

Date: (Filing No. H-)

LABOR, COMMERCE, RESEARCH AND ECONOMIC DEVELOPMENT

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**STATE OF MAINE
HOUSE OF REPRESENTATIVES
127TH LEGISLATURE
SECOND REGULAR SESSION**

COMMITTEE AMENDMENT “ ” to H.P. 937, L.D. 1384, Bill, “An Act To Improve Workplace Safety by Simplifying and Improving Employers' Substance Abuse Policy Requirements”

Amend the bill by striking out everything after the enacting clause and before the summary and inserting the following:

'Sec. 1. 26 MRSA §682, sub-§2, ¶B is enacted to read:

B. "Employee" also includes a temporary employee, provided by an employment agency, performing work under the direct supervision of the employer.

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

3. Employer. "Employer" means any person, partnership, corporation, association or other legal entity, public or private, that employs one or more employees or temporary employees if those temporary employees are under the person's or entity's direct supervision. ~~The term also includes an employment agency.~~

Sec. 3. 26 MRSA §682, sub-§§3-B and 3-C are enacted to read:

3-B. Legitimate medical explanation. "Legitimate medical explanation" means an explanation provided by an employee that justifies a positive result on a test for a substance. This may include, but is not limited to, use of a substance that was legally obtained in a foreign country, use of a controlled substance with a prescription, legal use of medical marijuana pursuant to Title 22, chapter 558-C or any other explanation that in the professional judgment of the medical review officer constitutes a legitimate medical use of a tested-for substance.

3-C. Medical review officer. "Medical review officer" means a person who is a licensed physician knowledgeable of, and with clinical experience in, controlled substance abuse disorders, substance abuse testing and causes of invalid test results, who is responsible for receiving and reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

COMMITTEE AMENDMENT

1 "Medical review officer" may include a person qualified to serve as a medical review
2 officer under federal drug testing laws as long as that person meets the requirements of
3 this subsection.

4 **Sec. 4. 26 MRSA §682, sub-§6-A** is enacted to read:

5 **6-A. Random testing.** "Random testing" means a method of selecting those to be
6 tested in which all persons potentially to be tested have an equal probability of selection
7 by chance.

8 **Sec. 5. 26 MRSA §682, sub-§7, ¶C**, as enacted by PL 2009, c. 133, §1, is
9 amended to read:

10 C. "Federally recognized substance abuse test" means any substance abuse test
11 recognized by the federal Food and Drug Administration as accurate and reliable
12 through the administration's clearance or approval process or a substance abuse test
13 conducted in accordance with mandated guidelines for federal workplace drug testing
14 programs or with protocols and levels established by the United States Department of
15 Health and Human Services, Substance Abuse and Mental Health Services
16 Administration.

17 **Sec. 6. 26 MRSA §683, first ¶**, as enacted by PL 1989, c. 536, §§1 and 2 and
18 affected by c. 604, §§2 and 3, is amended to read:

19 ~~No~~ An employer may not require, request or suggest that any employee or applicant
20 submit to a substance abuse test except in compliance with this section. All actions taken
21 under a substance abuse testing program ~~shall~~ must comply with this subchapter, rules
22 adopted under this subchapter and the ~~employer's written uniform substance abuse testing~~
23 ~~policy approved under section 686 developed by the Department of Labor pursuant to~~
24 ~~subsection 2.~~

25 **Sec. 7. 26 MRSA §683, sub-§2**, as amended by PL 2009, c. 133, §2, is further
26 amended to read:

27 **2. Uniform substance abuse testing policy.** ~~Before establishing any substance~~
28 ~~abuse testing program, an employer must develop or, as required in section 684,~~
29 ~~subsection 3, paragraph C, must appoint an employee committee to develop a written~~
30 ~~policy in compliance with this subchapter providing for, On or before January 1, 2017,~~
31 ~~the Department of Labor shall adopt by rule a uniform substance abuse testing policy for~~
32 ~~adoption by employers. Before establishing any new substance abuse testing program or~~
33 ~~reactivating an inactive substance abuse testing policy after January 1, 2017, an employer~~
34 ~~shall notify the department that the employer has adopted the uniform substance abuse~~
35 ~~testing policy as set forth in department rules and certify that it will carry out all~~
36 ~~substance abuse testing activities that are not regulated by the Federal Government in~~
37 ~~accordance with that policy. Any employer with an active substance abuse testing policy~~
38 ~~approved prior to January 1, 2017 may continue to operate under that policy but shall~~
39 ~~certify to the department by no later than January 1, 2018 that the employer has adopted~~
40 ~~the uniform substance abuse testing policy. The uniform substance abuse testing policy~~
41 ~~adopted by the department must provide at a minimum:~~

- 1 A. The procedure and consequences of an employee's voluntary admission of a
2 substance abuse problem and any available assistance, including the availability and
3 procedure of the employer's employee assistance program;
- 4 B. When substance abuse testing may occur. The ~~written~~ policy must describe:
- 5 (1) Which positions, if any, will be subject to testing, including any positions
6 subject to random or arbitrary testing under section 684, subsection 3. For
7 applicant testing and probable cause testing of employees, an employer may
8 designate that all positions are subject to testing; and
- 9 (2) The procedure to be followed in selecting employees to be tested on a
10 random or arbitrary basis under section 684, subsection 3;
- 11 C. ~~The~~ For the collection of samples.
- 12 (1) The collection of any sample for use in a substance abuse test must be
13 conducted in a medical facility and supervised by a licensed physician or nurse.
14 A medical facility includes a first aid station located at the work site.
- 15 (2) An employer may not require an employee or applicant to remove any
16 clothing for the purpose of collecting a urine sample, except that:
- 17 (a) An employer may require that an employee or applicant leave any
18 personal belongings other than clothing and any unnecessary coat, jacket or
19 similar outer garments outside the collection area; or
- 20 (b) If it is the standard practice of an off-site medical facility to require the
21 removal of clothing when collecting a urine sample for any purpose, the
22 physician or nurse supervising the collection of the sample in that facility
23 may require the employee or applicant to remove ~~their~~ clothing.
- 24 (3) ~~No~~ An employee or applicant may not be required to provide a urine sample
25 while being observed, directly or indirectly, by another individual.
- 26 (4) The employer may take additional actions necessary to ensure the integrity of
27 a urine sample if the sample collector or testing laboratory determines that the
28 sample may have been substituted, adulterated, diluted or otherwise tampered
29 with in an attempt to influence test results. The Department of Health and
30 Human Services shall adopt rules governing when those additional actions are
31 justified and the scope of those actions. These rules may not permit the direct or
32 indirect observation of the collection of a urine sample. If an employee or
33 applicant is found to have twice substituted, adulterated, diluted or otherwise
34 tampered with the employee's or applicant's urine sample, as determined under
35 the rules adopted by the department, the employee or applicant is deemed to have
36 refused to submit to a substance abuse test.
- 37 (5) If the employer proposes to use the type of screening test described in section
38 682, subsection 7, paragraph A, subparagraph (1), the ~~employer's~~ policy must
39 include:
- 40 (a) Procedures to ensure the confidentiality of test results as required in
41 section 685, subsection 3; and

- 1 (b) Procedures for training persons performing the test in the proper manner
2 of collecting samples and reading results, maintaining a proper chain of
3 custody and complying with other applicable provisions of this subchapter;
- 4 D. ~~The Procedures for the~~ storage of samples before testing sufficient to inhibit
5 deterioration of the sample;
- 6 E. The chain of custody of samples sufficient to protect the sample from tampering
7 and to verify the identity of each sample and test result;
- 8 F. The substances of abuse to be tested for. If marijuana is one of the tested-for
9 substances, the policy must provide the procedure, if any, for establishing
10 certification for approved use of medical marijuana;
- 11 G. The cutoff levels for both screening and confirmation tests at which the presence
12 of a substance of abuse in a sample is considered a confirmed positive test result.
- 13 (1) Cutoff levels for confirmation tests for marijuana may not be lower than 15
14 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for
15 urine samples.
- 16 (2) The Department of Health and Human Services shall adopt rules under
17 section 687 regulating screening and confirmation cutoff levels for other
18 substances of abuse, including those substances tested for in blood samples under
19 subsection 5, paragraph B, to ensure that levels are set within known tolerances
20 of test methods and above mere trace amounts. An employer may request that
21 the Department of Health and Human Services establish a cutoff level for any
22 substance of abuse for which the department has not established a cutoff level.
- 23 (3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and
24 Human Services does not have established cutoff levels or procedures for any
25 specific federally recognized substance abuse test, the minimum cutoff levels and
26 procedures that apply are those set forth in the Federal Register, Volume 69, No.
27 71, sections 3.4 to 3.7 on pages 19697 and 19698, in mandated guidelines for
28 federal workplace drug testing programs or in protocols and levels established by
29 the United States Department of Health and Human Services, Substance Abuse
30 and Mental Health Services Administration;
- 31 H. The consequences of a confirmed positive substance abuse test result;
- 32 I. The consequences for refusal to submit to a substance abuse test;
- 33 J. Opportunities and procedures for rehabilitation following a confirmed positive
34 result;
- 35 K. A procedure under which an employee or applicant who receives a confirmed
36 positive result may appeal and contest the accuracy of that result. The policy must
37 include a mechanism that provides an opportunity to appeal at no cost to the
38 appellant; and
- 39 L. Any other matters required by rules adopted by the Department of Labor under
40 section 687.

1 ~~An employer must consult with the employer's employees in the development of any~~
2 ~~portion of a substance abuse testing policy under this subsection that relates to the~~
3 ~~employees. The employer is not required to consult with the employees on those portions~~
4 ~~of a policy that relate only to applicants. The employer shall send a copy of the final~~
5 ~~written policy to the Department of Labor for review under section 686. The employer~~
6 ~~may not implement the policy until the Department of Labor approves the policy. The~~
7 ~~employer shall send a copy of any proposed change in an approved written policy to the~~
8 ~~Department of Labor for review under section 686. The employer may not implement the~~
9 ~~change until the Department of Labor approves the change.~~

10 **Sec. 8. 26 MRSA §683, sub-§3**, as amended by PL 1995, c. 324, §5, is further
11 amended to read:

12 **3. Copies to employees and applicants.** The employer shall provide each employee
13 with notice of, and an opportunity to review, a copy of the ~~written policy approved by the~~
14 ~~Department of Labor under section 686~~ uniform substance abuse testing policy at least 30
15 days before any portion of the ~~written~~ policy applicable to employees takes effect. ~~The~~
16 ~~employer shall provide each employee with a copy of any change in a written policy~~
17 ~~approved by the Department of Labor under section 686 at least 60 days before any~~
18 ~~portion of the change applicable to employees takes effect. The Department of Labor~~
19 ~~may waive the 60-day notice for the implementation of an amendment covering~~
20 ~~employees if the amendment was necessary to comply with the law or if, in the judgment~~
21 ~~of the department, the amendment promotes the purpose of the law and does not lessen~~
22 ~~the protection of an individual employee. If an employer intends to test an applicant, the~~
23 ~~employer shall provide the applicant with an opportunity to review a copy of the written~~
24 uniform policy ~~under subsection 2~~ before administering a substance abuse test to the
25 applicant. The 30-day ~~and 60-day~~ notice ~~periods~~ period provided for employees under
26 this subsection ~~de~~ does not apply to applicants.

27 **Sec. 9. 26 MRSA §683, sub-§4-A**, as enacted by PL 2007, c. 339, §2, is amended
28 to read:

29 **4-A. Waivers for temporary employment.** An employment agency, as defined in
30 section 611, may request a written waiver for a temporary placement from an individual
31 already in its employ or on a roster of eligibility as long as the client company has ~~an~~
32 ~~approved~~ adopted the uniform substance abuse testing policy in accordance with this
33 subchapter and the individual has not been assigned work at the client company in the 30
34 days previous to the request. The waiver is only to allow a test that might not otherwise
35 be allowed under this subchapter. The test must otherwise comply with the standards of
36 this subchapter and the ~~employment agency's approved~~ uniform policy regarding
37 applicant testing. The agency may not take adverse action against the individual for
38 refusal to sign a waiver.

39 **Sec. 10. 26 MRSA §683, sub-§5**, as amended by PL 1995, c. 324, §6 and PL
40 2003, c. 689, Pt. B, §6, is further amended to read:

41 **5. Right to obtain other samples.** ~~At the request of the employee or applicant at the~~
42 ~~time the test sample is taken, the employer shall,~~ at that time:

43 A. Segregate a portion of the sample for ~~that person's~~ the employee's or applicant's
44 own testing. Within 5 days after notice of the test result is given to the employee or

1 applicant, the employee or applicant shall notify the employer of the testing
2 laboratory selected by the employee or applicant. This laboratory must comply with
3 the requirements of this section related to testing laboratories. When the employer
4 receives notice of the employee or applicant's selection, the employer shall promptly
5 send the segregated portion of the sample to the named testing laboratory, subject to
6 the same chain of custody requirements applicable to testing of the employer's
7 portion of the sample. The employee or applicant shall pay the costs of these tests.
8 Payment for these tests may not be required earlier than when notice of the choice of
9 laboratory is given to the employer; and

10 B. In the case of an employee, have a blood sample taken from the employee by a
11 licensed physician, registered physician's assistant, registered nurse or a person
12 certified by the Department of Health and Human Services to draw blood samples.
13 The employer shall have this sample tested for the presence of alcohol or marijuana
14 metabolites, if those substances are to be tested for under the employer's written
15 policy. If the employee requests that a blood sample be taken as provided in this
16 paragraph, the employer may not test any other sample from the employee for the
17 presence of these substances.

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

24 (2) ~~No~~ An employer may not require, request or suggest that any employee or
25 applicant provide a blood sample for substance abuse testing purposes nor may
26 any employer conduct a substance abuse test upon a blood sample except as
27 provided in this paragraph.

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

30 **Sec. 11. 26 MRSA §683, sub-§8, ¶D**, as enacted by PL 1989, c. 536, §§1 and 2
31 and affected by c. 604, §§2 and 3, is amended to read:

32 D. Every employer whose uniform policy notification is approved by the Department
33 of Labor under section 686 shall annually send to the department a compilation of the
34 results of all substance abuse tests administered by that employer in the previous
35 calendar year. This report ~~shall~~ must provide separate categories for employees and
36 applicants and ~~shall~~ must be presented in statistical form so that no person who was
37 tested by that employer can be identified from the report. The report ~~shall~~ must
38 include a separate category for any tests conducted on a random or arbitrary basis
39 under section 684, subsection 3.

40 **Sec. 12. 26 MRSA §683, sub-§8, ¶E** is enacted to read:

41 E. Confirmed positive substance abuse test results may be reported to the employer
42 only by a medical review officer. The medical review officer shall contact the
43 employee and, if necessary, the employee's physician to review each confirmed

1 positive substance abuse test or any test found to be adulterated, substituted or
2 otherwise invalid to determine whether there is a legitimate medical explanation for
3 the result. An exchange between the employee and the medical review officer is not
4 subject to doctor-patient relationship confidentiality, although the medical review
5 officer must protect the confidentiality of the drug testing information as otherwise
6 provided in this chapter. The medical review officer may not disclose the presence or
7 absence of any physical or mental condition of the employee, the presence or absence
8 of any substances other than those allowed to be tested for under Department of
9 Health and Human Services laboratory testing rules or the presence or absence of any
10 substance for which there is a legitimate medical explanation. A medical review
11 officer may not be employed by an employer for whom the medical review officer
12 reviews laboratory results, and the medical review officer shall act independently in
13 carrying out any testing reviews or recommendations.

14 **Sec. 13. 26 MRSA §684, sub-§3, ¶C**, as enacted by PL 2003, c. 547, §2, is
15 amended to read:

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

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

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

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

37 (3-A) An employer may establish a random or arbitrary testing program under
38 this paragraph if the employer is required to test employees to retain a contract.
39 An employee may sign a waiver exempting that employee from testing required
40 for a contract if the employee acknowledges that the employee will not have an
41 opportunity to work under the contract for which testing is required.

42 (4) Employees who are covered by a collective bargaining agreement are not
43 included in testing programs pursuant to this paragraph unless they agree to be

1 included pursuant to a collective bargaining agreement as described under
2 paragraph A.

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

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

14 **Sec. 14. 26 MRSA §685, sub-§2, ¶A**, as amended by PL 1995, c. 324, §7, is
15 further amended to read:

16 A. Subject to any limitation of the Maine Human Rights Act or any other state law or
17 federal law, an employer may use a confirmed positive result for a substance of abuse
18 or refusal to submit to a test as a factor in any of the following decisions:

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

24 **Sec. 15. 26 MRSA §685, sub-§2, ¶A-1**, as enacted by PL 1995, c. 324, §8, is
25 amended to read:

26 A-1. An employer who tests a person as an applicant and employs that person prior
27 to receiving the test result may take no action on a confirmed positive result except in
28 accordance with the employee provisions of the ~~employer's approved~~ uniform
29 substance abuse testing policy.

30 **Sec. 16. 26 MRSA §685, sub-§2, ¶B**, as amended by PL 2003, c. 547, §3, is
31 further amended to read:

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

1 **Sec. 17. 26 MRSA §686**, as amended by PL 2009, c. 133, §3, is further amended
2 to read:

3 **§686. Review of uniform policy notifications**

4 **1. Review required.** The Department of Labor shall review each ~~written policy or~~
5 ~~change to an approved~~ notification of adoption of the uniform substance abuse testing
6 policy submitted to the department by an employer under section 683, subsection 2.

7 A. The department shall determine if the employer's ~~written policy or change~~
8 ~~complies with this subchapter and shall immediately notify the employer who~~
9 ~~submitted the policy or change of that determination~~ notification of adoption of the
10 uniform substance abuse testing policy is complete. If the department finds that the
11 ~~policy or change does not comply with this subchapter~~ notification of adoption of the
12 uniform substance abuse testing policy is incomplete, the department shall also notify
13 the employer of the specific areas in which the ~~policy or change~~ notification is
14 defective.

15 ~~B. The department may request additional information from an employer when~~
16 ~~necessary to determine whether an employment position meets the requirements of~~
17 ~~section 684, subsection 3. The department shall not approve any written policy that~~
18 ~~provides for random or arbitrary testing of any employment position that the~~
19 ~~employer has failed to demonstrate meets the requirements of section 684, subsection~~
20 ~~3.~~

21 C. The department shall allow for the use of any federally recognized substance
22 abuse test.

23 D. An employer shall notify the department in writing if it chooses to discontinue the
24 uniform substance abuse testing policy. The notice must include the effective date
25 and, once approved by the department, the employer will be put into an inactive
26 status and will not be allowed to conduct substance abuse testing. An employer that
27 has discontinued the uniform substance abuse testing policy must notify the
28 department in writing if the employer chooses to reinstate the uniform substance
29 abuse testing policy.

30 **2. Review procedure.** The Department of Labor shall adopt rules under section 687
31 governing the procedure for reviews conducted under this section.

32 A. The rules must provide for notice to be given to the employees of any employer
33 who submits a ~~written~~ notification of adoption of the uniform substance abuse testing
34 policy or an amendment applicable to employees to the department for review under
35 this section. The employees may submit written comments to the department
36 challenging any portion of the employer's written policy, including the proposed
37 designation of any position under section 684, subsection 3, paragraph B.

38 B. Nothing in this section requires a formal hearing to be held concerning the
39 submission and review of an employer's ~~written~~ notification of adoption of the
40 uniform substance abuse testing policy.

41 C. Notwithstanding Title 5, section 8003, the Maine Administrative Procedure Act,
42 Title 5, chapter 375, does not apply to reviews conducted under this section except

1 that all determinations by the Department of Labor under this section may be
2 appealed as provided in Title 5, chapter 375, subchapter ~~VII~~ 7.

3 D. The rules may ~~establish model applicant policies and employee probable cause~~
4 ~~policies and~~ provide for expedited approval and registration for employers adopting
5 ~~such model policies~~ the uniform substance abuse testing policy. The rules adopted
6 under this paragraph are routine technical rules pursuant to Title 5, chapter 375,
7 subchapter ~~H-A~~ 2-A.'

8 **SUMMARY**

9 This amendment, which is the majority report of the Joint Standing Committee on
10 Labor, Commerce, Research and Economic Development, replaces the bill and makes
11 changes to the substance abuse testing laws, including the following.

12 1. It requires an employer to adopt a uniform policy for substance abuse testing as
13 developed by the Department of Labor.

14 2. It provides that all confirmed positive substance abuse tests may be reported to the
15 employer only by a medical review officer, who may not be employed by the employer.

16 3. It allows an employee to provide a legitimate medical explanation for a positive
17 test result for legally obtained medications, including medical marijuana, preventing the
18 medical review officer from reporting a positive test for that substance to the employer.

19 4. It changes the definitions of "employer" and "employee" so that a temporary
20 employee provided by an employment agency that is directly supervised by an employer
21 must be treated the same as a regular employee of that employer for purposes of
22 substance abuse testing laws.

23 5. It allows testing laboratories to use alternate federal substance abuse testing
24 standards.

25 6. Under current law, an employer must provide an employee who receives an initial
26 confirmed positive result from a substance abuse test with an opportunity to participate in
27 a rehabilitation program before discharging or disciplining the employee. This
28 amendment reduces the timeframe for completing such a rehabilitation program from 6
29 months to 12 weeks.

30 **FISCAL NOTE REQUIRED**

31 **(See attached)**