An Act To Standardize and Simplify the Process for Employers To Provide a Drug-free Workplace

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

PART A

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

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~~except that the existence of probable cause may not be based exclusively on any of the following:

A. Information received from an anonymous informant; or

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~~.

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

Sec. A-2. 26 MRSA §683, first ¶, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is amended to read:

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~~must comply with this subchapter, rules adopted under this subchapter and the ~~employer's written policy approved under section 686~~model policy adopted pursuant to subsection 2.

Sec. A-3. 26 MRSA §683, sub-§1, as amended by PL 2011, c. 657, Pt. AA, §72, is repealed.

Sec. A-4. 26 MRSA §683, sub-§2, as amended by PL 2009, c. 133, §2, is further amended to read:

2. Statewide drug-free workplace model policy. The Commissioner of Labor shall establish a single, comprehensive statewide drug-free workplace model policy to be managed by the Department of Labor. The model policy must be in compliance with all pertinent rules and regulations for employers conducting substance abuse testing. The model policy must be posted on the bureau's publicly accessible website. 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~~adopt the model policy, except that an employer may retain its workplace policy approved under former section 686 until June 30, 2015

if the workplace policy was approved prior to the establishment of the model policy and is as stringent as or more stringent than the model policy. Effective July 1, 2015, all employers shall adopt the model policy. The department shall treat all employers that adopt the model policy as having the same substance abuse testing policy. The model policy must provide 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~~;

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

(1) Which positions, if any, ~~will be~~ are 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~~ the employee's or the applicant's clothing.

(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. 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), 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.

(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;

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~~adoption of the model policy.

Sec. A-5. 26 MRSA §683, sub-§3, as amended by PL 1995, c. 324, §5, is further amended to read:

3. Informing 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~~publish on a portion of its website that is accessible to employees the employer's workplace substance abuse testing policy adopted pursuant to this section 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~~inform 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~~ that the employer's workplace substance abuse testing policy adopted pursuant to this section can be located on the bureau's website.

Sec. A-6. 26 MRSA §683, sub-§5, ¶B, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3 and amended by PL 2003, c. 689, Pt. B, §6, is further amended to read:

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 substances are to be tested for under the employer's ~~written~~workplace substance abuse testing 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.

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

Sec. A-7. 26 MRSA §683, sub-§8, ¶D, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is repealed.

Sec. A-8. 26 MRSA §684, sub-§3, ¶C, as enacted by PL 2003, c. 547, §2, is amended to read:

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)~~ employer's workplace substance abuse testing policy 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.~~

Sec. A-9. 26 MRSA §684, sub-§4, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is amended to read:

4. Testing while undergoing 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~~consent 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.

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.

Sec. A-10. 26 MRSA §685, sub-§2, ¶C, as amended by PL 1995, c. 344, §1, is further amended to read:

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 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.

(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~~ are the responsibility of the employee. 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 employee is participating in a rehabilitation program, ~~provided~~ except 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~~ the employer's ~~written~~ workplace substance abuse testing policy adopted under section 683, subsection 2, 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 in 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~~ must 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~~ commence as if the employee had successfully completed rehabilitation on that date.

Sec. A-11. 26 MRSA §685, sub-§3, ¶A, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is amended to read:

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. 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.

Sec. A-12. 26 MRSA §686, as amended by PL 2009, c. 133, §3, is repealed.

Sec. A-13. 26 MRSA §690, as enacted by PL 1989, c. 536, §§1 and 2 and affected by c. 604, §§2 and 3, is repealed.

Sec. A-14. Effective date. This Part takes effect July 1, 2015.

PART B

Sec. B-1. Model policy; rules. The Department of Health and Human Services and the Department of Labor shall jointly adopt rules to establish and coordinate the statewide drug-free workplace model policy under the Maine Revised Statutes, Title 26, section 683, subsection 2 by July 1, 2015. Rules adopted pursuant to this section are routine technical rules pursuant to the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A.

SUMMARY

Current law requires employers that want to provide a drug-free workplace by testing applicants or employees for substance abuse to develop and file a policy with the Department of Labor. The Bureau of Labor Standards reviews the policies to ensure compliance with state laws and rules. This bill provides employers with a single, consistent model policy. The model policy, which must be established by the Commissioner of Labor and managed by the department, is intended to encourage greater participation by employers to reduce substance abuse in the workplace. The bill requires an employer to adopt the model policy before establishing a substance abuse testing program. It removes the requirements that employers provide an employee assistance program and pay for half of rehabilitation beyond services provided through health care benefits. Employers may offer an employee assistance program if they choose. The bill amends the definition of "probable cause" to provide that a single work-related accident is probable cause to suspect an employee is under the influence of a substance of abuse. The bill requires the Department of Health and Human Services and the Department of Labor to work together to adopt rules to establish the model policy by July 1, 2015.