

MAINE STATE LEGISLATURE

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122nd MAINE LEGISLATURE

FIRST REGULAR SESSION-2005

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No. 1361

H.P. 944

House of Representatives, March 17, 2005

An Act To Enhance Workplace Safety and Health through Substance Abuse Testing and Treatment

Reference to the Committee on Labor suggested and ordered printed.

Millicent M. MacFarland
MILLICENT M. MacFARLAND
Clerk

Presented by Representative PERRY of Calais.
Cosponsored by Senator MARTIN of Aroostook and
Representatives: DUCHESNE of Hudson, MARRACHÉ of Waterville, MAZUREK of
Rockland, PIOTTI of Unity, Senator: NUTTING of Androscoggin.

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

2
4 **Sec. 1. 26 MRSA §682, sub-§2**, as amended by PL 1995, c. 324, §3, is further amended to read:

6 **2. Employee.** "Employee" means a person who is permitted, required or directed by any employer to engage in any employment for consideration of direct gain or profit. ~~-A person separated from employment while receiving a mandated benefit, including but not limited to workers' compensation, unemployment compensation and family medical leave, is an employee for the period the person receives the benefit and for a minimum of 30 days beyond the termination of the benefit.~~ A person separated from employment while receiving a nonmandated benefit is an employee for a minimum of 30 days beyond the separation.

16 A. A full-time employee is an employee who customarily works 30 hours or more each week.

20 **Sec. 2. 26 MRSA §682, sub-§5-A** is enacted to read:

22 **5-A. Post-accident.** "Post-accident" means within 8 hours following an occurrence involving one or more employees on duty or in the workplace in which there is loss of human life or serious bodily injury or property damage apparently involving cost or loss greater than \$10,000.

28 **Sec. 3. 26 MRSA §682, sub-§6, ¶C**, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is amended to read:

32 C. ~~-A-~~ The mere fact of a single work-related accident, unless circumstances related to the accident provide a reasonable basis for suspicion of impairment or of the influence of a substance of abuse. This exclusion does not restrict post-accident testing otherwise permitted by this subchapter.

38 **Sec. 4. 26 MRSA §682, sub-§7, ¶A**, as amended by PL 2001, c. 556, §1 and PL 2003, c. 689, Pt. B, §6, is further amended to read:

42 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 Health and Human Services under rules adopted under section 687, and that is used as a preliminary step in detecting the presence of substances of abuse.

2 (1) A screening test of an applicant's or employee's
4 urine or saliva may be performed at the point of
6 collection through the use of a noninstrumented point
8 of collection test device approved by the federal Food
and Drug Administration. Section 683, subsection 5-A
governs the use of such tests.

10 **Sec. 5. 26 MRSA §683, sub-§2, ¶B,** as amended by PL 1989, c.
832, §6, is further amended to read:

12 B. When substance abuse testing may occur. The written
14 policy must describe:

16 (1) Which positions, if any, will be subject to
18 testing, including any positions subject to random or
20 arbitrary testing under section 684, subsection 3. For
applicant testing and probable cause and post-accident
testing of employees, an employer may designate that
all positions are subject to testing; and

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

26 **Sec. 6. 26 MRSA §684, sub-§2-A** is enacted to read:

28 2-A. Post-accident testing. An employer may require,
30 request or suggest that a surviving employee submit to a
32 post-accident substance abuse test if the employee while on duty
34 or in the workplace was involved in an occurrence in which there
36 was loss of human life, serious bodily injury or property damage
apparently involving cost or loss greater than \$10,000, unless
the circumstances clearly show that the employee did not
contribute to the cause of the occurrence. A post-accident test
sample may not be collected more than 8 hours after the
occurrence.

38 **Sec. 7. 26 MRSA §684, sub-§5,** as enacted by PL 1989, c. 832,
40 §11, is amended to read:

42 **5. Testing upon return to work.** If an employee who has
44 received a confirmed positive result returns to work with the
46 same employer, whether or not the employee has participated in a
rehabilitation program under section 685, subsection 2, the
48 employer may require, request or suggest that the employee submit
50 to - a- subsequent substance-abuse-test-anytime-between-90-days
and--one--year--after--the--date--of--the--employee's--prior--test
follow-up testing during the 18 months after the date of the
employee's return to work, in accordance with a written follow-up

2 treatment plan provided to the employer by a rehabilitation or
3 treatment provider. --A-test Testing may be administered under
4 this subsection in addition to any tests conducted under
5 subsections 2, ~~2-A~~ and 3. ~~An employer may require, request or~~
6 ~~suggest that an employee submit to a substance abuse test during~~
7 ~~the first 90 days after the date of the employee's prior test~~
8 ~~only as provided in subsections 2 and 3.~~ If the returning
9 employee holds a position that would create an unreasonable
10 threat to the health and safety of the public, the employee or
11 coworkers if the employee were under the influence of a substance
12 of abuse, testing under the follow-up treatment plan may extend
13 over 24 months and must provide for at least 6 follow-up tests in
14 the first 12 months after return to work.

15 **Sec. 8. 26 MRSA §685, sub-§2, ¶C,** as amended by PL 1995, c.
16 344, §1, is further amended to read:

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

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

30 (a) Except to the extent that costs are covered
31 by a group health insurance plan, ~~the costs of the~~
32 ~~public or private rehabilitation program must be~~
33 ~~equally divided between the employer and employee~~
34 ~~if the employer has more than 20 full-time~~
35 ~~employees. ---This requirement does not apply to~~
36 ~~municipalities or other political subdivisions of~~
37 ~~the State or to any employer when the employee is~~
38 ~~tested because of the alcohol and controlled~~
39 ~~substance testing mandated by the federal Omnibus~~
40 ~~Transportation Employee Testing Act of 1991,~~
41 ~~Public Law 102-143, Title V. ---If necessary, the~~
42 ~~employer shall assist in financing the cost share~~
43 ~~of the employee through a payroll deduction plan.~~
44 the employer shall pay a portion of the costs of
45 the public or private rehabilitation program as
46 follows:

2 (i) For employees with fewer than 2 full
4 years of service prior to the confirmed
 positive test, 1/2 of the cost up to \$250;

6 (ii) For employees with 2 to 5 full years of
8 service prior to the confirmed positive test,
 1/2 of the cost up to \$500;

10 (iii) For employees with 6 to 15 full years
12 of service prior to the confirmed positive
 test, 1/2 of the cost up to \$1,000; and

14 (iv) For employees with over 15 full years
16 of service prior to the confirmed positive
 test, 1/2 of the cost up to \$2,000.

18 This requirement does not apply to municipalities
20 or other political subdivisions of the State or to
22 any employer when the employee is tested because
24 of the alcohol and controlled substance testing
26 mandated by the federal Omnibus Transportation
 Employee Testing Act of 1991, Public Law 102-143,
 Title V. If necessary, the employer shall assist
 in financing the cost share of the employee
 through a payroll deduction plan.

28 (b) Except to the extent that costs are covered
30 by a group health insurance plan, an employer with
32 20 or fewer full-time employees, a municipality or
34 other political subdivision of the State is not
36 required to pay for any costs of rehabilitation or
38 treatment under any public or private
40 rehabilitation program. An employer is not
 required to pay for the costs of rehabilitation if
 the employee was tested because of the alcohol and
 controlled substance testing mandated by the
 federal Omnibus Transportation Employee Testing
 Act of 1991, Public Law 102-143, Title V.

42 (2) ~~No An~~ employer may ~~not~~ take any action described
44 in paragraph A while an employee is participating in a
46 rehabilitation program, ~~except as---provided---in~~
48 ~~subparagraph--(2-A)--and--except--that--an--employer--may~~
 ~~change--the--employee's--work--assignment--or--suspend--the~~
 ~~employee--from--active--duty--to--reduce--any--possible--safety~~
 ~~hazard.--Except--as--provided--in--subparagraph--(2-A)--an~~
 ~~employee's--pay--or--benefits--may--not--be--reduced--while--an~~
 ~~employee--is--participating--in--a--rehabilitation--program,~~

2 provided that the employer is not required to pay the
employee for periods in which the employee is
4 unavailable for work for the purposes of rehabilitation
or while the employee is medically disqualified. The
6 employee may apply normal sick leave and vacation time,
if any, for these periods.:

8 (i) As provided in subparagraph (2-A);

10 (ii) That an employer may change the employee's
12 work assignment to reduce any possible safety
14 hazard. If the employee is reassigned, the
16 employer shall pay the employee the rate of the
18 new work assignment until an evaluation conducted
20 by or arranged through the rehabilitation or
22 treatment provider concludes the unreasonable
24 safety hazard has abated, with or without
26 conditions such as regular or irregular interim
28 substance abuse testing during rehabilitation;

30 (iii) That an employer may suspend the employee
32 from active duty to reduce any possible safety
34 hazard. If the employee is suspended, the
36 employer shall pay the employee 1/2 of the
38 employee's regular weekly rate, unless and until
40 an evaluation conducted by or arranged through the
42 rehabilitation or treatment provider concludes the
44 unreasonable safety hazard has abated, with or
46 without conditions such as regular or irregular
48 interim substance abuse testing during
50 rehabilitation; and

(iv) That the employer is not required to pay the
employee for periods in which the employee is
unavailable for work for the purposes of
rehabilitation or while the employee is medically
disqualified.

The employee may apply normal sick leave and
vacation time, if any, for these periods.

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

(3) Except as provided in divisions (a) and (b), upon successfully completing the rehabilitation program, as

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

17 (a) If the employee who has completed
18 rehabilitation previously worked in an ~~employment~~
19 ~~position subject to random or arbitrary testing~~
20 ~~under an employer's written policy, the employer~~
21 ~~may refuse to allow the employee to return to the~~
22 ~~previous job if the employer believes that the~~
23 ~~employee may pose an unreasonable safety hazard~~
24 ~~because of the nature of the position a position~~
25 ~~that would create an unreasonable threat to the~~
26 ~~health and safety of the public, the employee or~~
27 ~~coworkers if the employee were under the influence~~
28 ~~of a substance of abuse, the employer may refuse~~
29 ~~to allow the employee to return to the previous~~
30 ~~job if the employer believes that the employee~~
31 ~~might pose an unreasonable safety hazard because~~
32 ~~of the nature of the position. The employer shall~~
33 ~~attempt to find suitable work for the employee~~
34 ~~immediately after refusing the employee's return~~
35 ~~to the previous position. No reduction may be~~
36 ~~made in the employee's previous benefits or rate~~
37 ~~of pay while awaiting reassignment to work or~~
38 ~~while working in a position other than the~~
39 ~~previous job. The employee shall must be~~
40 ~~reinstated to the previous position or to another~~
41 ~~position with an equivalent rate of pay and~~
42 ~~benefits and with no loss of seniority after an~~
43 ~~evaluation conducted by or arranged through the~~
44 ~~rehabilitation or treatment provider concludes~~
45 ~~that the unreasonable safety hazard has abated, or~~
46 ~~in any event within 6 months after returning to~~
47 ~~work in any capacity with the employer unless the~~
48 ~~employee has received a subsequent confirmed~~
49 ~~positive result within that time from a test~~
50 ~~administered under this subchapter or unless~~

2 conditions unrelated to the employee's previous
confirmed positive test result make that
4 reinstatement or reassignment impossible.
Placement of the employee in suitable work and
6 reinstatement may not conflict with any provision
of a collective bargaining agreement between the
8 employer and a labor organization that is the
collective bargaining representative of the unit
of which the employee is or would be a part.

10
12 (b) Notwithstanding division (a), if an employee
who has successfully completed rehabilitation is
14 medically disqualified, the employer is not
required to reinstate the employee or find
16 suitable work for the employee during the period
of disqualification. The employer is not required
18 to compensate the employee during the period of
disqualification. Immediately after the
20 employee's medical disqualification ceases, the
employer's obligations under division (a) attach
22 as if the employee had successfully completed
rehabilitation on that date.

24
SUMMARY

26
The bill:

28
1. Allows for post-accident testing when death, serious
30 injury or substantial property damage has occurred, separate and
apart from probable cause or random testing;

32
2. Permits the employer to require, request or suggest
34 subsequent follow-up testing of an employee returning to work
during the 18 months after the date of the employee's return to
36 work;

38
3. Allows for point-of-collection screening tests of
employees. Confirmation of positive tests would still be
40 required in the existing manner;

42
4. Amends the exclusion of a single work-related accident
as probable cause for testing when circumstances surrounding a
44 single work-related accident may give rise to probable cause to
test, even if the harm from the accident is not so severe as to
46 warrant general post-accident testing;

48
5. Sets reasonable limits on the currently open-ended
shifting of uninsured treatment or rehabilitation costs, based on
50 an employee's length of service and incorporates changes

recognizing that outpatient treatment is often the recommended approach;

6. Permits a program of follow-up testing after return to work following a confirmed positive test, as recommended by a rehabilitation or treatment provider. The statutes currently permit only a single follow-up test in the period between 90 days and one year after the employee's positive prior test. This change would permit a program of follow-up testing in the 12 months following a confirmed positive test, under circumstances similar to those now used for drivers of commercial motor vehicles under the Federal Motor Carrier Safety Regulations; and

7. Amends the provisions requiring return of an employee with a confirmed positive test result to a safety-sensitive position and insulating the employee from any financial consequences. The existing law requires that, if due to a perceived safety hazard an employee is not immediately returned to the safety-sensitive position, the employer must nonetheless pay the rate of the safety-sensitive job even though that job is not being performed. This change would provide employers greater flexibility to temporarily reassign such persons to other duties at the rates of pay corresponding to the new positions. As soon as the employee's rehabilitation or treatment provider concludes the unreasonable safety hazard has abated, the employee must be restored to full pay.