

MAINE STATE LEGISLATURE

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127th MAINE LEGISLATURE

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Legislative Document

No. 1384

H.P. 937

House of Representatives, April 30, 2015

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

Submitted by the Department of Labor pursuant to Joint Rule 204.
Reference to the Committee on Labor, Commerce, Research and Economic Development
suggested and ordered printed.

A handwritten signature in cursive script that reads "Robert B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Representative STETKIS of Canaan.

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

2 **Sec. 1. 26 MRSA §681, sub-§7**, as enacted by PL 1989, c. 536, §§1 and 2 and
3 affected by c. 604, §§2 and 3, is amended to read:

4 **7. Other discipline unaffected.** This subchapter does not prevent an employer from
5 establishing policies or rules related to the possession or use of substances of abuse by
6 employees, including impairment by substances of abuse of the employee at the
7 workplace and convictions for drug-related offenses, and taking action based upon a
8 violation of any of those policies or rules, except when a substance abuse test is required,
9 requested or suggested by the employer or used as the basis for any disciplinary action.

10 **Sec. 2. 26 MRSA §681, sub-§8**, as amended by PL 2011, c. 196, §1, is repealed.

11 **Sec. 3. 26 MRSA §681, sub-§10** is enacted to read:

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

14 A. This subchapter does not apply to an employee, independent contractor or
15 employee of an independent contractor who is subject to a federally mandated drug
16 and alcohol testing program.

17 B. If an employer has an employee who is subject to a federally mandated drug and
18 alcohol testing program, this subchapter does not apply to that employer's substance
19 abuse testing activities related to an employee who is not subject to federal testing
20 requirements as long as:

21 (1) Sample collection standards of section 683, subsection 2, paragraph C are
22 followed for an employee who is not subject to federal testing requirements;

23 (2) The employer otherwise follows the corresponding federal notification
24 provisions, procedural protocols and standards for substance abuse testing of an
25 employee who is not subject to federal testing requirements; and

26 (3) The employer meets any relevant reporting requirements for the substance
27 abuse testing of an employee who is not subject to federal testing requirements.

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

30 **6. Probable cause.** "Probable cause" means a reasonable ground for belief in the
31 existence of facts that induce a person to believe that an employee may be under the
32 influence of a substance of abuse, ~~provided that the~~. The existence of probable cause
33 may be based on a single work-related accident that results in personal injury or
34 significant damage to property, as "significant damage" is defined in the employer's
35 policy governing substance abuse testing, approved in accordance with section 683,
36 subsection 2. The existence of probable cause may not be based exclusively on any of
37 the following:

38 A. Information received from an anonymous informant; or

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

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

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

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

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

18 **Sec. 6. 26 MRSA §683, sub-§1**, as amended by PL 2011, c. 657, Pt. AA, §72, is
19 repealed.

20 **Sec. 7. 26 MRSA §683, sub-§1-A** is enacted to read:

21 **1-A. Employee assistance program.** An employer may have but is not required to
22 have an employee assistance program established before establishing a substance abuse
23 testing program for employees. If an employer elects to provide an employee assistance
24 program, the employer may participate in a cooperative employee assistance program that
25 serves the employees of more than one employer.

26 **Sec. 8. 26 MRSA §683, sub-§2**, as amended by PL 2009, c. 133, §2, is further
27 amended to read:

28 **2. Written policy.** Before establishing any substance abuse testing program, an
29 employer must develop ~~or, as required in section 684, subsection 3, paragraph C, must~~
30 ~~appoint an employee committee to develop~~ a written policy in compliance with this
31 subchapter providing for, at a minimum:

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

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

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

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

3 C. The collection of samples.

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

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

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

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

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

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

29 (5) If the employer proposes to use the type of screening test described in section
30 682, subsection 7, paragraph A, subparagraph (1), the employer's policy must
31 include:

32 (a) Procedures to ensure the confidentiality of test results as required in
33 section 685, subsection 3; and

34 (b) Procedures for training persons performing the test in the proper manner
35 of collecting samples and reading results, maintaining a proper chain of
36 custody and complying with other applicable provisions of this subchapter;

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

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

41 F. The substances of abuse to be tested for;

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

3 (1) Cutoff levels for confirmation tests for marijuana may not be lower than 15
4 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for
5 urine samples.

6 (2) The Department of Health and Human Services shall adopt rules under
7 section 687 regulating screening and confirmation cutoff levels for other
8 substances of abuse, including those substances tested for in blood samples under
9 subsection 5, paragraph B, to ensure that levels are set within known tolerances
10 of test methods and above mere trace amounts. An employer may request that
11 the Department of Health and Human Services establish a cutoff level for any
12 substance of abuse for which the department has not established a cutoff level.

13 (3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and
14 Human Services does not have established cutoff levels or procedures for any
15 specific federally recognized substance abuse test, the minimum cutoff levels and
16 procedures that apply are those set forth in the Federal Register, Volume 69, No.
17 71, sections 3.4 to 3.7 on pages 19697 and 19698;

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

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

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

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

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

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

37 The Commissioner of Labor shall develop model substance abuse policy templates to
38 provide to employers in the State to use in developing policies pursuant to this
39 subsection. The commissioner shall ensure that the templates, which must be made
40 available in an electronic form, provide employers adequate flexibility so as to facilitate
41 the ability of the employers' substance abuse testing programs and policies to meet the
42 requirements of this subchapter.

1 **Sec. 9. 26 MRSA §684, sub-§2**, as amended by PL 1989, c. 832, §10, is further
2 amended to read:

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

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

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

11 **Sec. 10. 26 MRSA §684, sub-§3**, as amended by PL 2003, c. 547, §2, is further
12 amended to read:

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

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

22 B. The employee works in a position the nature of which would create an
23 unreasonable threat to the health or safety of the public or the employee's coworkers
24 if the employee were under the influence of a substance of abuse. It is the intent of
25 the Legislature that the requirements of this paragraph be narrowly construed; or

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

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

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

40 (3) The written policy developed under subparagraph (2) must also require that
41 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 **Sec. 11. 26 MRSA §685, sub-§2, ¶C**, as amended by PL 1995, c. 344, §1, is
21 further amended to read:

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

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

31 (a) Except to the extent that costs are covered by a group health insurance
32 plan and are not required or agreed upon by the employer, the costs of the
33 public or private rehabilitation program must be equally divided between the
34 employer and employee if the employer has more than 20 full-time
35 employees. This requirement does not apply to municipalities or other
36 political subdivisions of the State or to any employer when the employee is
37 tested because of the alcohol and controlled substance testing mandated by
38 the federal Omnibus Transportation Employee Testing Act of 1991, Public
39 Law 102-143, Title V. If necessary, the are the responsibility of the
40 employee. Rehabilitation costs otherwise incurred that are not covered by
41 group health insurance are the responsibility of the employee, except that
42 nothing in this division precludes an employer from contributing to the cost
43 of such rehabilitation if the employer elects to do so. The employer

1 ~~shall~~ may assist in financing the cost share of the employee through a payroll
2 deduction plan.

3 (b) Except to the extent that costs are covered by a group health insurance
4 plan, an employer ~~with 20 or fewer full-time employees, a municipality or~~
5 ~~other political subdivision of the State~~ is not required to pay for any costs of
6 rehabilitation or treatment under any public or private rehabilitation program.
7 An employer is not required to pay for the costs of rehabilitation if the
8 employee was tested because of the alcohol and controlled substance testing
9 mandated by the federal Omnibus Transportation Employee Testing Act of
10 1991, Public Law 102-143, Title V.

11 (2) No employer may take any action described in paragraph A while an
12 employee is participating in a rehabilitation program, except as provided in
13 subparagraph (2-A) and except that an employer may change the employee's
14 work assignment or suspend the employee from active duty to reduce any
15 possible safety hazard. Except as provided in subparagraph (2-A), an employee's
16 pay or benefits may not be reduced while an employee is participating in a
17 rehabilitation program, provided that the employer is not required to pay the
18 employee for periods in which the employee is unavailable for work for the
19 purposes of rehabilitation or while the employee is medically disqualified. The
20 employee may apply normal sick leave and vacation time, if any, for these
21 periods.

22 (2-A) A rehabilitation or treatment provider shall promptly notify the employer
23 if the employee fails to comply with the prescribed rehabilitation program before
24 the expiration of the 6-month period provided in paragraph B. Upon receipt of
25 this notice, the employer may take any action described in paragraph A.

26 (3) Except as provided in divisions (a) and (b), upon successfully completing the
27 rehabilitation program, as determined by the rehabilitation or treatment provider
28 after consultation with the employer, the employee is entitled to return to the
29 employee's previous job with full pay and benefits unless conditions unrelated to
30 the employee's previous confirmed positive result make the employee's return
31 impossible. Reinstatement of the employee must not conflict with any provision
32 of a collective bargaining agreement between the employer and a labor
33 organization that is the collective bargaining representative of the unit of which
34 the employee is or would be a part. If the rehabilitation or treatment provider
35 determines that the employee has not successfully completed the rehabilitation
36 program within 6 months after starting the program, the employer may take any
37 action described in paragraph A.

38 (a) If the employee who has completed rehabilitation previously worked in
39 an employment position subject to random or arbitrary testing under an
40 employer's written policy, the employer may refuse to allow the employee to
41 return to the previous job if the employer believes that the employee may
42 pose an unreasonable safety hazard because of the nature of the position.
43 The employer shall attempt to find suitable work for the employee
44 immediately after refusing the employee's return to the previous position. No
45 reduction may be made in the employee's previous benefits or rate of pay

1 while awaiting reassignment to work or while working in a position other
2 than the previous job. The employee shall be reinstated to the previous
3 position or to another position with an equivalent rate of pay and benefits and
4 with no loss of seniority within 6 months after returning to work in any
5 capacity with the employer unless the employee has received a subsequent
6 confirmed positive result within that time from a test administered under this
7 subchapter or unless conditions unrelated to the employee's previous
8 confirmed positive test result make that reinstatement or reassignment
9 impossible. Placement of the employee in suitable work and reinstatement
10 may not conflict with any provision of a collective bargaining agreement
11 between the employer and a labor organization that is the collective
12 bargaining representative of the unit of which the employee is or would be a
13 part.

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

22 **SUMMARY**

23 This bill makes the following changes to the laws governing employment practices
24 concerning substance abuse testing.

25 1. It specifies that employers may establish policies or rules related to the possession
26 or use of substances of abuse by employees and for employee impairment by substances
27 of abuse at the workplace.

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

30 3. It authorizes an employer that has employees subject to a federally mandated
31 substance abuse testing program to extend its federal drug testing activities to its entire
32 workforce in order to maintain a single testing program and specifies that the employer
33 must maintain the privacy protections that Maine statute affords all other Maine
34 employees.

35 4. Current law prohibits a single work-related accident from forming the basis of
36 probable cause to believe that an employee may be under the influence of a substance of
37 abuse. This bill amends the law to provide that a single work-related accident that results
38 in injury or significant property damage may be probable cause to suspect an employee is
39 under the influence of a substance of abuse.

1 5. It eliminates the current requirement that, prior to establishing a substance abuse
2 testing program, an employer with over 20 full-time employees have a functioning
3 employee assistance program.

4 6. It directs the Commissioner of Labor to develop model policy templates with
5 adequate flexibility so as to facilitate the ability of the employers' substance abuse testing
6 programs and policies to meet the requirements of the Maine Revised Statutes, Title 26,
7 chapter 7, subchapter 3-A to develop new policies or update existing policies.

8 7. It expands the number of establishments that can undertake companywide random
9 substance abuse testing from those with 50 or more employees to those with 10 or more
10 employees.

11 8. The bill eliminates the requirement that employers share an employee's
12 rehabilitation costs not covered by group health insurance and clarifies that rehabilitation
13 costs not covered by a group health insurance program are the responsibility of the
14 employee.

15 9. It specifies that testing at the point of collection of saliva or urine is permissible
16 for both applicants for employment and for employees.