

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

FIRST REGULAR SESSION - 1989

Legislative Document

No. 833

H.P. 609

House of Representatives, March 17, 1989

Reference to the Committee on Labor suggested and ordered printed.

A handwritten signature in cursive script that reads "Ed Pert".

EDWIN H. PERT, Clerk

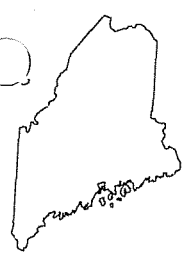
Presented by Speaker MARTIN of Eagle Lake.

Cosponsored by Senator DUTREMBLE of York, Representative McHENRY of Madawaska and President PRAY of Penobscot.

STATE OF MAINE

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

An Act Relating to Drug Testing.



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

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

5

7

SUBCHAPTER III-A

9

SUBSTANCE ABUSE TESTING

11

§681. Purpose; applicability

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1. Purpose. This subchapter is intended to:

15

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;

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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

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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.

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

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

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

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5. Contracts for work out of State. All employment 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.

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6. Medical examinations. This subchapter does not prevent an employer from requiring or performing medical examinations of

1 employees or applicants or from conducting medical screenings to
2 monitor exposure to toxic or other harmful substances in the
3 workplace, provided that these examinations are not used to avoid
4 the restrictions of this subchapter. No such examination may
5 include the use of any substance abuse test except in compliance
6 with this subchapter.

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

15
16 8. Federal law. This subchapter does not preempt any
17 federal law, rule or regulation.

18 **§682. Definitions**

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

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23
24 1. Applicant. "Applicant" means any person seeking
25 employment from an employer. The term includes any person using
26 an employment agency's services.

27
28 2. Employee. "Employee" means a person who is permitted,
29 required or directed by any employer to engage in any employment
30 for consideration of direct gain or profit.

31
32 3. Employer. "Employer" means any person, partnership,
33 corporation, association or other legal entity, public or
34 private, that employs one or more employees. The term includes
35 an employment agency.

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37 4. Negative test result. "Negative test result" means a
38 test result that indicates that:

39
40 A. A substance of abuse is not present in the tested
41 sample; or

42
43 B. A substance of abuse is present in the tested sample in
44 a concentration below the cutoff level.

45
46 5. Positive test result. "Positive test result" means a
47 test result that indicates the presence of a substance of abuse
48 in the tested sample above the cutoff level of the test.

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

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

A. Information received from an anonymous informant;

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

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

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

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

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

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

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

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

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

1 §683. Testing procedures

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5 No employer may require, request or suggest that any
7 employee or applicant submit to a substance abuse test except in
9 compliance with this section. All actions taken under a
 substance abuse testing program shall comply with this
 subchapter, rules adopted under this subchapter and the
 employer's written policy developed under subsection 2.

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

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

27 A. The procedure and consequences of an employee's
29 voluntary admission of a substance abuse problem and any
31 available assistance, including the availability and
 procedure of the employer's employee assistance program;

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

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

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

43 C. The collection of samples.

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

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

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

13 D. The storage of samples before testing sufficient to
15 inhibit deterioration of the sample;

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

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

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

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

31 (2) The Department of Human Services shall adopt rules
33 under section 686 regulating screening and confirmation
35 cutoff levels for other substances of abuse, including
37 those substances tested for in blood samples under
 subsection 5, paragraph B, to ensure that levels are
 set within known tolerances of test methods and above
 mere trace amounts;

39 H. The consequences of a confirmed positive substance abuse
41 test result;

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

45 J. The extent to which an employee or applicant who
47 requests a sample to be tested independently must share the
 results of the test with the employer;

49 K. Opportunities and procedures for rehabilitation
51 following a confirmed positive result;

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

5 M. Any other necessary or desirable matters.

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

11 3. Copies to employees and applicants. The employer shall
13 provide each employee with a copy of the written policy under
 subsection 2 and a copy of this subchapter at least 60 days
15 before the policy takes effect. If applicants are subject to
 testing under the written policy, the employer shall provide each
17 applicant with a copy of the written policy under subsection 2
 and a copy of this subchapter before administering a substance
19 abuse test to the applicant.

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

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

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

31 C. Attempts to waive an employee's or applicant's rights or
33 eliminate or diminish an employer's obligations under this
 subchapter.

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

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

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

47 B. In the case of an employee, have a blood sample taken
 from the employee by a licensed physician, registered
49 physician's assistant, registered nurse or a person
 certified by the Department of Human Services to draw blood
51 samples. The employer shall have this sample tested for the
 presence of alcohol or marijuana metabolites, if those

1 substances are to be tested for under the employer's written
3 policy. If the employee requests that a blood sample be
5 taken under this paragraph, the employer may not test any
other sample from the employee for the presence of these
substances.

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

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

21 6. Qualified testing laboratories required. No employer
23 may perform any substance abuse test administered to any of that
25 employer's employees or applicants. A substance abuse test
administered under this subchapter must be performed in a
qualified testing laboratory that complies with this subsection.

27 A. The director of the laboratory must be certified by the
29 American Board of Forensic Toxicology or the American Board
of Clinical Chemistry in Toxicological Chemistry.

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

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

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

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

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

51 (a) The use of internal quality controls during
each substance abuse test conducted under this
subchapter, including the use of blind samples and

1 samples of known concentrations which are used to
3 check the performance and calibration of testing
equipment;

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

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

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

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

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

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

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

35 (1) No testing laboratory may communicate to the
37 employer any test result other than a confirmed
positive result. A testing laboratory and the employer
39 must ensure that an unconfirmed positive screening test
result cannot be determined by an employer in any
41 manner, including, but not limited to, the method of
billing the employer for the tests performed by the
43 laboratory and the time within which results are
provided to the employer.

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

49 C. The sensitivity or cutoff level of the confirmation
51 test; and

1 D. Any available information concerning the margin of
2 accuracy and precision of the test methods employed.

3
4 The report shall not disclose the presence or absence of evidence
5 of any physical or mental condition or of any substance other
6 than the specific substances of abuse that the employer requested
7 to be identified. The employer shall promptly provide a legible
8 copy of the laboratory report to the employee or applicant tested.

9
10 9. Costs. The employer shall pay the costs of all
11 substance abuse tests which the employer requires, requests or
12 suggests that an employee or applicant submit. Except as
13 provided in paragraph A, the employee or applicant shall pay the
14 costs of any additional substance abuse tests.

15
16 Costs of a substance abuse test administered at the request of an
17 employee under subsection 5, paragraph B, shall be paid:

18 A. By the employer if the test results are negative for all
19 substances of abuse tested for; and

20
21 B. By the employee if the test results in a confirmed
22 positive result for any of the substances of abuse tested
23 for.

24
25 10. Limitation on use of tests. An employer may administer
26 substance abuse tests to employees or applicants only for the
27 purpose of discovering the use of substances of abuse that are
28 likely to cause impairment of the user. No employer may have
29 substance abuse tests administered to an employee or applicant
30 for the purpose of discovering any information unrelated to the
31 use of substances of abuse that are likely to cause user
32 impairment.

33
34 11. Rules. The Department of Human Services shall adopt
35 any rules under section 686 regulating substance abuse testing
36 procedures that it finds necessary or desirable to ensure
37 accurate and reliable substance abuse testing and to protect the
38 privacy rights of employees and applicants.

39
40 §684. Testing permitted

41
42 An employer may require, request or suggest that an employee
43 or applicant submit to a substance abuse test only as provided in
44 this section.

45
46 1. Testing of applicants. An employer may require, request
47 or suggest that an applicant submit to a substance abuse test
48 only if the applicant has been offered employment with the
49 employer. The offer of employment may be conditioned upon the
50 applicant receiving a negative test result.

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

12 3. Random or arbitrary testing of employees. In addition
13 to testing employees on a probable cause basis under subsection
14 2, an employer may require, request or suggest that an employee
15 submit to a substance abuse test on a random or arbitrary basis
16 as provided in the employer's written policy under section 683,
17 subsection 2, if at least one of the following conditions is met.

18 A. The employer and the employee have bargained for
19 provisions in a collective bargaining agreement, either
20 before or after the effective date of this subchapter, which
21 provide for random or arbitrary testing of employees.

22 B. The employee works in an occupation or work assignment
23 which is designated by the Department of Labor through rules
24 adopted under the Maine Administrative Procedure Act, Title
25 5, chapter 375. In adopting these rules, the department
26 shall provide a procedure for designating those employment
27 positions which meet the following minimum qualifications.

28 (1) The employee works at a nuclear electrical
29 generating facility. As used in this subparagraph,
30 employee includes an independent contractor and
31 employees of an independent contractor who are working
32 at the nuclear facility.

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

38 In making a determination under this subparagraph, the
39 Department of Labor shall not designate any position:

40 (a) In which an employee is capable of being
41 observed by the employer or an agent of the
42 employer while the employee is working;

1 (b) That requires work to be performed primarily
3 on the work site at which the employee is
5 employed, except on petition by an employer as
7 provided in this paragraph; or

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

21 (i) The nature of the motor vehicle being
23 operated;

25 (ii) Whether the motor vehicle is used to
27 transport persons other than the employee in
29 the normal course of employment;

31 (iii) The type of cargo, if any, that the
33 motor vehicle is used to transport and any
35 particular safety hazards associated with
37 that cargo; and

39 (iv) The nature of the area in which the
41 motor vehicle will be operated in the normal
43 course of employment.

45 The rules adopted by the department shall include a process
47 under which an employer may petition the department to
49 designate a position which is not on the list of positions
51 established by the department under this paragraph. The
53 rules shall include a procedure to notify employees of any
55 such petition by their employer. The employees may
57 challenge the proposed designation of any position and offer
59 evidence rebutting the employer's evidence supporting that
61 designation. The employer has the burden of demonstrating
63 that the position meets the requirements of this paragraph.

65 4. Testing while undergoing rehabilitation or treatment.

67 While the employee is participating in a substance abuse
69 rehabilitation program either as a result of voluntary contact
71 with or mandatory referral to the employer's employee assistance
73 program or after a confirmed positive result as provided in
75 section 685, subsection 2, paragraphs B and C, substance abuse
77 testing may be conducted by the rehabilitation or treatment
79 provider as required, requested or suggested by that provider.

81 A. Substance abuse testing conducted as part of such a
83 rehabilitation or treatment program is not subject to the
85 provisions of this subchapter regulating substance abuse
87 testing.

1
3 B. An employer may not require, request or suggest that any
5 substance abuse test be administered to any employee while
the employee is undergoing such rehabilitation or treatment,
except as provided in subsections 2 and 3.

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

11 §685. Action taken on substance abuse tests

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

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

21 2. Use of confirmation test results. The following
23 provisions govern an employer's use of confirmed positive results
25 and an employee's or applicant's refusal to submit to a test
requested or required by an employer in compliance with this sub-
chapter.

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

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

33 (2) Discharge of an employee;

35 (3) Discipline of an employee; or

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

39 B. Before taking any action described in paragraph A in the
41 case of an employee who receives a confirmed positive
43 result, an employer shall provide the employee with an
45 opportunity to participate in a rehabilitation program
designed to enable the employee to avoid future use of a
substance of abuse, except when:

47 (1) The employee has previously received 2 confirmed
49 positive results; or

51 (2) The employee receives a subsequent confirmed
positive result within one year after the
rehabilitation or treatment provider indicates that the

1 employee has successfully completed a rehabilitation
2 program as provided in paragraph C, subparagraph (3).

3
4 C. If the employee chooses not to participate in a
5 rehabilitation program under this subsection, the employer
6 may take any action described in paragraph A. If the
7 employee chooses to participate in a rehabilitation program,
8 the following provisions apply.

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

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

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

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

34 (iii) Notwithstanding subdivision (i), if
35 the employer has between 21 and 50 full-time
36 employees and does not provide or participate
37 in an employee group health benefit plan
38 subject to Title 24, section 2329, or Title
39 24-A, section 2842, the employer and the
40 affected employee shall equally divide the
41 costs of rehabilitation or treatment under
42 this division; or

43 (b) Enter a public or private rehabilitation
44 program of the employee's choice at the employee's
45 expense, unless it is covered by a health
46 insurance plan.

1
3 (2) No employer may take any action described in
5 paragraph A while an employee is participating in a
7 rehabilitation program, except that an employer may
9 change the employee's work assignment or suspend the
11 employee from active duty to reduce any possible safety
13 hazard. No reduction in pay or benefits may be made
15 while an employee is participating in a rehabilitation
17 program, provided that the employer is not required to
19 pay the employee for periods in which the employee is
21 unavailable for work for the purposes of
23 rehabilitation. The employee may apply normal sick
25 leave and vacation time, if any, for these periods.

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

29 (a) If the employee who has completed
31 rehabilitation previously worked in an employment
33 position designated under section 684, subsection
35 3, paragraph B, the employer may refuse to allow
37 the employee to return to the previous job if the
39 employer believes that the employee may pose an
41 unreasonable safety hazard because of the nature
43 of the position. The employer shall attempt to
45 find suitable work for the employee immediately
47 after refusing the employee's return to the
49 previous position. No reduction may be made in
51 the employee's previous benefits or rate of pay
while awaiting reassignment to work or while
working in a position other than the previous
job. The employee shall be reinstated to the
previous position within 6 months after returning
to work in any capacity with the employer unless
the employee has received a subsequent confirmed
positive result within that time from a test
administered under this subchapter.

49 D. This subsection does not require an employer to take any
51 disciplinary action against an employee who refuses to
submit to a test, receives a single or repeated confirmed
positive results or does not choose to participate in a

1 rehabilitation program. This subsection is intended to set
3 minimum opportunities for an employee with a substance abuse
5 problem to address the problem through rehabilitation. An
7 employer may offer additional opportunities, not otherwise
9 in violation of this subchapter, for rehabilitation or
11 continued employment without rehabilitation.

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

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

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

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

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

49 **§686. Rulemaking**

51 The Department of Human Services shall adopt rules under the
53 Maine Administrative Procedure Act, Title 5, chapter 375, to
55 carry out the purposes of this subchapter. The department shall
57 consult with the Department of Labor which shall assist in
59 developing these rules when necessary. The Department of Human
61 Services shall adopt initial rules before December 1, 1989.

63 **§687. Substance abuse education**

65 All employers shall cooperate fully with the Department of
67 Labor, the Department of Human Services, the Department of Public
69 Safety and any other state agency in programs designed to educate
71 employees about the dangers of substance abuse and about public
73 and private services available to employees who have a substance
75 abuse problem.

77 **§688. Violation and remedies**

79 The following provisions govern the enforcement of this
81 subchapter.

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

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

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

11 C. Court costs; and

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

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

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

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

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

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

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

39 4. Enforcement. The Department of Labor or the affected
41 employee or employees may enforce this subchapter. The
department may:

43 A. Collect the judgment on behalf of the employee or
45 employees; and

47 B. Supervise the payment of the judgment and the
49 reinstatement of the employee or employees.

1 **§689. Report**

3 The Department of Labor shall report to the joint standing
5 committee of the Legislature having jurisdiction over labor on
7 February 1, 1990, and annually on that date thereafter. This
9 report shall:

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

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

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

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

33 **Sec. 3. Transition.** No employer may commence a workplace
35 substance abuse testing program after the effective date of this
37 Act until January 1, 1990. All workplace substance abuse testing
39 programs in existence on the effective date of this Act shall
41 stop; any substance abuse testing of employees or applicants,
43 except that any workplace substance abuse testing program that
45 existed on January 1, 1989, may continue operation until January
47 1, 1990. All workplace substance abuse testing programs must
49 comply fully with this Act and rules adopted under this Act on
51 January 1, 1990.

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

	1989-90	1990-91
HUMAN SERVICES,		
DEPARTMENT OF		
Bureau of Health		
Positions	(1/2)	(1/2)
Personal Services	\$10,642	\$15,479
All Other	1,266	1,500
Capital Expenditures	590	
Provides funds for a		
half-time laboratory		
supervisor position and		

1 related expenses to develop,
2 adopt and monitor rules for
3 substance abuse testing.

5 **DEPARTMENT OF HUMAN SERVICES**
6 **TOTAL**

\$12,498

\$16,979

7 **LABOR, DEPARTMENT OF**

9 **Regulation and Enforcement**

11	Positions	(1)	(1)
13	Personal Services	\$15,797	\$22,715
14	All Other	3,200	3,500
15	Capital Expenditures	590	

17 Provides funds for a
18 clerical-enforcement position
19 and related expenses
20 including the cost of a
21 report.

23 **DEPARTMENT OF LABOR**
24 **TOTAL**

\$19,587

\$26,215

25 **TOTAL APPROPRIATIONS**

\$32,085

\$43,194

27
29 **STATEMENT OF FACT**

31
32 This bill attempts to reach a compromise position that
33 allows random testing of certain employees with safeguards
34 against any abuse of such testing. The Legislature acknowledges
35 that substance abuse in the workplace may pose a safety threat
36 and that substance abuse testing may help to identify substance
37 abuse by employees in the workplace. At the same time, the
38 Legislature recognizes that unrestricted workplace substance
39 abuse testing programs pose grave risks of unduly infringing upon
40 the privacy rights of employees, that such testing programs may
41 be poorly conceived and implemented by some employers, and that
42 these programs may be used for purposes beyond their legitimate
43 scope. For these reasons, this bill allows substance abuse
44 testing programs to be employed in the workplace, but restricts
45 their application and ensures that proper procedures and
46 safeguards are implemented.

47
48 Although recognizing that constitutional protections do not
49 extend to the private sphere, it is manifest that all individuals
50 retain certain rights to their personal privacy which may not be
51 infringed upon without substantial justification. For this
52 reason, the bill prohibits the use of random or arbitrary
53 substance abuse testing of employees except for those employees
54 who work in positions where it would be difficult to discover the
55 symptoms of an individual's substance abuse problem and in which
56 an impaired worker would pose a substantial threat of direct and
57 immediate serious bodily harm to the public or coworkers.

1
3 The bill allows an employer to require substance abuse
5 testing of any employee when there is probable cause to impose
7 the test. The concept of probable cause, as defined in the bill,
9 requires an employer to have reasonable grounds for believing
11 that an employee is under the influence of a substance of abuse
before the employer may require a test. The purpose of this
definition is to prevent an employer from imposing substance
abuse tests upon an employee without reliable, objective
information supporting the finding of probable cause.

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

23 The bill also regulates the actual testing process to ensure
25 that proper testing procedures are followed and that an
27 employee's privacy rights are protected from undue intrusion.
29 The bill requires a testing program to be conducted pursuant to a
31 written policy developed by the employer in consultation with the
33 employees. Certain testing procedures are also regulated.
35 Strict confidentiality of any information acquired through the
37 testing process is required. Blood testing is prohibited except
39 upon request of the employee. A test sample must be collected in
a medical facility and be supervised by medical personnel. The
test subject may remain clothed and free from observation by any
other individual when a urine sample is collected. The test
subject may request a portion of the sample for the subject's own
testing as a check on the accuracy of testing laboratories used
by the employer. All positive screening test results must be
confirmed by gas chromatography-mass spectrometry, which is the
most accurate test currently available. No employer may perform
a substance abuse test for any of that employer's employees or
41 applicants; all tests must be performed by a qualified testing
43 laboratory. The Department of Human Services is directed to
45 adopt rules to ensure that all testing procedures are regulated
when necessary to protect an individual's privacy rights or to
ensure accurate testing. Finally, employers are prohibited from
using substance abuse tests to discover any information that does
47 not relate to an individual's use of a substance of abuse that is
likely to cause impairment of the user. Further, testing
49 laboratories are prohibited from reporting such information to
the employer. These provisions ensure that testing programs will
51 not be used to discover personal information in which the

1 employer has no legitimate interest, such as pregnancy or mental
or physical illness that does not affect work performance.

3
5 The bill also regulates discipline taken upon receipt of a
positive test result. Recognizing that the prevention and
7 deterrence of safety hazards caused by employee impairment in the
workplace is the justification for testing programs, and not the
9 identification and punishment of persons who suffer from the
disease of substance abuse, this bill attempts to provide minimum
11 opportunities for a substance abusing employee to receive
rehabilitation. An employer is not required to provide an
13 opportunity for rehabilitation to a job applicant who receives a
confirmed positive result. Any employer who establishes a
15 testing program must first have a functioning employee assistance
program. These programs have consistently demonstrated their
17 ability to deal with a wide range of employee problems
economically and effectively, including employee substance
19 abuse. Once a testing program is established and an employee
receives a confirmed positive test result, the employer is
21 authorized to dismiss or discipline that employee unless the
employee enters a substance abuse rehabilitation program. If the
23 employee elects to undergo rehabilitation, the employee may be
suspended with no reduction in pay, except that an employer is
25 not required to pay the employee for any time during which the
employee is unavailable for work for the purposes of
27 rehabilitation. Upon successfully completing the rehabilitation
program, the employee may return to the employee's previous job.
29 The employer is no longer required to offer the employee an
opportunity to undergo rehabilitation if the employee has already
31 tested positive at least twice or if the employee receives a
confirmed positive result within one year of completing a
previous rehabilitation program.

33
35 The bill also includes a transition clause intended to
define the permissible scope of substance abuse testing in the
workplace during the interim period after passage of this bill
37 but before the rules required by this bill are adopted. No
employer may institute a substance abuse testing program in the
39 workplace after the effective date of this bill until January 1,
1990. All employers must stop any substance abuse testing of
41 employees or applicants on the effective date of this bill,
except that any employer who was conducting a testing program on
43 January 1, 1989, may continue to operate that program. As of
January 1, 1990, all testing programs must comply with this bill
45 and the rules adopted under it.