

# MAINE STATE LEGISLATURE

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MEMORANDUM

TO: The Honorable Christopher W. Rector, Senate Chair, Joint Standing Committee on Labor, Commerce, Research and Economic Development

The Honorable Kerri L. Prescott, House Chair, Joint Standing Committee on Labor, Commerce, Research and Economic Development

Members of the Joint Standing Committee on Labor, Commerce, Research and Economic Development

FROM: Robert J. Winglass, Commissioner, Maine Department of Labor

DATE: January 11, 2012

RE: Report of Findings and Recommendations for L.D. 1241, "An Act to Exempt Employers Subject to Federally mandated Drug and Alcohol Programs from Maine Substance Abuse Program Laws"

Attached you will find a report from the Department of Labor, Bureau of Labor Standards, as required under Public Law 2011, Chapter 196. In addition you will find a draft bill that addresses our findings. After you review the report, the Department stands prepared to meet with you to discuss these findings and recommendations in more detail.

FEB 15 2012

**Report of Findings and Recommendations**  
**by the Bureau of Labor Standards on**  
**L.D. 1241, "An Act to Exempt Employers Subject to**  
**Federally Mandated Drug and Alcohol Programs from**  
**Maine Substance Abuse Program Laws"**

Transmitted to:

Joint Standing Committee on Labor, Commerce, Research and Economic Development

By:

Robert J. Winglass, Commissioner

Maine Department of Labor

January, 2012

As Required by Public Law 2011, Chapter 196

## **Legislative Background**

The Joint Standing Committee on Labor, Commerce, Research and Economic Development (“Committee”) asked the Maine Department of Labor (“Department”) to submit a report that includes its findings and recommendations regarding the simplification and streamlining of the Maine Revised Statutes, Title 26, chapter 7, subchapter 3-A. The Department looked at the following three issues and made additional recommendations.

### **1. Regarding the issue of initiating substance abuse testing when an employee causes a work-related accident that results in property damage, personal injury or loss of life or a citation or summons being issued to the employee by a law enforcement officer:**

Current statute limits an employer’s ability to test an employee on the basis of a single accident. The Department believes that the language in our recommendation provides more latitude for an employer to respond in situations where the safety of others and/or property was compromised.

The Department recommends that 26 MRSA §682, sub§6, ¶C be changed to:

C. A single work-related accident except when the employee causes a work-related accident that results in significant property damage, personal injury or loss of life or a citation or summons being issued to the employer or employee by a law enforcement officer.

### **2. Regarding the issue of submitting supervisory personnel to substance abuse testing on a random or arbitrary basis when an employer requires, requests or suggests that other employees be tested:**

Current statute allows an employer to include supervisors when testing employees. The Department believes that requiring an employer to include supervisors further restricts an employer’s ability to make decisions. The Department believes the decision to include supervisors is better left to the employer.

The Department recommends that 26 MRSA §684, sub§3 be changed to:

3. Random or arbitrary testing of employees. In addition to testing employees on a probable cause basis under sub§2, an employer may require, request or suggest that employees who meet the criteria to be safety-sensitive submit to a substance abuse test on a random or arbitrary basis by using one of the following three methods (A, B or C).

### **3. Regarding the issue of eliminating the requirement that an employer provide an opportunity and pay for an employee to participate in an assistance program when the employee has received a confirmed positive result on a substance abuse test:**

Current statute requires an employer with over 20 full time employees to have a functioning employee assistance program, and pay for rehabilitation programs if needed, in order to have a substance abuse testing program. The Department considered various approaches to this issue, one of which was increasing the number of full time employees to a number greater than 20.

However, we have no criteria to determine an acceptable number of employees. If the Committee wishes to retain this requirement, we feel any decision to increase the number of employees is best made by the Committee.

In keeping with the philosophy of allowing employers greater latitude and fewer restrictions, the Department recommends that the requirement of an Employee Assistance Program (EAP) be removed and that the employer be given the option of offering rehabilitative counseling. By taking that approach, we:

- Recommend that 26 MRSA §681, sub§1, ¶C be removed.
- Recommend that 26 MRSA §683 sub§1 be removed.
- Recommend that 26 MRSA §683 sub§2, ¶A be changed to:  
The procedure and consequences of an employee's voluntary admission of a substance abuse problem and any available assistance, including the availability and procedure of the employer's employee assistance program and a statement that the employee will not be disciplined for voluntarily coming forward unless the employee has had a prior positive test with the current employer.
- Recommend that 26 MRSA §683, sub§2, ¶J be changed to:  
Opportunities and procedures for rehabilitation following a confirmed positive result; The consequences for a positive confirmation test result i.e., if the employee will be allowed to participate in a rehabilitation program may be at the employee's expense or if disciplinary action, including termination, will occur;
- Recommend that 26 MRSA §684, sub§5 be changed to:  
**Testing upon return to work.** If an employee who has received a confirmed positive result is permitted to attend a rehabilitation program and returns to work with the same employer, ~~whether or not the employee has participated in a rehabilitation program under section 685, subsection 2,~~ the employer may require, request or suggest that the employee submit to a subsequent substance abuse test anytime between 90 days and one year after the date of the employee's prior test. A test may be administered under this subsection in addition to any tests conducted under sub§§2 and 3. An employer may require, request or suggest that an employee submit to a substance abuse test during the first 90 days after the date of the employee's prior test only as provided in sub§§2 and 3.
- Recommend that 26 MRSA §685, sub§2, ¶A-1 be changed to:  
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 positive result. ~~except in accordance with the employee provisions of the employer's approved policy.~~
- Recommend that 26 MRSA §685, sub§2, ¶¶B, C and D be removed.
- Recommend that 26 MRSA §685, sub§3, ¶A be changed to:  
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 if the employer allows such treatment.~~ This paragraph does not prevent:

Regarding the amendment to 26 MRSA §681, sub§8 passed by the Legislature last session, the Department recommends that the Committee further review the language to determine whether the effected changes in the statute reflect what was intended by the Committee and the Legislature. The Department will be happy to explain its understanding of those effects and has provided alternative language should the Committee choose to further revise this section of the statute.

**Final Recommendations:**

1. The Department recommends that 26 MRSA §1193, sub§3, ¶A be amended to include the following:  
“An applicant who has been offered suitable employment but refuses to submit to a substance abuse test that has been approved by the Department under 26 MRSA Chapter 7, Subchapter 3-A, upon which such employment may be contingent, may be considered disqualified from eligibility and denied benefits under 26 MRSA §1193, sub§3, ¶A on the basis of her/his refusal.”
2. The Committee is authorized to introduce a bill related to the Department’s report to the Second Regular Session of the 125<sup>th</sup> Legislature. To assist in that effort, members of the Department who work most closely with this section of the law made some further recommendations to the statute based on their experience. The attached draft addresses the issues covered in this report and offers language clarifying or otherwise addressing several other issues that have arisen in the course of the Department’s efforts to implement this statute. The Department hopes you will incorporate the recommended changes when submitting your bill.

Enclosure:     Draft bill

## Draft Bill for LCRED Committee's Consideration

### 26 §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 tests while allowing the use of tests when the employer has a compelling reason to administer a test;

B. Ensure that, when substance abuse 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. C.~~ Eliminate drug use in the workplace.

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

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

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

**4. Home rule authority preempted.** No municipality may enact any ordinance under its home rule authority regulating an employer's use of substance abuse tests.

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

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

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**7. Other discipline unaffected.** ~~This subchapter does not prevent an employer from establishing rules related to the possession or use of substances of abuse by employees, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules, except when a substance abuse test is required, requested or suggested by the employer or used as the basis for any disciplinary action. Employers may establish policies prohibiting the use of substances of abuse by employees in the workplace or policies which allow the employer to take disciplinary action on convictions for drug-related offenses. This subchapter affects only those employers who choose to conduct non-federally mandated drug testing on applicants or employees.~~

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

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

~~B. This subchapter, except for section 685, subsection 2 and section 689, subsections 1 and 4, does not apply to employees subject to substance abuse testing under any federal law or regulation or under rules adopted by the Department of Public Safety that incorporate any federal laws or regulations related to substance abuse testing for motor carriers. This exception does not prevent the negotiation of collective bargaining agreements that provide greater protection to employees as long as the agreements are consistent with federal~~

~~W.~~

- (1) ~~For the purposes of applying section 685, subsection 2 to an employee under this paragraph, the employee is deemed to have previously worked in an employment position subject to random or arbitrary testing under an employer's written policy.~~

~~(B) Notwithstanding any provision to the contrary contained herein, this subchapter does not apply to any employer subject to a federally mandated drug and alcohol program, including, but not limited to, testing mandated by federal Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143, title V) and their 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. Employers who are required to test employees under federal law, including the Omnibus Transportation Employee Testing Act of 1991, Public Law 102 143, title V), may extend the United States Department of Transportation mandated program to its entire workforce, including independent contractors and employees of independent contractors who are working for or at the facilities of the employer who is subject to federally mandated drug and alcohol testing program. Such programs do not have to be approved by the Maine Department of Labor.~~

**9. Board of Licensure of Railroad Personnel; testing restricted.**

## **26 §682. DEFINITIONS**

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.



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**1. Applicant.** "Applicant" means any person seeking employment from an employer. The term includes any person using an employment agency's services.

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

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

**3. Employer.** "Employer" means any person, partnership, corporation, association or other legal entity, public or private, that employs one or more employees. The term also includes an employment agency.

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

**4. Negative test result.** "Negative test result" means a test result that indicates that:

A. A substance of abuse is not present in the tested sample; or

B. A substance of abuse is present in the tested sample in a concentration below the cutoff level.

**5. Positive test result.** "Positive test result" means a test result that indicates the presence of a substance of abuse in the tested sample above the cutoff level of the test.

A. "Confirmed positive result" means a confirmation test result that indicates the presence of a substance of abuse above the cutoff level in the tested sample.

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

A. Information received from an anonymous informant;

B. 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; or

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C. A single work-related accident except when the employee causes a work-related accident that results in significant property damage, personal injury or loss of life or a citation or summons being issued to the employer or employee by a law enforcement officer.

**7. Substance abuse test.** "Substance abuse test" means any test procedure designed to take and analyze body fluids or materials from the body for the purpose of detecting the presence of substances of abuse. The term does not include tests designed to determine blood-alcohol concentration levels from a sample of an individual's breath. The testing of an applicant or employee's breath for alcohol does not have to be submitted to the Department of Labor as part of the employer's policy, and the employer may discipline an employee whose breath test is positive.

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

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

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

C. "Federally recognized substance abuse test" means any substance abuse test recognized by the federal Food and Drug Administration as accurate and reliable through the administration's clearance or approval process.

**8. Substance of abuse.** "Substance of abuse" means any scheduled drug, alcohol or other drug, or any of their metabolites.

A. "Alcohol" has the same meaning as found in Title 28-A, section 2, subsection 2.

B. "Drug" has the same meaning as found in Title 32, section 13702-A, subsection 11.

C. "Scheduled drug" has the same meaning as found in Title 17-A, section 1101, subsection 11.

## **26 §683. TESTING PROCEDURES**

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

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

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

~~B. The employee assistance program must be certified by the Office of Substance Abuse under rules adopted pursuant to section 687. The rules must ensure that the employee assistance programs have the necessary personnel, facilities and procedures to meet minimum standards of professionalism and effectiveness in assisting employees.~~

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

A. The procedure and consequences of an employee's voluntary admission of a substance abuse problem ~~and any available assistance, including the availability and procedure of the employer's employee assistance program and a statement that the employee will not be disciplined for voluntarily coming forward unless the employee has had a prior positive test with the current employer.~~

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

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

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

C. The collection of samples.

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

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

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

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

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

(4) The employer may take additional actions necessary to ensure the integrity of a urine sample if the sample collector or testing laboratory determines that the sample may have been substituted, adulterated, diluted or otherwise tampered with in an attempt to influence test results. The Department of Health and Human Services shall adopt rules governing when those additional actions are justified and the scope of those actions. These rules may not permit the direct or indirect observation of the collection of a urine sample. The applicant or employee whose original sample has been deemed to be substituted, adulterated, diluted or otherwise tampered with shall be given the opportunity to submit a second sample.

If an employee or applicant is found to have twice substituted, adulterated, diluted or otherwise tampered with the employee's or applicant's urine sample, as determined under the rules adopted by the department, the employee or applicant is deemed to have refused to submit to a substance abuse test.

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

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

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

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

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

F. The substances of abuse to be tested for;

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

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

(2) The Department of Health and Human Services shall adopt rules under section 687 regulating screening and confirmation cutoff levels for other substances of abuse, including those substances tested for in blood samples under subsection 5, paragraph B, to ensure that levels are set within known tolerances 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.

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(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 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.

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

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

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

The consequences for a positive confirmation test result i.e. if the employee will be allowed to participate in a rehabilitation program may be at the employee's expense or if disciplinary action, including termination, will occur;

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 a copy of the written policy approved by the Department of Labor under section 686 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 a copy of the written policy under subsection 2 before administering a substance abuse test to the applicant. The 30-day and 60-day notice periods provided for employees under this subsection do 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 test; or

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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~~ if the client company has an approved substance abuse testing policy 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 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~~ any substances and their metabolites that are to be tested for under the employer's written 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 employer may require, request or suggest that any employee or applicant provide a blood sample for substance abuse testing purposes nor may any employer conduct a substance abuse test upon a blood sample except as provided in this paragraph.

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(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 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 employer may perform any substance abuse 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 test administered under this subchapter must be performed in a qualified testing laboratory that complies with this subsection.

A. [1989, c. 832, §8 (RP).]

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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 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 test conducted under this subchapter, including the use of blind samples and samples of known concentrations which 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 non-negative ~~positive~~, a confirmation test shall 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 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, 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 not be reported in numerical or quantitative form but shall 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.



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(b) A testing laboratory and the employer must 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 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. [1989, c. 832, §9 (AMD).]

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 policy 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 tests administered by that employer in the previous calendar year. This report shall provide separate categories for employees and applicants and shall be presented in statistical form so that no person who was tested by that employer can be identified from the report. The report shall include a separate category for any tests conducted on a random or arbitrary basis under section 684, subsection 3.

**9. Costs.** The employer shall pay the costs of all substance abuse tests 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 tests.

Costs of a substance abuse test administered at the request of an employee under subsection 5, paragraph B, shall 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.

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**10. Limitation on use of tests.** An employer may administer substance abuse 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 employer may have substance abuse 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 testing procedures that it finds necessary or desirable to ensure accurate and reliable substance abuse testing and to protect the privacy rights of employees and applicants.

### **26 §684. IMPOSITION OF TESTS**

**1. Testing of applicants.** An employer may require, request or suggest that an applicant submit to a substance abuse 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.

**3. Random or arbitrary testing of employees.** In addition to testing employees on a probable cause basis under subsection 2, an employer may require, request or suggest that employees who meet the criteria to be safety-sensitive submit to a substance abuse test on a random or arbitrary basis ~~if:~~ by using one of the following three methods (A, B or C).

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

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

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

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

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

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

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

(5) Before initiating a testing program under this paragraph, the employer must obtain from the Department of Labor approval of the policy developed by the employee committee, as required in section 686. If the employer does not approve of the written policy developed by the employee committee, the employer may decide not to submit the policy to the department and not to establish the testing program. The employer may not change the written policy without approval of the employee committee.

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

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

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

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

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

**5. Testing upon return to work.** If an employee who has received a confirmed positive result is permitted to attend a rehabilitation program and returns to work with the same employer, ~~whether or not the employee has participated in a rehabilitation program under section 685, subsection 2,~~ the employer may require, request or suggest that the employee submit to a subsequent substance abuse test anytime between 90 days and one year after the date of the employee's prior test. A test may be administered under this subsection in addition to any tests conducted under subsections 2 and 3. An employer may require, request or suggest that an employee submit to a substance abuse test during the first 90 days after the date of the employee's prior test only as provided in subsections 2 and 3.

[ 1989, c. 832, §11 (NEW) .]

## **26 §685. ACTION TAKEN ON SUBSTANCE ABUSE TESTS**

Action taken by an employer on the basis of a substance abuse 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, an employer may use a confirmed positive result or refusal to submit to a test 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;

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- (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 positive result. ~~except in accordance with the employee provisions of the employer's approved 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 in a rehabilitation 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. The employer may take any action described in paragraph A if the employee receives a subsequent confirmed positive result from a test administered by the employer under this subchapter.~~

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

~~(1) If the employer has an employee assistance program that offers counseling or rehabilitation services, the employee may choose to enter that program at the employer's employee'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 program at the employee's expense.~~

~~(a) Except to the extent that costs are covered by a group health insurance plan, the costs of the public or private rehabilitation program must be equally divided between the employer and employee if the employer has more than 20 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 employer shall assist in financing the cost share of the employee through a payroll deduction plan.~~

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

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

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

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

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

~~(a) If the employee who has completed rehabilitation previously worked in an employment position subject to random or arbitrary testing under an 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 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 be reinstated to the previous position or to another position with an equivalent rate of pay and benefits and with no loss of seniority within 6 months after returning to work in any capacity with the employer unless the employee has received a subsequent confirmed positive result within that time from a test administered under this subchapter or unless conditions unrelated to the employee's previous confirmed positive test result make that reinstatement or reassignment impossible. Placement of the employee in suitable work and reinstatement may not conflict with any provision of a collective bargaining agreement between the employer and a labor organization that is the collective bargaining representative of the unit of which the employee is or would be a part.~~

~~(b) Notwithstanding division (a), if an employee who has successfully completed rehabilitation is medically disqualified, the employer is not required to reinstate the employee or find suitable work for the employee during the period of disqualification. The employer is not required to compensate the employee during the period of disqualification. Immediately after the employee's medical disqualification ceases, the employer's obligations under division (a) attach as if the employee had successfully completed rehabilitation on that date. [1995, c. 344, §1 (AMD).]~~

~~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 program. This subsection is intended to set minimum opportunities for an employee with a substance abuse problem to address the problem through rehabilitation. An employer may offer additional opportunities, not otherwise in violation of this subchapter, for rehabilitation or continued employment without rehabilitation.~~

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**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~~ if the employer allows such treatment. 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 test required, requested or suggested by any employer may not be used in any criminal proceeding. [1989,

## **26 §686. REVIEW OF WRITTEN POLICIES**

**1. Review required.** The Department of Labor shall review each written policy or change to an approved 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 complies with this subchapter and shall immediately notify the employer who submitted the policy or change of that determination. If the department finds that the policy or change does not comply with this subchapter, the department shall also notify the employer of the specific areas in which the policy or change is defective.

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 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 policy or 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.

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B. Nothing in this section requires a formal hearing to be held concerning the submission and review of an employer's written 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 VII.

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 rules adopted under this paragraph are routine technical rules pursuant to Title 5, chapter 375, subchapter II-A.