

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

SECOND REGULAR SESSION - 1990

Legislative Document

No. 2049

S.P. 801

In Senate, December 29, 1989

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Received by the Secretary of the Senate on December 29, 1989. Referred to the Committee on Labor and 1,600 ordered printed pursuant to Joint Rule 14.

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

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator DUTREMBLE of York.
Cosponsored by Speaker MARTIN of Eagle Lake.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND NINETY

An Act to Make Revisions in the Drug Testing Laws.



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

2 **Sec. 1. 26 MRSA §681, sub-§1**, as enacted by PL 1989, c. 536,
4 §§1 and 2, is repealed.

6 **Sec. 2. 26 MRSA §681, sub-§1-A** is enacted to read:

8 1-A. Purpose. This subchapter is intended to:

10 A. Maintain a healthy and productive work force through
12 safe working conditions free from the effects of drugs and
 alcohol;

14 B. Eliminate the effects of drug and alcohol use in the
16 workplace on injuries, absenteeism, health and benefit
 programs, theft, employee morale, productivity and security;

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

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

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

34 **Sec. 3. 26 MRSA §681, sub-§8**, as enacted by PL 1989, c. 536,
 §§1 and 2, is amended to read:

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

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

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

2 C. Federal contractors subject to the Drug Free Workplace
4 Act of 1988, 41 United States Code, Section 701, and the
 Federal Acquisition Regulation, 48 Code of Federal
 Regulations, Subparts 9.4, 23.5 and 52.2; and

6 D. Employers subject to rules promulgated by the Department
 of Transportation.

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10 **Sec. 4. 26 MRSA §682, sub-§6, ¶C,** as enacted by PL 1989, c.
 536, §§1 and 2, is amended to read:

12 C. A single work-related accident, unless the accident
14 results in death, injury to the public, injury likely to
 involve lost time, or property damage exceeding \$500.

16 **Sec. 5. 26 MRSA §682, sub-§7, ¶B,** as enacted by PL 1989, c.
 536, §§1 and 2, is amended to read:

18 B. "Confirmation test" means a 2nd substance abuse test,
20 performed through the use of gas chromatography-mass
22 spectrometry or a testing technology of similar or greater
24 accuracy and reliability approved by the Department of Human
 Services under rules adopted under section 687, that is used
 to verify the presence of a substance of abuse indicated by
 an initial positive screening test result.

26 **Sec. 6. 26 MRSA §683, sub-§1,** as enacted by PL 1989, c. 536,
28 §§1 and 2, is amended to read:

30 **1. Employee assistance program required.** Before
32 establishing any substance abuse testing program for employees,
 an employer with over 20 50 full-time employees must have a
 functioning employee assistance program.

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

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

46 **Sec. 7. 26 MRSA §683, sub-§2,** as enacted by PL 1989, c. 536,
48 §§1 and 2, is amended to read:

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

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

B. When substance abuse testing may occur, ~~including~~.

(1) ~~A description of~~ The written policy must describe which positions, if any, will be subject to testing, including any positions subject to random or arbitrary testing under section 684, subsection 3. For preemployment and probable cause testing, an employer may designate that all positions are subject to testing; and

(2) The written policy must describe the procedure to be followed in selecting employees to be tested on a random or arbitrary basis under section 684, subsection 3;

C. The collection of samples.

(1) The collection of any sample for use in a substance abuse test must be conducted in a medical facility and supervised by a physician licensed under 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.

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

(a) An employer may 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; or

(b) If it is the standard practice of an off-site medical facility to require the removal of clothing when collecting a urine sample for any purpose, the physician or nurse supervising the collection of the sample in that facility may require the employee or applicant to remove their clothing.

(3) No Except as provided in subsection 4, no employee or applicant may be required to provide a urine sample while being observed, directly or indirectly, by another individual.

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(4) The employer may take additional action to ensure urine sample integrity if the sample collector determines the temperature, Ph or specific gravity of the sample is not within an established range. This additional action may include requiring the employee to submit another sample while being observed either directly or indirectly by the person collecting the sample;

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. For any substance of abuse for which the Department of Human Services does not establish a cutoff level, an employer may petition the Department of Human Services to approve a cutoff level. Within 30 days of the date of its receipt of the employer's petition, the department shall either approve the requested cutoff level or establish a cutoff level;

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

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

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

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

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

8 An Except for preemployment testing policies, an employer must
10 consult with the employer's employees in the development of a
12 substance abuse testing policy under this subsection. The
14 employer shall send a copy of the final written policy to the
16 Department of Labor for review under section 686. The employer
18 may not implement the policy until the Department of Labor
approves the policy. The employer shall send a copy of any
proposed change in an approved written policy to the Department
of Labor for review under section 686. The employer may not
implement the change until the Department of Labor approves the
change.

20 **Sec. 8. 26 MRSA §683, sub-§3, as enacted by PL 1989, c. 536,**
22 **§§1 and 2, is amended to read:**

24 **3. Copies to employees and applicants.** The employer shall
26 provide each employee with a copy of the written policy approved
by the Department of Labor under section 686 ~~and a copy of this~~
subchapter at least 60 30 days before the policy takes effect.
28 The employer shall provide each employee with a copy of any
change in a written policy approved by the Department of Labor
under section 686 at least 60 days before the change takes
30 effect. ~~If applicants are subject to testing under the written~~
~~policy~~ an employer intends to test an applicant, the employer
32 shall provide each the applicant with a copy of the written
policy under subsection 2 ~~and a copy of this subchapter~~ before
34 administering a substance abuse test to the applicant.

36 **Sec. 9. 26 MRSA §683, sub-§5, as enacted by PL 1989, c. 536,**
38 **§§1 and 2, is amended to read:**

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

44 A. Segregate a portion of the sample for that person's own
testing. Within 5 days after the sample is collected, the
46 employee ~~or applicant~~ shall notify the employer of the
testing laboratory selected by the employee ~~or applicant~~.
48 This laboratory must comply with the requirements of this
section related to testing laboratories. When the employer
receives notice of the employee's ~~or applicant's~~
50 selection, the employer shall promptly send the segregated
portion of the sample to the named testing laboratory,
52 subject to the same chain of custody requirements applicable

2 to testing of the employer's portion of the sample. The
employee ~~or applicant~~ shall pay the costs of these tests; and

4 B. In the case of an employee, have a blood sample taken
6 from the employee by a licensed physician, registered
8 physician's assistant, registered nurse or a person
10 certified by the Department of Human Services to draw blood
12 samples. The employer shall have this sample tested for the
14 presence of alcohol ~~or marijuana metabolites~~, if these
substances ~~are~~ alcohol is to be tested for under the
employer's written policy. If the employee requests that a
blood sample be taken as provided in this paragraph, the
employer may not test any other sample from the employee for
the presence of these substances alcohol.

16 (1) The Department of Human Services may identify, by
18 rules adopted under section 687, other substances of
20 abuse for which an employee may request a blood sample
22 be tested 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.

24 (2) No employer may require, request or suggest that
26 any employee or applicant provide a blood sample for
28 substance abuse testing purposes nor may any employer
conduct a substance abuse test upon a blood sample
except as provided in this paragraph.

30 (3) Applicants do not have the right to require the
32 employer to test a blood sample as provided in this
paragraph.

34 **Sec. 10. 26 MRSA §683, sub-§6**, as enacted by PL 1989, c. 536,
§§1 and 2, is amended to read:

36 **6. Qualified testing laboratories required.** No employer
38 may perform any substance abuse test administered to any of that
40 employer's employees confirmation test. An employer may perform
42 screening tests administered to applicants or employees if the
44 employer's testing facilities comply with the requirements for
46 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.

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

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

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

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

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

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

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

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

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

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

40 **Sec. 11. 26 MRSA §683, sub-§7**, as enacted by PL 1989, c. 536,
§§1 and 2, is amended to read:

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

2 **Sec. 12. 26 MRSA §683, sub-§8, ¶¶A and B**, as enacted by PL
1989, c. 536, §§1 and 2, are amended to read:

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

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

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

14 (a) Unless the employee or applicant consents,
test results shall not be reported in numerical or
16 quantitative form but shall state only that the
test result was positive or negative. This
18 division does not apply if the test or the test
results become the subject of any grievance
20 procedure, administrative proceeding or civil
action.

22 (b) ~~A testing laboratory and the employer must~~
~~ensure that an employee's unconfirmed positive~~
24 ~~screening test result cannot be determined by the~~
~~employer in any manner, including, but not limited~~
26 ~~to, the method of billing the employer for the~~
~~tests performed by the laboratory and the time~~
28 ~~within which results are provided to the~~
~~employer. This division does not apply to test~~
30 ~~results for applicants shall retain records of~~
confirmed positive test results in a numerical or
32 quantitative form for a period of 7 years;

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

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

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

44 B. The employer shall promptly notify the employee or
46 applicant tested of the test result. Upon request of an
employee or applicant, the employer shall promptly provide a
48 legible copy of the laboratory report to the employee or
applicant. Within 3 working days after notice of a confirmed
50 positive test result, the employee or applicant may submit
information to the employer explaining the results.

2 **Sec. 13. 26 MRSA §684, sub-§2, ¶A**, as enacted by PL 1989, c.
536, §§1 and 2, is amended to read:

4 A. The employee's immediate supervisor, other supervisory
6 personnel, medical personnel, members of management, or the
employer's security personnel shall make the determination
of probable cause.

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10 **Sec. 14. 26 MRSA §684, sub-§2-A** is enacted to read:

12 2-A. Conditional return to work. An employer may require
14 that an employee submit to a substance abuse test and receive a
confirmed negative result before returning to work if the
employee:

16 A. Refuses to submit to a substance abuse test;

18 B. Receives a confirmed positive test result, regardless of
20 whether the employee chooses to enter into a rehabilitation
program under section 685, subsection 2, paragraph B or has
22 been disciplined under section 685, subsection 2, paragraph
A; or

24 C. Has been out of work for more than 3 months for any
reason.

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28 **Sec. 15. 26 MRSA §684, sub-§3, ¶B**, as enacted by PL 1989, c.
536, §§1 and 2, is amended to read:

30 B. The employee works in a position the nature of which
32 would create an unreasonable threat to national security or
to the health or safety of the public, the employee or the
34 employee's co-workers if the employee were under the
influence of a substance of abuse. It is the intent of the
Legislature that the requirements of this paragraph be
36 narrowly construed.

38 **Sec. 16. 26 MRSA §684, sub-§4, ¶¶B and C**, as enacted by PL
1989, c. 536, §§1 and 2, are amended to read:

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42 B. An If an employee participates in a rehabilitation
treatment program under section 685, subsection 2,
44 paragraph B, an employer may not require, request or
suggest that any a substance abuse test be administered
46 to any the employee while the employee is undergoing
such rehabilitation or treatment, except as provided in
48 subsections 2 and 3 and for a period of one year
thereafter. The results of any such testing may be
made available to the employer.

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52 C. The results of any substance abuse test
administered to an employee as part of such a voluntary

2 rehabilitation or treatment program may not be released
3 to the employer. An employer may not require that
4 substance abuse tests be administered to any employee
5 solely because the employee is participating in a
6 voluntary rehabilitation or treatment program.

7 **Sec. 17. 26 MRSA §685, sub-§1**, as enacted by PL 1989, c. 536,
8 §§1 and 2, are amended to read:

9 **1. Before receipt of test results.** An employer may suspend
10 an employee with ~~full~~ without pay and ~~benefits~~ or may transfer
11 the employee to another position with ~~no~~ a reduction in pay ~~or~~
12 ~~benefits~~ while awaiting an employee's test results. If the
13 results of a confirmed test are negative, the employee must be
14 reinstated to the employee's prior position with full back pay.

15 **Sec. 18. 26 MRSA §685, sub-§2, ¶¶B and C**, as enacted by PL
16 1989, c. 536, §§1 and 2, are amended to read:

17 **B.** Before taking any action described in paragraph A in the
18 case of an employee who receives a confirmed positive result
19 and who has been employed by the employer for at least one
20 year, an employer shall provide the employee with an
21 opportunity to participate for ~~at least~~ up to 6 months in a
22 rehabilitation program designed to enable the employee to
23 avoid future use of a substance of abuse. The employer may
24 take any action described in paragraph A if the employee
25 receives a subsequent confirmed positive result within 3
26 years after the rehabilitation or treatment provider
27 indicates that the employee has successfully completed a
28 rehabilitation program as provided in paragraph C,
29 subparagraph (3).

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

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

43 (a) ~~Except to the extent that costs~~ Unless the
44 services provided under a program are covered by a
45 group health insurance plan, the costs of the
46 public or private rehabilitation program shall be
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2 equally divided between the employer and employee
3 if the employer has more than 20 full-time
4 employees. If the services are covered by a group
5 health insurance plan, the employee shall be
6 liable for whatever deductibles or co-insurance is
7 applicable under the plan. If necessary, the
8 employer shall assist in financing the cost share
of the employee through a payroll deduction plan.

10 (b) Except to the extent that costs are covered
11 by a group health insurance plan, an employer with
12 20 or fewer full-time employees is not required to
13 pay for any costs of rehabilitation or treatment
14 under any public or private rehabilitation program.

16 (2) No employer may take any action described in
17 paragraph A while an employee is participating in a
18 rehabilitation program, except as provided in
19 subparagraph 3 and except that an employer may change
20 the employee's work assignment or suspend the employee
21 from active duty to reduce any possible safety hazard.
22 No Except as provided in subparagraph 3, no reduction
23 in pay or benefits may be made while an employee is
24 participating in a rehabilitation program, provided
25 that the employer is not required to pay the employee
26 for periods in which the employee is unavailable for
27 work for the purposes of rehabilitation. The employee
28 may apply normal sick leave and vacation time, if any,
29 for these periods.

30 (3) Except as provided in division (a), upon
31 successfully completing the rehabilitation program, as
32 determined by the rehabilitation or treatment provider
33 after consultation with the employer, the employee is
34 entitled to return to the employee's previous job with
35 full pay and benefits unless conditions unrelated to
36 the employee's previous confirmed positive result make
37 the employee's return impossible. If the
38 rehabilitation or treatment provider determines that
39 the employee has not successfully completed has failed
40 to comply with the employee's prescribed rehabilitation
41 program prior to the expiration of the 6-month period
42 provided in section 685, subsection 2, paragraph B, the
43 rehabilitation-program-within-6-months-after-starting
44 the-program, the employer may take any action described
45 in paragraph A. An employer may also take any action
46 described in paragraph A if the employee receives 2 or
47 more confirmed positive test results within 6 months of
48 an employee's starting a rehabilitation program.

50 (a) If the employee who has completed
51 rehabilitation previously worked in an employment

2 position subject to random or arbitrary testing
3 under an employer's written policy, the employer
4 may refuse to allow the employee to return to the
5 previous job if the employer believes that the
6 employee may pose an unreasonable safety hazard
7 because of the nature of the position. The
8 employer shall attempt to find suitable work for
9 the employee immediately after refusing the
10 employee's return to the previous position. ~~No~~
11 ~~reduction may be made in the employee's previous~~
12 ~~benefits or rate of pay while awaiting~~
13 ~~reassignment to work or while working in a~~
14 ~~position other than the previous job.~~ The
15 employer shall be reinstated to the previous
16 position or to another position with an equivalent
17 rate of pay and benefits and with no loss of
18 seniority within 6 months after returning to work
19 in any capacity with the employer unless the
20 employee has received a subsequent confirmed
21 positive result within that time from a test
22 administered under this subchapter or unless
23 conditions unrelated to the employee's previous
24 confirmed positive test result makes such
25 reinstatement or reassignment impossible.
26 Placement of the employee in suitable work and
27 reinstatement must not conflict with any provision
28 of a collective bargaining agreement between the
29 employer and a labor organization which is the
30 collective bargaining representative of the unit
31 of which the employee is or would be a part.

32 **Sec. 19. 26 MRSA §686, sub-§1, ¶A,** as enacted by PL 1989, c.
33 536, §§1 and 2, is amended to read:

34 A. The department shall, within 30 days of receipt,
35 determine if the employer's written policy or change
36 complies with this subchapter and shall immediately notify
37 the employer who submitted the policy or change of that
38 determination. If the department finds that the policy or
39 change does not comply with this subchapter, the department
40 shall also notify the employer of the specific areas in
41 which the policy or change is defective.

44 **Sec. 20. 26 MRSA §689, sub-§1, ¶B,** as enacted by PL 1989, c.
45 536, §§1 and 2, is amended to read:

46 B. Reinstatement of the employee to the employee's job with
47 full benefits, unless the employer can demonstrate that
48 reinstatement presents a threat to the health and safety of
49 the public, the employee or the employee's coworkers;
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STATEMENT OF FACT

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6 This bill makes several changes to the current law on
substance abuse testing. The bill includes provisions to
8 exempt certain federal contractors subject to the federal Drug
Free Workplace Act of 1988; adjust the definition of probable
10 cause to include a single work-related accident if it is severe
according to specified standards; remove an applicant's right to
12 obtain other tests; allow an employer to require a negative test
result as a precondition to an employee's return to work. The
14 bill makes several other changes to promote a healthy and
productive work force and safe workplaces.

16