

# MAINE STATE LEGISLATURE

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# 126th MAINE LEGISLATURE

## SECOND REGULAR SESSION-2014

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Legislative Document

No. 1669

S.P. 664

In Senate, December 23, 2013

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**An Act To Standardize and Simplify the Process for Employers To  
Provide a Drug-free Workplace**

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Submitted by the Department of Labor pursuant to Joint Rule 204.

Received by the Secretary of the Senate on December 23, 2013. Referred to the Committee on Labor, Commerce, Research and Economic Development pursuant to Joint Rule 308.2 and ordered printed.

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT  
Secretary of the Senate

Presented by Senator CUSHING of Penobscot.

Cosponsored by Representative MALABY of Hancock and

Senator: LANGLEY of Hancock, Representatives: DAVIS of Sangerville, LOCKMAN of Amherst, VOLK of Scarborough.

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

2 **PART A**

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

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

9 A. Information received from an anonymous informant; or

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

15 ~~C. A single work-related accident.~~

16 **Sec. A-2. 26 MRSA §683, first ¶**, as enacted by PL 1989, c. 536, §§1 and 2 and  
17 affected by c. 604, §§2 and 3, is amended to read:

18 No employer may require, request or suggest that any employee or applicant submit  
19 to a substance abuse test except in compliance with this section. All actions taken under  
20 a substance abuse testing program ~~shall~~ must comply with this subchapter, rules adopted  
21 under this subchapter and the ~~employer's written policy approved under section 686~~  
22 model policy adopted pursuant to subsection 2.

23 **Sec. A-3. 26 MRSA §683, sub-§1**, as amended by PL 2011, c. 657, Pt. AA, §72,  
24 is repealed.

25 **Sec. A-4. 26 MRSA §683, sub-§2**, as amended by PL 2009, c. 133, §2, is further  
26 amended to read:

27 **2. Statewide drug-free workplace model policy.** The Commissioner of Labor shall  
28 establish a single, comprehensive statewide drug-free workplace model policy to be  
29 managed by the Department of Labor. The model policy must be in compliance with all  
30 pertinent rules and regulations for employers conducting substance abuse testing. The  
31 model policy must be posted on the bureau's publicly accessible website. Before  
32 establishing any substance abuse testing program, an employer must ~~develop or, as~~  
33 required in section 684, subsection 3, paragraph C, must appoint an employee committee  
34 to develop a written policy in compliance with this subchapter providing ~~adopt the model~~  
35 policy, except that an employer may retain its workplace policy approved under former  
36 section 686 until June 30, 2015 if the workplace policy was approved prior to the  
37 establishment of the model policy and is as stringent as or more stringent than the model  
38 policy. Effective July 1, 2015, all employers shall adopt the model policy. The

1 department shall treat all employers that adopt the model policy as having the same  
2 substance abuse testing policy. The model policy must provide for, at a minimum:

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

6 B. When substance abuse testing may occur. The ~~written policy~~ model policy must  
7 describe:

8 (1) Which positions, if any, ~~will be~~ are subject to testing, including any positions  
9 subject to random or arbitrary testing under section 684, subsection 3. For  
10 applicant testing and probable cause testing of employees, an employer may  
11 designate that all positions are subject to testing; and

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

14 C. The collection of samples.

15 (1) The collection of any sample for use in a substance abuse test must be  
16 conducted in a medical facility and supervised by a licensed physician or nurse.  
17 A medical facility includes a first aid station located at the work site.

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

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

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

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

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

- 1 (5) If the employer proposes to use the type of screening test described in section  
2 682, subsection 7, paragraph A, subparagraph (1), the employer's policy must  
3 include:
- 4 (a) Procedures to ensure the confidentiality of test results as required in  
5 section 685, subsection 3; and
  - 6 (b) Procedures for training persons performing the test in the proper manner  
7 of collecting samples and reading results, maintaining a proper chain of  
8 custody and complying with other applicable provisions of this subchapter;
- 9 D. The storage of samples before testing sufficient to inhibit deterioration of the  
10 sample;
- 11 E. The chain of custody of samples sufficient to protect the sample from tampering  
12 and to verify the identity of each sample and test result;
- 13 F. The substances of abuse to be tested for;
- 14 G. The cutoff levels for both screening and confirmation tests at which the presence  
15 of a substance of abuse in a sample is considered a positive test result.
- 16 (1) Cutoff levels for confirmation tests for marijuana may not be lower than 15  
17 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for  
18 urine samples.
  - 19 (2) The Department of Health and Human Services shall adopt rules under  
20 section 687 regulating screening and confirmation cutoff levels for other  
21 substances of abuse, including those substances tested for in blood samples under  
22 subsection 5, paragraph B, to ensure that levels are set within known tolerances  
23 of test methods and above mere trace amounts. An employer may request that  
24 the Department of Health and Human Services establish a cutoff level for any  
25 substance of abuse for which the department has not established a cutoff level.
  - 26 (3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and  
27 Human Services does not have established cutoff levels or procedures for any  
28 specific federally recognized substance abuse test, the minimum cutoff levels and  
29 procedures that apply are those set forth in the Federal Register, Volume 69, No.  
30 71, sections 3.4 to 3.7 on pages 19697 and 19698;
- 31 H. The consequences of a confirmed positive substance abuse test result;
- 32 I. The consequences for refusal to submit to a substance abuse test;
- 33 J. Opportunities and procedures for rehabilitation following a confirmed positive  
34 result;
- 35 K. A procedure under which an employee or applicant who receives a confirmed  
36 positive result may appeal and contest the accuracy of that result. The policy must  
37 include a mechanism that provides an opportunity to appeal at no cost to the  
38 appellant; and
- 39 L. Any other matters required by rules adopted by the Department of Labor under  
40 section 687.

1 An employer must consult with the employer's employees in the development of any  
2 portion of a substance abuse testing policy under this subsection that relates to the  
3 employees. The employer is not required to consult with the employees on those portions  
4 of a policy that relate only to applicants. The employer shall send a copy of the final  
5 written policy to the Department of Labor for review under section 686. The employer  
6 may not implement the policy until the Department of Labor approves the policy. The  
7 employer shall send a copy of any proposed change in an approved written policy to the  
8 Department of Labor for review under section 686. The employer may not implement the  
9 change until the Department of Labor approves the change adoption of the model policy.

10 **Sec. A-5. 26 MRSA §683, sub-§3**, as amended by PL 1995, c. 324, §5, is further  
11 amended to read:

12 **3. Informing employees and applicants.** The employer shall ~~provide each~~  
13 ~~employee with a copy of the written policy approved by the Department of Labor under~~  
14 ~~section 686~~ publish on a portion of its website that is accessible to employees the  
15 employer's workplace substance abuse testing policy adopted pursuant to this section at  
16 least 30 days before any portion of the written policy applicable to employees takes  
17 effect. The employer shall provide each employee with a copy of any change in a written  
18 policy approved by the Department of Labor under section 686 at least 60 days before  
19 any portion of the change applicable to employees takes effect. The Department of Labor  
20 may waive the 60 day notice for the implementation of an amendment covering  
21 employees if the amendment was necessary to comply with the law or if, in the judgment  
22 of the department, the amendment promotes the purpose of the law and does not lessen  
23 the protection of an individual employee. If an employer intends to test an applicant, the  
24 employer shall ~~provide~~ inform the applicant ~~with a copy of the written policy under~~  
25 ~~subsection 2 before administering a substance abuse test to the applicant. The 30 day and~~  
26 ~~60 day notice periods provided for employees under this subsection do not apply to~~  
27 ~~applicants that the employer's workplace substance abuse testing policy adopted pursuant~~  
28 ~~to this section can be located on the bureau's website.~~

29 **Sec. A-6. 26 MRSA §683, sub-§5, ¶B**, as enacted by PL 1989, c. 536, §§1 and 2  
30 and affected by c. 604, §§2 and 3 and amended by PL 2003, c. 689, Pt. B, §6, is further  
31 amended to read:

32 B. In the case of an employee, have a blood sample taken from the employee by a  
33 licensed physician, registered physician's assistant, registered nurse or a person  
34 certified by the Department of Health and Human Services to draw blood samples.  
35 The employer shall have this sample tested for the presence of alcohol or marijuana  
36 metabolites, if those substances are to be tested for under the employer's ~~written~~  
37 workplace substance abuse testing policy. If the employee requests that a blood  
38 sample be taken as provided in this paragraph, the employer may not test any other  
39 sample from the employee for the presence of these substances.

40 (1) The Department of Health and Human Services may identify, by rules  
41 adopted under section 687, other substances of abuse for which an employee may  
42 request a blood sample be tested instead of a urine sample if the department  
43 determines that a sufficient correlation exists between the presence of the

1 substance in an individual's blood and its effect upon the individual's  
2 performance.

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

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

9 **Sec. A-7. 26 MRSA §683, sub-§8, ¶D**, as enacted by PL 1989, c. 536, §§1 and 2  
10 and affected by c. 604, §§2 and 3, is repealed.

11 **Sec. A-8. 26 MRSA §684, sub-§3, ¶C**, as enacted by PL 2003, c. 547, §2, is  
12 amended to read:

13 C. The employer has established a random or arbitrary testing program under this  
14 paragraph that applies to all employees, except as provided in subparagraph (4),  
15 regardless of position.

16 (1) An employer may establish a testing program under this paragraph only if the  
17 employer has 50 or more employees who are not covered by a collective  
18 bargaining agreement.

19 ~~(2) The written policy required by section 683, subsection 2 with respect to a~~  
20 ~~testing program under this paragraph must be developed by a committee of at~~  
21 ~~least 10 of the employer's employees. The employer shall appoint members to~~  
22 ~~the committee from a cross section of employees who are eligible to be tested.~~  
23 ~~The committee must include a medical professional who is trained in procedures~~  
24 ~~for testing for substances of abuse. If no such person is employed by the~~  
25 ~~employer, the employer shall obtain the services of such a person to serve as a~~  
26 ~~member of the committee created under this subparagraph.~~

27 (3) ~~The written policy developed under subparagraph (2)~~ employer's workplace  
28 substance abuse testing policy must also require that selection of employees for  
29 testing be performed by a person or entity not subject to the employer's influence,  
30 such as a medical review officer. Selection must be made from a list, provided  
31 by the employer, of all employees subject to testing under this paragraph. The list  
32 may not contain information that would identify the employee to the person or  
33 entity making the selection.

34 (4) Employees who are covered by a collective bargaining agreement are not  
35 included in testing programs pursuant to this paragraph unless they agree to be  
36 included pursuant to a collective bargaining agreement as described under  
37 paragraph A.

38 ~~(5) Before initiating a testing program under this paragraph, the employer must~~  
39 ~~obtain from the Department of Labor approval of the policy developed by the~~  
40 ~~employee committee, as required in section 686. If the employer does not~~  
41 ~~approve of the written policy developed by the employee committee, the~~  
42 ~~employer may decide not to submit the policy to the department and not to~~

1 establish the testing program. The employer may not change the written policy  
2 without approval of the employee committee.

3 ~~(6) The employer may not discharge, suspend, demote, discipline or otherwise~~  
4 ~~discriminate with regard to compensation or working conditions against an~~  
5 ~~employee for participating or refusing to participate in an employee committee~~  
6 ~~created pursuant to this paragraph.~~

7 **Sec. A-9. 26 MRSA §684, sub-§4**, as enacted by PL 1989, c. 536, §§1 and 2 and  
8 affected by c. 604, §§2 and 3, is amended to read:

9 **4. Testing while undergoing rehabilitation or treatment.** While the employee is  
10 participating in a substance abuse rehabilitation program either as a result of voluntary  
11 ~~contact with or mandatory referral to the employer's employee assistance program~~  
12 consent or after a confirmed positive result as provided in section 685, subsection 2,  
13 paragraphs B and C, substance abuse testing may be conducted by the rehabilitation or  
14 treatment provider as required, requested or suggested by that provider.

15 A. Substance abuse testing conducted as part of ~~such~~ a rehabilitation or treatment  
16 program is not subject to the provisions of this subchapter regulating substance abuse  
17 testing.

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

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

23 **Sec. A-10. 26 MRSA §685, sub-§2, ¶C**, as amended by PL 1995, c. 344, §1, is  
24 further amended to read:

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

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

34 (a) Except to the extent that costs are covered by a group health insurance  
35 plan, the costs of the public or private rehabilitation program ~~must be equally~~  
36 ~~divided between the employer and employee if the employer has more than~~  
37 ~~20 full-time employees~~ are the responsibility of the employee. This  
38 requirement does not apply to municipalities or other political subdivisions of  
39 the State or to any employer when the employee is tested because of the  
40 alcohol and controlled substance testing mandated by the federal Omnibus  
41 Transportation Employee Testing Act of 1991, Public Law 102-143, Title V.



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If necessary, the employer shall assist in financing the cost share of the employee through a payroll deduction plan.

(b) Except to the extent that costs are covered by a group health insurance plan, an employer with 20 or fewer full-time employees, a municipality or other political subdivision of the State is not required to pay for any costs of rehabilitation or treatment under any public or private 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.

(2) No employer may take any action described in paragraph A while an employee is participating in a rehabilitation program, except as provided in 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, ~~provided except~~ 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 determined by the rehabilitation or treatment provider after consultation with the employer, the employee is entitled to return to the employee's previous job with full pay and benefits unless conditions unrelated to the employee's previous confirmed positive result make the employee's return impossible. Reinstatement of the 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.

(a) If the employee who has completed rehabilitation previously worked in an employment position subject to random or arbitrary testing under ~~an~~ the employer's written workplace substance abuse testing policy adopted under section 683, subsection 2, the employer may refuse to allow the employee to return to the previous job if the employer believes that the employee may pose an unreasonable safety hazard because of the nature of the position. The employer shall attempt to find suitable work for the employee immediately after refusing the employee's return to the previous position. No

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reduction may be made in 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~~ must be reinstated to the previous 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.

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

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

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

- (1) The release of this information when required or permitted by state or federal law, ~~including release under section 683, subsection 8, paragraph D~~; or
- (2) The use of this information in any grievance procedure, administrative hearing or civil action relating to the imposition of the test or the use of test results.

**Sec. A-12. 26 MRSA §686**, as amended by PL 2009, c. 133, §3, is repealed.

**Sec. A-13. 26 MRSA §690**, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is repealed.

**Sec. A-14. Effective date.** This Part takes effect July 1, 2015.

**PART B**

**Sec. B-1. Model policy; rules.** The Department of Health and Human Services and the Department of Labor shall jointly adopt rules to establish and coordinate the

1 statewide drug-free workplace model policy under the Maine Revised Statutes, Title 26,  
2 section 683, subsection 2 by July 1, 2015. Rules adopted pursuant to this section are  
3 routine technical rules pursuant to the Maine Revised Statutes, Title 5, chapter 375,  
4 subchapter 2-A.

5 **SUMMARY**

6 Current law requires employers that want to provide a drug-free workplace by testing  
7 applicants or employees for substance abuse to develop and file a policy with the  
8 Department of Labor. The Bureau of Labor Standards reviews the policies to ensure  
9 compliance with state laws and rules. This bill provides employers with a single,  
10 consistent model policy. The model policy, which must be established by the  
11 Commissioner of Labor and managed by the department, is intended to encourage greater  
12 participation by employers to reduce substance abuse in the workplace. The bill requires  
13 an employer to adopt the model policy before establishing a substance abuse testing  
14 program. It removes the requirements that employers provide an employee assistance  
15 program and pay for half of rehabilitation beyond services provided through health care  
16 benefits. Employers may offer an employee assistance program if they choose. The bill  
17 amends the definition of "probable cause" to provide that a single work-related accident is  
18 probable cause to suspect an employee is under the influence of a substance of abuse.  
19 The bill requires the Department of Health and Human Services and the Department of  
20 Labor to work together to adopt rules to establish the model policy by July 1, 2015.