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**STATE OF MAINE
HOUSE OF REPRESENTATIVES
132ND LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT “ ” to H.P. 1425, L.D. 2110, “An Act to Update Employer Substance Use Testing Policy Requirements”

Amend the bill in section 5 in the first blocked paragraph in the first line (page 1, line 23 in L.D.) by striking out the following: "A" and inserting the following: 'A With the approval of the Department of Labor, a'

Amend the bill in section 6 in subsection 8 in paragraph C by striking out all of the last sentence (page 2, lines 2 to 4 in L.D.) and inserting the following: 'To qualify for the limitation under this paragraph, the employer must have at least one employee located in the State for whom substance use testing is federally mandated, and the employer, in conducting any substance use testing of applicants or employees for whom substance use testing is not federally mandated, shall follow the same federal regulations applicable to the testing of employees for whom substance use testing is federally mandated.'

Amend the bill by striking out all of section 7 and inserting the following:

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

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

Amend the bill by striking out all of section 9 and inserting the following:

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

3-B. Legitimate medical explanation. "Legitimate medical explanation" means an explanation provided by an employee that justifies a confirmed positive result on a test for a tested-for substance. "Legitimate medical explanation" includes:

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1 A. Use of a controlled substance with a valid prescription, prescribed for a legitimate
2 medical purpose in a quantity appropriate for the condition and expected duration with
3 levels consistent with prescribed amounts; or

4 B. Legal use of cannabis pursuant to the Maine Medical Use of Cannabis Act.'

5 Amend the bill by striking out all of sections 12 and 13 and inserting the following:

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

7 **5-A. Observable behavior.** "Observable behavior" means observable physical,
8 behavioral or psychological signs that can be seen, heard, smelled or otherwise observed
9 that provide a reasonable suspicion that an employee is impaired by substance use,
10 including signs regarding appearance, behavior, speech or odor that are usually associated
11 with substance use.

12 **Sec. 13. 26 MRSA §682, sub-§5-B** is enacted to read:

13 **5-B. Random testing.** "Random testing" or "random" means a neutral selection
14 method by which all employees have an equal chance of being selected for substance use
15 testing.

16 **Sec. 14. 26 MRSA §682, sub-§6**, as amended by PL 2017, c. 407, Pt. A, §106, is
17 further amended to read:

18 **6. Probable-cause Reasonable suspicion.** "Probable-cause Reasonable suspicion"
19 means a reasonable ground for belief in the existence of facts that induce a person to believe
20 specific and articulable facts that, taken together with rational inferences from those facts,
21 reasonably support the belief that an employee may be under the influence of a substance,
22 provided except that the existence of probable-cause reasonable suspicion may not be based
23 exclusively on any of the following:

24 A. Information received from an anonymous informant;

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

29 C. A single work-related accident without the employee also exhibiting observable
30 behavior indicating impairment at the time of the accident.'

31 Amend the bill in section 15 in subsection 2 in paragraph B in subparagraph (1) in the
32 2nd line (page 4, line 2 in L.D.) by striking out the following: "arbitrary" and inserting the
33 following: '~~arbitrary~~ criteria-based'

34 Amend the bill in section 15 in subsection 2 in paragraph B in subparagraph (2) in the
35 last line (page 4, line 6 in L.D.) by striking out the following: "arbitrary" and inserting the
36 following: '~~arbitrary~~ criteria-based'

37 Amend the bill by striking out all of sections 16 and 17 and inserting the following:

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

40 B. In the case of an employee, have a blood sample taken from the employee by a
41 licensed physician, licensed physician associate, or registered nurse or a other person

1 certified by the Department of Health and Human Services trained and qualified to
2 draw blood samples. The employer shall have this sample tested for the presence of
3 alcohol or cannabis metabolites, if those substances are to be tested for under the
4 employer's written policy. If the employee requests that a blood sample be taken as
5 provided in this paragraph, the employer may not test any other sample from the
6 employee for the presence of these substances. The employer shall ensure that the
7 testing facility and confirmation testing laboratory used by the employer accepts and
8 has the ability to test blood samples.

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

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

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

21 Amend the bill by striking out all of section 19 and inserting the following:

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

24 **6. Qualified testing laboratories required.** ~~An~~ Except as provided in subsection
25 5-A, an employer may not administer or perform any screening tests or substance use test
26 administered tests to any of that employer's employees. ~~An employer may perform~~
27 ~~screening tests administered to applicants if the employer's testing facilities unless the~~
28 employer's testing facilities comply with the requirements for testing laboratories under
29 this subsection. ~~Except as provided in subsection 5-A, any substance use test administered~~
30 ~~under this subchapter must be performed in a qualified testing laboratory that complies~~
31 with a qualified testing laboratory under this subsection.

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

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

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

40 (1) The laboratory possesses all licenses or certifications that the department finds
41 necessary or desirable to ensure reliable and accurate test results;

42 (2) The laboratory follows proper quality control procedures, including, but not
43 limited to:

- 1 (a) The use of internal quality controls during each substance use test
2 conducted under this subchapter, including the use of blind samples and
3 samples of known concentrations that are used to check the performance and
4 calibration of testing equipment;
- 5 (b) The internal review and certification process for test results, including the
6 qualifications of the person who performs that function in the testing
7 laboratory; and
- 8 (c) Security measures implemented by the testing laboratory; and
- 9 (3) Other necessary and proper actions are taken to ensure reliable and accurate
10 test results.'

11 Amend the bill in section 20 in subsection 7 in the 4th line (page 8, line 18 in L.D.) by
12 inserting after the following: "~~positive~~" the following: 'a'

13 Amend the bill in section 20 in subsection 7 in the 4th line (page 8, line 18 in L.D.) by
14 inserting after the following: "~~non-negative~~" the following: 'test result'

15 Amend the bill by striking out all of sections 21 to 23 and inserting the following:

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

17 **7-A. Medical review officer.** A medical review officer must have knowledge and
18 clinical experience of controlled substance use disorders and be knowledgeable in
19 deviations of substance use testing specimens and causes of invalid testing results. The
20 medical review officer shall act independently in carrying out any testing reviews pursuant
21 to this section.

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

- 24 (2) Any confirmed positive results on any tested sample.
- 25 (a) Unless the employee or applicant consents, test results may not be reported
26 in numerical or quantitative form but must state only that the test result was
27 ~~positive~~ a confirmed positive result, with or without a legitimate medical
28 explanation, or negative. This division does not apply if the test or the test
29 ~~results become~~ result becomes the subject of any grievance procedure,
30 administrative proceeding or civil action.
- 31 (b) A testing laboratory and the employer shall ensure that an employee's
32 unconfirmed ~~positive screening~~ non-negative test result on a screening test
33 cannot be determined by the employer in any manner, including, but not
34 limited to, the method of billing the employer for the tests performed by the
35 laboratory and the time within which results are provided to the employer.
36 This division does not apply to test results for applicants;

37 **Sec. 23. 26 MRSA §683, sub-§8, ¶B**, as amended by PL 1989, c. 832, §9, is further
38 amended to read:

39 B. The employer shall promptly notify the employee or applicant tested of the test
40 result. Upon request of an employee or applicant, the employer shall promptly provide
41 a legible copy of the laboratory report to the employee or applicant. Within 3 working

1 days after notice of a confirmed positive test result, the employee or applicant may
2 submit information to the employer explaining or contesting the results.

3 **Sec. 24. 26 MRSA §683, sub-§8, ¶B-1** is enacted to read:

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

13 **Sec. 25. 26 MRSA §683, sub-§8, ¶D**, as amended by PL 2017, c. 407, Pt. A, §107,
14 is further amended to read:

15 D. Every employer whose policy is approved by the Department of Labor under
16 section 686 shall annually send to the department a compilation of the results of all
17 substance use tests administered by that employer in the previous calendar year. This
18 report must provide separate categories for employees and applicants and must be
19 presented in statistical form so that no person who was tested by that employer can be
20 identified from the report. The report must include a separate category for any tests
21 conducted on a random or arbitrary criteria-based basis under section 684, subsection
22 3.'

23 Amend the bill by striking out all of section 26 and inserting the following:

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

26 **3. Random or arbitrary criteria-based testing of employees.** In addition to testing
27 employees on a probable cause reasonable suspicion basis under subsection 2, an employer
28 may require, request or suggest that an employee submit to a substance use test on a random
29 or arbitrary criteria-based basis if:

30 A. The employer and the employee have bargained for provisions in a collective
31 bargaining agreement, either before or after ~~the effective date of this subchapter~~
32 September 30, 1989, that provide for random or arbitrary criteria-based testing of
33 employees. A random or arbitrary criteria-based testing program that would result
34 from implementation of an employer's last best offer is not considered a provision
35 bargained for in a collective bargaining agreement for purposes of this section;

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

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

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

4 ~~(2) The written policy required by section 683, subsection 2 with respect to a~~
5 ~~testing program under this paragraph must be developed by a committee of at least~~
6 ~~10 of the employer's employees. The employer shall appoint members to the~~
7 ~~committee from a cross-section of employees who are eligible to be tested. The~~
8 ~~committee must include a medical professional who is trained in procedures for~~
9 ~~testing for substances. If no such person is employed by the employer, the~~
10 ~~employer shall obtain the services of such a person to serve as a member of the~~
11 ~~committee created under this subparagraph.~~

12 (2-A) An employer may establish a testing program under this paragraph if the
13 employer is required to test employees to retain a contract.

14 (3) The written policy ~~developed under subparagraph (2)~~ required by section 683,
15 subsection 2 must also require that selection of employees for testing be performed
16 by a person or entity not subject to the employer's influence, such as a medical
17 review officer. Selection must be made from a list, provided by the employer, of
18 all employees subject to testing under this paragraph. The list may not contain
19 information that would identify the employee to the person or entity making the
20 selection.

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

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

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

36 Amend the bill in section 34 in subparagraph (3) in division (a) in the 2nd line (page
37 12, line 43 in L.D.) by striking out the following: "arbitrary" and inserting the following:
38 'arbitrary criteria-based'

39 Amend the bill in section 34 in subparagraph (3) in division (a) in the 15th line (page
40 13, line 12 in L.D.) by striking out the following: "test" and inserting the following: 'test'

41 Amend the bill by inserting after section 34 the following:

42 '**Sec. 35. 26 MRSA §686, sub-§1, ¶B**, as enacted by PL 1989, c. 536, §§1 and 2
43 and affected by c. 604, §§2 and 3, is amended to read:

1 B. The department may request additional information from an employer when
2 necessary to determine whether an employment position meets the requirements of
3 section 684, subsection 3. The department ~~shall~~ may not approve any written policy
4 that provides for random or ~~arbitrary~~ criteria-based testing of any employment position
5 that the employer has failed to demonstrate meets the requirements of section 684,
6 subsection 3.'

7 Amend the bill in section 35 in paragraph B-1 in the first line (page 13, line 27 in L.D.)
8 by striking out the following: "~~chooses~~" and inserting the following: 'intends'

9 Amend the bill in section 35 in paragraph B-1 in the 3rd line (page 13, line 29 in L.D.)
10 by inserting before the following: "effective" the following: 'anticipated'

11 Amend the bill by inserting after section 36 the following:

12 '**Sec. 37. 26 MRSA §690, sub-§3**, as amended by PL 2017, c. 407, Pt. A, §113, is
13 further amended to read:

14 **3. Random or ~~arbitrary~~ criteria-based testing.** Indicate those employers whose
15 substance use testing policies permit random or ~~arbitrary~~ criteria-based testing under
16 section 684, subsection 3, and describe the employment positions subject to such random
17 or ~~arbitrary~~ criteria-based testing;'

18 Amend the bill by relettering or renumbering any nonconsecutive Part letter or section
19 number to read consecutively.

20 SUMMARY

21 This amendment:

22 1. Clarifies that authorization from the Department of Labor is required for any
23 substance use testing program;

24 2. Clarifies that an employer who is subject to federal substance use testing
25 requirements must test any nonfederally mandated employees in the same manner as its
26 federally mandated employees;

27 3. Replaces the term "arbitrary" with "criteria-based testing";

28 4. Clarifies the definitions of "legitimate medical explanation" and "observable
29 behavior";

30 5. Provides a definition of "random testing";

31 6. Clarifies that an employer may not perform a substance use test on its employees
32 unless its facilities comply with the requirements for a qualified testing laboratory; and

33 7. Makes a number of technical changes.

34 FISCAL NOTE REQUIRED

35 (See attached)