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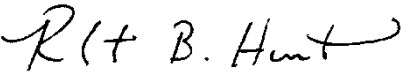
No. 2110

H.P. 1425

House of Representatives, January 7, 2026

An Act to Update Employer Substance Use Testing Policy Requirements

Submitted by the Department of Labor pursuant to Joint Rule 203.
Reference to the Committee on Labor suggested and ordered printed.


ROBERT B. HUNT
Clerk

Presented by Representative SKOLD of Portland.

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

2 **Sec. 1. 26 MRSA §681, sub-§1, ¶C**, as amended by PL 2017, c. 407, Pt. A, §105,
3 is further amended to read:

4 C. Ensure that an employee with substance use disorder receives an opportunity for
5 rehabilitation and treatment of the disease and returns to work as quickly as possible;
6 ~~and~~

7 **Sec. 2. 26 MRSA §681, sub-§1, ¶D**, as enacted by PL 1989, c. 832, §1, is amended
8 to read:

9 D. Eliminate drug use in the workplace; ~~and~~

10 **Sec. 3. 26 MRSA §681, sub-§1, ¶E** is enacted to read:

11 E. Protect employees in the State from injuries and illnesses caused by impairment in
12 the workplace.

13 **Sec. 4. 26 MRSA §681, sub-§2**, as amended by PL 2017, c. 407, Pt. A, §105, is
14 further amended to read:

15 **2. Employer discretion.** This subchapter does not require or encourage employers to
16 conduct substance use testing of employees or applicants. An employer ~~who~~ that chooses
17 to conduct such testing is limited by this subchapter, but may establish policies that are
18 supplemental to and not inconsistent with this subchapter. An employer that chooses to
19 conduct testing pursuant to this subchapter shall follow the procedures of the employer's
20 substance use testing policy fully once a test has been initiated.

21 **Sec. 5. 26 MRSA §681, sub-§3**, as amended by PL 2017, c. 407, Pt. A, §105, is
22 further amended by amending the first blocked paragraph to read:

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

30 **Sec. 6. 26 MRSA §681, sub-§8**, as amended by PL 2017, c. 407, Pt. A, §105, is
31 further amended to read:

32 ~~**8. Nuclear power plants; federal law**~~ **Federally mandated substance use testing**
33 **program.** The following limitations apply to the application of this subchapter.

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

37 C. This subchapter does not apply to any employer subject to a federally mandated
38 substance use testing program, including, but not limited to, testing mandated by the
39 federal Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143,
40 Title V, its applicants for employment and its employees, including independent
41 contractors and employees of independent contractors who are working for or at the

1 facilities of an employer ~~who~~ that is subject to such a federally mandated substance use
2 testing program. To qualify for the limitation under this paragraph, the employer must
3 have at least one position located in the State for which substance use testing is
4 federally mandated.

5 **Sec. 7. 26 MRSA §682, sub-§1-A** is enacted to read:

6 **1-A. Arbitrary.** "Arbitrary," with respect to substance use testing, means that the
7 frequency of substance use testing and the selection of persons being tested are based on a
8 set event, such as an employment anniversary or promotion. Arbitrary testing also includes
9 client-required or site-specific testing based on criteria unrelated to substance use, such as
10 when a client requires testing prior to work on a project or specific site.

11 **Sec. 8. 26 MRSA §682, sub-§3-A**, as amended by PL 2017, c. 407, Pt. A, §106, is
12 repealed.

13 **Sec. 9. 26 MRSA §682, sub-§3-B** is enacted to read:

14 **3-B. Legitimate medical explanation.** "Legitimate medical explanation" means an
15 explanation provided by an employee that justifies a confirmed positive result on a test for
16 a tested-for substance. "Legitimate medical explanation" includes, but is not limited to, use
17 of a controlled substance with a prescription, legal use of cannabis pursuant to the Maine
18 Medical Use of Cannabis Act or any other explanation that, in the professional judgment
19 of the medical review officer, constitutes a legitimate medical use of a tested-for substance.

20 **Sec. 10. 26 MRSA §682, sub-§3-C** is enacted to read:

21 **3-C. Medical review officer.** "Medical review officer" means a person who is a
22 licensed physician and who is responsible for receiving and reviewing laboratory results
23 generated by an employer's substance use testing program and evaluating medical
24 explanations for certain substance use test results.

25 **Sec. 11. 26 MRSA §682, sub-§5**, as amended by PL 2017, c. 407, Pt. A, §106, is
26 further amended to read:

27 **5. Positive Non-negative test result.** "Positive Non-negative test result" means a test
28 result that indicates the presence of a substance in the tested sample above the cutoff level
29 of the test but that has not been confirmed by a confirmation test.

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

32 **Sec. 12. 26 MRSA §682, sub-§5-A** is enacted to read:

33 **5-A. Observable behavior.** "Observable behavior" means observable physical,
34 behavioral and psychological signs that provide a reasonable suspicion that an employee is
35 impaired by substance use, including signs regarding appearance, behavior, speech and
36 smell that are usually associated with substance use.

37 **Sec. 13. 26 MRSA §682, sub-§6**, as amended by PL 2017, c. 407, Pt. A, §106, is
38 further amended to read:

39 **6. Probable-cause Reasonable suspicion.** "~~Probable-cause~~ Reasonable suspicion"
40 means a reasonable ground for belief in the existence of facts that induce a person to believe
41 that an employee may be under the influence of a substance, ~~provided~~ except that the

1 existence of ~~probable cause~~ reasonable suspicion may not be based exclusively on any of
2 the following:

- 3 A. Information received from an anonymous informant;
- 4 B. Any information tending to indicate that an employee may have possessed or used
5 a substance off duty, except when the employee is observed possessing or ingesting
6 any substance either while on the employer's premises or in the proximity of the
7 employer's premises during or immediately before the employee's working hours; or
- 8 C. A single work-related accident, unless the employee's observable behavior indicates
9 impairment at the time of the accident.

10 **Sec. 14. 26 MRSA §682, sub-§7**, as amended by PL 2017, c. 407, Pt. A, §106, is
11 further amended to read:

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

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

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

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

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

32 **Sec. 15. 26 MRSA §683, sub-§2**, as amended by PL 2017, c. 407, Pt. A, §107 and
33 PL 2021, c. 669, §5, is further amended to read:

34 **2. Written policy.** Before establishing any substance use testing program, an
35 employer shall develop ~~or, as required in section 684, subsection 3, paragraph C, appoint~~
36 ~~an employee committee to develop~~ a written policy in compliance with this subchapter
37 providing for, at a minimum:

- 38 A. The procedure and consequences of an employee's voluntary admission of a
39 substance use problem and any available assistance, including the availability and
40 procedure of the employer's employee assistance program;
- 41 B. When substance use 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~~ reasonable suspicion 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 use 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.~~

(3) An employee or applicant may not 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. 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 use test.

(5) If the employer proposes to use the type of screening test described in section 682, subsection 7, paragraph A, subparagraph (1), 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;

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

3 F. The substances to be tested for;

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

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

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

16 ~~(3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and~~
17 ~~Human Services does not have established cutoff levels or procedures for any~~
18 ~~specific federally recognized substance use test, the minimum cutoff levels and~~
19 ~~procedures that apply are those set forth in the Federal Register, Volume 69, No.~~
20 ~~71, sections 3.4 to 3.7 on pages 19697 and 19698;~~

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

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

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

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

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

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

40 **Sec. 16. 26 MRSA §683, sub-§3**, as amended by PL 2017, c. 407, Pt. A, §107, is
41 further amended to read:

1 **3. Copies to employees and applicants.** The employer shall provide each employee
2 with a copy of the written policy approved by the Department of Labor under section 686
3 at least 30 days before any portion of the written policy applicable to employees takes
4 effect. The employer shall provide each employee with a copy of any change in a written
5 policy approved by the Department of Labor under section 686 at least 60 days before any
6 portion of the change applicable to employees takes effect. The Department of Labor may
7 waive the 60-day notice for the implementation of an amendment covering employees if
8 the amendment was necessary to comply with the law or if, in the judgment of the
9 department, the amendment promotes the purpose of the law and does not lessen the
10 protection of an individual employee. If an employer intends to test an applicant, the
11 employer shall provide the applicant with an opportunity to review a copy of the written
12 policy under subsection 2 before administering a substance use test to the applicant. The
13 30-day and 60-day notice periods provided for employees under this subsection do not
14 apply to applicants.

15 **Sec. 17. 26 MRSA §683, sub-§5, ¶B,** as amended by PL 2019, c. 627, Pt. B, §7;
16 PL 2021, c. 669, §5; and PL 2025, c. 316, §3, is further amended to read:

17 B. In the case of an employee, have a blood sample taken from the employee by a
18 licensed physician, licensed physician associate, or registered nurse or a other person
19 trained and certified by the Department of Health and Human Services to draw blood
20 samples. The employer shall have this sample tested for the presence of alcohol or
21 cannabis metabolites, if those substances are to be tested for under the employer's
22 written policy. If the employee requests that a blood sample be taken as provided in
23 this paragraph, the employer may not test any other sample from the employee for the
24 presence of these substances. The employer shall ensure that the testing facility and
25 confirmation testing laboratory used by the employer accepts and has the ability to test
26 blood samples.

27 (1) The Department of Health and Human Services may identify, by rules adopted
28 under section 687, other substances for which an employee may request a blood
29 sample be tested instead of a urine sample if the department determines that a
30 sufficient correlation exists between the presence of the substance in an individual's
31 blood and its effect upon the individual's performance.

32 (2) An employer may not require, request or suggest that any employee or
33 applicant provide a blood sample for substance use testing purposes nor may any
34 employer conduct a substance use test upon a blood sample except as provided in
35 this paragraph.

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

38 **Sec. 18. 26 MRSA §683, sub-§5-A,** as amended by PL 2017, c. 407, Pt. A, §107,
39 is further amended to read:

40 **5-A. Point of collection screening test.** Except as provided in this subsection, all
41 provisions of this subchapter regulating screening tests apply to noninstrumented point of
42 collection test devices described in section 682, subsection 7, paragraph A, subparagraph
43 (1).

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

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

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

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

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

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

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

24 **Sec. 19. 26 MRSA §683, sub-§6**, as amended by PL 2017, c. 407, Pt. A, §107, is
25 further amended to read:

26 **6. Qualified testing laboratories required.** An employer may not perform any
27 substance use test administered to any of that employer's employees. An employer may
28 collect a sample from any of that employer's employees if the employer's facilities comply
29 with the requirements for collecting samples under this subsection. An employer may
30 perform screening tests administered to applicants if the employer's testing facilities
31 comply with the requirements for testing laboratories under this subsection. Except as
32 provided in subsection 5-A, any substance use test administered under this subchapter must
33 be performed in a qualified testing laboratory that complies with this subsection.

34 B. The laboratory must have written testing procedures and procedures to ensure a
35 clear chain of custody.

36 C. The laboratory must demonstrate satisfactory performance in the proficiency testing
37 program of the National Institute on Drug Abuse, the College of American ~~Pathology~~
38 Pathologists or the ~~American~~ Association for ~~Clinical Chemistry~~ Diagnostics and
39 Laboratory Medicine or a successor.

40 D. The laboratory must comply with rules adopted by the Department of Health and
41 Human Services under section 687. These rules must ensure that:

42 (1) The laboratory possesses all licenses or certifications that the department finds
43 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 use test conducted under this subchapter, including the use of blind samples and samples of known concentrations that are used to check the performance and calibration of testing equipment;

(b) The internal review and certification process for test results, including the qualifications of the person who performs that function in the testing laboratory; and

(c) Security measures implemented by the testing laboratory; and

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

Sec. 20. 26 MRSA §683, sub-§7, as amended by PL 2017, c. 407, Pt. A, §107, is further amended to read:

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

Sec. 21. 26 MRSA §683, sub-§7-A is enacted to read:

7-A. Medical review officer. A medical review officer may not be an employee of the employer for which the medical review officer reviews laboratory results. The medical review officer must have knowledge and clinical experience of controlled substance use disorders and be knowledgeable in deviations of substance use testing specimens and causes of invalid testing results. The medical review officer shall act independently in carrying out any testing reviews or recommendations.

Sec. 22. 26 MRSA §683, sub-§8, ¶A, as amended by PL 2017, c. 407, Pt. A, §107, is further amended by amending subparagraph (2) to read:

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

(a) Unless the employee or applicant consents, test results may not be reported in numerical or quantitative form but must state only that the test result was ~~positive~~ non-negative or negative. This division does not apply if the test or the test results become the subject of any grievance procedure, administrative proceeding or civil action.

(b) A testing laboratory and the employer shall ensure that an employee's unconfirmed ~~positive~~ non-negative 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;

1 **Sec. 23. 26 MRSA §683, sub-§8, ¶B-1** is enacted to read:

2 B-1. An applicant or employee must be given the opportunity to contest a non-negative
3 test result by discussing with the medical review officer or confirmation testing
4 laboratory representative any legitimate reason for the non-negative test result. If the
5 medical review officer or laboratory representative determines that there is a legitimate
6 medical explanation for the non-negative test result, the result must be reported to the
7 employer as negative and all records relating to the test must be destroyed. If the
8 medical review officer or laboratory representative determines there is no legitimate
9 medical explanation for the non-negative test result, the result must be reported to the
10 employer as confirmed positive.

11 **Sec. 24. 26 MRSA §683, sub-§8, ¶E** is enacted to read:

12 E. A confirmed positive result may be reported to an employer only by a medical
13 review officer. The medical review officer shall contact the employee or applicant and,
14 if necessary, the employee's or applicant's physician to review each confirmed positive
15 result or any test found to be adulterated, substituted or otherwise invalid to determine
16 whether or not there is a legitimate medical explanation for the result. Any exchange
17 between the employee or applicant and the medical review officer is not subject to the
18 physician-patient privilege, but the medical review officer shall protect the
19 confidentiality of the substance use testing information as otherwise provided in this
20 subchapter. The medical review officer may not disclose the presence or absence of
21 any physical or mental condition of the employee or applicant or the presence or
22 absence of any substances other than those allowed to be tested for under the
23 Department of Health and Human Services laboratory testing rules.

24 **Sec. 25. 26 MRSA §684, sub-§2**, as amended by PL 2017, c. 407, Pt. A, §108, is
25 further amended to read:

26 **2. Probable-cause Reasonable suspicion testing of employees.** An employer may
27 require, request or suggest that an employee submit to a substance use test if the employer
28 has ~~probable-cause~~ reasonable suspicion to ~~test the employee~~ believe that, based on
29 observable behaviors, the employee may be impaired.

30 A. The employee's immediate supervisor, other supervisory personnel, a licensed
31 physician or nurse, or the employer's security personnel must make the determination
32 of ~~probable-cause~~ reasonable suspicion.

33 B. The supervisor or other person must state, in writing, the facts upon which the
34 determination made under paragraph A is based and provide a copy of the statement to
35 the employee prior to the test's being conducted.

36 **Sec. 26. 26 MRSA §684, sub-§3**, as amended by PL 2017, c. 407, Pt. A, §108, is
37 further amended to read:

38 **3. Random or arbitrary testing of employees.** In addition to testing employees on
39 a ~~probable-cause~~ reasonable suspicion basis under subsection 2, an employer may require,
40 request or suggest that an employee submit to a substance use test on a random or arbitrary
41 basis if:

42 A. The employer and the employee have bargained for provisions in a collective
43 bargaining agreement, either before or after ~~the effective date of this subchapter~~

1 September 30, 1989, that provide for random or arbitrary testing of employees. A
2 random or arbitrary testing program that would result from implementation of an
3 employer's last best offer is not considered a provision bargained for in a collective
4 bargaining agreement for purposes of this section;

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

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

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

15 ~~(2) The written policy required by section 683, subsection 2 with respect to a~~
16 ~~testing program under this paragraph must be developed by a committee of at least~~
17 ~~10 of the employer's employees. The employer shall appoint members to the~~
18 ~~committee from a cross-section of employees who are eligible to be tested. The~~
19 ~~committee must include a medical professional who is trained in procedures for~~
20 ~~testing for substances. If no such person is employed by the employer, the~~
21 ~~employer shall obtain the services of such a person to serve as a member of the~~
22 ~~committee created under this subparagraph.~~

23 (2-A) An employer may establish a testing program under this paragraph if the
24 employer is required to test employees to retain a contract.

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

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

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

42 ~~(6) The employer may not discharge, suspend, demote, discipline or otherwise~~
43 ~~discriminate with regard to compensation or working conditions against an~~

1 ~~employee for participating or refusing to participate in an employee committee~~
2 ~~created pursuant to this paragraph.~~

3 Arbitrary testing may be conducted only on an employee whose position is of a nature that
4 could pose a potential threat to the health or safety of the public or coworkers if the
5 employee is under the influence of a substance.

6 **Sec. 27. 26 MRSA §684, sub-§5**, as amended by PL 2017, c. 407, Pt. A, §108, is
7 further amended to read:

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

17 **Sec. 28. 26 MRSA §685, sub-§2, ¶A**, as amended by PL 1995, c. 324, §7, is further
18 amended to read:

19 A. Subject to any limitation of the Maine Human Rights Act or any other state law,
20 including laws relating to the medical use of cannabis, or federal law, an employer may
21 use a confirmed positive result or refusal to submit to a test as a factor in any of the
22 following decisions:

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

28 **Sec. 29. 26 MRSA §685, sub-§2, ¶B**, as amended by PL 2017, c. 407, Pt. A, §109,
29 is further amended to read:

30 B. Before taking any action described in paragraph A in the case of an employee who
31 receives an initial confirmed positive result, an employer shall provide the employee
32 with an opportunity to participate for up to ~~6 months~~ 12 weeks in a rehabilitation
33 program designed to enable the employee to avoid future use of a substance and to
34 participate in an employee assistance program, if the employer has such a program.
35 The employer may take any action described in paragraph A if the employee receives
36 a subsequent confirmed positive result from a test administered by the employer under
37 this subchapter.

38 **Sec. 30. 26 MRSA §685, sub-§2, ¶C**, as amended by PL 2017, c. 407, Pt. A, §109,
39 is further amended by amending subparagraph (1), division (a) to read:

- 40 (a) Except to the extent that costs are covered by a group health insurance
41 plan, the costs of the public or private rehabilitation program ~~must be equally~~
42 ~~divided between the employer and employee if the employer has more than 20~~

1 ~~full-time employees~~ are the sole responsibility of the employee. This
2 requirement does not apply to municipalities or other political subdivisions of
3 the State or to any employer when the employee is tested because of the alcohol
4 and controlled substance testing mandated by the federal Omnibus
5 Transportation Employee Testing Act of 1991, Public Law 102-143, Title V.
6 If necessary, the employer shall assist in financing the cost share of the
7 employee through a payroll deduction plan.

8 **Sec. 31. 26 MRSA §685, sub-§2, ¶C**, as amended by PL 2017, c. 407, Pt. A, §109,
9 is further amended by repealing subparagraph (1), division (b).

10 **Sec. 32. 26 MRSA §685, sub-§2, ¶C**, as amended by PL 2017, c. 407, Pt. A, §109,
11 is further amended by amending subparagraph (2) to read:

12 (2) An employer may not take any action described in paragraph A while an
13 employee is participating in a rehabilitation program, except as provided in
14 subparagraph (2-A) and except that an employer may change the employee's work
15 assignment or suspend the employee from active duty to reduce any possible safety
16 hazard. Except as provided in subparagraph (2-A), an employee's pay or benefits
17 may not be reduced while an employee is participating in a rehabilitation program,
18 provided that the employer is not required to pay the employee for periods in which
19 the employee is unavailable for work for the purposes of rehabilitation ~~or while the~~
20 ~~employee is medically disqualified~~. The employee may apply normal sick leave
21 and vacation time, if any, for these periods.

22 **Sec. 33. 26 MRSA §685, sub-§2, ¶C**, as amended by PL 2017, c. 407, Pt. A, §109,
23 is further amended by amending subparagraph (2-A) to read:

24 (2-A) A rehabilitation or treatment provider shall promptly notify the employer if
25 the employee fails to comply with the prescribed rehabilitation program before the
26 expiration of the ~~6-month~~ 12-week period provided in paragraph B. Upon receipt
27 of this notice, the employer may take any action described in paragraph A.

28 **Sec. 34. 26 MRSA §685, sub-§2, ¶C**, as amended by PL 2017, c. 407, Pt. A, §109,
29 is further amended by amending subparagraph (3) to read:

30 (3) Except as provided in ~~divisions~~ division (a) ~~and (b)~~, upon successfully
31 completing the rehabilitation program, as determined by the rehabilitation or
32 treatment provider after consultation with the employer, the employee is entitled
33 to return to the employee's previous job with full pay and benefits unless conditions
34 unrelated to the employee's previous confirmed positive result make the
35 employee's return impossible. Reinstatement of the employee may not conflict
36 with any provision of a collective bargaining agreement between the employer and
37 a labor organization that is the collective bargaining representative of the unit of
38 which the employee is or would be a part. If the rehabilitation or treatment provider
39 determines that the employee has not successfully completed the rehabilitation
40 program within ~~6-months~~ 12 weeks after starting the program, the employer may
41 take any action described in paragraph A.

42 (a) If the employee who has completed rehabilitation previously worked in an
43 employment position subject to random or arbitrary testing under an
44 employer's written policy, the employer may refuse to allow the employee to

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

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

26 **Sec. 35. 26 MRSA §686, sub-§1, ¶B-1** is enacted to read:

27 B-1. An employer shall notify the department in writing if the employer chooses to
28 discontinue an approved substance use testing policy. The notice must include the
29 effective date of the discontinuation. Once the discontinuation is approved by the
30 department, the employer must be put into an inactive status and may not conduct
31 substance use testing, unless mandated by federal law to test employees. An employer
32 that has discontinued an approved substance use testing policy shall notify the
33 department in writing if the employer chooses to reinstate a prior approved substance
34 use testing policy.

35 **Sec. 36. 26 MRSA §686, sub-§2, ¶D**, as enacted by PL 1997, c. 49, §1, is amended
36 to read:

37 D. The rules may establish model applicant policies and employee ~~probable cause~~
38 reasonable suspicion policies and provide for expedited approval and registration for
39 employers adopting such model policies. The rules adopted under this paragraph are
40 routine technical rules pursuant to Title 5, chapter 375, subchapter H-A 2-A.

41 SUMMARY

42 This bill updates and clarifies certain statutes governing employers administering
43 substance use tests, including the following:

- 1 1. Requiring that an applicant or employee must be given an opportunity to contest a
2 non-negative result;
- 3 2. Requiring that results must be reported to an employer by a medical review officer;
- 4 3. Reducing the rehabilitation program opportunity based on a confirmed positive
5 result from 6 months to 12 weeks and placing the sole responsibility of the cost on the
6 employee;
- 7 4. Requiring that testing laboratories be able to process blood tests;
- 8 5. Allowing an employer that complies with the requirements governing testing
9 facilities to be considered a qualified testing laboratory to collect samples from employees;
10 and
- 11 6. Making other technical changes.