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No. 1222

S.P. 413

In Senate, March 30, 2017

**An Act To Address the Policies Relating to Substance Use in the
Workplace**

Reference to the Committee on Labor, Commerce, Research and Economic Development suggested and ordered printed.

A handwritten signature in cursive script, reading "Heather J.R. Priest".

HEATHER J.R. PRIEST
Secretary of the Senate

Presented by Senator CUSHING of Penobscot.
Cosponsored by Representative GUERIN of Glenburn and
Senators: MASON of Androscoggin, VOLK of Cumberland, Representatives: BICKFORD of
Auburn, COREY of Windham, TIMBERLAKE of Turner.

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

2 **Sec. 1. 26 MRSA §681**, as amended by PL 2011, c. 196, §1, is further amended to
3 read:

4 **§681. Purpose; applicability**

5 **1. Purpose.** This subchapter is intended to:

6 A. Protect the privacy rights of individual employees in the State from undue
7 invasion by employers through the use of substance ~~abuse~~ use tests while allowing
8 the use of tests when the employer has a compelling reason to administer a test;

9 B. Ensure that, when substance ~~abuse~~ use tests are used, proper test procedures are
10 employed to protect the privacy rights of employees and applicants and to achieve
11 reliable and accurate results;

12 C. Ensure that an employee with a substance abuse problem receives an opportunity
13 for rehabilitation and treatment of the disease and returns to work as quickly as
14 possible; ~~and~~

15 D. Eliminate drug use in the workplace; and

16 E. Protect workers from injuries and illnesses caused by impairment in the
17 workplace.

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

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

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

32 **4. Home rule authority preempted.** ~~No~~ A municipality may not enact any
33 ordinance under its home rule authority regulating an employer's use of substance ~~abuse~~
34 use tests.

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

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

7 **7. Other discipline unaffected.** This subchapter does not prevent an employer from
8 establishing rules related to the possession or use of substances of abuse by employees,
9 including convictions for drug-related offenses, and taking action based upon a violation
10 of any of those rules, except when a substance ~~abuse~~ use test is required, requested or
11 suggested by the employer or used as the basis for any disciplinary action.

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

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

17 ~~C. This subchapter does not apply to any employer subject to a federally mandated~~
18 ~~drug and alcohol testing program, including, but not limited to, testing mandated by~~
19 ~~the federal Omnibus Transportation Employee Testing Act of 1991, Public Law 102-~~
20 ~~143, Title V, and its employees, including independent contractors and employees of~~
21 ~~independent contractors who are working for or at the facilities of an employer who~~
22 ~~is subject to such a federally mandated drug and alcohol testing program.~~

23 **10. Federally mandated drug and alcohol testing programs.** The following
24 limitations apply to the application of this subchapter.

25 A. This subchapter does not apply to an employee, an independent contractor or an
26 employee of an independent contractor who is working for or at the facilities of an
27 employer who is subject to a federally mandated drug and alcohol testing program.

28 B. An employer with employees in this State who are subject to a federally mandated
29 drug and alcohol testing program either may follow a substance use testing policy
30 established in accordance with this subchapter or may choose not to follow this
31 subchapter for substance use testing of employees who are not subject to federal
32 testing requirements, in which case the employer shall:

33 (1) Prepare a substance use testing plan for employees who are not federally
34 regulated and provide a copy of that plan to employees and the Bureau of Labor
35 Standards prior to testing. The plan must identify the kinds of testing to be
36 administered, notification and administration procedures and how confirmed
37 positive test results that may be allowable under state law but not federal law will
38 be handled for the employees who are not federally regulated. The plan must
39 describe a process to ensure, at a minimum, that provisions of 49 Code of Federal
40 Regulations, Part 40, Subpart O will be followed to allow employees who are not
41 federally regulated and who test positive the opportunity to contact and work
42 with substance abuse professionals in evaluation, treatment and return-to-duty
43 processes; and

1 (2) Follow corresponding federal notification provisions and procedural
2 protocols for employees who are not federally regulated and comply with section
3 683, subsection 8, paragraph D in reporting annually the results of substance use
4 testing of such employees.

5 **Sec. 2. 26 MRSA §682, sub-§1-A** is enacted to read:

6 **1-A. Arbitrary testing.** "Arbitrary testing" means substance use testing in which
7 the frequency of testing and the selection of those being tested are based on a set event,
8 including, but not limited to, an employment anniversary or promotion, or are based on
9 client-required or site-specific testing, for example when a client requires testing prior to
10 work on a project or specific site.

11 **Sec. 3. 26 MRSA §682, sub-§3-A,** as enacted by PL 1989, c. 832, §4, is amended
12 to read:

13 **3-A. Medically disqualified.** "Medically disqualified" means that an employee is
14 prohibited by a federal law or regulation, or any rules adopted by the State's Department
15 of Public Safety that incorporate any federal laws or regulations related to substance
16 ~~abuse~~ use testing for motor carriers, from continuing in the employee's former
17 employment position due to the result of a substance ~~abuse~~ use test conducted under the
18 federal law or regulation or the Department of Public Safety rule.

19 **Sec. 4. 26 MRSA §682, sub-§§3-B to 3-E** are enacted to read:

20 **3-B. Established drug-free workplace policy.** "Established drug-free workplace
21 policy" means a substance use policy adopted by an employer who has certified to the
22 Department of Labor that all affected employees have been notified of the policy and
23 have had an opportunity to review the policy and its requirements.

24 **3-C. Fitness-for-duty evaluation.** "Fitness-for-duty evaluation" means an
25 evaluation to determine whether an individual is in a physical, mental and emotional state
26 that enables the employee to perform the essential tasks of that employee's work
27 assignment in a manner that does not threaten the safety or health of the employee,
28 coworkers or the public or damage to property.

29 **3-D. Impairment or impaired.** "Impairment" or "impaired" means any observed
30 ~~abnormality~~ or change in an employee's physical, psychological or physiological
31 condition or an event in the workplace that could reasonably lead to the conclusion that
32 the employee may behave or perform tasks in a manner that threatens the safety of the
33 employee, the employee's coworkers or any other individuals.

34 **3-E. Medical review officer.** "Medical review officer" means a licensed physician
35 knowledgeable of, and with clinical experience in, controlled substance abuse disorders,
36 deviations of substance use testing specimens and causes of invalid testing results, who is
37 responsible for receiving and reviewing laboratory results generated by an employer's
38 drug testing program and evaluating medical explanations for certain drug test results.
39 "Medical review officer" may include a person qualified to serve as a medical review

1 officer under federal drug testing laws, as long as that person meets the requirements of
2 this subsection.

3 **Sec. 5. 26 MRSA §682, sub-§4-A** is enacted to read:

4 **4-A. Occupational health care provider.** "Occupational health care provider"
5 means an occupational medicine specialist with a wide knowledge of clinical medicine
6 who has competencies in areas such as employee work-related injury management,
7 periodic regulatory medical evaluations for specific job roles, fitness-for-duty evaluations
8 of non-work-related employee conditions and evaluation of other employment-related
9 medical concerns. An occupational health care provider may be a physician, physician
10 assistant or nurse practitioner or other similar medical professional trained in
11 occupational health care. An occupational health care provider may have knowledge of
12 the specific nature of the employment functions performed by employees for the specific
13 employer.

14 **Sec. 6. 26 MRSA §682, sub-§6**, as enacted by PL 1989, c. 536, §§1 and 2 and
15 affected by c. 604, §§2 and 3, is repealed.

16 **Sec. 7. 26 MRSA §682, sub-§§6-A to 6-C**are enacted to read:

17 **6-A. Random testing.** "Random testing" means a method of selecting those to be
18 tested in which all persons potentially to be tested have an equal probability of selection
19 by chance.

20 **6-B. Return-to-work agreement.** "Return-to-work agreement" means a written
21 document that sets forth the expectations that the employer and the employer's employee
22 assistance program or a medical professional have of an employee who has completed
23 mandated treatment for substance abuse problems. It also sets forth the consequences if
24 the expectations are not met.

25 **6-C. Safety-sensitive task.** "Safety-sensitive task" means a work task or an
26 employee occupation that, based on its nature, machinery, location, surroundings or
27 influence upon other operations, could pose a threat to the safety of the employee, a
28 coworker or others.

29 **Sec. 8. 26 MRSA §682, sub-§7**, as amended by PL 2009, c. 133, §1, is further
30 amended to read:

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

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

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

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

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

16 **Sec. 9. 26 MRSA §683**, as amended by PL 2011, c. 657, Pt. AA, §72, is further
17 amended to read:

18 **§683. Testing procedures**

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

25 **1. Employee assistance program required.** Before establishing any substance
26 ~~abuse~~ use testing program for employees, an employer with over ~~20~~ 50 full-time
27 employees must have a functioning employee assistance program.

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

30 B. The employee assistance program must be certified by the Department of Health
31 and Human Services under rules adopted pursuant to section 687. The rules must
32 ensure that the employee assistance programs have the necessary personnel, facilities
33 and procedures to meet minimum standards of professionalism and effectiveness in
34 assisting employees.

35 **2. Uniform impairment and substance use testing policy.** ~~Before establishing any~~
36 ~~substance abuse testing program, an employer must develop or, as required in section~~
37 ~~684, subsection 3, paragraph C, must appoint an employee committee to develop a~~
38 ~~written policy in compliance with this subchapter providing for~~ On or before January 1,
39 2018, the Department of Labor shall adopt by rule a uniform impairment and substance
40 use testing policy for adoption by employers. Before establishing any new substance use
41 testing program or reactivating an inactive substance use testing policy after January 1,
42 2018, an employer shall certify to the department that it has adopted the uniform

1 impairment and substance use testing policy as set forth in department rules and that it
2 will carry out all substance use testing activities that are not regulated by the Federal
3 Government in accordance with that policy. An employer with an active substance use
4 testing policy approved prior to January 1, 2018 may continue to operate under that
5 policy but shall certify to the department by no later than January 1, 2019 that the
6 employer has adopted the uniform impairment and substance use testing policy. The
7 uniform impairment and substance use testing policy developed by the department must
8 provide, at a minimum:

9 A. The procedure and consequences of an employee's voluntary admission of a
10 substance abuse problem and any available assistance, including the availability and
11 procedure of the employer's employee assistance program;

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

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

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

19 C. ~~The~~ For the collection of samples.

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

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

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

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

32 (3) ~~No~~ An employee or applicant may not be required to provide a urine sample
33 while being observed, directly or indirectly, by another individual.

34 (4) The employer may take additional actions necessary to ensure the integrity of
35 a urine sample if the sample collector or testing laboratory determines that the
36 sample may have been substituted, adulterated, diluted or otherwise tampered
37 with in an attempt to influence test results. The Department of Health and
38 Human Services shall adopt rules governing when those additional actions are
39 justified and the scope of those actions. These rules may not permit the direct or
40 indirect observation of the collection of a urine sample. If an employee or
41 applicant is found to have twice substituted, adulterated, diluted or otherwise
42 tampered with the employee's or applicant's urine sample, as determined under

- 1 the rules adopted by the department, the employee or applicant is deemed to have
2 refused to submit to a substance ~~abuse~~ use test.
- 3 (5) If the employer proposes to use the type of screening test described in section
4 682, subsection 7, paragraph A, subparagraph (1), the ~~employer's~~ policy must
5 include:
- 6 (a) Procedures to ensure the confidentiality of test results as required in
7 section 685, subsection 3; and
- 8 (b) Procedures for training persons performing the test in the proper manner
9 of collecting samples and reading results, maintaining a proper chain of
10 custody and complying with other applicable provisions of this subchapter;
- 11 D. ~~The Procedures for the~~ storage of samples before testing sufficient to inhibit
12 deterioration of the sample;
- 13 E. The chain of custody of samples sufficient to protect the sample from tampering
14 and to verify the identity of each sample and test result;
- 15 F. The substances of abuse to be tested for;
- 16 G. The cutoff levels for ~~both screening and~~ confirmation tests at which the presence
17 of a substance of abuse in a sample is considered a confirmed positive test result.
- 18 (1) Cutoff levels for confirmation tests for marijuana may not be lower than 15
19 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for
20 urine samples.
- 21 (2) The Department of Health and Human Services shall adopt rules under
22 section 687 regulating screening and confirmation cutoff levels for other
23 substances of abuse, including those substances tested for in blood samples under
24 subsection 5, paragraph B, to ensure that levels are set within known tolerances
25 of test methods and above mere trace amounts. An employer may request that
26 the Department of Health and Human Services establish a cutoff level for any
27 substance of abuse for which the department has not established a cutoff level.
- 28 (3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and
29 Human Services does not have established cutoff levels or procedures for any
30 specific federally recognized substance ~~abuse~~ use test, the minimum cutoff levels
31 and procedures that apply are those set forth in the Federal Register, Volume 69,
32 No. 71, sections 3.4 to 3.7 on pages 19697 and 19698, in mandated guidelines for
33 federal workplace drug testing programs or in the protocols and levels established
34 by the United States Department of Health and Human Services, Substance
35 Abuse and Mental Health Services Administration;
- 36 H. The consequences of a confirmed positive substance ~~abuse~~ use test result;
- 37 I. The consequences for refusal to submit to a substance ~~abuse~~ use test;
- 38 J. Opportunities and procedures for rehabilitation following a confirmed positive
39 substance use test result;
- 40 K. A procedure under which an employee or applicant who receives a confirmed
41 positive substance use test result may appeal and contest the accuracy of that result.

1 The policy must include a mechanism that provides an opportunity to appeal at no
2 cost to the appellant; and

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

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

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

30 **4. Consent forms prohibited.** An employer may not require, request or suggest that
31 ~~any~~ an employee or applicant sign or agree to any form or agreement that attempts to:

32 A. Absolve the employer from any potential liability arising out of the imposition of
33 the substance ~~abuse~~ use test; or

34 B. Waive an employee's or applicant's rights or eliminate or diminish an employer's
35 obligations under this subchapter except as provided in subsection 4-A.

36 Any form or agreement prohibited by this subsection is void.

37 **4-A. Waivers for temporary employment.** An employment agency, as defined in
38 section 611, may request a written waiver for a temporary placement from an individual
39 already in its employ or on a roster of eligibility as long as the client company has ~~an~~
40 ~~approved~~ adopted the uniform impairment and substance ~~abuse~~ use testing policy in
41 accordance with subsection 2 and the individual has not been assigned work at the client
42 company in the 30 days previous to the request. The waiver is only to allow a test that
43 might not otherwise be allowed under this subchapter. The test must otherwise comply

1 with the standards of this subchapter and the ~~employment agency's approved~~ uniform
2 policy regarding applicant testing. The agency may not take adverse action against the
3 individual for refusal to sign a waiver.

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

6 A. Segregate a portion of the sample for that person's own testing. Within 5 days
7 after notice of the test result is given to the employee or applicant, the employee or
8 applicant shall notify the employer of the testing laboratory selected by the employee
9 or applicant. This laboratory must comply with the requirements of this section
10 related to testing laboratories. When the employer receives notice of the employee or
11 applicant's selection, the employer shall promptly send the segregated portion of the
12 sample to the named testing laboratory, subject to the same chain of custody
13 requirements applicable to testing of the employer's portion of the sample. The
14 employee or applicant shall pay the costs of these tests. Payment for these tests may
15 not be required earlier than when notice of the choice of laboratory is given to the
16 employer; and

17 B. In the case of an employee, have a blood sample taken from the employee by a
18 licensed physician, registered physician's assistant, registered nurse or a person
19 certified by the Department of Health and Human Services to draw blood samples.
20 The employer shall have this sample tested for the presence of alcohol or marijuana
21 metabolites, if those substances are to be tested for under the ~~employer's written~~
22 uniform impairment and substance use testing policy adopted pursuant to subsection
23 2. If the employee requests that a blood sample be taken as provided in this
24 paragraph, the employer may not test any other sample from the employee for the
25 presence of these substances.

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

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

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

38 **5-A. Point of collection screening test.** Except as provided in this subsection, all
39 provisions of this subchapter regulating screening tests apply to noninstrumented point of
40 collection test devices described in section 682, subsection 7, paragraph A, subparagraph
41 (1).

42 A. A noninstrumented point of collection test described in section 682, subsection 7,
43 paragraph A, subparagraph (1) may be performed at the point of collection rather

1 than in a laboratory. Subsections 6 and 7 and subsection 8, paragraphs A to C do not
2 apply to such screening tests. Subsection 5 applies only to a sample that results in a
3 positive test result.

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

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

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

12 (2) For a point of collection screening test that results in a preliminary positive
13 test result, the person performing the test may not release the test result to the
14 employer until after the result of the confirmation test has been determined.

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

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

21 **6. Qualified testing laboratories required.** ~~No~~ An employer may not perform any
22 substance ~~abuse~~ use test administered to any of that employer's employees. An employer
23 may perform screening tests administered to applicants if the employer's testing facilities
24 comply with the requirements for testing laboratories under this subsection. Except as
25 provided in subsection 5-A, any substance ~~abuse~~ use test administered under this
26 subchapter must be performed in a qualified testing laboratory that complies with this
27 subsection.

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

30 C. The laboratory must demonstrate satisfactory performance in the proficiency
31 testing program of the National Institute on Drug Abuse, the College of American
32 Pathology or the American Association for Clinical Chemistry.

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

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

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

39 (a) The use of internal quality controls during each substance ~~abuse~~ use test
40 conducted under this subchapter, including the use of blind samples and

1 samples of known concentrations ~~which~~ that are used to check the
2 performance and calibration of testing equipment;

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

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

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

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

17 **8. Laboratory report of test results.** This subsection governs the reporting of test
18 results.

19 A. A laboratory report of test results ~~shall~~ must, at a minimum, state:

20 (1) The name of the laboratory that performed the test or tests;

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

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

27 (b) A testing laboratory and the employer ~~must~~ shall ensure that an
28 employee's unconfirmed positive screening test result cannot be determined
29 by the employer in any manner, including, but not limited to, the method of
30 billing the employer for the tests performed by the laboratory and the time
31 within which results are provided to the employer. This division does not
32 apply to test results for applicants;

33 (3) The sensitivity or cutoff level of the confirmation test; and

34 (4) Any available information concerning the margin of accuracy and precision
35 of the test methods employed.

36 The report ~~shall~~ may not disclose the presence or absence of evidence of any physical
37 or mental condition or of any substance other than the specific substances of abuse
38 that the employer requested to be identified. A testing laboratory shall retain records
39 of confirmed positive results in a numerical or quantitative form for at least 2 years.

1 B. The employer shall promptly notify the employee or applicant tested of the test
2 result. Upon request of an employee or applicant, the employer shall promptly
3 provide a legible copy of the laboratory report to the employee or applicant. Within 3
4 working days after notice of a confirmed positive test result, the employee or
5 applicant may submit information to the employer explaining or contesting the
6 results.

7 C. The testing laboratory shall send test reports for samples segregated at an
8 employee's or applicant's request under subsection 5, paragraph A, to both the
9 employer and the employee or applicant tested.

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

18 E. Any laboratory-confirmed positive substance use test results must be reported to a
19 medical review officer. The medical review officer may be directly or indirectly
20 retained by the employer, but shall act independently in carrying out any testing
21 reviews or recommendations. The medical review officer shall contact the employee
22 and, if necessary, the employee's physician to review each confirmed positive
23 substance use test or any test found to be adulterated, substituted or otherwise invalid
24 to determine whether there is, in the opinion of the medical review officer, a
25 legitimate medical explanation for the result. An exchange between the employee
26 and the medical review officer is not subject to doctor-patient relationship
27 confidentiality, although the medical review officer shall protect the confidentiality of
28 the drug testing information as otherwise provided in this chapter. The medical
29 review officer may not disclose the presence or absence of any physical or mental
30 condition of the employee, the presence or absence of any substances other than those
31 allowed to be tested for under Department of Health and Human Services laboratory
32 testing rules or the presence or absence of any substance for which there is a
33 legitimate medical explanation.

34 **9. Costs.** The employer shall pay the costs of all substance ~~abuse~~ use tests to which
35 the employer requires, requests or suggests that an employee or applicant submit. Except
36 as provided in paragraph A, the employee or applicant shall pay the costs of any
37 additional substance ~~abuse~~ use tests.

38 Costs of a substance ~~abuse~~ use test administered at the request of an employee under
39 subsection 5, paragraph B, ~~shall~~ must be paid:

40 A. By the employer if the test results are negative for all substances of abuse tested
41 for in the sample; and

42 B. By the employee if the test results in a confirmed positive result for any of the
43 substances of abuse tested for in the sample.

1 **10. Limitation on use of tests.** An employer may administer substance ~~abuse use~~ tests to employees or applicants only for the purpose of discovering the use of any
2 substance of abuse likely to cause impairment of the user or the use of any scheduled
3 drug. ~~No~~ An employer may not have substance ~~abuse use~~ tests administered to an
4 employee or applicant for the purpose of discovering any other information.
5

6 **11. Rules.** The Department of Health and Human Services shall adopt any rules
7 under section 687 regulating substance ~~abuse use~~ testing procedures that it finds
8 necessary or desirable to ensure accurate and reliable substance ~~abuse use~~ testing and to
9 protect the privacy rights of employees and applicants.

10 **Sec. 10. 26 MRSA §684,** as amended by PL 2003, c. 547, §2, is further amended
11 to read:

12 **§684. Imposition of tests**

13 **1. Testing of applicants.** An employer may require, request or suggest that an
14 applicant submit to a substance ~~abuse use~~ test only if:

15 A. The applicant has been offered employment with the employer; or

16 B. The applicant has been offered a position on a roster of eligibility from which
17 applicants will be selected for employment. The number of persons on this roster of
18 eligibility may not exceed the number of applicants hired by that employer in the
19 preceding 6 months.

20 The offer of employment or offer of a position on a roster of eligibility may be
21 conditioned on the applicant receiving a negative test result.

22 ~~**2. Probable cause testing of employees.** An employer may require, request or~~
23 ~~suggest that an employee submit to a substance abuse test if the employer has probable~~
24 ~~cause to test the employee.~~

25 ~~A. The employee's immediate supervisor, other supervisory personnel, a licensed~~
26 ~~physician or nurse, or the employer's security personnel shall make the determination~~
27 ~~of probable cause.~~

28 ~~B. The supervisor or other person must state, in writing, the facts upon which this~~
29 ~~determination is based and provide a copy of the statement to the employee.~~

30 **2-A. Impairment detection required; testing of employees.** An employer may
31 require, request or suggest that an employee submit to a substance use test, an impairment
32 determination by an occupational health care provider, or both, only if the employer has
33 made an impairment detection regarding the employee pursuant to this subsection.

34 A. Only supervisory, human resources or security personnel approved for
35 impairment detection by the Department of Labor or a licensed physician or nurse
36 may make an impairment detection regarding an individual employee.

37 B. The person making the impairment detection shall state in writing, on a form
38 provided by the department, the facts upon which the detection is based, and shall
39 provide a copy of the completed form to the employee as soon as possible but no later

1 than 24 hours from the time the detection is made. The completed impairment
2 detection form must be provided to the employee prior to any substance use testing of
3 that employee.

4 C. At least 2 weeks prior to conducting any impairment detection activities under
5 this subsection, the employer must provide the department with a list of all positions
6 subject to impairment detection activities and notify employees by posting that list in
7 a location accessible to all employees. The employer may amend the list as long as,
8 at least 2 weeks prior to any impairment detection activities, employees whose
9 positions are being added to the list are notified of their inclusion on the list, the
10 amended list is posted in a location accessible to employees and the amended list is
11 submitted to the department.

12 D. Subject to any limitation of the Maine Human Rights Act or any other state or
13 federal law, there may be no cause of action against an employer for making and
14 acting upon impairment detection in accordance with this subsection as long as the
15 completed impairment detection form is provided to the employee and the
16 impairment detection is based on the employer's good faith belief that the employee
17 was impaired at work.

18 E. An impairment detection may not be based exclusively on:

19 (1) Information received from an anonymous informant; or

20 (2) Any information tending to indicate that an employee may have possessed or
21 used a substance of abuse off duty, except when the employee is observed
22 possessing or ingesting any substance of abuse while either on the employer's
23 premises or in the proximity of the employer's premises during or immediately
24 before the employee's working hours.

25 **2-B. Impairment determination; temporary removal.** If an impairment detection
26 is made, the employer may immediately remove the employee, or temporary employee,
27 from the workplace pending resolution of the impairment detection.

28 A. Any impairment detection must be confirmed through a medical review by an
29 occupational health care provider prior to any further action by the employer based
30 on the impairment determination. The occupational health care provider may require
31 that the employee submit to testing for substances of abuse, including prescription
32 medications, to assist in investigating and confirming the impairment detection. The
33 occupational health care provider may perform a fitness-for-duty evaluation of the
34 employee. The occupational health care provider may direct the employee to obtain
35 further medical evaluation either by the employee's physician or by another licensed
36 physician acceptable to the occupational health care provider.

37 B. Any substance use testing subsequent to an impairment detection confirmation
38 must be done by an independent testing facility, and all screening and confirmatory
39 test results must be delivered to the medical review officer for review according to
40 section 683, subsection 8, paragraph E. The medical review officer shall provide the
41 results to the occupational health care provider and may not provide the results to the
42 employer. When an employer is using a substance use test only, the medical review
43 officer shall provide the results to the employer. Prescription medications may be

1 tested for only when impairment detection has been made, and only for the purpose
2 of assisting the occupational health care provider in evaluating whether an employee
3 is impaired and the cause of the impairment.

4 C. The occupational health care provider shall make the final determination of
5 whether an employee was or is impaired, identify the cause of any impairment,
6 determine whether the employee can continue to perform any safety-sensitive tasks
7 and determine the impairment remediation program, if any, necessary to ensure that
8 the impairment will not recur or will not adversely affect the safety of the employee,
9 coworkers and other persons at the work site in the future. The occupational health
10 care provider may also make further recommendations regarding the employee's
11 ability to safely perform all assigned tasks, including requiring any remedial
12 measures, which may include, without limitation, compliance with return-to-work
13 agreements or a written agreement by the employee to schedule any necessary
14 medications in a manner that will not lead to impairment on the job. A return-to-
15 work agreement may be used if an employee has violated the drug-free workplace
16 policy and has been provided the opportunity to participate in treatment as a
17 condition of continued employment or reemployment.

18 D. If the occupational health care provider finds that the employee was not impaired
19 on the job or that any such impairment did not pose a safety risk and did not violate
20 the employer's established drug-free workplace policy, the employer shall reinstate
21 the employee to the employee's position.

22 E. If an impairment detection is made at a time when an occupational health care
23 provider is not normally available for work, the employer may take any steps to
24 remove the employee, and, prior to the employee's next scheduled work day, the
25 employer may determine whether to allow the employee to return to work or to
26 request an impairment determination or fitness-for-duty evaluation by the
27 occupational health care provider.

28 F. An occupational health care provider who makes or acts upon an impairment
29 determination in accordance with this section is not subject to a cause of action as
30 long as the determination is based on the occupational health care provider's good
31 faith, professional judgment. An occupational health care provider may not be an
32 employee or agent of, or have any financial interest in, a testing laboratory for which
33 the occupational health care provider is reviewing drug test results. An occupational
34 health care provider may not derive any financial benefit by having an employer use
35 a laboratory that may be construed as a potential conflict of interest.

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

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

1 considered a provision bargained for in a collective bargaining agreement for
2 purposes of this section;

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

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

11 (1) An employer may establish a testing program under this paragraph only if the
12 employer has ~~50~~ 10 or more employees who are not covered by a collective
13 bargaining agreement.

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

22 (2-A) An employer may establish a random or arbitrary testing program under
23 this paragraph if the employer is required to test employees to retain a contract.
24 An employee may be allowed to sign a waiver exempting the employee from
25 testing when required for a contract and the employee acknowledges that the
26 employee may not have an opportunity to work under the contract for which
27 testing is required.

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

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

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

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

5 (7) An arbitrary test may be conducted only on an employee whose job is of a
6 nature that could pose a threat to the health or safety of the public or coworkers if
7 the employee were under the influence of a substance of abuse.

8 **4. Testing while undergoing treatment.** While the employee is participating in a
9 substance abuse ~~rehabilitation~~ treatment program either as a result of voluntary contact
10 with or mandatory referral to the employer's employee assistance program or after a
11 confirmed positive test result as provided in section 685, subsection 2, paragraphs B and
12 C, substance ~~abuse~~ use testing may be conducted by the ~~rehabilitation~~ or treatment
13 provider as required, requested or suggested by that provider.

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

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

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

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

31 **Sec. 11. 26 MRSA §685**, as amended by PL 2003, c. 547, §3, is further amended
32 to read:

33 **§685. Action taken on substance use tests**

34 Action taken by an employer on the basis of a substance ~~abuse~~ use test is limited as
35 provided in this section.

36 **1. Before receipt of test results.** An employer may suspend an employee with full
37 pay and benefits or may transfer the employee to another position with no reduction in
38 pay or benefits while awaiting an employee's test results.

1 **2. Use of confirmation test results.** This subsection governs an employer's use of
2 confirmed positive test results and an employee's or applicant's refusal to submit to a test
3 requested or required by an employer in compliance with this subchapter.

4 A. Subject to any limitation of the Maine Human Rights Act or any other state law or
5 federal law; and to provisions in this subsection, an employer may use a confirmed
6 positive test result ~~or~~ for a substance of abuse, refusal to submit to a substance use
7 test, a violation of an established drug-free workplace policy or an impairment
8 confirmed by an occupational health care provider pursuant to section 684,
9 subsection 2-B as a factor in any of the following decisions:

- 10 (1) Refusal to hire an applicant for employment or refusal to place an applicant
11 on a roster of eligibility;
- 12 (2) Discharge of an employee;
- 13 (3) Discipline of an employee; or
- 14 (4) Change in the employee's work assignment.

15 A-1. An employer who tests a person as an applicant and employs that person prior
16 to receiving the test result may take no action on a confirmed positive test result
17 except in accordance with the employee provisions of the ~~employer's approved~~
18 uniform impairment and substance use testing policy adopted pursuant to section 683,
19 subsection 2.

20 B. Before taking any action described in paragraph A in the case of an employee
21 who receives an initial confirmed positive test result, an employer shall provide the
22 employee with an opportunity to participate for up to ~~6 months~~ 12 weeks in a
23 ~~rehabilitation~~ treatment program designed to enable the employee to avoid future use
24 of a substance of abuse and to participate in an employee assistance program, if the
25 employer has such a program. A confirmed impairment under section 684,
26 subsection 2-B caused by a substance of abuse is the same as an initial confirmed
27 positive test result for purposes of this paragraph, with or without a substance use test
28 result. A treatment program under this paragraph may be provided by an
29 occupational health care provider. Participation by an employee in a treatment
30 program must begin within 30 days of the employee's receiving notice of the positive
31 test result or confirmed impairment, unless otherwise agreed to by the employer. The
32 employer may take any action described in paragraph A if the employee receives a
33 subsequent confirmed positive test result from a substance use test administered by
34 the employer under this subchapter or the employee receives a subsequent confirmed
35 impairment caused by a substance of abuse with or without a substance use test.

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

- 40 (1) If the employer has an employee assistance program that offers counseling or
41 ~~rehabilitation~~ treatment services, the employee may choose to enter that program
42 at the employer's expense. If these services are not available from an employer's
43 employee assistance program or if the employee chooses not to participate in that

1 program, the employee may enter a public or private ~~rehabilitation~~ treatment
2 program.

3 (a) Except to the extent that costs are covered by a group health insurance
4 plan, the costs of the public or private ~~rehabilitation~~ treatment program, if
5 required by the employer, must be equally divided between the employer and
6 employee if the employer has more than ~~20~~ 50 full-time employees. This
7 requirement does not apply to municipalities or other political subdivisions of
8 the State or to any employer when the employee is tested because of the
9 alcohol and controlled substance testing mandated by the federal Omnibus
10 Transportation Employee Testing Act of 1991, Public Law 102-143, Title V.
11 ~~If necessary, the~~ The employer ~~shall~~ may assist in financing the cost share of
12 the employee through a payroll deduction plan.

13 (b) Except to the extent that costs are covered by a group health insurance
14 plan, an employer with ~~20~~ 50 or fewer full-time employees, a municipality or
15 other political subdivision of the State is not required to pay for any costs of
16 ~~rehabilitation~~ or treatment under any public or private ~~rehabilitation~~ treatment
17 program. An employer is not required to pay for the costs of ~~rehabilitation~~
18 treatment if the employee was tested because of the alcohol and controlled
19 substance testing mandated by the federal Omnibus Transportation Employee
20 Testing Act of 1991, Public Law 102-143, Title V.

21 (2) ~~No~~ An employer may not take any action described in paragraph A while an
22 employee is participating in a ~~rehabilitation~~ treatment program, except as
23 provided in subparagraph (2-A) and except that an employer may change the
24 employee's work assignment or suspend the employee from active duty to reduce
25 any possible safety hazard. Except as provided in subparagraph (2-A), an
26 employee's pay or benefits may not be reduced while an employee is participating
27 in a ~~rehabilitation~~ treatment program, ~~provided~~ except that the employer is not
28 required to pay the employee for periods in which the employee is unavailable
29 for work for the purposes of ~~rehabilitation~~ treatment or while the employee is
30 medically disqualified. The employee may apply normal sick leave and vacation
31 time, if any, for these periods.

32 (2-A) A ~~rehabilitation~~ or treatment provider shall promptly notify the employer
33 if the employee fails to comply with the prescribed ~~rehabilitation~~ treatment
34 program before the expiration of the ~~6-month~~ 12-week period provided in
35 paragraph B. Upon receipt of this notice, the employer may take any action
36 described in paragraph A.

37 (3) Except as provided in divisions (a) and (b), upon successfully completing the
38 ~~rehabilitation~~ treatment program, as determined by the ~~rehabilitation~~ or treatment
39 provider after consultation with the employer, the employee is entitled to return
40 to the employee's previous job with full pay and benefits unless conditions
41 unrelated to the employee's previous confirmed positive test result make the
42 employee's return impossible. Reinstatement of the employee ~~must~~ may not
43 conflict with any provision of a collective bargaining agreement between the
44 employer and a labor organization that is the collective bargaining representative
45 of the unit of which the employee is or would be a part. If the ~~rehabilitation~~ or

1 treatment provider determines that the employee has not successfully completed
2 the ~~rehabilitation~~ treatment program within 6 months after starting the program,
3 the employer may take any action described in paragraph A.

4 (a) If the employee who has completed ~~rehabilitation~~ treatment previously
5 worked in an employment position subject to random or arbitrary testing
6 under an employer's written policy, the employer may refuse to allow the
7 employee to return to the previous job if the employer believes that the
8 employee may pose an unreasonable safety hazard because of the nature of
9 the position. The employer shall attempt to find suitable work for the
10 employee immediately after refusing the employee's return to the previous
11 position. No reduction may be made in the employee's previous benefits or
12 rate of pay while awaiting reassignment to work or while working in a
13 position other than the previous job. The employee ~~shall~~ must be reinstated
14 to the previous position or to another position with an equivalent rate of pay
15 and benefits and with no loss of seniority within 6 months after returning to
16 work in any capacity with the employer unless the employee has received a
17 subsequent confirmed positive test result within that time from a test
18 administered under this subchapter or unless conditions unrelated to the
19 employee's previous confirmed positive test result make that reinstatement or
20 reassignment impossible. Placement of the employee in suitable work and
21 reinstatement may not conflict with any provision of a collective bargaining
22 agreement between the employer and a labor organization that is the
23 collective bargaining representative of the unit of which the employee is or
24 would be a part.

25 (b) Notwithstanding division (a), if an employee who has successfully
26 completed ~~rehabilitation~~ treatment is medically disqualified, the employer is
27 not required to reinstate the employee or find suitable work for the employee
28 during the period of disqualification. The employer is not required to
29 compensate the employee during the period of disqualification. Immediately
30 after the employee's medical disqualification ceases, the employer's
31 obligations under division (a) attach as if the employee had successfully
32 completed ~~rehabilitation~~ treatment on that date.

33 D. This subsection does not require an employer to take any disciplinary action
34 against an employee who refuses to submit to a test, receives a single or repeated
35 confirmed positive test result or does not choose to participate in a ~~rehabilitation~~
36 treatment program. This subsection is intended to set minimum opportunities for an
37 employee with a substance abuse problem to address the problem through
38 ~~rehabilitation~~ treatment. An employer may offer additional opportunities, not
39 otherwise in violation of this subchapter, for ~~rehabilitation~~ treatment or continued
40 employment without ~~rehabilitation~~ treatment.

41 **3. Confidentiality.** This subsection governs the use of information acquired by an
42 employer in the testing process.

43 A. Unless the employee or applicant consents, all information acquired by an
44 employer in the testing process is confidential and may not be released to any person
45 other than the employee or applicant who is tested, any necessary personnel of the

1 employer and a provider of ~~rehabilitation~~ or treatment services under subsection 2,
2 paragraph C. This paragraph does not prevent:

3 (1) The release of this information when required or permitted by state or federal
4 law, including release under section 683, subsection 8, paragraph D; or

5 (2) The use of this information in any grievance procedure, administrative
6 hearing or civil action relating to the imposition of the test or the use of test
7 results.

8 B. Notwithstanding any other law, the results of any substance ~~abuse~~ use test
9 required, requested or suggested by any employer may not be used in any criminal
10 proceeding.

11 **Sec. 12. 26 MRSA §686**, as amended by PL 2009, c. 133, §3, is further amended
12 to read:

13 **§686. Review of uniform impairment and substance use testing policy certification**

14 **1. Review required.** The Department of Labor shall review each ~~written policy or~~
15 ~~change to an approved~~ certification of adoption of the uniform impairment and substance
16 use testing policy submitted to the department by an employer under section 683,
17 subsection 2.

18 A. The department shall determine if the employer's ~~written policy or change~~
19 ~~complies with this subchapter and shall immediately notify the employer who~~
20 ~~submitted the policy or change of that determination~~ certification of adoption of the
21 uniform impairment and substance use testing policy is complete. If the department
22 finds that the ~~policy or change does not comply with this subchapter~~ employer's
23 certification is incomplete, the department shall also notify the employer of the
24 specific areas in which the ~~policy or change is defective~~ defects. If the employer's
25 certification is determined to be complete, the department shall approve the
26 conducting of substance use testing by the employer in accordance with this
27 subchapter and shall notify the employer of this approval.

28 ~~B. The department may request additional information from an employer when~~
29 ~~necessary to determine whether an employment position meets the requirements of~~
30 ~~section 684, subsection 3. The department shall not approve any written policy that~~
31 ~~provides for random or arbitrary testing of any employment position that the~~
32 ~~employer has failed to demonstrate meets the requirements of section 684, subsection~~
33 ~~3.~~

34 C. The department shall allow for the use of any federally recognized substance
35 ~~abuse~~ use test.

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

38 A. The rules must provide for notice to be given to the employees of any employer
39 who submits a ~~written~~ certification of adoption of the uniform impairment and
40 substance use testing policy under section 683, subsection 2 or an amendment
41 applicable to employees to the department for review under this section. The

1 employees may submit written comments to the department challenging ~~any portion~~
2 ~~of the employer's written policy, including~~ the proposed designation of any position
3 under section 684, subsection 3, paragraph B.

4 B. Nothing in this section requires a formal hearing to be held concerning the
5 submission and review of an employer's ~~written~~ certification of adoption of the
6 uniform impairment and substance use testing policy under section 683, subsection 2.

7 C. Notwithstanding Title 5, section 8003, the Maine Administrative Procedure Act,
8 Title 5, chapter 375, does not apply to reviews conducted under this section except
9 that all determinations by the Department of Labor under this section may be
10 appealed as provided in Title 5, chapter 375, subchapter ~~VII~~ 7.

11 D. The rules may ~~establish model applicant policies and employee probable cause~~
12 ~~policies and~~ provide for expedited approval and registration for employers adopting
13 ~~such model policies~~ the uniform impairment and substance use testing policy under
14 section 683, subsection 2. The rules adopted under this paragraph are routine
15 technical rules pursuant to Title 5, chapter 375, subchapter ~~II-A~~ 2-A.

16 **Sec. 13. 26 MRSA §689, sub-§3**, as enacted by PL 1989, c. 536, §§1 and 2 and
17 affected by c. 604, §§2 and 3, is amended to read:

18 **3. Harassment.** In addition to the liability imposed under subsection 1, any
19 employer who requires or repeatedly attempts to require an employee or applicant to
20 submit to a substance ~~abuse~~ use test under conditions that would not justify the test under
21 this subchapter or who without substantial justification repeatedly requires an employee
22 to submit to a substance ~~abuse~~ use test under section 684, subsection 3:

23 A. Is subject to a civil penalty not to exceed \$1,000, payable to the affected
24 employee, to be recovered in a civil action; and

25 B. For any subsequent offense against the same employee, is subject to a civil
26 penalty of \$2,000, payable to the affected employee, to be recovered in a civil action.

27 **Sec. 14. 26 MRSA §689, sub-§5** is enacted to read:

28 **5. Civil violation.** In addition to the other remedies provided in this section, an
29 employer who does not comply with this subchapter commits a civil violation for which
30 the following fines may be adjudged:

31 A. For the first violation, not more than \$500;

32 B. For the 2nd violation, not more than \$750; and

33 C. For a 3rd violation, and each subsequent violation, not more than \$1,000.

34 **Sec. 15. 26 MRSA §690**, as enacted by PL 1989, c. 536, §§1 and 2 and affected
35 by c. 604, §§2 and 3, is amended to read:

1 applicable to all employers. Employers must certify their adoption of the policy and be
2 approved by the Department of Labor prior to conducting substance use testing.

3 5. It removes the "probable cause" standard and replaces it with an "impairment
4 detection" standard required before the employer may conduct substance use testing. For
5 employers authorized to conduct substance use testing, only an employer or employee
6 approved for impairment detection by the Department of Labor or a medical person may
7 make an impairment detection. Among other things, this detection may be based on a
8 single work-related accident, unlike the "probable cause" standard under current law. The
9 employer may immediately remove the employee from the workplace pending resolution
10 of the impairment detection.

11 6. It adds an "impairment determination" process that may be used as an alternative
12 or in addition to a substance use test. Under this process, an occupational health care
13 provider conducts a medical review in order to confirm the impairment detection, which
14 may include a substance use test that includes testing for prescription drugs. If the
15 impairment is confirmed, the employer may take employment action including firing or
16 disciplining the employee, subject to any limitations under the Maine Human Rights Act
17 and any other state or federal law. If the occupational health care provider finds that the
18 employee was not impaired or that such impairment did not pose a safety risk, the
19 employee is entitled to full reinstatement to the employee's position.

20 7. It adds a violation of an established drug-free workplace policy as grounds for
21 employment action.

22 8. It adds a first impairment determination to the requirement, applicable to an initial
23 confirmed positive substance use test, that the employer must provide the employee with
24 an opportunity to participate in a treatment program before discharging or disciplining the
25 employee. The time frame for completing the treatment program is reduced from 6
26 months to 12 weeks, and an employer with between 20 and 50 full-time employees is no
27 longer required to pay half of the costs of the treatment program. An employer with more
28 than 50 full-time employees must pay half of treatment costs not covered by a group
29 health insurance plan when the treatment program is required of the employee.

30 9. It modifies the current requirement that, prior to establishing a substance use
31 testing program, an employer with over 20 full-time employees have a functioning
32 employee assistance program, instead requiring the program of employers with over 50
33 full-time employees.

34 10. It expands the number of establishments that may undertake company-wide
35 random substance use testing by authorizing such testing for companies with 10 or more
36 employees instead of with 50 employees, as is the current standard.

37 11. It provides that a confirmed positive substance use test may be reported to the
38 employee only by a medical review officer and allows an employee to provide a
39 legitimate medical explanation for a positive test result for legally obtained medications,
40 preventing the medical review officer from reporting a positive test for that substance to
41 the employer.

1 12. It allows testing laboratories to use federal testing standards to encourage testing
2 of biological samples beyond urine and blood.

3 13. It adds a new civil violation for any employer noncompliance with the substance
4 use testing laws, for which a fine of not more than \$500 for the first violation, \$750 for
5 the 2nd violation and \$1,000 for 3rd and subsequent violations may be adjudged.