

MAINE STATE LEGISLATURE

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L.D. 2049

(Filing No. S-600)

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**STATE OF MAINE
SENATE
114TH LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT "A" to S.P. 801, L.D. 2049, Bill, "An Act to Make Revisions in the Drug Testing Laws"

Amend the bill by inserting after the title and before the enacting clause the following:

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the laws governing an employer's use of substance abuse tests require certain revisions to ensure effective implementation; and

Whereas, these revisions need to take effect as soon as possible to enable employers to continue their substance abuse testing programs with a minimum of interruption; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Further 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Sec. 1. 26 MRSA §681, sub-§1, as enacted by PL 1989, c. 536, §§1 and 2, and as amended by c. 604, §§2 and 3, is repealed and the following enacted in its place:

- 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;

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

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

16 D. Eliminate drug use in the workplace.

18 **Sec. 2. 26 MRSA §681, sub-§8**, as enacted by PL 1989, c. 536,
20 §§1 and 2, and as amended by c. 604, §§2 and 3, is repealed and
22 the following enacted in its place:

24 8. Federal law; exception. This subchapter does not apply
26 to the extent it is preempted by any federal law, rule or
28 regulation. Any person subject to a federal law, rule or
30 regulation that preempts certain provisions of this subchapter
32 remains subject to any provision of this subchapter that is not
34 preempted by a federal law, rule or regulation. This subchapter
36 does not apply in any way to nuclear electrical generating
38 facilities and their employees, including independent contractors
40 and employees of independent contractors who are working at
42 nuclear electrical generating facilities.

44 **Sec. 3. 26 MRSA §681, sub-§9** is enacted to read:

46 9. Licensing boards; testing prohibited. An agency, board
48 or other entity authorized to license or certify persons for
50 professional or employment purposes may not require that a person
52 submit to a substance abuse test as a condition of the issuance,
renewal or continued validity of a license or certification.

54 **Sec. 4. 26 MRSA §682, sub-§7, ¶B**, as enacted by PL 1989, c.
56 536, §§1 and 2, and as amended by c. 604, §§2 and 3, is further
58 amended to read:

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

66 (1) The Department of Human Services may recommend to
68 the joint standing committee of the Legislature having
70 jurisdiction over labor matters that other testing
72 technologies be authorized for use in confirmation
tests if the department finds those technologies to be
of equal or greater accuracy and reliability than gas
chromatography-mass spectrometry.

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2 **Sec. 5. 26 MRSA §683, sub-§2**, as enacted by PL 1989, c. 536,
3 §§1 and 2, and as amended by c. 604, §§2 and 3, is further
4 amended to read:

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

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

14 B. When substance abuse testing may occur, ~~including.~~ The
15 written policy must describe:

18 (1) ~~A description of which~~ Which positions, if any,
19 will be subject to testing, including any positions
20 subject to random or arbitrary testing under section
21 684, subsection 3. For applicant testing and probable
22 cause testing of employees, an employer may designate
23 that all positions are subject to testing; and

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

28 C. The collection of samples.

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

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

42 (a) An employer may require that an employee or
43 applicant leave any personal belongings other than
44 clothing and any unnecessary coat, jacket or
45 similar outer garments outside the collection
46 area; or

48 (b) If it is the standard practice of an off-site
49 medical facility to require the removal of
50 clothing when collecting a urine sample for any
51 purpose, the physician or nurse supervising the

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collection of the sample in that facility may require the employee or applicant to remove their clothing.

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

(4) The employer may take additional actions necessary to ensure the integrity of a urine sample if the sample collector or testing laboratory determines that the sample may have been substituted, adulterated, diluted or otherwise tampered with in an attempt to influence test results. The Department of Human Services shall adopt rules governing when those additional actions are justified and the scope of those actions. These rules may not permit the direct or indirect observation of the collection of a urine sample. If an employee or applicant is found to have twice substituted, adulterated, diluted or otherwise tampered with the employee or applicant's urine sample, as determined under the rules adopted by the department, the employee or applicant is deemed to have refused to submit to a substance abuse test;

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

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

F. The substances of abuse to be tested for;

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

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

(2) The Department of Human Services shall adopt rules under section 687 regulating screening and confirmation cutoff levels for other substances of abuse, including 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. An employer may request that the Department of Human Services establish a cutoff level

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2 for any substance of abuse for which the department has
3 not established a cutoff level;

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

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

10 J. Opportunities and procedures for rehabilitation
11 following a confirmed positive result;

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

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

20 An employer must consult with the employer's employees in the
21 development of any portion of a substance abuse testing policy
22 under this subsection that relates to the employees. The
23 employer is not required to consult with the employees on those
24 portions of a policy that relate only to applicants. The
25 employer shall send a copy of the final written policy to the
26 Department of Labor for review under section 686. The employer
27 may not implement the policy until the Department of Labor
28 approves the policy. The employer shall send a copy of any
29 proposed change in an approved written policy to the Department
30 of Labor for review under section 686. The employer may not
31 implement the change until the Department of Labor approves the
32 change.

34 **Sec. 6. 26 MRSA §683, sub-§3,** as enacted by PL 1989, c. 536,
35 §§1 and 2, and as amended by c. 604, §§1 to 3, is further amended
36 to read:

38 **3. Copies to employees and applicants.** The employer shall
39 provide each employee with a copy of the written policy approved
40 by the Department of Labor under section 686 ~~and a copy of this~~
41 ~~subchapter~~ at least 60 30 days before any portion of the written
42 policy applicable to employees takes effect. The employer shall
43 provide each employee with a copy of any change in a written
44 policy approved by the Department of Labor under section 686 at
45 least 60 days before any portion of the change applicable to
46 employees takes effect. ~~If applicants are subject to testing~~
47 ~~under the written policy~~ an employer intends to test an
48 applicant, the employer shall provide each the applicant with a
49 copy of the written policy under subsection 2 ~~and a copy of this~~
50 ~~subchapter~~ before administering a substance abuse test to the
51 applicant. The 30-day and 60-day notice period periods provided
52 for employees under this subsection ~~does~~ do not apply to
applicants.

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Sec. 7. 26 MRSA §683, sub-§6, as enacted by PL 1989, c. 536, §§1 and 2, and as amended by c. 604, §§2 and 3, is further amended to read:

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

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

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

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

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

(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

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

6 **Sec. 8. 26 MRSA §683, sub-§8, ¶¶A and B**, as enacted by PL 1989,
8 c. 536, §§1 and 2, and as amended by c. 604, §§2 and 3, are
10 further amended to read:

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

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

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

24 (a) Unless the employee or applicant consents,
26 test results shall not be reported in numerical or
28 quantitative form but shall state only that the
30 test result was positive or negative. This
32 division does not apply if the test or the test
34 results become the subject of any grievance
36 procedure, administrative proceeding or civil
38 action.

40 (b) A testing laboratory and the employer must
42 ensure that an employee's unconfirmed positive
44 screening test result cannot be determined by the
46 employer in any manner, including, but not limited
48 to, the method of billing the employer for the
50 tests performed by the laboratory and the time
52 within which results are provided to the
employer. This division does not apply to test
results for applicants;

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

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

The report shall not disclose the presence or absence of
evidence of any physical or mental condition or of any
substance other than the specific substances of abuse that
the employer requested to be identified. A testing
laboratory shall retain records of confirmed positive
results in a numerical or quantitative form for at least 2
years.

B. The employer shall promptly notify the employee or
applicant tested of the test result. Upon request of an

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2 employee or applicant, the employer shall promptly provide a
legible copy of the laboratory report to the employee or
3 applicant. Within 3 working days after notice of a
4 confirmed positive test result, the employee or applicant
5 may submit information to the employer explaining or
6 contesting the results.

8 **Sec. 9. 26 MRSA §684, sub-§2, ¶A**, as enacted by PL 1989, c.
536, §§1 and 2, and as amended by c. 604, §§2 and 3, is further
10 amended to read:

12 A. The employee's immediate supervisor, other supervisory
personnel, a licensed physician or nurse, or the employer's
14 security personnel shall make the determination of probable
cause.

16 **Sec. 10. 26 MRSA §684, sub-§5** is enacted to read:

18 **5. Testing upon return to work.** If an employee who has
20 received a confirmed positive result returns to work with the
21 same employer, whether or not the employee has participated in a
22 rehabilitation program under section 685, subsection 2, the
23 employer may require, request or suggest that the employee submit
24 to a subsequent substance abuse test anytime between 90 days and
25 one year after the date of the employee's prior test. A test may
26 be administered under this subsection in addition to any tests
27 conducted under subsections 2 and 3. An employer may require,
28 request or suggest that an employee submit to a substance abuse
29 test during the first 90 days after the date of the employee's
30 prior test only as provided in subsections 2 and 3.

32 **Sec. 11. 26 MRSA §685, sub-§2, ¶B**, as enacted by PL 1989, c.
536, §§1 and 2, and as amended by c. 604, §§2 and 3, is further
34 amended to read:

36 B. Before taking any action described in paragraph A in the
case of an employee who receives a an initial confirmed
38 positive result, an employer shall provide the employee with
an opportunity to participate for at-least up to 6 months in
40 a rehabilitation program designed to enable the employee to
avoid future use of a substance of abuse. The employer may
42 take any action described in paragraph A if the employee
receives a subsequent confirmed positive result within-3
44 years--after--the--rehabilitation--or--treatment--provider
45 indicates--that--the--employee--has--successfully--completed--a
46 rehabilitation--program--as--provided--in--paragraph--C,
47 subparagraph--(3) from a test administered by the employer
48 under this subchapter.

50 **Sec. 12. 26 MRSA §685, sub-§2, ¶C**, as enacted by PL 1989, c.
536, §§1 and 2, and as amended by c. 604, §§2 and 3, is further
52 amended to read:

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

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

16 (a) Except to the extent that costs are covered
17 by a group health insurance plan, the costs of the
18 public or private rehabilitation program shall be
19 equally divided between the employer and employee
20 if the employer has more than 20 full-time
21 employees. If necessary, the employer shall
22 assist in financing the cost share of the employee
23 through a payroll deduction plan.

24 (b) Except to the extent that costs are covered
25 by a group health insurance plan, an employer with
26 20 or fewer full-time employees is not required to
27 pay for any costs of rehabilitation or treatment
28 under any public or private rehabilitation program.

29 (2) No employer may take any action described in
30 paragraph A while an employee is participating in a
31 rehabilitation program, except as provided in
32 subparagraph (2-A) and except that an employer may
33 change the employee's work assignment or suspend the
34 employee from active duty to reduce any possible safety
35 hazard. ~~No--reduction--in~~ Except as provided in
36 subparagraph (2-A), an employee's pay or benefits may
37 not be made reduced while an employee is participating
38 in a rehabilitation program, provided that the employer
39 is not required to pay the employee for periods in
40 which the employee is unavailable for work for the
41 purposes of rehabilitation. The employee may apply
42 normal sick leave and vacation time, if any, for these
43 periods.

44 (2-A) A rehabilitation or treatment provider shall
45 promptly notify the employer if the employee fails to
46 comply with the prescribed rehabilitation program
47 before the expiration of the 6-month period provided in
48 paragraph B. Upon receipt of this notice, the employer
49 may take any action described in paragraph A.

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2 (3) Except as provided in division (a), upon
4 successfully completing the rehabilitation program, as
6 determined by the rehabilitation or treatment provider
8 after consultation with the employer, the employee is
10 entitled to return to the employee's previous job with
12 full pay and benefits unless conditions unrelated to
14 the employee's previous confirmed positive result make
16 the employee's return impossible. Reinstatement of the
18 employee must not conflict with any provision of a
collective bargaining agreement between the employer
and a labor organization that is the collective
bargaining representative of the unit of which the
employee is or would be a part. If the rehabilitation
or treatment provider determines that the employee has
not successfully completed the rehabilitation program
within 6 months after starting the program, the
employer may take any action described in paragraph A.

20 (a) If the employee who has completed
22 rehabilitation previously worked in an employment
24 position subject to random or arbitrary testing
26 under an employer's written policy, the employer
28 may refuse to allow the employee to return to the
30 previous job if the employer believes that the
32 employee may pose an unreasonable safety hazard
34 because of the nature of the position. The
36 employer shall attempt to find suitable work for
38 the employee immediately after refusing the
40 employee's return to the previous position. No
42 reduction may be made in the employee's previous
44 benefits or rate of pay while awaiting
46 reassignment to work or while working in a
48 position other than the previous job. The
50 employee shall be reinstated to the previous
52 position or to another position with an equivalent
rate of pay and benefits and with no loss of
seniority 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 or unless
conditions unrelated to the employee's previous
confirmed positive test result make that
reinstatement or reassignment impossible.
Placement of the employee in suitable work and
reinstatement may not conflict with any provision
of a collective bargaining agreement between the
employer and a labor organization that is the
collective bargaining representative of the unit
of which the employee is or would be a part.

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- 2 designed to prevent tampering with the sample. It further
3 provides that 2 attempts at tampering is the equivalent of a
4 refusal to submit to a test, which subjects the employee to
5 possible discipline or discharge.
- 6 9. The amendment clarifies that an employer may request
7 that the Department of Human Services establish a cutoff
8 level for a designated substance of abuse. The department
9 is free to accept an employer's suggested level, adopt a
10 different level or refuse to set any level for the substance.
- 11 10. The amendment clarifies that an employer is not
12 required to consult with the employees on any portion of a
13 substance abuse testing policy that applies only to
14 applicants.
- 15 11. The amendment repeals the requirement that employers
16 provide employees and applicants with a copy of the drug
17 testing laws. It also reduces the initial notice period for
18 employees from 60 to 30 days and provides that an employer
19 is required to give a copy of the employer's testing policy
20 only to those applicants whom the employer intends to test.
- 21 12. The amendment repeals the requirement that a testing
22 laboratory's director possess certain certifications.
- 23 13. The amendment permits the release of test results in
24 quantitative form if litigation arises concerning those
25 results. It further requires testing laboratories to retain
26 these records for at least 2 years and offers an employee
27 the right to dispute the test results within 3 days after
28 receiving the results.
- 29 14. The amendment permits a licensed physician or nurse to
30 determine whether probable cause exists to test an employee.
- 31 15. The amendment permits an employer to require a
32 substance abuse test of an employee who receives a confirmed
33 positive result and who returns to work with the same
34 employer. Due to the long latency periods associated with
35 tests for certain substances of abuse, this test may not be
36 administered earlier than 90 days after the first test that
37 resulted in the positive result. It must also be
38 administered no later than one year from the first test.
39 The employer retains the right granted under current law to
40 require additional tests on a random basis, if the employee
41 works in a position subject to random testing, or for
42 probable cause during the initial 90-day period as well as
43 afterward.
- 44 16. The amendment permits an employer to discipline or
45 discharge an employee if the employee receives a 2nd
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2 confirmed positive result at any time. The employee retains
the right to seek rehabilitation after an initial positive
3 result.

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6 17. The amendment requires a rehabilitation or treatment
provider to notify an employer during the rehabilitation
period if the employee fails to comply with the prescribed
8 rehabilitation program. Upon receipt of this notice, the
employer may discipline or discharge the employee.

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12 18. Finally, the amendment clarifies that any employee who
successfully completes rehabilitation is entitled to
reinstatement with the employer, but that reinstatement may
14 not conflict with any applicable collective bargaining
agreement. Reinstatement is not required if unrelated
16 conditions make it impossible to return the employee to work.

Reported by Senator Esty for the Committee on Labor.
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