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Date: 3/31/16 Minority

L.D. 1384
(Filing No. H-625)

LABOR, COMMERCE, RESEARCH AND ECONOMIC DEVELOPMENT

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**STATE OF MAINE
HOUSE OF REPRESENTATIVES
127TH LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT "B" to H.P. 937, L.D. 1384, Bill, "An Act To Improve Workplace Safety by Simplifying and Improving Employers' Substance Abuse Policy Requirements"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

Sec. 1. 26 MRSA §681, as amended by PL 2011, c. 196, §1, is further amended to read:

§681. Purpose; applicability

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~~ use tests while allowing the use of tests when the employer has a compelling reason to administer a test;
- B. Ensure that, when substance ~~abuse~~ use tests are used, proper test procedures are employed to protect the privacy rights of employees and applicants and to achieve reliable and accurate results;
- C. Ensure that an employee with a substance abuse problem receives an opportunity for rehabilitation and treatment of the disease and returns to work as quickly as possible; ~~and~~
- D. Eliminate drug use in the workplace; and
- E. Protect Maine workers from injuries and illnesses caused by impairment in the workplace.

2. Employer discretion. This subchapter does not require or encourage employers to conduct substance ~~abuse~~ use testing of employees or applicants. An employer who chooses to conduct such testing is limited by this subchapter, but may establish policies ~~which~~ that are supplemental to and not inconsistent with this subchapter.

COMMITTEE AMENDMENT

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

4 A labor organization with a collective bargaining agreement effective in the State may
5 conduct a program of substance ~~abuse~~ use testing of its members. The program may
6 include testing of new members and periodic testing of all members. It may not include
7 random testing of members. The program may be voluntary. The results may not be
8 used to preclude referral to a job where testing is not required or to otherwise discipline a
9 member. Sample collection and testing must be done in accordance with this subchapter.
10 Approval of the Department of Labor is not required.

11 **4. Home rule authority preempted.** ~~No~~ A municipality may not enact any
12 ordinance under its home rule authority regulating an employer's use of substance ~~abuse~~
13 use tests.

14 **5. Contracts for work out of State.** All employment contracts subject to the laws
15 of this State ~~shall~~ must include an agreement that this subchapter will apply to any
16 employer who hires employees to work outside the State.

17 **6. Medical examinations.** This subchapter does not prevent an employer from
18 requiring or performing medical examinations of employees or applicants or from
19 conducting medical screenings to monitor exposure to toxic or other harmful substances
20 in the workplace, ~~provided that~~ as long as these examinations are not used to avoid the
21 restrictions of this subchapter. ~~No such~~ An examination may not include the use of any
22 substance ~~abuse~~ use test except in compliance with this subchapter.

23 **7. Other discipline unaffected.** This subchapter does not prevent an employer from
24 establishing rules related to the possession or use of substances of abuse by employees,
25 including convictions for drug-related offenses, and taking action based upon a violation
26 of any of those rules, except when a substance ~~abuse~~ use test is required, requested or
27 suggested by the employer or used as the basis for any disciplinary action.

28 ~~**8. Nuclear power plants; federal law.** The following limitations apply to the~~
29 ~~application of this subchapter.~~

30 ~~A. This subchapter does not apply to nuclear electrical generating facilities and their~~
31 ~~employees, including independent contractors and employees of independent~~
32 ~~contractors who are working at nuclear electrical generating facilities.~~

33 ~~C. This subchapter does not apply to any employer subject to a federally mandated~~
34 ~~drug and alcohol testing program, including, but not limited to, testing mandated by~~
35 ~~the federal Omnibus Transportation Employee Testing Act of 1991, Public Law 102-~~
36 ~~143, Title V, and its employees, including independent contractors and employees of~~
37 ~~independent contractors who are working for or at the facilities of an employer who~~
38 ~~is subject to such a federally mandated drug and alcohol testing program.~~

39 **10. Federally mandated drug and alcohol testing programs.** The following
40 limitations apply to the application of this subchapter.

41 A. This subchapter does not apply to an employee, an independent contractor or an
42 employee of an independent contractor who is working for or at the facilities of an
43 employer who is subject to a federally mandated drug and alcohol testing program.

1 B. An employer with employees in this State who are subject to a federally mandated
2 drug and alcohol testing program may either follow a substance use testing policy
3 established in accordance with this subchapter or may choose not to follow this
4 subchapter for substance use testing of employees who are not subject to federal
5 testing requirements, in which case the employer shall:

6 (1) Prepare a substance use testing plan for employees who are not federally
7 regulated and provide a copy of that plan to employees and the Bureau of Labor
8 Standards prior to testing. The plan must identify the kinds of testing to be
9 administered, notification and administration procedures and how confirmed
10 positive test results that may be allowable under state law but not federal law will
11 be handled for the employees who are not federally regulated. The plan must
12 describe a process to ensure, at a minimum, that provisions of 49 Code of Federal
13 Regulations, Part 40, Subpart O will be followed to allow employees who are not
14 federally regulated and who test positive the opportunity to contact and work
15 with substance abuse professionals in evaluation, treatment and return-to-duty
16 processes; and

17 (2) Follow corresponding federal notification provisions and procedural
18 protocols for any employees who are not federally regulated and comply with
19 section 683, subsection 8, paragraph D in reporting annually the results of
20 substance use testing of such employees.

21 **Sec. 2. 26 MRSA §682, sub-§1-A** is enacted to read:

22 **1-A. Arbitrary testing.** "Arbitrary testing" means substance use testing in which
23 the frequency of testing and the selection of those being tested are based on a set event,
24 including, but not limited to, an employment anniversary or promotion, or are based on
25 client-required or site-specific testing, for example when a client requires testing prior to
26 work on a project or specific site.

27 **Sec. 3. 26 MRSA §682, sub-§3-A,** as enacted by PL 1989, c. 832, §4, is amended
28 to read:

29 **3-A. Medically disqualified.** "Medically disqualified" means that an employee is
30 prohibited by a federal law or regulation, or any rules adopted by the State's Department
31 of Public Safety that incorporate any federal laws or regulations related to substance
32 ~~abuse use~~ testing for motor carriers, from continuing in the employee's former
33 employment position due to the result of a substance ~~abuse use~~ test conducted under the
34 federal law or regulation or the Department of Public Safety rule.

35 **Sec. 4. 26 MRSA §682, sub-§§3-B to 3-E** are enacted to read:

36 **3-B. Established drug-free workplace policy.** "Established drug-free workplace
37 policy" means a substance use policy adopted by an employer who has certified to the
38 Department of Labor that all affected employees have been notified of the policy and
39 have had an opportunity to review the policy and its requirements.

40 **3-C. Fitness-for-duty evaluation.** "Fitness-for-duty evaluation" means an
41 evaluation to determine whether an individual is in a physical, mental and emotional state
42 that enables the employee to perform the essential tasks of that employee's work

1 assignment in a manner that does not threaten the safety or health of the employee,
2 coworkers or the public or damage to property.

3 **3-D. Impairment or impaired.** "Impairment" or "impaired" means any observed
4 abnormality or change in an employee's physical, psychological or physiological
5 condition or an event in the workplace that could reasonably lead to the conclusion that
6 the employee may behave or perform tasks in a manner that threatens the safety of the
7 employee, the employee's coworkers or any other individuals.

8 **3-E. Medical review officer.** "Medical review officer" means a licensed physician
9 knowledgeable of, and with clinical experience in, controlled substance abuse disorders,
10 deviations of substance use testing specimens and causes of invalid testing results, who is
11 responsible for receiving and reviewing laboratory results generated by an employer's
12 drug testing program and evaluating medical explanations for certain drug test results.
13 "Medical review officer" may include a person qualified to serve as a medical review
14 officer under federal drug testing laws, as long as that person meets the requirements of
15 this subsection.

16 **Sec. 5. 26 MRSA §682, sub-§4-A** is enacted to read:

17 **4-A. Occupational health care provider.** "Occupational health care provider"
18 means an occupational medicine specialist with a wide knowledge of clinical medicine
19 who has competencies in areas such as employee work-related injury management,
20 periodic regulatory medical evaluations for specific job roles, fitness-for-duty evaluations
21 of non-work-related employee conditions and evaluation of other employment-related
22 medical concerns. An occupational health care provider may be a physician, physician
23 assistant or nurse practitioner or other similar medical professional trained in
24 occupational health care. An occupational health care provider may have knowledge of
25 the specific nature of the employment functions performed by employees for the specific
26 employer.

27 **Sec. 6. 26 MRSA §682, sub-§6,** as enacted by PL 1989, c. 536, §§1 and 2 and
28 affected by c. 604, §§2 and 3, is repealed.

29 **Sec. 7. 26 MRSA §682, sub-§§6-A to 6-D** are enacted to read:

30 **6-A. Random testing.** "Random testing" means a method of selecting those to be
31 tested in which all persons potentially to be tested have an equal probability of selection
32 by chance.

33 **6-B. Return-to-work agreement.** "Return-to-work agreement" means a written
34 document that sets forth the expectations that the employer and the employer's employee
35 assistance program or a medical professional have of an employee who has completed
36 mandated treatment for substance abuse problems. It also sets forth the consequences if
37 the expectations are not met.

38 **6-C. Safety-sensitive task or occupation.** "Safety-sensitive task or occupation"
39 means a work task or an employee occupation that, based on its nature, machinery,
40 location, surroundings or influence upon other operations, could pose a threat to the
41 safety of the employee, a coworker or others.

1 **6-D. Sampling and screening organization.** "Sampling and screening
2 organization" means an entity that is hired by an employer to collect biological samples
3 from employees and conduct screening tests for substances of abuse.

4 **Sec. 8. 26 MRSA §682, sub-§7**, as amended by PL 2009, c. 133, §1, is further
5 amended to read:

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

10 A. "Screening test" means an initial substance ~~abuse~~ use test performed through the
11 use of immunoassay technology or a federally recognized substance ~~abuse~~ use test, or
12 a test technology of similar or greater accuracy and reliability approved by the
13 Department of Health and Human Services under rules adopted under section 687,
14 and that is used as a preliminary step in detecting the presence of substances of abuse.

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

19 B. "Confirmation test" means a 2nd substance ~~abuse~~ use test that is used to verify the
20 presence of a substance of abuse indicated by an initial positive screening test result
21 and is a federally recognized substance ~~abuse~~ use test or is performed through the use
22 of liquid or gas chromatography-mass spectrometry.

23 C. "Federally recognized substance ~~abuse~~ use test" means any substance ~~abuse~~ use
24 test recognized by the federal Food and Drug Administration as accurate and reliable
25 through the administration's clearance or approval process, a substance use test
26 conducted in accordance with mandated guidelines for federal workplace drug testing
27 programs or a substance use test conducted according to protocols and levels
28 established by the United States Department of Health and Human Services,
29 Substance Abuse and Mental Health Services Administration.

30 **Sec. 9. 26 MRSA §683**, as amended by PL 2011, c. 657, Pt. AA, §72, is further
31 amended to read:

32 **§683. Testing procedures**

33 ~~No~~ An employer may not require, request or suggest that any employee or applicant
34 submit to a substance ~~abuse~~ use test except in compliance with this section. All actions
35 taken under a substance ~~abuse~~ use testing program ~~shall~~ must comply with this
36 subchapter, rules adopted under this subchapter and the ~~employer's written uniform~~
37 impairment and substance use testing policy approved under section 686 developed by
38 the Department of Labor pursuant to subsection 2.

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

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

3 B. The employee assistance program must be certified by the Department of Health
4 and Human Services under rules adopted pursuant to section 687. The rules must
5 ensure that the employee assistance programs have the necessary personnel, facilities
6 and procedures to meet minimum standards of professionalism and effectiveness in
7 assisting employees.

8 **2. Uniform impairment and substance use testing policy.** ~~Before establishing any~~
9 ~~substance abuse testing program, an employer must develop or, as required in section~~
10 ~~684, subsection 3, paragraph C, must appoint an employee committee to develop a~~
11 ~~written policy in compliance with this subchapter providing for~~ On or before January 1,
12 2017, the Department of Labor shall adopt by rule a uniform impairment and substance
13 use testing policy for adoption by employers. Before establishing any new substance use
14 testing program or reactivating an inactive substance use testing policy after January 1,
15 2017, an employer shall notify the department that it has adopted the uniform impairment
16 and substance use testing policy as set forth in department rules and certify that it will
17 carry out all substance use testing activities that are not regulated by the Federal
18 Government in accordance with that policy. An employer with an active substance use
19 testing policy approved prior to January 1, 2017 may continue to operate under that
20 policy but shall certify to the department by no later than January 1, 2018 that the
21 employer has adopted the uniform impairment and substance use testing policy. The
22 uniform impairment and substance use testing policy developed by the department must
23 provide, at a minimum:

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

27 B. When substance ~~abuse~~ use testing may occur. The ~~written~~ policy must describe:

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

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

34 C. ~~The~~ For the collection of samples.

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

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

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

- 1 ~~(b) If it is the standard practice of an off site medical facility to require the~~
2 ~~removal of clothing when collecting a urine sample for any purpose, the~~
3 ~~physician or nurse supervising the collection of the sample in that facility~~
4 ~~may require the employee or applicant to remove their clothing.~~
- 5 (3) ~~No~~ An employee or applicant may not be required to provide a urine sample
6 while being observed, directly or indirectly, by another individual.
- 7 (4) The employer may take additional actions necessary to ensure the integrity of
8 a urine sample if the sample collector or testing laboratory determines that the
9 sample may have been substituted, adulterated, diluted or otherwise tampered
10 with in an attempt to influence test results. The Department of Health and
11 Human Services shall adopt rules governing when those additional actions are
12 justified and the scope of those actions. These rules may not permit the direct or
13 indirect observation of the collection of a urine sample. If an employee or
14 applicant is found to have twice substituted, adulterated, diluted or otherwise
15 tampered with the employee's or applicant's urine sample, as determined under
16 the rules adopted by the department, the employee or applicant is deemed to have
17 refused to submit to a substance ~~abuse~~ use test.
- 18 (5) If the employer proposes to use the type of screening test described in section
19 682, subsection 7, paragraph A, subparagraph (1), the ~~employer's~~ policy must
20 include:
- 21 (a) Procedures to ensure the confidentiality of test results as required in
22 section 685, subsection 3; and
- 23 (b) Procedures for training persons performing the test in the proper manner
24 of collecting samples and reading results, maintaining a proper chain of
25 custody and complying with other applicable provisions of this subchapter;
- 26 D. ~~The Procedures for the~~ storage of samples before testing sufficient to inhibit
27 deterioration of the sample;
- 28 E. The chain of custody of samples sufficient to protect the sample from tampering
29 and to verify the identity of each sample and test result;
- 30 F. The substances of abuse to be tested for;
- 31 G. The cutoff levels for ~~both screening and~~ confirmation tests at which the presence
32 of a substance of abuse in a sample is considered a confirmed positive test result.
- 33 (1) Cutoff levels for confirmation tests for marijuana may not be lower than 15
34 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for
35 urine samples.
- 36 (2) The Department of Health and Human Services shall adopt rules under
37 section 687 regulating screening and confirmation cutoff levels for other
38 substances of abuse, including those substances tested for in blood samples under
39 subsection 5, paragraph B, to ensure that levels are set within known tolerances
40 of test methods and above mere trace amounts. An employer may request that

the Department of Health and Human Services establish a cutoff level for any substance of abuse for which the department has not established a cutoff level.

(3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and Human Services does not have established cutoff levels or procedures for any specific federally recognized substance ~~abuse~~ use test, the minimum cutoff levels and procedures that apply are those set forth in the Federal Register, Volume 69, No. 71, sections 3.4 to 3.7 on pages 19697 and 19698, in mandated guidelines for federal workplace drug testing programs or in the protocols and levels established by the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration;

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

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

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

K. A procedure under which an employee or applicant who receives a confirmed positive result may appeal and contest the accuracy of that result. The policy must include a mechanism that provides an opportunity to appeal at no cost to the appellant; and

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

~~An employer must consult with the employer's employees in the development of any portion of a substance abuse testing policy under this subsection that relates to the employees. The employer is not required to consult with the employees on those portions of a policy that relate only to applicants. The employer shall send a copy of the final written policy to the Department of Labor for review under section 686. The employer 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.~~

3. Copies to employees and applicants. The employer shall provide each employee with notice of, and an opportunity to review, a copy of the ~~written policy approved by the Department of Labor under section 686~~ uniform impairment and substance use testing policy at least 30 days before any portion of the ~~written~~ policy applicable to employees takes effect. ~~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 any portion of the change applicable to employees takes effect. The Department of Labor may waive the 60-day notice for the implementation of an amendment covering employees if the amendment was necessary to comply with the law or if, in the judgment of the department, the amendment promotes the purpose of the law and does not lessen the protection of an individual employee.~~ If an employer intends to test an applicant, the employer shall provide the applicant with an opportunity to review a copy of the ~~written~~ uniform policy ~~under subsection 2~~ before administering a substance ~~abuse~~ use test to the

applicant. The 30-day ~~and 60-day~~ notice ~~periods~~ period provided for employees under this subsection ~~do~~ does not apply to applicants.

4. Consent forms prohibited. An employer may not require, request or suggest that any employee or applicant sign or agree to any form or agreement that attempts to:

A. Absolve the employer from any potential liability arising out of the imposition of the substance ~~abuse~~ use test; or

B. Waive an employee's or applicant's rights or eliminate or diminish an employer's obligations under this subchapter except as provided in subsection 4-A.

Any form or agreement prohibited by this subsection is void.

4-A. Waivers for temporary employment. An employment agency, as defined in section 611, may request a written waiver for a temporary placement from an individual already in its employ or on a roster of eligibility as long as the client company has ~~an approved~~ adopted the uniform impairment and substance abuse use testing policy in accordance with this subchapter and the individual has not been assigned work at the client company in the 30 days previous to the request. The waiver is only to allow a test that might not otherwise be allowed under this subchapter. The test must otherwise comply with the standards of this subchapter and the ~~employment agency's approved~~ uniform policy regarding applicant testing. The agency may not take adverse action against the individual for refusal to sign a waiver.

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

A. Segregate a portion of the sample for that person's own testing. Within 5 days after notice of the test result is given to the employee or applicant, the employee or applicant shall notify the employer of the testing laboratory selected by the employee or applicant. This laboratory must comply with the requirements of this section related to testing laboratories. When the employer receives notice of the employee or applicant's selection, the employer shall promptly send the segregated portion of the sample to the named testing laboratory, subject to the same chain of custody requirements applicable to testing of the employer's portion of the sample. The employee or applicant shall pay the costs of these tests. Payment for these tests may not be required earlier than when notice of the choice of laboratory is given to the employer; and

B. In the case of an employee, have a blood sample taken from the employee by a licensed physician, registered physician's assistant, registered nurse or a person certified by the Department of Health and Human Services to draw blood samples. The employer shall have this sample tested for the presence of alcohol or marijuana metabolites, if those substances are to be tested for under the ~~employer's written~~ uniform impairment and substance use testing 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.

(1) The Department of Health and Human Services may identify, by rules adopted under section 687, other substances of abuse for which an employee may request a blood sample 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.

(2) ~~No~~ An employer may not require, request or suggest that any employee or applicant provide a blood sample for substance ~~abuse~~ use testing purposes nor may any employer conduct a substance ~~abuse~~ use test upon a blood sample except as provided in this paragraph.

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

5-A. Point of collection screening test. Except as provided in this subsection, all provisions of this subchapter regulating screening tests apply to noninstrumented point of collection test devices described in section 682, subsection 7, paragraph A, subparagraph (1).

A. A noninstrumented point of collection test described in section 682, subsection 7, paragraph A, subparagraph (1) may be performed at the point of collection rather than in a laboratory. Subsections 6 and 7 and subsection 8, paragraphs A to C do not apply to such screening tests. Subsection 5 applies only to a sample that results in a positive test result.

B. Any sample that results in a negative test result must be destroyed. Any sample that results in a ~~positive~~ positive test result must be sent to a qualified testing laboratory consistent with subsections 6 to 8 for confirmation testing.

C. A person who performs a point of collection screening test or a confirmation test may release the results of that test only as follows.

(1) For a point of collection screening test that results in a preliminary positive or negative test result, the person performing the test shall release the test result to the employee who is the subject of the test immediately.

(2) For a point of collection screening test that results in a preliminary positive test result, the person performing the test may not release the test result to the employer until after the result of the confirmation test has been determined.

(3) For a point of collection screening test that results in a preliminary negative test result, the person performing the test may not release the test result to the employer until after the result of a confirmation test would have been determined if one had been performed.

(4) For a confirmation test, the person performing the test shall release the result immediately to the employee who is the subject of the test and to the employer.

6. Qualified testing laboratories required. ~~No~~ An employer may not perform any substance ~~abuse~~ use 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 as provided in subsection 5-A, any substance ~~abuse~~ use test administered under this

subchapter must be performed in a qualified testing laboratory that complies with this subsection.

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 Health and Human Services under section 687. These rules ~~shall~~ must 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~~ use test conducted under this subchapter, including the use of blind samples and samples of known concentrations ~~which~~ that 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

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

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

8. Laboratory report of test results. This subsection governs the reporting of test results.

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

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

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

(a) Unless the employee or applicant consents, test results ~~shall~~ may not be reported in numerical or quantitative form but ~~shall~~ must state only that the test result was positive or negative. This division does not apply if the test or

the test results become the subject of any grievance procedure, administrative proceeding or civil action.

(b) A testing laboratory and the employer ~~must~~ shall ensure that an employee's unconfirmed positive screening test result cannot be determined by the employer in any manner, including, but not limited to, the method of billing the employer for the tests performed by the laboratory and the time 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~~ may 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 employee or applicant, the employer shall promptly provide a legible copy of the laboratory report to the employee or applicant. Within 3 working days after notice of a confirmed positive test result, the employee or applicant may submit information to the employer explaining or contesting the results.

C. The testing laboratory shall send test reports for samples segregated at an employee's or applicant's request under subsection 5, paragraph A, to both the employer and the employee or applicant tested.

D. Every employer whose uniform policy notification is approved by the Department of Labor under section 686 shall annually send to the department a compilation of the results of all substance ~~abuse~~ use tests administered by that employer in the previous calendar year. This report ~~shall~~ must provide separate categories for employees and applicants and ~~shall~~ must be presented in statistical form so that no person who was tested by that employer can be identified from the report. The report ~~shall~~ must include a separate category for any tests conducted on a random or arbitrary basis under section 684, subsection 3.

E. Any laboratory-confirmed positive substance use test results must be reported to a medical review officer. The medical review officer may be directly or indirectly retained by the employer, but shall act independently in carrying out any testing reviews or recommendations. The medical review officer shall contact the employee and, if necessary, the employee's physician to review each confirmed positive substance use test or any test found to be adulterated, substituted or otherwise invalid to determine whether there is, in the opinion of the medical review officer, a legitimate medical explanation for the result. Any exchange between the employee and the medical review officer is not subject to doctor-patient relationship confidentiality, although the medical review officer shall protect the confidentiality of the drug testing information as otherwise provided in this chapter. The medical

review officer may not disclose the presence or absence of any physical or mental condition of the employee, the presence or absence of any substances other than those allowed to be tested for under Department of Health and Human Services laboratory testing rules or the presence or absence of any substance for which there is a legitimate medical explanation.

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

Costs of a substance ~~abuse~~ use test administered at the request of an employee under subsection 5, paragraph B, ~~shall~~ must be paid:

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

B. By the employee if the test results in a confirmed positive result for any of the substances of abuse tested for in the sample.

10. Limitation on use of tests. An employer may administer substance ~~abuse~~ use tests to employees or applicants only for the purpose of discovering the use of any substance of abuse likely to cause impairment of the user or the use of any scheduled drug. ~~No~~ An employer may not have substance ~~abuse~~ use tests administered to an employee or applicant for the purpose of discovering any other information.

11. Rules. The Department of Health and Human Services shall adopt any rules under section 687 regulating substance ~~abuse~~ use testing procedures that it finds necessary or desirable to ensure accurate and reliable substance ~~abuse~~ use testing and to protect the privacy rights of employees and applicants.

Sec. 10. 26 MRSA §684, as amended by PL 2003, c. 547, §2, is further amended to read:

§684. Imposition of tests

1. Testing of applicants. An employer may require, request or suggest that an applicant submit to a substance ~~abuse~~ use test only if:

A. The applicant has been offered employment with the employer; or

B. The applicant has been offered a position on a roster of eligibility from which applicants will be selected for employment. The number of persons on this roster of eligibility may not exceed the number of applicants hired by that employer in the preceding 6 months.

The offer of employment or offer of a position on a roster of eligibility may be conditioned on the applicant receiving a negative test result.

~~**2. Probable cause testing of employees.** An employer may require, request or suggest that an employee submit to a substance abuse test if the employer has probable cause to test the employee.~~

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

~~B. The supervisor or other person must state, in writing, the facts upon which this determination is based and provide a copy of the statement to the employee.~~

2-A. Impairment detection required; testing of employees. An employer may require, request or suggest that an employee submit to a substance use test, an impairment determination by an occupational health care provider, or both, only if the employer has made an impairment detection regarding the employee pursuant to this subsection.

A. Only supervisory, human resources or security personnel approved for impairment detection by the Department of Labor or a licensed physician or nurse may make an impairment detection regarding an individual employee.

B. The person making the impairment detection shall state in writing, on a form provided by the department, the facts upon which the detection is based, and provide a copy of the completed form to the employee as soon as possible but no later than 24 hours from the time the detection is made. The completed impairment detection form must be provided to the employee prior to any substance use testing of that employee.

C. At least 2 weeks prior to conducting any impairment detection activities under this subsection, the employer must provide the department with a list of all positions subject to impairment detection activities and notify employees by posting that list in a location accessible to all employees. The employer may amend the list as long as, at least 2 weeks prior to any impairment detection activities, employees whose positions are being added to the list are notified of their inclusion on the list, the amended list is posted in a location accessible to employees and the amended list is submitted to the department.

D. Subject to any limitation of the Maine Human Rights Act or any other state or federal law, there may be no cause of action against an employer for making and acting upon impairment detection in accordance with this subsection as long as the completed impairment detection form is provided to the employee and the impairment detection is based on the employer's good faith belief that the employee was impaired at work.

E. An impairment detection may not be based exclusively on:

(1) Information received from an anonymous informant; or

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

2-B. Impairment determination; temporary removal. If an impairment detection is made, the employer may immediately remove the employee, or temporary employee, from the workplace pending resolution of the impairment detection.

1 A. Any impairment detection must be confirmed through a medical review by an
2 occupational health care provider prior to any further action by the employer based
3 on the impairment determination. The occupational health care provider may require
4 that the employee submit to testing for substances of abuse, including prescription
5 medications, to assist in investigating and confirming the impairment detection. The
6 occupational health care provider may perform a fitness-for-duty evaluation of the
7 employee. The occupational health care provider may direct the employee to obtain
8 further medical evaluation either by the employee's physician or by another licensed
9 physician acceptable to the occupational health care provider.

10 B. Any substance use testing subsequent to an impairment detection confirmation
11 must be done by an independent testing facility and all screening and confirmatory
12 test results must be delivered to the medical review officer for review according to
13 section 683, subsection 8, paragraph E. The medical review officer shall provide the
14 results to the occupational health care provider and may not provide the results to the
15 employer. When an employer is using a substance use test only, the medical review
16 officer shall provide the results to the employer. Prescription medications may be
17 tested for only when impairment detection has been made, and only for the purpose
18 of assisting the occupational health care provider in evaluating whether an employee
19 is impaired and the cause of the impairment.

20 C. The occupational health care provider shall make the final determination of
21 whether an employee was or is impaired, identify the cause of any impairment,
22 determine whether the employee can continue to perform any safety-sensitive tasks
23 and determine the impairment remediation program, if any, necessary to ensure that
24 the impairment will not recur or will not adversely affect the safety of the employee,
25 coworkers and other persons at the work site in the future. The occupational health
26 care provider may also make further recommendations regarding the employee's
27 ability to safely perform all assigned tasks, including requiring any remedial
28 measures, including, but not limited to, compliance with return-to-work agreements
29 or a written agreement by the employee to schedule any necessary medications in a
30 manner that will not lead to impairment on the job. A return-to-work agreement may
31 be used if an employee has violated the drug-free workplace policy and has been
32 provided the opportunity to participate in treatment as a condition of continued
33 employment or reemployment.

34 D. If the occupational health care provider finds that the employee was not impaired
35 on the job or that any such impairment did not pose a safety risk and did not violate
36 the employer's established drug-free workplace policy, the employer shall reinstate
37 the employee to the employee's position.

38 E. If an impairment detection is made at a time when an occupational health care
39 provider is not normally available for work, the employer may take any steps to
40 remove the employee, and, prior to the employee's next scheduled work day, the
41 employer may determine whether to allow the employee to return to work or to
42 request an impairment determination or fitness-for-duty evaluation by the
43 occupational health care provider.

44 F. An occupational health care provider who makes or acts upon an impairment
45 determination in accordance with this section is not subject to a cause of action as

1 long as the determination is based on the occupational health care provider's good
2 faith, professional judgment. An occupational health care provider may not be an
3 employee or agent of, or have any financial interest in, a testing laboratory for which
4 the occupational health care provider is reviewing drug test results. An occupational
5 health care provider may not derive any financial benefit by having an employer use
6 a laboratory that may be construed as a potential conflict of interest.

7 **3. Random or arbitrary testing of employees.** ~~In addition to testing employees on~~
8 ~~a probable cause basis under subsection 2, an~~ An employer may require, ~~request or~~
9 ~~suggest~~ that an employee submit to a substance ~~abuse~~ use test on a random or arbitrary
10 basis if:

11 A. The employer and the employee have bargained for provisions in a collective
12 bargaining agreement, either before or after the effective date of this subchapter, that
13 provide for random or arbitrary testing of employees. A random or arbitrary testing
14 program that would result from implementation of an employer's last best offer is not
15 considered a provision bargained for in a collective bargaining agreement for
16 purposes of this section;

17 B. The employee works in a position the nature of which ~~would create an~~
18 ~~unreasonable~~ could pose a threat to the health or safety of the public or the
19 employee's coworkers if the employee were ~~under the influence of~~ impaired by a
20 substance of abuse. It is the intent of the Legislature that the requirements of this
21 paragraph be narrowly construed; or

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

25 (1) An employer may establish a testing program under this paragraph only if the
26 employer has ~~50~~ 10 or more employees who are not covered by a collective
27 bargaining agreement.

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

36 (2-A) An employer may establish a random or arbitrary testing program under
37 this paragraph if the employer is required to test employees to retain a contract.
38 An employee may be allowed to sign a waiver exempting the employee from
39 testing when required for a contract and the employee acknowledges that the
40 employee may not have an opportunity to work under the contract for which
41 testing is required.

42 ~~(3) The written policy developed under subparagraph (2) must also require that~~
43 ~~selection of employees for testing be performed by a person or entity not subject~~

- 1 ~~to the employer's influence, such as a medical review officer. Selection must be~~
- 2 ~~made from a list, provided by the employer, of all employees subject to testing~~
- 3 ~~under this paragraph. The list may not contain information that would identify the~~
- 4 ~~employee to the person or entity making the selection.~~
- 5 (4) Employees who are covered by a collective bargaining agreement are not
- 6 included in testing programs pursuant to this paragraph unless they agree to be
- 7 included pursuant to a collective bargaining agreement as described under
- 8 paragraph A.
- 9 (5) ~~Before initiating a testing program under this paragraph, the employer must~~
- 10 ~~obtain from the Department of Labor approval of the policy developed by the~~
- 11 ~~employee committee, as required in section 686. If the employer does not~~
- 12 ~~approve of the written policy developed by the employee committee, the~~
- 13 ~~employer may decide not to submit the policy to the department and not to~~
- 14 ~~establish the testing program. The employer may not change the written policy~~
- 15 ~~without approval of the employee committee.~~
- 16 (6) ~~The employer may not discharge, suspend, demote, discipline or otherwise~~
- 17 ~~discriminate with regard to compensation or working conditions against an~~
- 18 ~~employee for participating or refusing to participate in an employee committee~~
- 19 ~~created pursuant to this paragraph.~~
- 20 (7) An arbitrary test may be conducted only on an employee whose job is of a
- 21 nature that could pose a threat to the health or safety of the public or coworkers if
- 22 the employee were under the influence of a substance of abuse.
- 23 **4. Testing while undergoing treatment.** While the employee is participating in a
- 24 substance abuse ~~rehabilitation~~ treatment program either as a result of voluntary contact
- 25 with or mandatory referral to the employer's employee assistance program or after a
- 26 confirmed positive result as provided in section 685, subsection 2, paragraphs B and C,
- 27 substance ~~abuse~~ use testing may be conducted by the ~~rehabilitation or~~ treatment provider
- 28 as required, requested or suggested by that provider.
- 29 A. Substance ~~abuse~~ use testing conducted as part of such a ~~rehabilitation or~~ treatment
- 30 program is not subject to the provisions of this subchapter regulating substance ~~abuse~~
- 31 use testing.
- 32 B. An employer may not require, request or suggest that any substance ~~abuse~~ use test
- 33 be administered to any employee while the employee is undergoing such
- 34 ~~rehabilitation or~~ treatment, except as provided in subsections ~~2~~ 2-A and 3.
- 35 C. The results of any substance ~~abuse~~ use test administered to an employee as part of
- 36 such a ~~rehabilitation or~~ treatment program may not be released to the employer.
- 37 **5. Testing upon return to work.** If an employee who has received a confirmed
- 38 positive result returns to work with the same employer, whether or not the employee has
- 39 participated in a ~~rehabilitation~~ treatment program under section 685, subsection 2, the
- 40 employer may require, ~~request or suggest~~ that the employee submit to a subsequent
- 41 substance ~~abuse~~ use test anytime between 90 days and one year after the date of the
- 42 employee's prior test. A test may be administered under this subsection in addition to any

tests conducted under subsections 2 2-A and 3. An employer may require, request or suggest that an employee submit to a substance ~~abuse~~ use test during the first 90 days after the date of the employee's prior test only as provided in subsections 2 2-A and 3.

Sec. 11. 26 MRSA §685, as amended by PL 2003, c. 547, §3, is further amended to read:

§685. Action taken on substance use tests

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

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

2. Use of confirmation test results. This subsection governs an employer's use of confirmed positive results and an employee's or applicant's refusal to submit to a test requested or required by an employer in compliance with this subchapter.

A. Subject to any limitation of the Maine Human Rights Act or any other state law or federal law; and to provisions in this subsection, an employer may use a confirmed positive ~~test~~ result ~~or for a substance of abuse~~, refusal to submit to a substance use test, a violation of an established drug-free workplace policy or an impairment confirmed by an occupational health care provider pursuant to section 684, subsection 2-B as a factor in any of the following decisions:

- (1) Refusal to hire an applicant for employment or refusal to place an applicant on a roster of eligibility;
- (2) Discharge of an employee;
- (3) Discipline of an employee; or
- (4) Change in the employee's work assignment.

A-1. An employer who tests a person as an applicant and employs that person prior to receiving the test result may take no action on a confirmed positive result except in accordance with the employee provisions of the ~~employer's approved~~ uniform impairment and substance use testing policy.

B. Before taking any action described in paragraph A in the case of an employee who receives an initial confirmed positive result, an employer shall provide the employee with an opportunity to participate for up to ~~6 months~~ 12 weeks in a ~~rehabilitation treatment~~ program designed to enable the employee to avoid future use of a substance of abuse and to participate in an employee assistance program, if the employer has such a program. A confirmed impairment under section 684, subsection 2-B caused by a substance of abuse is the same as an initial confirmed positive result for purposes of this paragraph, with or without a substance use test result. A treatment program under this paragraph may be provided by an occupational health care provider. Participation by an employee in a treatment program must begin within 30 days of the employee's receiving notice of the positive test result or confirmed impairment, unless otherwise agreed to by the employer. The employer

may take any action described in paragraph A if the employee receives a subsequent confirmed positive result from a substance use test administered by the employer under this subchapter or the employee receives a subsequent confirmed impairment caused by a substance of abuse with or without a substance use test.

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

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

(a) Except to the extent that costs are covered by a group health insurance plan, the costs of the public or private ~~rehabilitation treatment~~ program, if required by the employer, must be equally divided between the employer and employee if the employer has more than ~~20~~ 50 full-time employees. This requirement does not apply to municipalities or other political subdivisions of the State or to any employer when the employee is 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. ~~If necessary, the~~ The employer shall ~~may~~ 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~~ 50 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 treatment~~ program. An employer is not required to pay for the costs of ~~rehabilitation treatment~~ treatment 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~~ An employer may not take any action described in paragraph A while an employee is participating in a ~~rehabilitation treatment~~ 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 treatment~~ 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 treatment~~ treatment 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~~ treatment program before the expiration of the ~~6-month~~ 12-week 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~~ treatment 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~~ 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. If the ~~rehabilitation~~ or treatment provider determines that the employee has not successfully completed the ~~rehabilitation~~ treatment 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~~ treatment previously worked in an employment position subject to random or arbitrary testing under an employer's written policy, 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 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~~ treatment 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 as if the employee had successfully completed ~~rehabilitation~~ treatment on that date.

D. This subsection does not require an employer to take any disciplinary action against an employee who refuses to submit to a test, receives a single or repeated confirmed positive result or does not choose to participate in a ~~rehabilitation treatment~~ program. This subsection is intended to set minimum opportunities for an employee with a substance abuse problem to address the problem through ~~rehabilitation treatment~~. An employer may offer additional opportunities, not otherwise in violation of this subchapter, for ~~rehabilitation treatment~~ or continued employment without ~~rehabilitation treatment~~.

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

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.

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

Sec. 12. 26 MRSA §686, as amended by PL 2009, c. 133, §3, is further amended to read:

§686. Review of uniform impairment and substance use testing policy notifications

1. **Review required.** The Department of Labor shall review each ~~written policy or change to an approved~~ notification of adoption of the uniform impairment and substance use testing policy submitted to the department by an employer under section 683, subsection 2.

A. The department shall determine if the employer's ~~written policy or change~~ notification of adoption of the uniform impairment and substance use testing policy is complete. If the department finds that the ~~policy or change does not comply with this subchapter~~ notification is incomplete, the department shall also notify the employer of the specific ~~areas in which the policy or change is defective~~ defects. If the employer's notification is determined to be complete, the department shall approve the conducting of substance use testing by the employer in accordance with this subchapter and shall notify the employer.

~~B. The department may request additional information from an employer when necessary to determine whether an employment position meets the requirements of~~

~~section 684, subsection 3. The department shall not approve any written policy that provides for random or arbitrary testing of any employment position that the employer has failed to demonstrate meets the requirements of section 684, subsection 3.~~

C. The department shall allow for the use of any federally recognized substance ~~abuse~~ use test.

2. Review procedure. The Department of Labor shall adopt rules under section 687 governing the procedure for reviews conducted under this section.

A. The rules must provide for notice to be given to the employees of any employer who submits a ~~written notification of adoption of the uniform impairment and substance use testing~~ policy or an amendment applicable to employees to the department for review under this section. The employees may submit written comments to the department challenging ~~any portion of the employer's written policy, including~~ the proposed designation of any position under section 684, subsection 3, paragraph B.

B. Nothing in this section requires a formal hearing to be held concerning the submission and review of an employer's ~~written notification of adoption of the uniform impairment and substance use testing~~ policy.

C. Notwithstanding Title 5, section 8003, the Maine Administrative Procedure Act, Title 5, chapter 375, does not apply to reviews conducted under this section except that all determinations by the Department of Labor under this section may be appealed as provided in Title 5, chapter 375, subchapter ~~VH~~ 7.

D. The rules may ~~establish model applicant policies and employee probable cause policies and~~ provide for expedited approval and registration for employers adopting ~~such model policies~~ the uniform impairment and substance use testing policy. The rules adopted under this paragraph are routine technical rules pursuant to Title 5, chapter 375, subchapter ~~H-A~~ 2-A.

Sec. 13. 26 MRSA §689, sub-§3, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is amended to read:

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

A. Is subject to a civil penalty not to exceed \$1,000, payable to the affected employee, to be recovered in a civil action; and

B. For any subsequent offense against the same employee, is subject to a civil penalty of \$2,000, payable to the affected employee, to be recovered in a civil action.

Sec. 14. 26 MRSA §689, sub-§5 is enacted to read:

5. Civil violation. In addition to the other remedies provided in this section, an employer who does not comply with this subchapter commits a civil violation for which the following fines may be adjudged.

B. For the 2nd violation, not more than \$750; and

Sec. 15. 26 MRSA §690, as enacted by PL 1989, c. 536, §§1 and 2 and affected c. 604, §§2 and 3, is amended to read:

The Department of Labor shall report to the joint standing committee of the Legislature having jurisdiction over labor matters on March 1, 1990, and annually on that date thereafter. This report ~~shall~~ must:

2. Persons tested. Indicate whether those employers listed under subsection 1 are testing applicants or employees, or both;

4. Results. Provide statistical data relating to the reports received from employers indicating the number of substance ~~abuse~~ use tests administered by those employers in the previous calendar year and the results of those tests; and

Sec. 16. Maine Revised Statutes headnote amended; revision clause. In the Maine Revised Statutes, Title 26, chapter 7, subchapter 3-A, in the subchapter headnote, the words "substance abuse testing" are amended to read "substance use testing" and the Revisor of Statutes shall implement this revision when updating, publishing or republishing the statutes.'

This amendment, which is the minority report of the committee, replaces the bill and makes changes to the laws governing employment practices concerning substance abuse testing, including the following.

2. It repeals a section of law that addresses nuclear power plants since there are no operating nuclear power plants in this State.

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COMMITTEE AMENDMENT

1 follow federal notification and procedural protocols for such employees and annually
2 report the results of testing to the department.

3 4. It streamlines the current drug testing policy approval by requiring the Department
4 of Labor to develop a uniform impairment and substance use testing policy applicable to
5 all employers. Employers must notify, and be approved by, the Department of Labor
6 prior to conducting substance use testing.

7 5. It removes the "probable cause" standard and replaces it with an "impairment
8 detection" standard required before the employer may conduct substance use testing. For
9 employers authorized to conduct substance use testing, only an employer or employee
10 approved for impairment detection by the Department of Labor or a medical person may
11 make an impairment detection. Among other things, this detection may be based on a
12 single work-related accident, unlike the "probable cause" standard under current law. The
13 employer may immediately remove the employee from the workplace pending resolution
14 of the impairment detection.

15 6. It adds an "impairment determination" process that may be used as an alternative
16 or in addition to a substance use test. Under this process, an occupational health care
17 provider conducts a medical review in order to confirm the impairment detection, which
18 may include a substance use test that includes testing for prescription drugs. If the
19 impairment is confirmed, the employer may take employment action including firing or
20 disciplining the employee, subject to any limitations under the Maine Human Rights Act
21 and any other state or federal law. If the occupational health care provider finds that the
22 employee was not impaired or that such impairment did not pose a safety risk, the
23 employee is entitled to full reinstatement of the employee's position.

24 7. It adds a violation of an established drug-free workplace policy as grounds for
25 employment action;

26 8. It adds a first impairment determination to the requirement, applicable to an initial
27 confirmed positive substance use test, that the employer must provide the employee with
28 an opportunity to participate in a treatment program before discharging or disciplining the
29 employee. The time frame for completing the treatment program is reduced from 6
30 months to 12 weeks, and an employer with between 20 and 50 full-time employees is no
31 longer required to pay half of the costs of the treatment program. An employer with more
32 than 50 full-time employees must pay half of treatment costs not covered by a group
33 health insurance plan when the treatment program is required of the employee.

34 9. It modifies the current requirement that, prior to establishing a substance use
35 testing program, an employer with over 20 full-time employees have a functioning
36 employee assistance program, instead requiring the program of employers with over 50
37 full-time employees.

38 10. It expands the number of establishments that may undertake company-wide
39 random substance abuse testing by authorizing such testing companies with 10 or more
40 employees instead of with 50 employees, as is the current standard.

41 11. It provides that all confirmed positive substance use tests may be reported to the
42 employee only by a medical review officer and allows an employee to provide a
43 legitimate medical explanation for a positive test result for legally obtained medications,

1 preventing the medical review officer from reporting a positive test for that substance to
2 the employer.

3 12. It allows testing laboratories to use federal testing standards to encourage testing
4 of biological samples beyond urine and blood.

5 13. It adds a new civil violation for any employer noncompliance with the substance
6 use testing laws, for which a fine of not more than \$500 for the first violation, \$750 for
7 the 2nd violation and \$1,000 for 3rd and subsequent violations may be adjudged.

8 **FISCAL NOTE REQUIRED**

9 **(See attached)**



127th MAINE LEGISLATURE

LD 1384

LR 458(03)

An Act To Improve Workplace Safety by Simplifying and Improving Employers' Substance Abuse Policy Requirements

Fiscal Note for Bill as Amended by Committee Amendment *B (H-625)*
Committee: Labor, Commerce, Research and Economic Development
Fiscal Note Required: Yes

Fiscal Note

Potential current biennium cost increase - General Fund
Minor revenue increase - General Fund

Correctional and Judicial Impact Statements

Increases the number of civil violations.

Increases the number of civil suits.

The collection of additional fines and filing fees may also increase General Fund revenue by minor amounts.

Fiscal Detail and Notes

The Maine Human Rights Commission may require additional General Fund appropriations to respond to the anticipated increase in the number of complaints filed. The amount needed will depend on the number of new case filings and the complexity of each case.

Additional costs to the Department of Labor to implement the requirements of this legislation can be absorbed within existing budgeted resources.