an employee as part of such a rehabilitation or treatment
45 program may not be released to the employer.

46 §685. Action taken on substance abuse tests

47
48 Action taken by an employer on the basis of a substance
49 abuse test is limited as provided in this section.
50

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

9 2. Use of confirmation test results. This subsection
11 governs an employer's use of confirmed positive results and an
13 employee's or applicant's refusal to submit to a test requested
15 or required by an employer in compliance with this subchapter.

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

25 (1) Refusal to hire an applicant for employment;

27 (2) Discharge of an employee;

29 (3) Discipline of an employee; or

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

33 B. Before taking any action described in paragraph A in the
35 case of an employee who receives a confirmed positive
37 result, an employer shall provide the employee with an
39 opportunity to participate for at least 6 months in a
41 rehabilitation program designed to enable the employee to
43 avoid future use of a substance of abuse. The employer may
45 take any action described in paragraph A if the employee
47 receives a subsequent confirmed positive result within 3
49 years after the rehabilitation or treatment provider
51 indicates that the employee has successfully completed a
 rehabilitation program as provided in paragraph C,
 subparagraph (3).

C. If the employee chooses not to participate in a
 rehabilitation program under this subsection, the employer
 may take any action described in paragraph A. If the
 employee chooses to participate in a rehabilitation program,
 the following provisions apply.

(1) If the employer has an employee assistance program
 that offers counseling or rehabilitation services, the
 employee may choose to enter that program at the
 employer's expense. If these services are not
 available from an employer's employee assistance
 program or if the employee chooses not to participate
 in that program, the employee may enter a public or
 private rehabilitation program.

1 (a) Except to the extent that costs are covered
3 by a group health insurance plan, the costs of the
5 public or private rehabilitation program shall be
7 equally divided between the employer and employee
9 if the employer has more than 20 full-time
11 employees. If necessary, the employer shall
13 assist in financing the cost share of the employee
15 through a payroll deduction plan.

11 (b) Except to the extent that costs are covered
13 by a group health insurance plan, an employer with
15 20 or fewer full-time employees is not required to
17 pay for any costs of rehabilitation or treatment
19 under any public or private rehabilitation program.

17 (2) No employer may take any action described in
19 paragraph A while an employee is participating in a
21 rehabilitation program, except that an employer may
23 change the employee's work assignment or suspend the
25 employee from active duty to reduce any possible safety
27 hazard. No reduction in pay or benefits may be made
29 while an employee is participating in a rehabilitation
31 program, provided that the employer is not required to
33 pay the employee for periods in which the employee is
35 unavailable for work for the purposes of
37 rehabilitation. The employee may apply normal sick
39 leave and vacation time, if any, for these periods.

29 (3) Except as provided in division (a), upon
31 successfully completing the rehabilitation program, as
33 determined by the rehabilitation or treatment provider
35 after consultation with the employer, the employee is
37 entitled to return to the employee's previous job with
39 full pay and benefits unless conditions unrelated to
41 the employee's previous confirmed positive result make
43 the employee's return impossible. If the
45 rehabilitation or treatment provider determines that
47 the employee has not successfully completed the
49 rehabilitation program within 6 months after starting
51 the program, the employer may take any action described
 in paragraph A.

43 (a) If the employee who has completed
45 rehabilitation previously worked in an employment
47 position subject to random or arbitrary testing
49 under an employer's written policy, the employer
51 may refuse to allow the employee to return to the
 previous job if the employer believes that the
 employee may pose an unreasonable safety hazard
 because of the nature of the position. The
 employer shall attempt to find suitable work for
 the employee immediately after refusing the

1 employee's return to the previous position. No
2 reduction may be made in the employee's previous
3 benefits or rate of pay while awaiting
4 reassignment to work or while working in a
5 position other than the previous job. The
6 employee shall be reinstated to the previous
7 position or to another position with an equivalent
8 rate of pay and benefits and with no loss of
9 seniority within 6 months after returning to work
10 in any capacity with the employer unless the
11 employee has received a subsequent confirmed
12 positive result within that time from a test
13 administered under this subchapter.

14 D. This subsection does not require an employer to take any
15 disciplinary action against an employee who refuses to
16 submit to a test, receives a single or repeated confirmed
17 positive result or does not choose to participate in a
18 rehabilitation program. This subsection is intended to set
19 minimum opportunities for an employee with a substance abuse
20 problem to address the problem through rehabilitation. An
21 employer may offer additional opportunities, not otherwise
22 in violation of this subchapter, for rehabilitation or
23 continued employment without rehabilitation.

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

26 A. Unless the employee or applicant consents, all
27 information acquired by an employer in the testing process
28 is confidential and may not be released to any person other
29 than the employee or applicant who is tested, any necessary
30 personnel of the employer and a provider of rehabilitation
31 or treatment services under subsection 2, paragraph C. This
32 paragraph does not prevent:

33 (1) The release of this information when required or
34 permitted by state or federal law, including release
35 under section 683, subsection 8, paragraph D; or

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

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

43 §686. Review of written policies

44

1 1. Review required. The Department of Labor shall review
2 each written policy or change to an approved policy submitted to
3 the department by an employer under section 683, subsection 2.

5 A. The department shall determine if the employer's written
6 policy or change complies with this subchapter and shall
7 immediately notify the employer who submitted the policy or
8 change of that determination. If the department finds that
9 the policy or change does not comply with this subchapter,
10 the department shall also notify the employer of the
11 specific areas in which the policy or change is defective.

13 B. The department may request additional information from
14 an employer when necessary to determine whether an
15 employment position meets the requirements of section 684,
16 subsection 3. The department shall not approve any written
17 policy that provides for random or arbitrary testing of any
18 employment position that the employer has failed to
19 demonstrate meets the requirements of section 684,
20 subsection 3.

21 2. Review procedure. The Department of Labor shall adopt
22 rules under section 687 governing the procedure for reviews
23 conducted under this section.

25 A. The rules shall provide for notice to be given to the
26 employees of any employer who submits a written policy to
27 the department for review under this section. The employees
28 may submit written comments to the department challenging
29 any portion of the employer's written policy, including the
30 proposed designation of any position under section 684,
31 subsection 3, paragraph B.

33 B. Nothing in this section requires a formal hearing to be
34 held concerning the submission and review of an employer's
35 written policy.

37 C. Notwithstanding Title 5, section 8003, the Maine
38 Administrative Procedure Act, Title 5, chapter 375, does not
39 apply to reviews conducted under this section except that
40 all determinations by the Department of Labor under this
41 section may be appealed as provided in Title 5, chapter 375,
42 subchapter VII.

45 **§687. Rulemaking**

47 1. Department of Human Services. The Department of Human
48 Services shall adopt rules under the Maine Administrative
49 Procedure Act, Title 5, chapter 375, as provided in this
50 subchapter.

1 2. Department of Labor. The Department of Labor shall
2 adopt rules under the Maine Administrative Procedure Act, Title
3 5, chapter 375, as provided in this subchapter.

5 3. Coordination; deadline. The Department of Human
6 Services and the Department of Labor shall cooperate to ensure
7 any necessary coordination between the rules of both
8 departments. The Department of Human Services and the Department
9 of Labor shall adopt initial rules before December 1, 1989.

11 §688. Substance abuse education

13 All employers shall cooperate fully with the Department of
14 Labor, the Department of Human Services, the Department of Public
15 Safety and any other state agency in programs designed to educate
16 employees about the dangers of substance abuse and about public
17 and private services available to employees who have a substance
18 abuse problem.

19 §689. Violation and remedies

21 This section governs the enforcement of this subchapter.

23 1. Remedies. Any employer who violates this subchapter is
24 liable to any employee subjected to discipline or discharge based
25 on that violation for:

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

29 B. Reinstatement of the employee to the employee's job with
31 full benefits;

33 C. Court costs; and

35 D. Reasonable attorney's fees, as set by the court.

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

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

45 B. For any subsequent offense, is subject to a civil
46 penalty of \$2,000, payable to the affected employee, to be
47 recovered in a civil action.

49 3. Harassment. In addition to the liability imposed under
50 subsection 1, any employer who requires or repeatedly attempts to
51 require an employee or applicant to submit to a substance abuse
 test under conditions that would not justify the test under this

1 subchapter or who without substantial justification repeatedly
2 requires an employee to submit to a substance abuse test under
3 section 684, subsection 3:

5 A. Is subject to a civil penalty not to exceed \$1,000,
6 payable to the affected employee, to be recovered in a civil
7 action; and

9 B. For any subsequent offense against the same employee, is
10 subject to a civil penalty of \$2,000, payable to the
11 affected employee, to be recovered in a civil action.

13 4. Enforcement. The Department of Labor or the affected
14 employee or employees may enforce this subchapter. The
15 department may:

17 A. Collect the judgment on behalf of the employee or
18 employees; and

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

23 §690. Report

25 The Department of Labor shall report to the joint standing
26 committee of the Legislature having jurisdiction over labor
27 matters on March 1, 1990, and annually on that date thereafter.
28 This report shall:

29 1. List of employers. List those employers whose substance
30 abuse testing policies have been approved by the Department of
31 Labor under section 686;

32 2. Persons tested. Indicate whether those employers are
33 testing applicants or employees, or both;

34 3. Random or arbitrary testing. Indicate those employers
35 whose substance abuse testing policies permit random or arbitrary
36 testing under section 684, subsection 3, and describe the
37 employment positions subject to such random or arbitrary testing;

38 4. Results. Provide statistical data relating to the
39 reports received from employers indicating the number of
40 substance abuse tests administered by those employers in the
41 previous calendar year and the results of those tests; and

42 5. Description. Briefly describe the general scope and
43 practice of workplace substance abuse testing in the State.

44 Sec. 2. Transition. No employer may commence a workplace
45 substance abuse testing program after the effective date of this
46 Act until January 1, 1990. All workplace substance abuse testing
47 programs in effect on the effective date of this Act shall continue
48 in effect until the end of the calendar year in which they expire.
49 This section shall not apply to any workplace substance abuse testing
50 program that is subject to the provisions of section 686.
51 This section shall not apply to any workplace substance abuse testing

1 programs in existence on the effective date of this Act may
 2 continue operation until January 1, 1990. All workplace
 3 substance abuse testing programs must comply fully with this Act
 4 and rules adopted under this Act on January 1, 1990.

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

	1989-90	1990-91
JUDICIAL DEPARTMENT		
Courts - Supreme, Superior, District and Administrative		
Positions	(1)	(1)
Personal Services	\$14,018	\$18,691
Provides funds for a clerk to handle increases in the courts' caseloads.		
JUDICIAL DEPARTMENT TOTAL	<u>\$14,018</u>	<u>\$18,691</u>
HUMAN SERVICES, DEPARTMENT OF		
Bureau of Health		
Positions	(1)	(1)
Personal Services	\$18,483	\$25,050
All Other	2,000	2,500
Capital Expenditures	1,000	
Provides funds for a Chemist II position to establish rules and monitor substance abuse testing procedures.		
DEPARTMENT OF HUMAN SERVICES TOTAL	<u>\$21,483</u>	<u>\$28,550</u>
LABOR, DEPARTMENT OF		
Regulation and Enforcement		
Positions	(1)	(1)
Personal Services	\$16,530	\$23,704
All Other	3,200	3,500
Capital Expenditures	590	

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Provides funds for an Assistant Labor and Safety Inspector position to keep records and perform field inspection.

DEPARTMENT OF LABOR		
TOTAL	<u>\$20,320</u>	<u>\$27,204</u>
TOTAL APPROPRIATIONS	<u>\$58,821</u>	<u>\$74,445'</u>

STATEMENT OF FACT

This amendment completely replaces the original bill and makes the following changes.

1. The amendment provides an exemption for nuclear electrical generating facilities. The amendment also exempts intrastate motor carriers if substance abuse testing is performed in conformity with the federal regulations governing the administration of substance abuse tests to employees of interstate carriers. This ensures that all motor carriers are subject to the same testing guidelines regardless of whether they are interstate or intrastate operators.

2. The amendment clarifies the definition of "probable cause" to allow an employer to use an anonymous tip, information related to an employee's drug use off duty and a work-related accident as components of a finding of probable cause, so long as other information is available to indicate that probable cause exists. These factors alone are not sufficient to justify the imposition of a substance abuse test on an employee under the probable cause standard. It also deletes the requirement that an employer identify any witness to any fact relied upon in the determination of probable cause.

3. The amendment requires only employers with over 20 employees to provide an employee assistance program before beginning a substance abuse testing program. These employers must pay for any rehabilitation provided by the employee assistance program to an employee who receives a positive test result. The employer and the employee will split any uninsured costs of rehabilitation or treatment provided from another source. Employers with 20 or fewer employees are not required to pay for any uninsured costs of an employee's rehabilitation.

4. The amendment permits an off-site medical facility to require an employee to disrobe when providing a urine sample if that is the facility's standard practice in all cases where a urine sample is collected for any purpose. An employee may not

COMMITTEE AMENDMENT "A" to H.P. 609, L.D. 833

1 be required to disrobe if the sample is collected at an
2 employer's first-aid station.

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4 5. The amendment reduces the minimum cutoff level for
5 marijuana confirmation tests from 50 to 20 nanograms.

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6. The amendment rewrites the procedure to be followed in
8 testing an employee's portion of a sample by requiring the
9 employer to handle the sample under the same chain of custody
10 requirements that apply to the employer's portion of the sample
11 and further requires that the laboratory selected by the employee
12 must meet the requirements for testing laboratories under the
13 amendment. The test results from samples segregated at an
14 employee's request are provided directly to both the employer and
15 the employee.

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7. The amendment allows applicants to be tested if they are
18 offered a position on a roster of eligibility as well as if they
19 are offered employment by an employer and clarifies that an
20 applicant does not have the right to request a blood sample to be
21 drawn in place of a urine sample for testing of alcohol and
22 marijuana, as is the case for employees. The amendment further
23 provides that an employer may conduct the initial screening test
24 for applicants if the employer's testing facilities meet the
25 requirements for testing laboratories under the amendment, other
26 than the requirements related to the director of the testing
27 laboratory. The amendment permits testing laboratories to
28 provide immediate negative test results for applicants but
29 retains the requirement that unconfirmed positive screening test
30 results for employees may not be identified by an employer.
31 Quantitative results for either a positive or negative test may
32 not be reported unless the employee or applicant consents. The
33 amendment further requires an employer to provide a copy of a
34 laboratory test report only upon request of an employee or
35 applicant.

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8. The amendment clarifies an employer's ability to test
38 for any illegal drug as well as any substance likely to cause
39 impairment of the user.

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9. The amendment broadens the list of persons who may make
42 a determination of probable cause by including an employer's
43 security personnel and by deleting the restriction that the
44 person determining probable cause must be familiar with the
45 employee's past behavior.

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10. The amendment replaces the requirements for random or
48 arbitrary testing by allowing such testing for any employee who
49 is working in a position that would pose an unreasonable threat
50 to the health and safety of others if that employee was under the
51 influence of a substance of abuse. It is intended that this
provision be narrowly construed to include only those employment

COMMITTEE AMENDMENT "A" to H.P. 609, L.D. 833

1 positions in which there is a strong possibility that serious
harm may result from an impaired person's performance on the job.

3

5 11. The amendment limits an employer's obligation to permit
an employee to participate in a rehabilitation program to 6
7 months. If the employee has not successfully completed the
program at that point, the employer may take disciplinary action
9 against the employee. The time period within which an employer
will not be obligated to provide an opportunity for
11 rehabilitation following an employee's subsequent positive test
result is also extended from one to 3 years.

13 12. The amendment replaces the criminal penalties provided
in the bill for an employer's repeated violations with enhanced
15 civil penalties.

17 13. Finally, the amendment requires all employers to submit
their written substance abuse testing policies to the Department
19 of Labor for approval before they may begin testing under the
policies. The Department of Labor will provide by rule for an
21 informal review procedure that provides an employer's employees
an opportunity to challenge any portion of the employer's
23 proposed policy.

Reported by the Committee on Labor
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6/16/89 (Filing No. H-599)