

# MAINE STATE LEGISLATURE

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Report on

# Maine Employer Drug Testing Survey - 2014

December 2014

Submitted by  
Maine Department of Labor  
Bureau of Labor Standards

# **Employer Drug Testing Survey 2014**

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## INTRODUCTION

During the second session of the 126<sup>th</sup> Maine Legislature, the Committee on Labor, Commerce, Research and Economic Development (LCRED) considered LD1669, “An Act to Standardize and Simplify the Process for Employers to Provide a Drug-free Workplace”. The bill called for a number of changes in the Maine Drug Testing Law that would have streamlined the employers’ requirements for approval of drug testing programs. Based on questions and discussions in the hearing and work session the Department determined that the Committee and participants could benefit by having more concrete and complete information about the facts, practices, ramifications and perceptions surrounding the policy issues.

During the following spring and summer, the Department of Labor, Bureau of Labor Standards (BLS ) carried out a three-pronged effort to gather the information and address the issues. BLS gathered information about drug testing programs and approaches in all other states throughout the country; it reviewed the federal drug testing programs (US Department of Transportation, Department of Defense and US Department of Labor); and it conducted an employer drug testing survey to better understand the experiences, attitudes, constraints and priorities of the stakeholders involved with the Maine drug testing law.

This report focuses on the results of the employer drug testing survey. It was launched July 22, 2014 and remained open until August 22, 2014.

BLS especially thanks the many respondents who took the time to participate in this survey. The level of response to this survey was higher than for surveys generally. Also many participants took the time to pass the word on to others who then called or emailed BLS for access to the survey. With the level of participation that took place, BLS is more confident in the survey analyses, and the range of positions and perspectives that have been recorded.



## **SURVEY STRUCTURE AND OBJECTIVES**

### **Survey Objectives and Participants**

During the summer of 2014, BLS conducted the Employer Drug Testing Survey using an online resource called “Survey Monkey”. The principal objective of this survey was to gather information about the experiences, attitudes, constraints and priorities of the stakeholders involved in the Maine drug testing law. While some information from the survey may be used for quantitative comparisons and preference evaluations, it was not intended to be an opinion poll or a statistically-valid population study. Rather, it was meant to facilitate an “electronic public meeting” where anyone who wished to participate was allowed to answer any of the questions about drug testing policy issues and drug testing regulation generally, and express their opinions and preferences and experiences. It took the place of public gatherings, workgroups and perhaps formal hearings that might otherwise solicit that information.

Survey participants were drawn from three sources. BLS assembled an initial list of 56 stakeholders including employers, employees, representatives of substance abuse sampling agencies, labor organizations, attorneys, and others who had come in contact with BLS staff in the course of administering the law. Then BLS added its entire list of 498 active drug testing policy holders. Finally, an additional 64 participants were enlisted via the Department’s statewide press releases that invited anyone interested to participate in the survey.

### **Survey Structure**

Survey Monkey is a popular online survey site that is used to measure consumer satisfaction; public opinion; marketing trends, education, and human resources research; event planning; and other such information gathering activities. The Maine Department of Labor uses its Survey Monkey account routinely as a cost-effective way to gather preferences, opinions and other information from stakeholders and members of the public. A Survey Monkey questionnaire is relatively easy for BLS to design and for most people to use. Survey Monkey also tabulates responses and provides the typical statistical and analytical functions. One drawback is that Survey Monkey requires participants to be able to use the internet and online resources; so for this survey, BLS spent a lot of time and effort beforehand confirming email addresses for all participants to be sure they would receive an email invitation and be able to access Survey Monkey online.

The employer drug testing survey included certain questions for which responses were required of each participant. These allowed BLS to determine the standard classifications of each participant’s organization; the number of employees represented by each participant’s organization; the geographic location of each participant; and the specific interest that each participant represented. This information made it possible for BLS to categorize and analyze responses from specific sources and subgroups. For example, BLS could determine how certain groups answered and commented on a given question compared to other groups. The survey also posed some non-required general questions that provide a better understanding of the substance abuse and drug testing experiences of each organization and why they chose to conduct, or not conduct, substance abuse testing.

The survey also asked specific questions and invited general comments on a number of drug testing policy issues that have been identified in previous discussions and legislative sessions. These included:

- Whether or not to adopt a uniform model policy in lieu of individualized substance abuse testing policies (programs);
- Whether or not employee assistance programs should continue to be required for the larger employers;
- Whether or not large employers should continue to share in any uncovered rehabilitation costs;
- How to clarify the provision of the statute relating to companies that also test employees under federal requirements;
- Should smaller companies be able to do employee-wide random drug testing?
- Should the law continue to exempt first time accidents as probable cause for drug testing?
- Should the law be changed to accommodate situations where companies who do not conduct employer drug testing are suddenly required to do so in order to receive project contracts?
- Whether the employer drug testing law should further address the use of medical marijuana in the workplace.

Finally, the survey asked participants to comment on the content of the survey and whether or not it had covered the important issues relating to employer drug testing. It also asked them to rank those issues by priority, in terms of the need to address and resolve them.

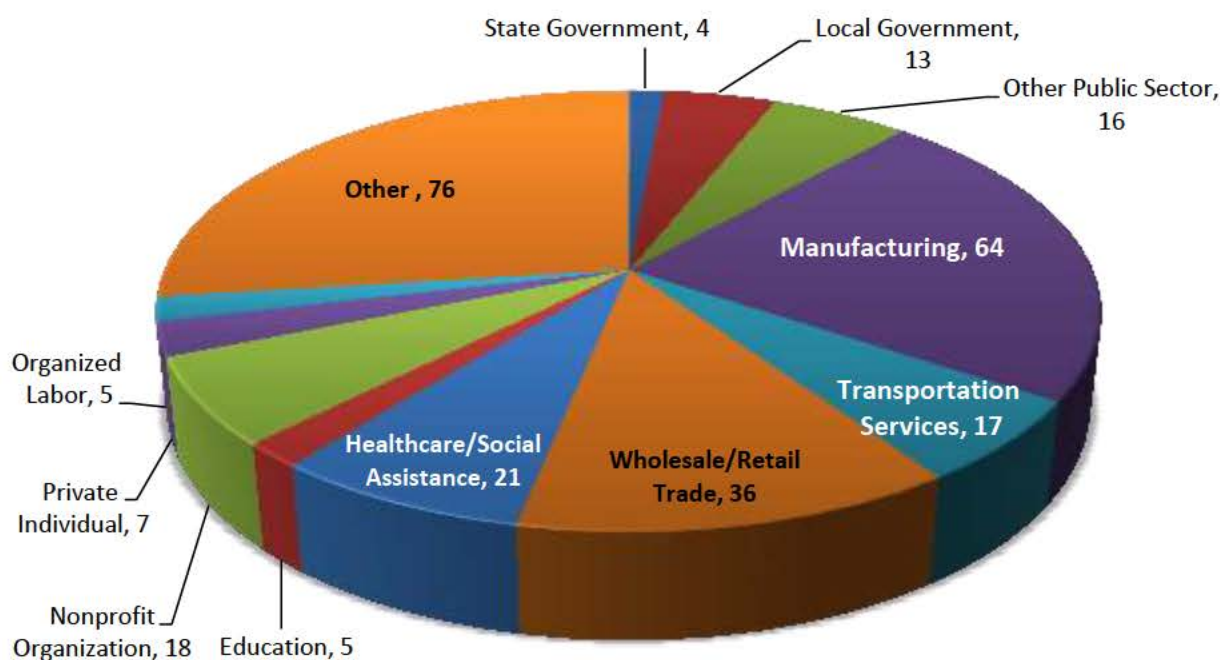


# CHARACTERISTICS OF THE PARTICIPANTS

## Organizations and Representation

Of the 618 invitees, Survey Monkey received responses from 247 participants - about a 40 percent return. As shown by the chart below, there was a wide variety of representation including trade, manufacturing and transportation sectors, government, health care, organized labor and nonprofit organizations.

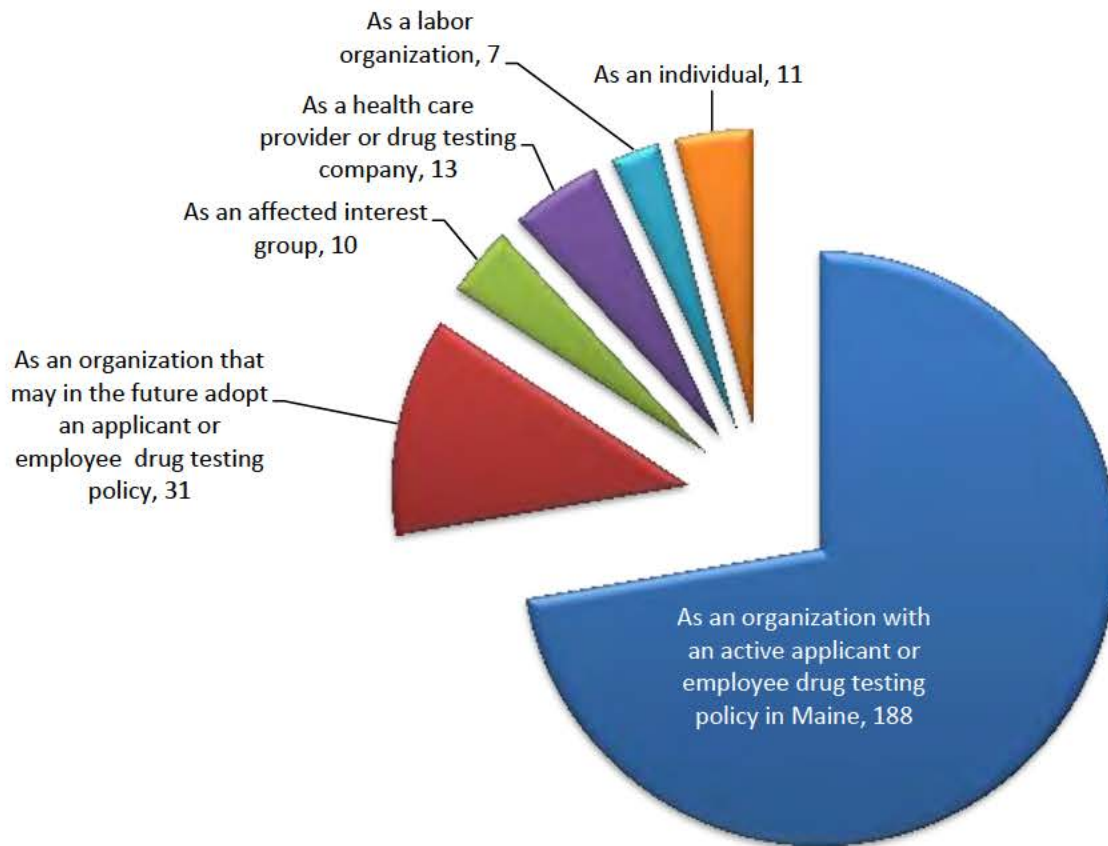
### Organizations



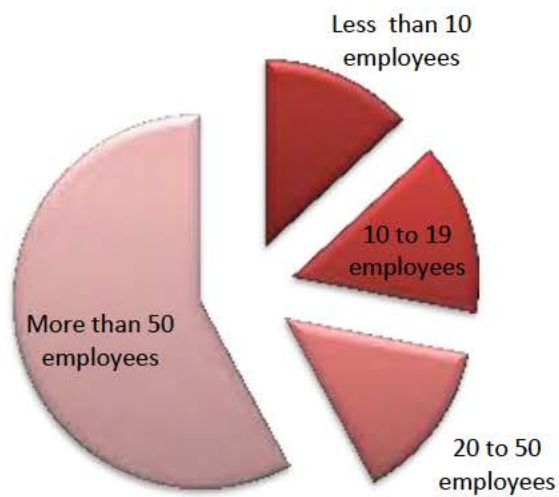
Each survey participant was asked to indicate the role they were carrying out in providing their response, the size of their organizations and their geographic locations. As shown by the following charts, almost three-quarters were representing an organization that conducts substance abuse testing, with the remaining quarter divided fairly evenly among several interests; most of the participants represented the larger employers and participants were well distributed among the geographic areas.

### Representation

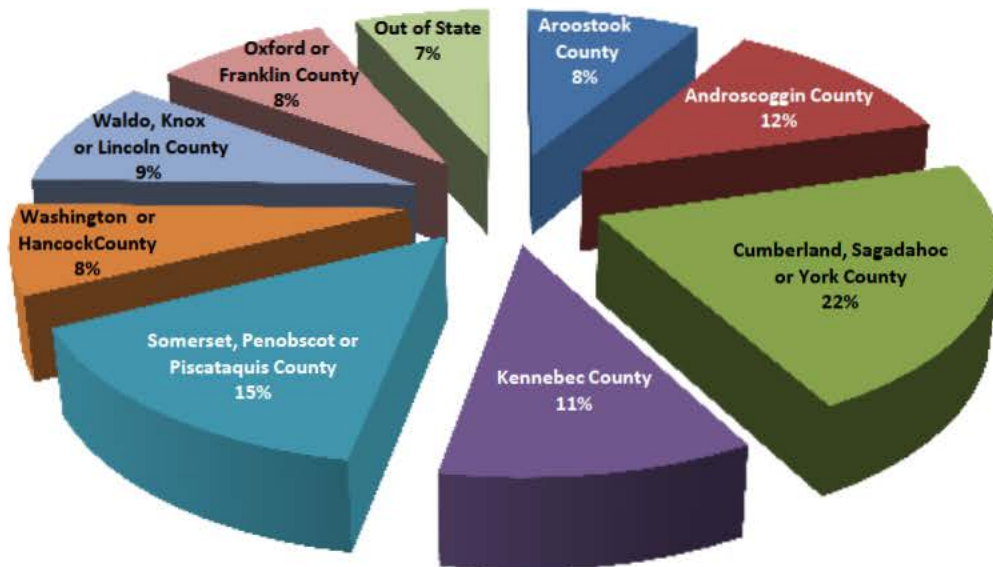




### Size of Organizations



## Geographic Distribution



## SUBSTANCE ABUSE EXPERIENCES AND RESPONSE

As shown in the charts below, the majority of organizations have not experienced drug-related incidents in their work places. Interestingly, however, about a third of the participants indicated they had not had an incident, but expected to have one at some point in the future. Among those who have had substance abuse related experiences at work, there appears to be a variety of the kinds of events that can occur. Also, many organizations that do have them may be reluctant to report substance abuse incidents in workers compensation claims.

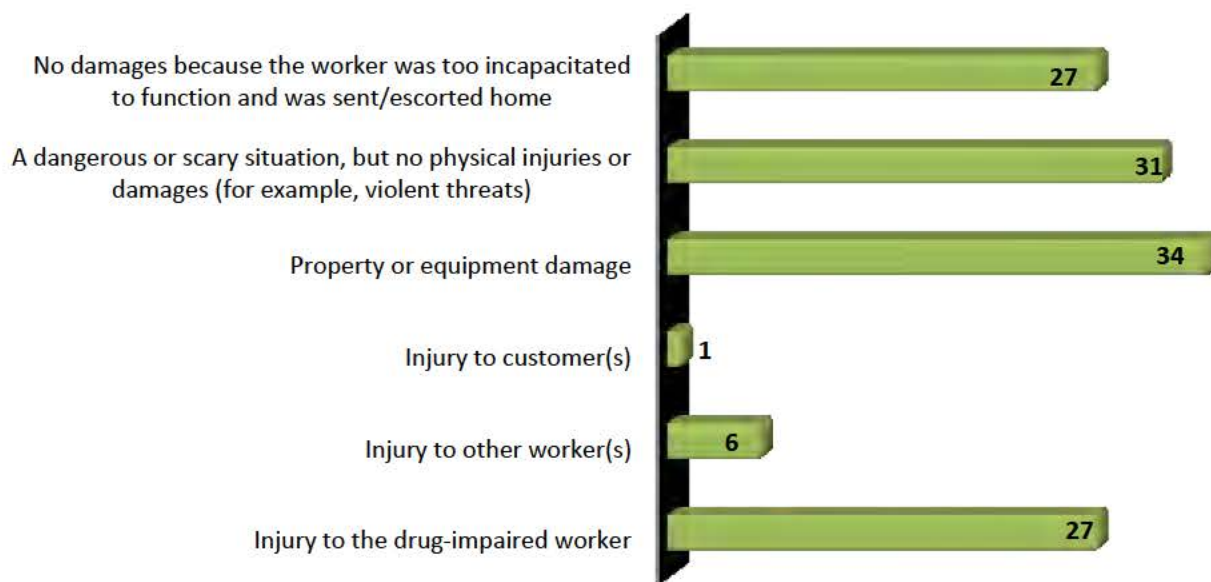
### Substance Abuse Experiences

**Q. Have you ever had a workplace incident that you believed was caused or aggravated by an employee's substance abuse?**

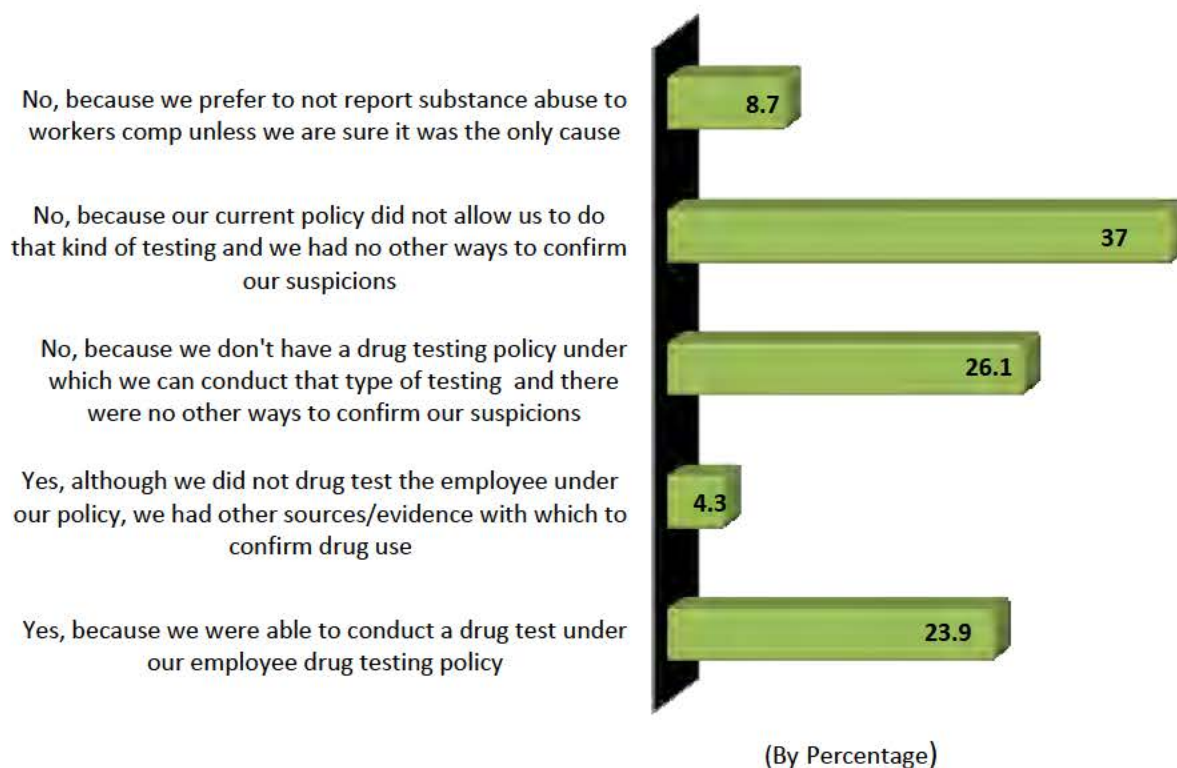




## Characteristics of substance abuse incidents that occurred

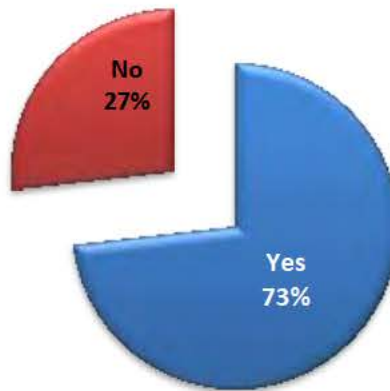


## Q. When reporting a suspected substance abuse incident to Workers Comp, did you report that its cause was from substance abuse?

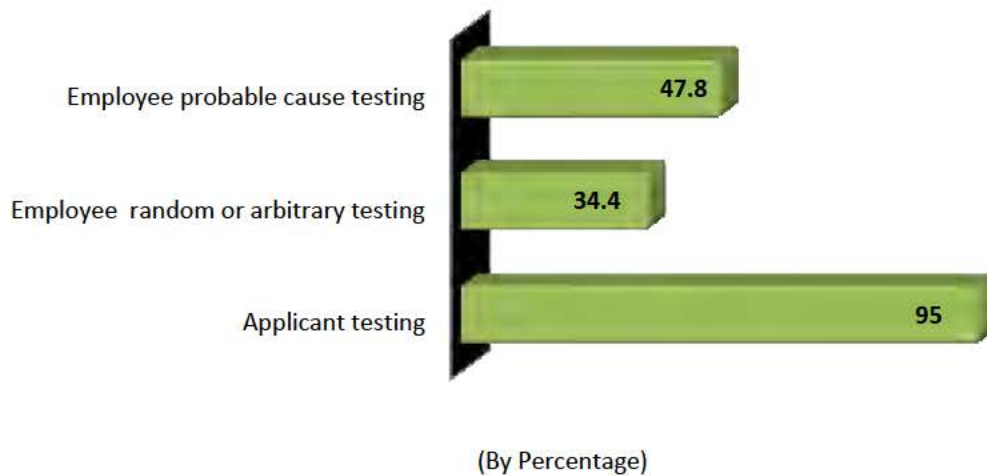


## SUBSTANCE ABUSE TESTING

**Q. Does your organization conduct drug testing of Maine employees under the state drug-testing law?**



**Q. Among those that do conduct drug testing, which types of testing are used?**



## Reasons provided for conducting substance abuse testing.





## Why employers choose not to conduct substance abuse testing.



# RESPONSES TO SPECIFIC POLICY ISSUES

## Uniform Model Policy

### **Background**

The Maine Employer Drug Testing Law requires employers to submit a substance abuse testing policy for approval by the Bureau prior to drug testing applicants or employees not subject to federal drug-testing requirements.

As originally administered, each employer had to prepare and submit its unique drug testing policy document for BLS to approve. To make this task simpler and less costly, BLS created “model policy” templates for employers to use that provided the structure and language necessary for an approvable policy. These templates are found on the Department’s website, and an employer may download a specific template tailored to the type or combination of drug testing program(s) that an employer desires to implement.

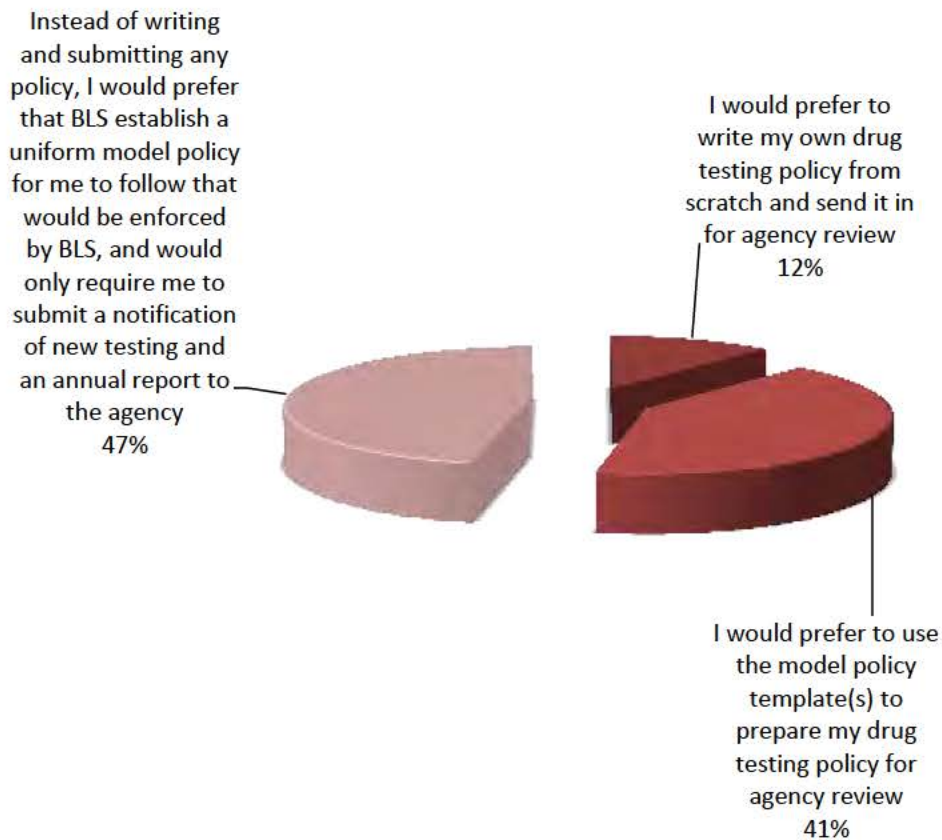
Some have suggested that the next step in streamlining and simplifying the drug testing policy approval process would be for BLS to develop a uniform policy applicable to all drug testing scenarios. Employers would then be able to adopt the uniform policy by reference, eliminating the need to prepare and submit individual policies. Such a “uniform policy” would integrate all requirements of the drug testing law into a single set of rules and parameters that would address all possible drug testing scenarios and could be applied to each drug testing program. It would be established through formal rulemaking and enforced by BLS. The only requirements for employers, besides following the new rules, would be to formally notify BLS prior to commencing a drug testing program and to report drug testing activities each year.

Others have suggested that any efficiencies or benefits from the creation of a uniform model policy have already been achieved through the creation of the downloadable policy templates. A number of employers have commented to BLS that the templates simplify the application process substantially. They indicate that this part of the drug testing law no longer needs fixing.

### **Survey Information**

Of the survey participants that answered this question: 47 percent indicate they prefer that BLS establish a uniform model policy and 53 percent do not. Those who do not include 41 percent that prefer to keep with the current policy templates and 12 percent that prefer to write their own policy documents. Inasmuch as most of the respondents were employers, this is a different outcome than we might have anticipated.

## Policy Development Preference



## Comments

Comments received from 37 participants offered arguments for creating a uniform policy and, alternatively, arguments for making simple improvements to the current model policy templates. More of the written comments favored relatively simple improvements to the current model policy templates and how they are applied, rather than developing a new uniform policy.



## Employee Assistance Programs (EAP)

### **Background**

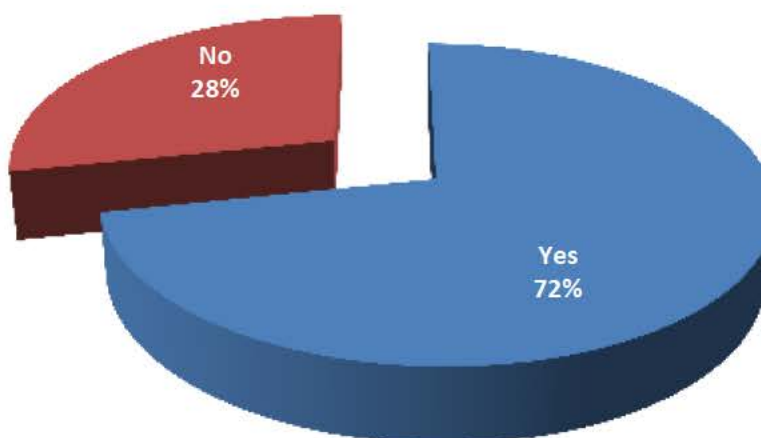
Under the drug testing law, any employer with more than 20 full-time employees that conducts employee drug testing is required to have a functioning employee assistance program (EAP) certified by the Maine Department of Health and Human Services.

Some have suggested that procuring or maintaining an EAP can be overly costly for employers, especially smaller businesses. As such, they can be a barrier or disincentive for employers who wish to conduct employee drug testing. Others suggest that there may be less costly alternatives to maintaining an EAP that could be attractive to both large and smaller employers.

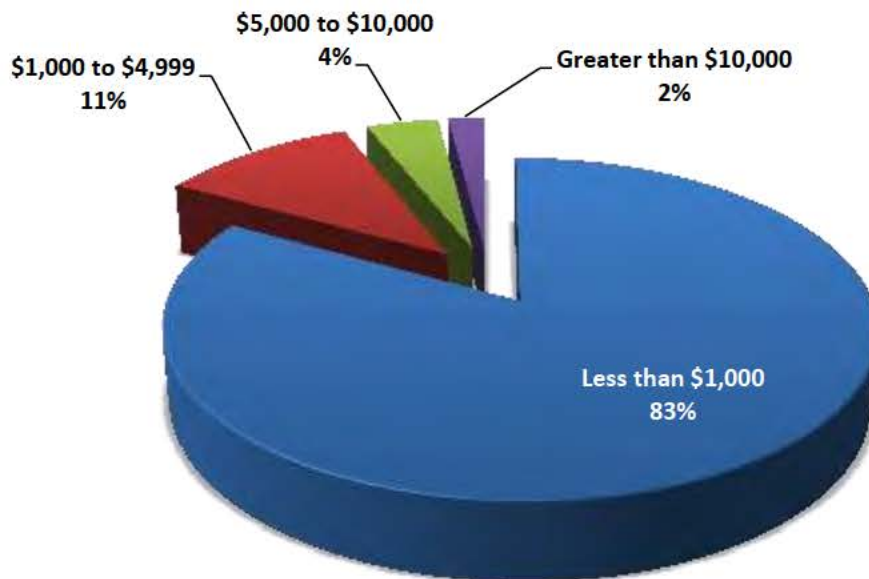
### **Employer Drug Testing Survey Information**

Of the employers who responded to the EAP questions, 72 percent indicated they have an EAP and most had an annual EAP cost of less than \$1,000 per employee served. Most of the employers who have EAPs are not looking to replace them.

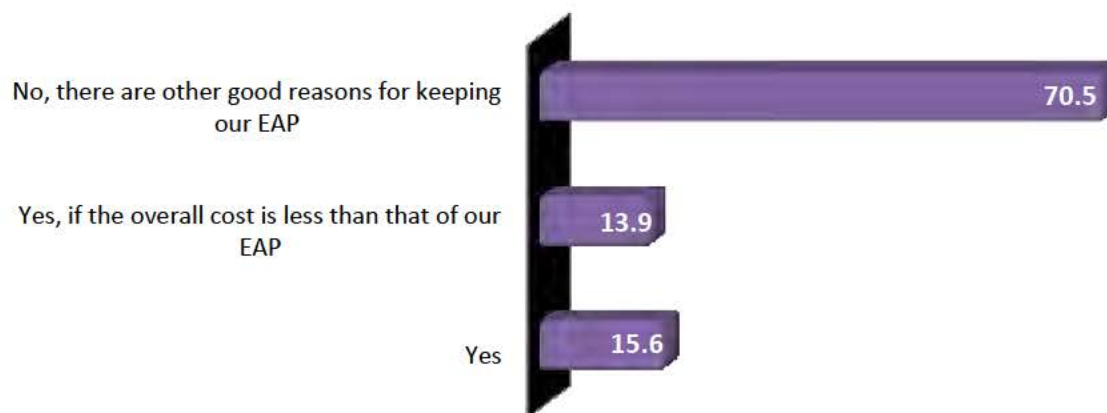
#### **Q. Does your organization maintain an Employee Assistance Program?**



**Q. What is your annual EAP cost per employee that uses the program?**

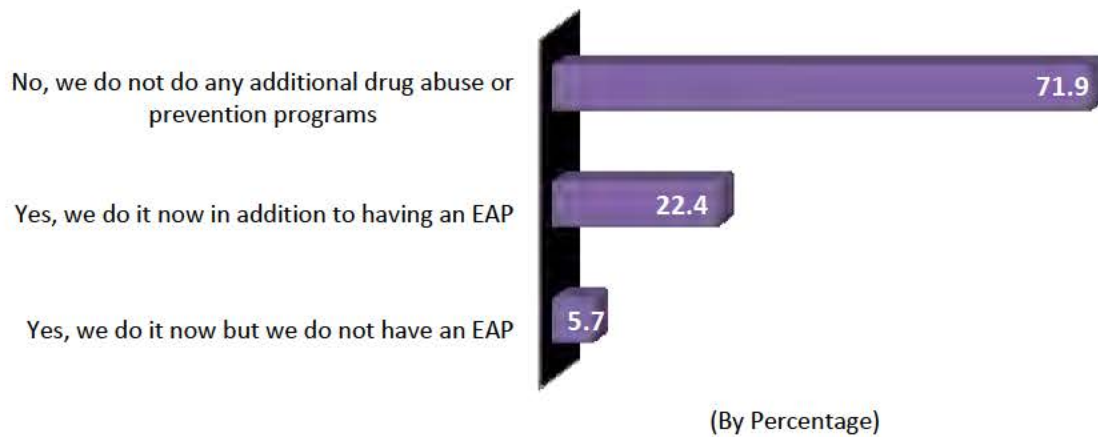


**Q. Would your organization consider providing drug abuse awareness, prevention and intervention programs as well as related training for your employees in lieu of an EAP, even though they would require your time and funding?**

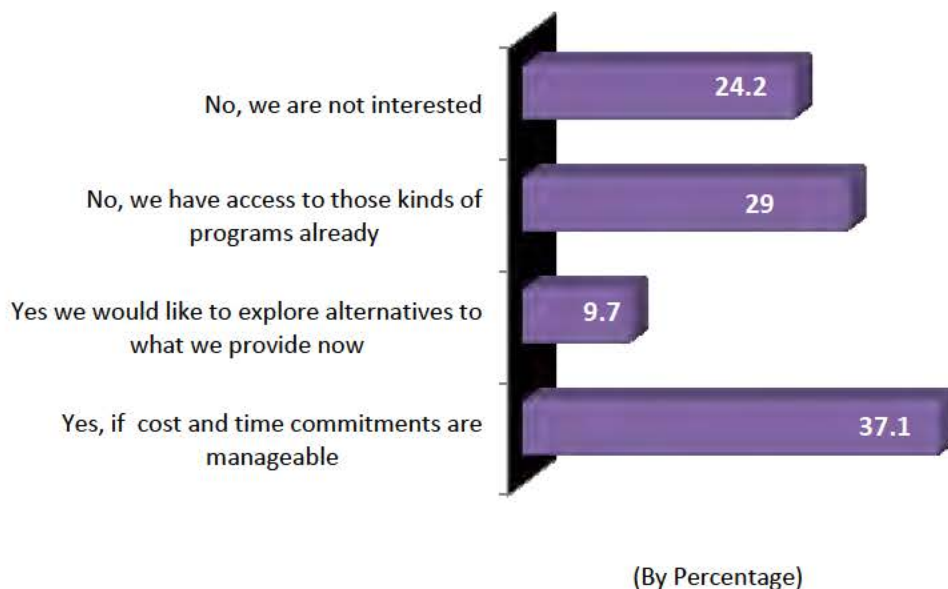


(By Percentage)

**Q. Are you currently conducting drug awareness, drug abuse prevention or intervention programs that are not part of an EAP?**

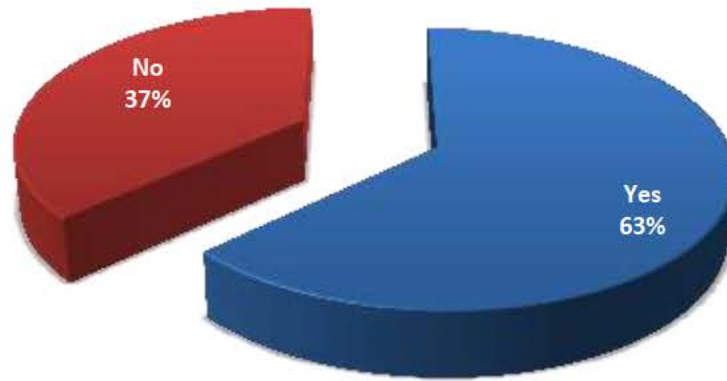


**Q. Would your organization be interested in participating in, or having your employees participate in drug abuse, awareness, prevention and/or intervention training sessions provided by state or other professional health and wellness organizations?**





**Q. If an affordable drug awareness/drug abuse prevention training program were available online or at accessible locations, would you be interested in adding it to your new employee training requirements?**



### **Comments**

Written comments and observations relating to medical EAPs were provided by many survey participants. They fall into the following general statements in order of prevalence:

- EAPs are good resources, they have many good aspects, we are satisfied with our EAPs. (30 commenters)
- We are unsure of any other effective alternative to EAPs. (14 commenters)
- EAPs are not necessary. (11 commenters)
- We should be allowed to use other alternatives to EAPs, so long as they are not mandated. (10 commenters)
- Employees, not employers, should be responsible for treatment of their own problems. (6 commenters)
- Employees do need to have regular substance abuse-related education and training programs. (5 commenters)
- EAPs are too expensive, unaffordable. (5 commenters)
- The State of Maine should provide these services for free. (3 commenters)

### **Background**

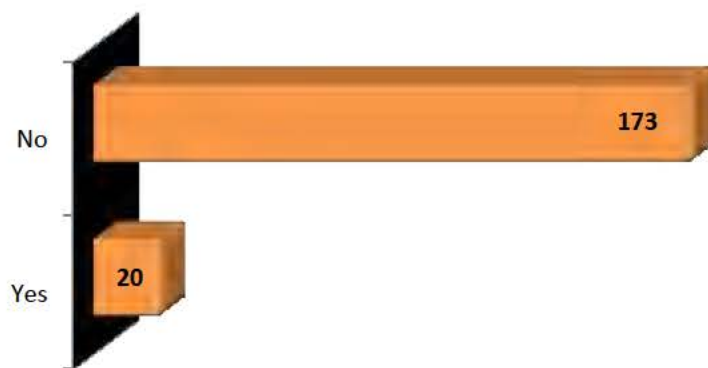
Under Maine's drug testing law, the first time an employee tests positive, that employee must be offered an opportunity for six months of rehabilitation, and, if the employer has more than 20 employees, that employer is required to pay half of those rehabilitation expenses beyond what is covered by health insurance.

Some have suggested that having to automatically offer rehab and pay half of the uncovered rehabilitation cost after a first-time positive test can be overly burdensome and costly for employers, especially smaller businesses. As such, they provide a barrier or disincentive for employers that wish to conduct employee drug testing.

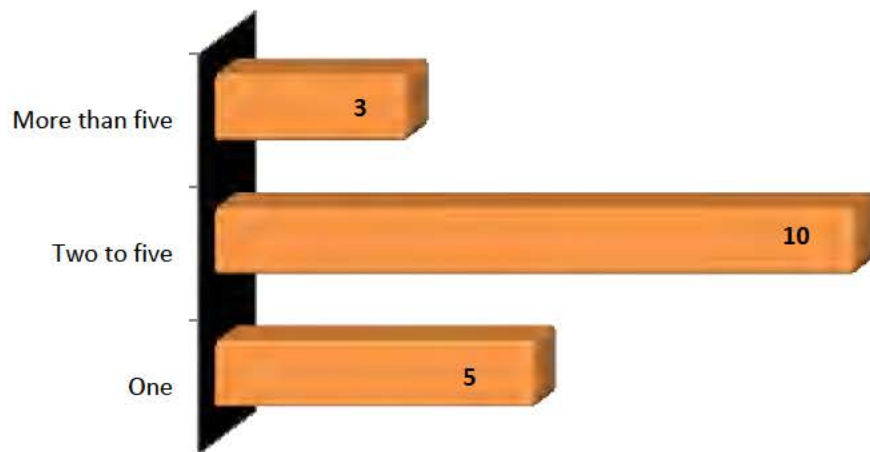
### **Employer Drug Testing Survey Information**

Only ten percent of the employers who responded said they have had employees go through rehab for substance abuse. Most of them have had between two and five people in rehab programs with mixed success. Less than half indicated that they at some time had to pay costs beyond what was covered by health care insurance.

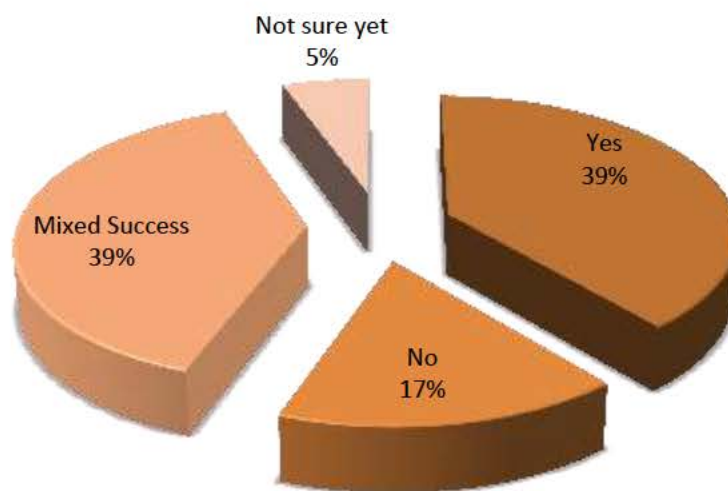
**Q. Has any employee in your organization opted to enter a six-month rehab program as a result of a positive drug test or other disclosure of substance abuse?**



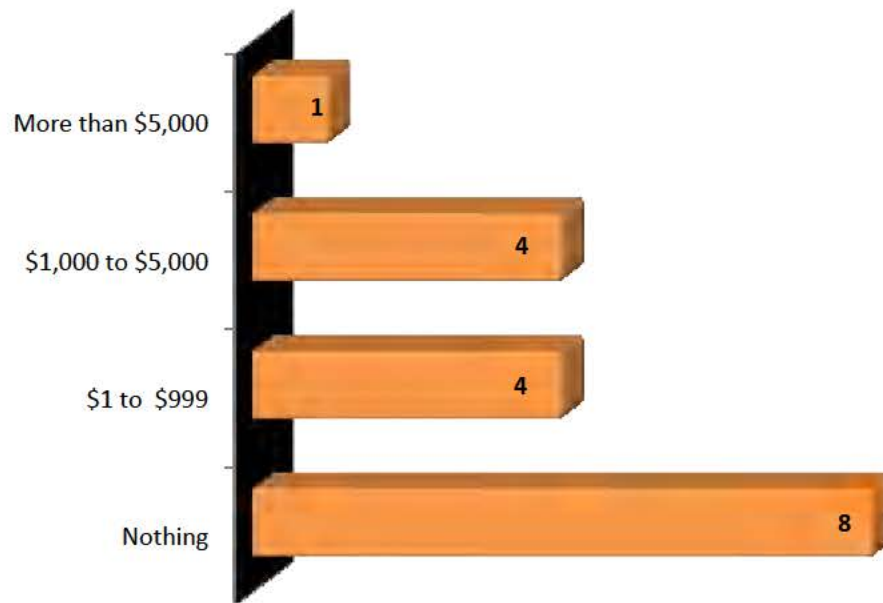
**Q. How many employees in your organization have entered a six-month substance abuse rehab program?**



**Q. Was the six-month rehab program successful?**



**Q. What is the most your company has paid for any employee's drug rehab above and beyond the covered costs?**



### **Comments**

Most of the written comments strongly objected to businesses being required to pay for, or share, the cost of employee rehab above what is covered by insurance. More employers objected to those costs than the number who actually had to pay them. The argument is generally that employers should not have to pay rehab costs for a substance abuse problem that they did not create; that responsibility should be squarely on the employee.



## Federal/Non-Federal Employee Testing

### Background

In 2011, the 125th Maine Legislature amended the drug testing law regarding employers subject to federal drug testing regulations. As amended, Section 281, Subsection 8 paragraph c. of the law now states:

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

Because of how this paragraph is written, and because the federal drug testing law is based on the qualifications of employees rather than the status of employers, BLS has received numerous inquiries from employers and others about this provision of the law.

Most are confused or have differing opinions about what the paragraph means and how to apply it to their particular situations. Some think it means that if an employer is subject to the requirements of federal drug-testing laws, it can be exempt from the Maine law if it applies the federal drug testing procedures to its non-federally regulated employees. Others believe it means that if an employer has even one employee or contractor in its workforce who is subject to federal drug-testing requirements, that employer can do any kind of drug testing and impose any kind of consequences upon its non-federally regulated employees and be subject to neither the federal law nor the Maine drug testing law.

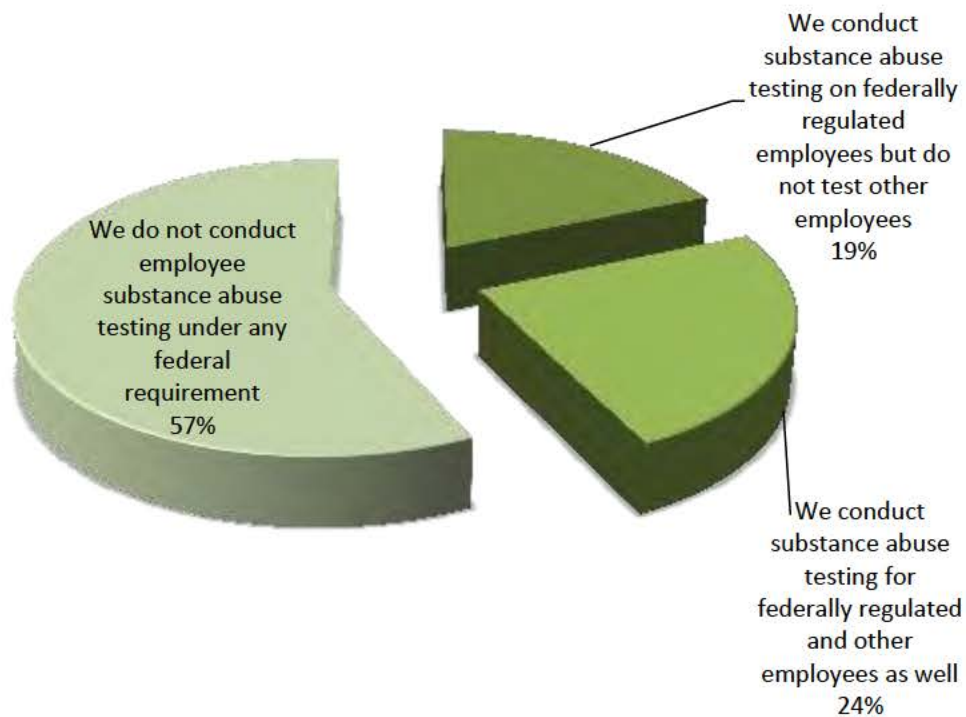
### Employer Drug Testing Survey Information

About 42 percent of the survey participants are involved with federally-required drug testing. About half of the employers who conduct drug testing for federally regulated employees also conduct drug testing of non-federally regulated employees.

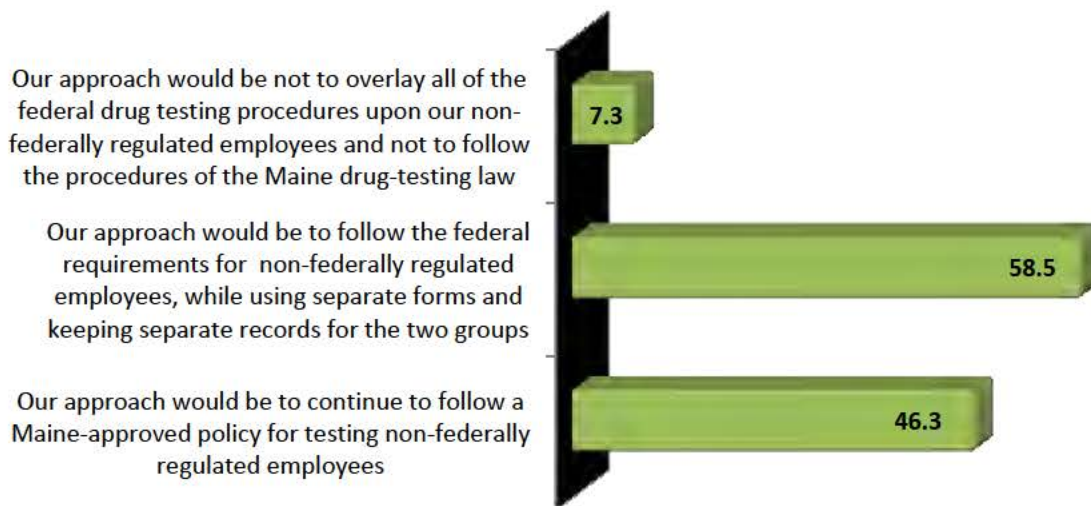
When asked for preferences, almost half (41%) of the participants indicated they would continue to follow their Maine approved policy for testing non-federally regulated employees and a little more than half (52%) would prefer to extend their federal drug testing activities to their non-federally regulated employees. A smaller number (7%) indicated that they would not abide by federal or state substance abuse testing procedures with their non-federally regulated employees.

Thirty percent of the participants who test federally regulated and non-federally regulated employees said they do not report their testing of non-federally regulated employees to the State of Maine.

**Q. Do you have employees subject to federal drug-testing requirements and, if so, do you also test your non-federally regulated employees for substance abuse?**



**Q. Which statement(s) describes your preference for drug-testing federally regulated and non-federally regulated employees?**



(By Percentage)

**Q. If you drug test both federally and non-federally regulated employees do you still report your drug testing activities for the non-federal employees to Maine BLS?**





### **Comments**

Although almost half the participants prefer operating under their state-approved drug testing policies for non-federally regulated employees, many written comments argued for a single set of procedures when federally regulated and non-federally regulated employees are tested. Many also stated that they were looking to the Department to reduce confusion over this part of the law. One pointed out that some provisions of the federal programs ought not to be applied to non-federally regulated employees, including observed urine sample collection, which is allowed and in some cases required under the federal program. Another noted that employers should continue to report testing of non-federally regulated employees to the Department so that it will know the full extent of employee drug testing that occurs in Maine.

## Size of Random Testing Populations

### **Background**

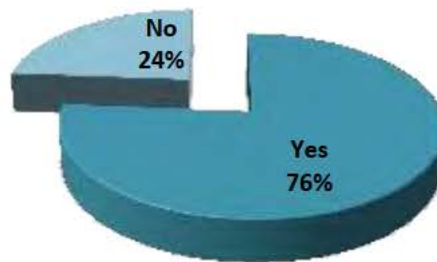
Under the current drug testing law, employers with fewer than 50 employees are not allowed to conduct company-wide random drug testing if some of their employees are not in high risk or health- and safety-sensitive positions.

Some employers have suggested that the 50-employee cutoff is too high, and that those with smaller numbers of employees should be able to conduct random testing for their entire workforce.

### **Employer Drug Testing Survey Information**

Of the survey participants that answered the question, 76 percent believe that the state should allow company-wide random drug testing for organizations with fewer than 50 employees. Of the participants, 23% indicated they had been prevented from conducting random drug testing because they had fewer than 50 employees. There is a fairly even distribution of employees in the companies that have up to 50 employees.

**Q. Do you believe the state should allow company-wide random drug testing for organizations with fewer than 50 employees when some of those employees are not in health- or safety-sensitive positions?**



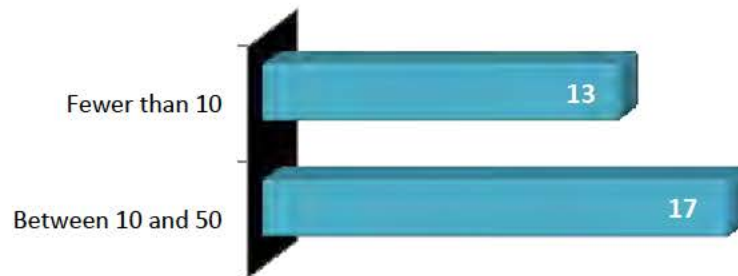


**Q. Has your organization been prevented from conducting random drug testing because it has fewer than 50 employees in high risk or health- or safety-sensitive positions?**



(By percentage)

**Q. How many employees would be in your random drug testing pool?**



(By Percentage)

### **Comments**

All of the additional comments were in support of lowering the cutoff from 50 employees, indicating that smaller companies have drug abuse problems as well and that confidentiality and randomness can be maintained with less than 50 employees as well as with more.

### **Background**

Under Section 682.6 C of the employer drug testing law, the definition of probable cause specifically excludes “a single work-related accident.” This means that the first work-related accident that an employee causes cannot be the reason for probable cause drug testing. Some have suggested that this definition is not appropriate, because significant personal harm and/or property damage can be done by even one work-related accident that stems from drug abuse. Moreover, no other state or federal drug testing program allows that kind of exception.

### **Employer Drug Testing Survey Information**

About 10 percent of those who responded indicated that at least once they have had to forego probable cause testing due to the event being the first accident and 8 percent indicated that situation has occurred more than once at their organization.

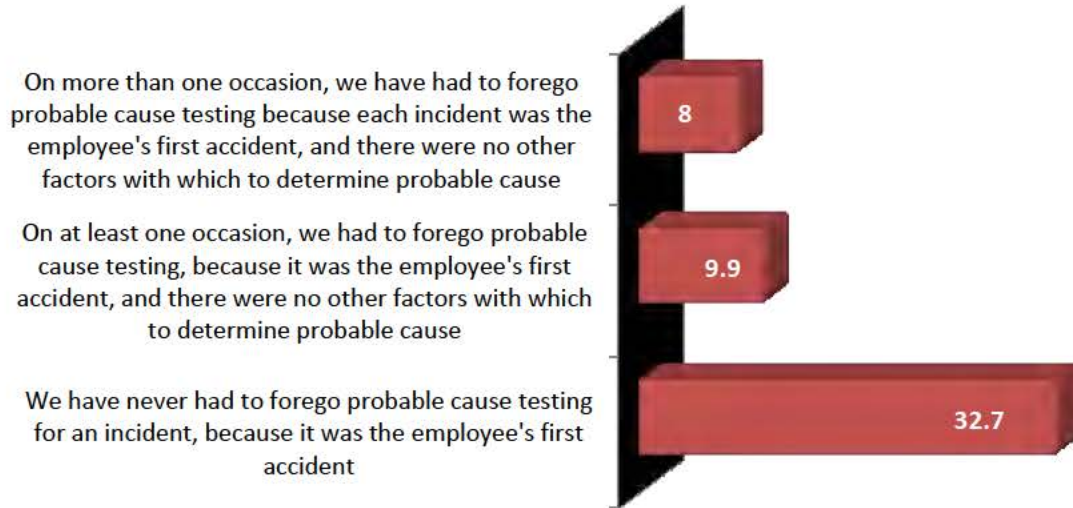
Most of the participants (75 percent) indicated that they would prefer that the definition of probable cause testing should not exempt the first accident.

About half of the participants indicated that all their employees worked in safety-sensitive positions, while 39 percent said that only some of them did and 12 percent indicated that none of them did.

#### **Q. Which statement below best describes your situation?**

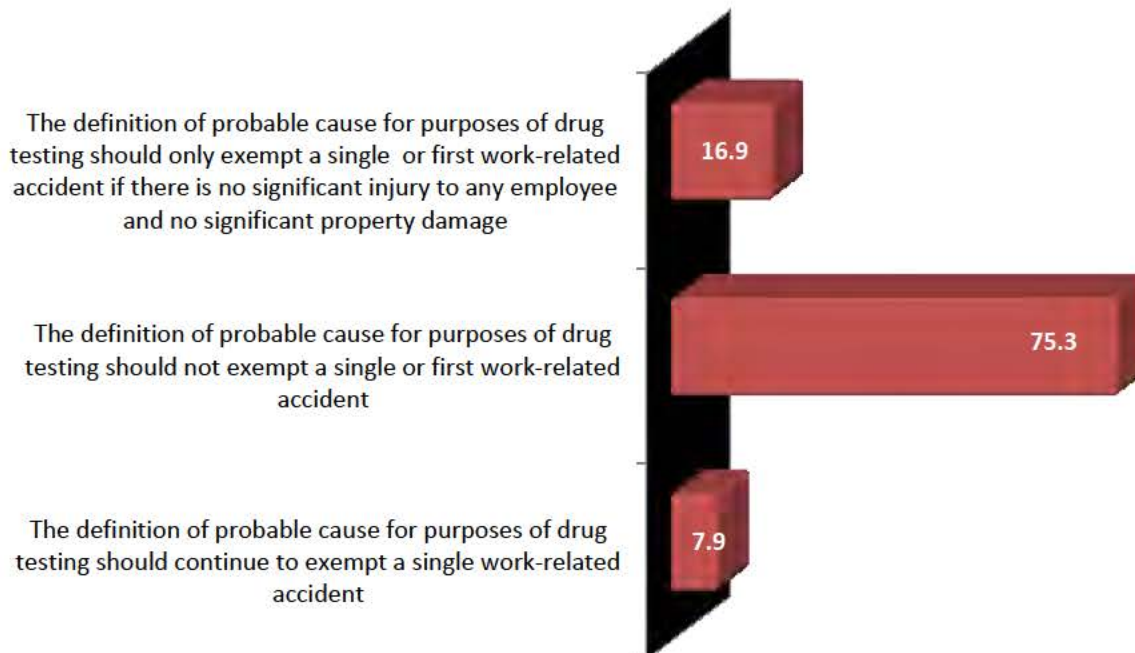


**Q. Which best describes your experience with a probable cause determination relating to the "first" accident by an employee?**



(By Percentage)

**Q. Which statement best describes your preference?**



(By Percentage)

## **Comments**

Some commenters suggest that the exemption for the first accident should simply be removed, while others suggest that it be exempted if it caused or could have caused injuries or significant damages so that employers could not invoke probable cause testing for single accidents that are inconsequential.



## Temporary Project Testing

### Background

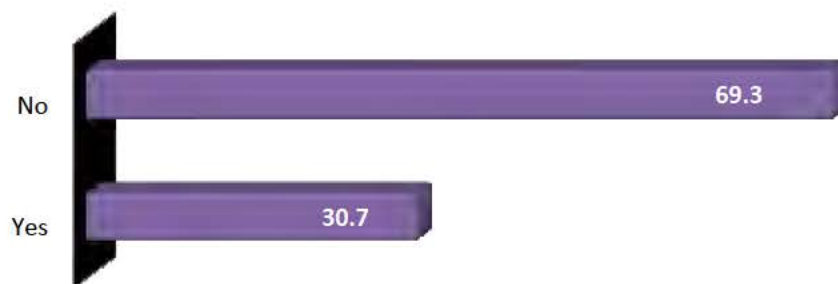
BLS consistently receives inquiries relating to drug testing of employees involved with short-term contracts for specialized work, like that which occurs during maintenance shutdowns at paper mills and other manufacturing facilities. At times, a company lands a contract for a short-term construction or maintenance job for a company that requires drug testing of all employees who come on the site. However, before it can test those employees, the contractor must have an approved Maine drug testing policy. Likewise, if a Maine company is awarded a contract to provide services outside of Maine and the contract-offering company requires drug testing, the Maine company must have an approved Maine drug testing policy before it can test the employees it will take to the out-of-state job.

Obtaining an approved employee drug testing policy can be problematic under these circumstances. Under the current law, it takes at least 40 days after an employee drug testing policy application is submitted to BLS before any actual drug testing can occur due to notice and waiting requirements. Further, if the contract work involves more than 20 employees, the contractor must have an approved EAP prior to commencing the work and is responsible for cost sharing should there be a need for employee rehab. These can be significant barriers for companies who rely on this type of work. The Department's only advice in the past has been for the contractors in that situation to try to prevail upon the companies to relax their drug testing requirements.

### Employer Drug Testing Survey Information

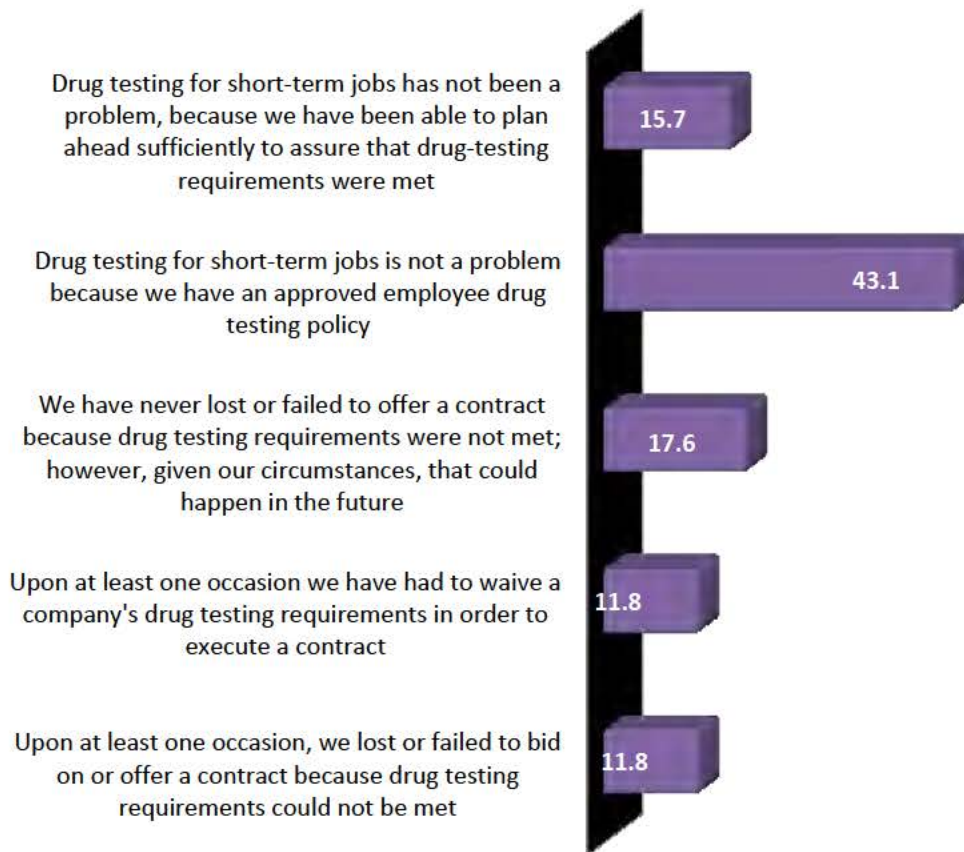
Of the survey participants who answered this question, 24 percent indicated that they have lost a contract or the contracting company had to waive their drug testing policy to award their contract. For one reason or the other it was not a problem for the remaining 76 percent although some worry that it will be a problem for them at some point.

**Q. Does your company or organization routinely compete for, or contract out, short term projects each year?**



(By Percentage)

**Q. Which best describes your experiences?**



(By Percentage)

## **Comments**

Most of the comments seem to suggest that employers can avoid the problem by having an approved policy or by otherwise planning ahead.



### **Background**

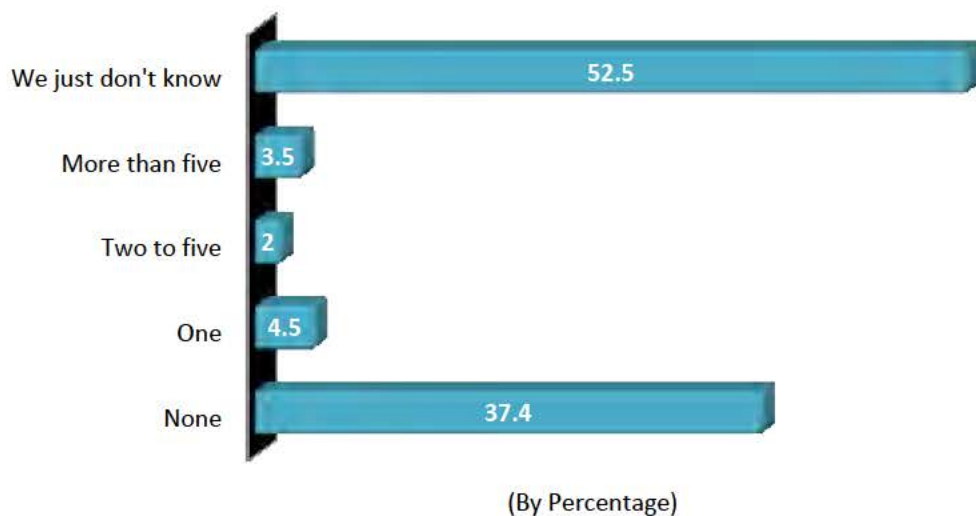
BLS has received inquiries about how the legal medical use of marijuana fits in with workplace drug testing and drug-free workplace policies. If an employee legally uses marijuana away from the job for therapeutic purposes and is subject to drug testing at work, that individual is likely to test positive for marijuana. Because marijuana and metabolites are retained in a person's body for days and sometimes weeks, a test can be positive whether he or she is actually “impaired” or “under the influence” at the job.

On the one hand, employees who are legally allowed to take medical marijuana, and are careful to avoid impairment at work, believe they should not be subject to the consequences of a positive employee drug test. On the other hand, employers want to protect their employees and property from the risks associated with someone working under the influence of drugs, whether their use is medical, legal, or otherwise.

### **Employer Drug Testing Survey Information**

Of the participants that answered the question, 53 percent did not know how many, if any, people in their organizations are legally allowed to use medical marijuana. Only a few employers (8 percent) have been asked by employees to waive drug testing due to their possession of a medical marijuana card. Almost all of them (90 percent) indicated that there have not been any situations in their organization involving misunderstandings or confusion about medical or otherwise legalized marijuana use and drug testing. When asked how they would approach a positive drug test due to medical marijuana use, half of the participants (52 percent) indicated they would treat the employee no differently than one who has tested positive for any other controlled substance.

**Q. In your organization, how many employees or co-workers are legally allowed to use medical marijuana?**

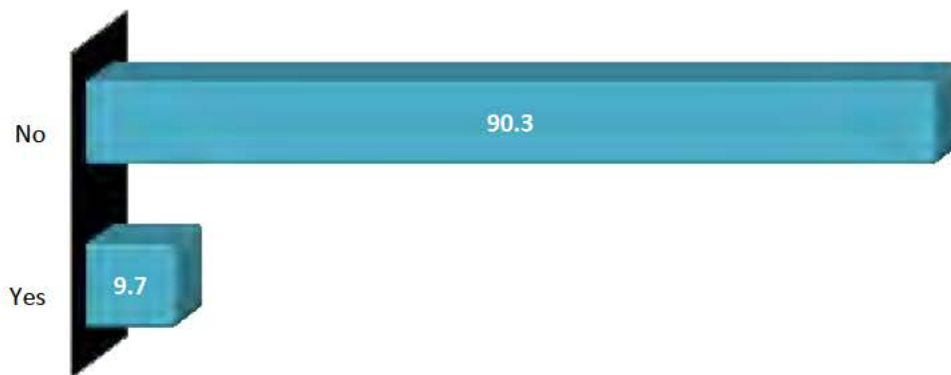


**Q. In your organization, have any employees asked to waive their drug testing due to use of medical marijuana?**



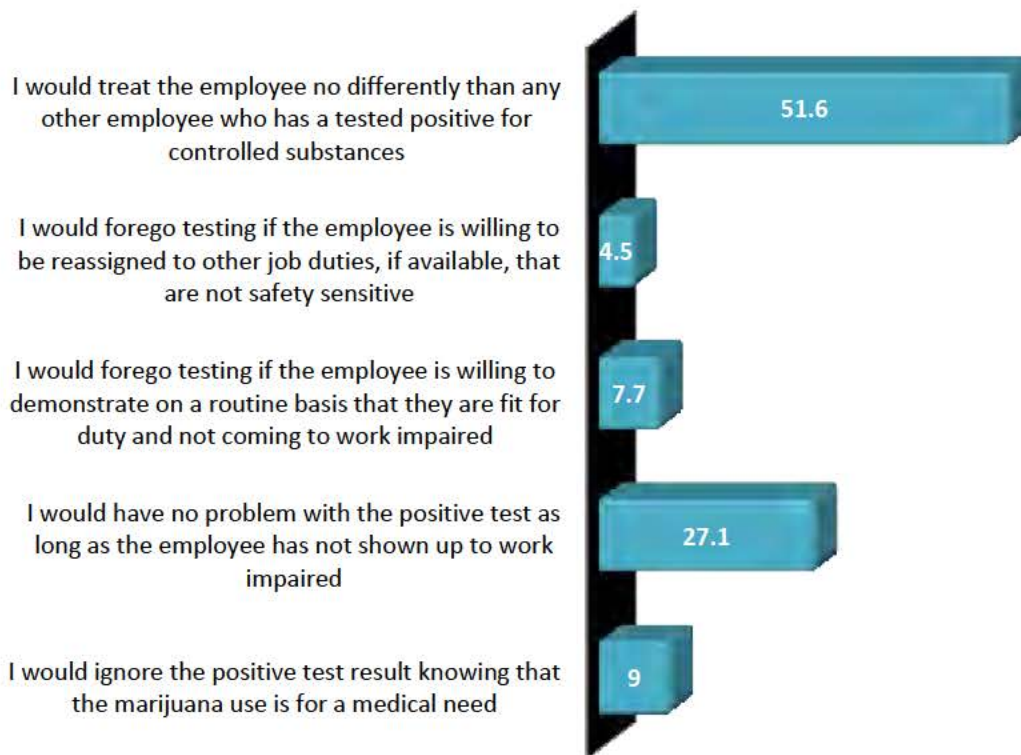


**Q. In your organization, has any situation arisen because of worker's misunderstanding or confusion regarding the use of medical or "municipally legalized" marijuana and drug-testing?**



(By Percentage)

**Q. If an employee had a positive drug test due solely to the use of medical marijuana, which best describes what your response would be?**



(By Percentage)

## **Comments**

Written comments and observations relating to medical marijuana and drug testing were provided by 84 survey participants. They fall into the following general statements in order of prevalence:

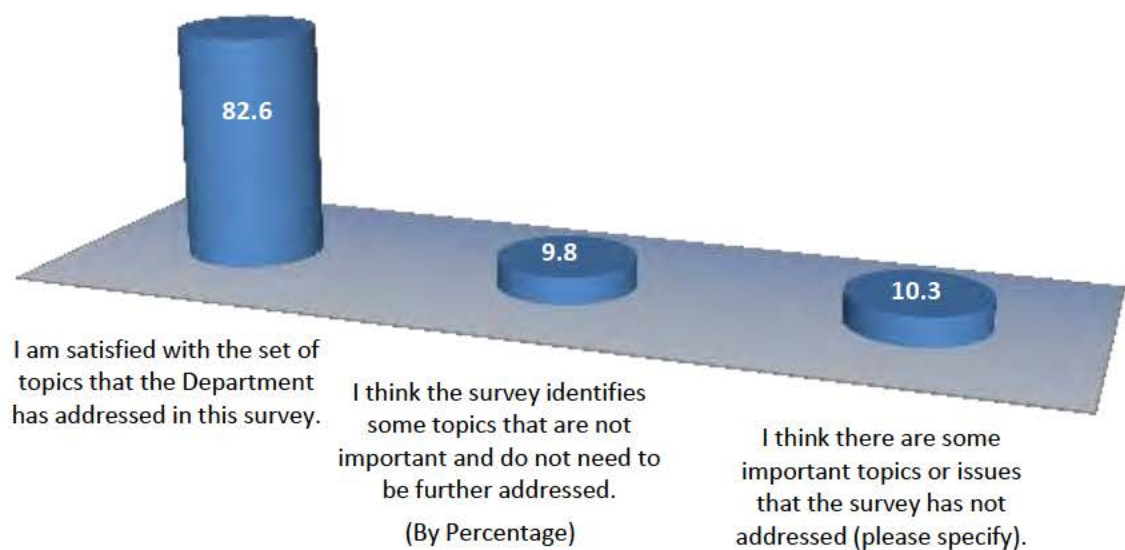
- Medical marijuana use in the workplace poses complex and difficult questions for which there are yet no answers. We have to learn more about the nature of risks, how to determine impairment, and what tolerable limits in individuals are. Presently, there is no clear cut way to determine or to dismiss impairment of any marijuana user. (24 commenters)
- Positive tests resulting from medical marijuana should be screened by the medical review officer, and not reported as positives to the employer. (14 commenters)
- Organizations should follow the federal law, which considers any use of marijuana illegal. (13 commenters)
- Medical use of marijuana by employees is alright, so long as it is documented by a medical provider or if there is some demonstration or other evidence that medical marijuana users are not coming to work impaired. (12 commenters)
- Am opposed to, intolerant of, or uncomfortable with the new medical marijuana law and a positive test for marijuana should be treated no differently than a positive test for any other substance of abuse. (10 commenters)
- Our organization has safety-sensitive positions where there is no room for risks that could stem from marijuana use. (8 commenters)
- We don't test for marijuana. (3 commenters)

# COVERAGE OF TOPICS AND RANKING

## Coverage

The chart below summarizes the responses relating to the coverage of topics by this survey. Most of the participants (83 percent) indicated that they were satisfied with the set of topics that were presented by the survey.

**Q. What do you think about the coverage of topics in this survey?**





## RANKING PRIORITIES

Participants were asked to rank the possible changes to the Maine Employer Drug Testing law/regulations based on how urgent or necessary they thought they were. The issues with the lower rating averages would be deemed the most urgent, based overall on the choices made by survey participants.

<b>PRIORITY RANKING OF POLICY ISSUES</b> (BY PERCENTAGE)					
	Very im- portant - should be done right away	Important - should be done in the next legisla- tive session	Less im- portant - can be done sometime in the future	Not im- portant - doesn't need to be done at all	Rating Av- erage
Develop a regulatory uniform/model policy	49	61	44	22	2.22
Modify employer assis- tance requirements	47	61	47	22	2.25
Modify employee rehab and cost sharing re- quirements	65	53	38	19	2.06
Clarify provisions relat- ing to drug testing fed- erally regulated and non-federally regulated employees	53	75	39	11	2.04
Modify the size of ran- dom drug testing popu- lations	35	58	60	24	2.41
Modify the probable cause definition as re- lates to the first acci- dent	72	67	29	12	1.89
Provide for drug testing of employees who work on temporary projects	38	56	52	34	2.46
Modify the law to ad- dress medical marijuana use	86	66	18	11	1.75