Bill Analysis (prepared by Bureau of Labor Standards, MDOL)

Title 26: LABOR AND INDUSTRY

Chapter 7: EMPLOYMENT PRACTICES

Subchapter 3-A: SUBSTANCE USE TESTING

§681. PURPOSE; APPLICABILITY

1-3. Purpose – Amend language to stress importance of addressing impairment in the workplace.

4. Employer Discretion – Addition of language regarding employers' requirement to follow the testing process once they start it due to possible violations of the statute should they veer from it.

5. Collective Bargaining Agreements – Removal of language exempting unions' substance use testing policies from the requirement for approval by MDOL, to ensure that they adhere to the statute's guidelines.

6. Nuclear Power plants; federal law. Federally mandated drug and alcohol testing programs (federal exemption) – Removal of section A as there are no nuclear electrical generating facilities in Maine any longer, but leave history as section B.

Addition of "applicants for employment" to paragraph C to clarify that, if a company is eligible to take advantage of this exemption, it includes not only employees but applicants for employment as well.

Addition of last sentence to clarify that, in order to be eligible for this exemption, there must be at least 1 position working in Maine that falls under federal testing rules.

§682. DEFINITIONS

7. Addition of definition for "arbitrary" – Distinguishes "arbitrary" from "random" testing by clarifying that "arbitrary" testing is "based on a set event" like an anniversary or promotion, or "other criteria unrelated to substance use."

8. Removal of "Medically Disqualified" definition – This is a federal testing standard and does not apply to state testing rules.

9. Addition of definition for "legitimate medical explanation" – Clarification that a testing process must have a mechanism for an applicant/employee to explain why a substance is in their system. Including medical marijuana use based on a physician's recommendation or prescription as a "legitimate medical explanation" does not supersede any federal testing rules related to the presence of marijuana in a substance use test.

10. Addition of definition of a "Medical Review Officer" – The statute has referred to a "medical review officer" (MRO) in §681 but has not defined who can serve in that capacity.

11. Change "Positive" to "Non-negative" definition – Brings statutory language into alignment with current practice, DHHS Lab rules, and the steps in a substance use testing process:

- If the screening result is either 0 substance exposure OR exposure less than the screening cut off allows, then that is a **Negative** result.
- If the screening result shows an exposure to a substance above the noted screening cut off level, then it must be re-tested and confirmed. It is considered **Non-Negative** at this point.
- If the confirmation test result shows an exposure above the confirmation cutoff level noted, then the applicant/employee has the opportunity to provide a "legitimate medical explanation." If they can offer proof and the MRO can confirm there is a prescription for the substance, then it will be reported back to the employer as a **Negative.**
- If the confirmation test comes back showing an exposure above that of the confirmation cutoff level noted and there is no confirmed legitimate medical explanation, it will be reported back to the employer as a **Confirmed Positive** result.

12. Observable behavior – defines "observable behavior" as physical, behavioral, and psychological signs giving rise to "reasonable suspicion" that an employee is impaired by substance use.

13. Reasonable suspicion – Replaces the "probable cause" and clarifies that a single work-related accident cannot be the sole basis for probable cause to test an employee unless there is also observable behavior consistent with impairment.

14. Removal of last sentence in substance use test definition – Defines breath test to align with the federal definition.

§683. TESTING PROCEDURES

15. Written policy – Removes section permitting an off-site medical facility to require the removal of clothing as part of collecting a urine sample.

Reinforces that DHHS shall set cutoff levels for substance use testing and removes paragraph referencing an obsolete Federal Register volume. Federal Register references are no longer relevant and are not used in the most recently updated DHHS Lab rules, whose 2023 cutoff levels take into consideration federal drug and alcohol testing cut-off levels and cut-off levels that meet industry standards.

17. Blood samples – Removes requirement of certification of individuals to draw blood samples because DHHS no longer certifies people to draw blood samples., this language was also removed from the recently updated DHHS lab rules. Addition of language to ensure that testing facilities and confirmation testing labs can accommodate requests to test blood samples.

Imposes requirement that employers ensure that testing facilities and labs used for employee substance use tests accept and test blood samples.

18. Point of collection tests – Clarifies when results of a point of collection test result is shared with the employee and employer.

19. Qualified testing laboratory required – Clarifies that an employer may collect a sample from an employee "if the employer's facilities comply with the requirements for collecting samples under this section."

21. Medical review officer – Clarifies that the Medical Review Officer cannot be an employee of the employer for who they review test results and must act independently.

23. Employee contest of non-negative result – Provides a process for an employee to contest a non-negative result by providing a "legitimate medical explanation" for the substance(s) present in the test result.

24. Report of positive result – Provides a process for the medical review officer to report a confirmed positive test result to an employee.

§684. IMPOSITION OF TESTS

25. Reasonable suspicion testing – Aligns with the change to "probable cause" in the statute and requires written notice of the basis for the reasonable suspicion testing to be given to the employee prior to the test.

26. Random testing – Removes requirement to form a committee when developing a random testing policy, because the current requirement creates a barrier to employer participation in the substance use testing program.

Permits an employer to establish a random testing posily if required to retain a contract.

Limits arbitrary testing to employees "whose position is of a nature that could pose a potential threat to the health or safety of the public or coworkers if the employee is under the influence of a substance."

27. Testing upon return to work – Clarification that employers may conduct one unannounced test between 90 days and 1 year of the original test given when an employee, who tested confirmed positive, is returning to work after completing treatment/rehabilitation.

§685. ACTION TAKEN ON SUBSTANCE USE TESTS

28. Discrimination and retaliation – Adds the "laws relating to the medical use of cannabis" to the list of laws that could limit an employer's decisions based on a confirmed positive test or refusal to submit to a test by an employee. Title 22 Section 2430-C prohibits discrimination against a qualified patient or a caregiver. This only applies to valid medical marijuana card holders and not recreational users.

29. Timeframe for employees to participate in treatment following their first confirmed positive result – Changes 6 months to 12 weeks, to align with FMLA and Maine's PFML, which allow for up to 12 weeks.

30. Removal of requirement for employers to pay half the cost of rehabilitation above what is covered by health insurance – Treats substance use disorder treatment the same as other health care services covered by employer-provided health insurance. This section allows but does not require an employer to assist with the costs of treatment.

31. Removal of entire paragraph regarding employers with 20 or fewer full-time employees not having to pay any of the costs associated with the rehabilitation option – This paragraph is unnecessary with the change to 2C(1)(a) (Sec. 30 of the Bill).

32. Removal of entire paragraph regarding medical disqualification – This is a federal testing standard and does not apply to state testing rules.

33. Timeframe for employees to complete treatment following their first confirmed positive result – Changes 6 months to 12 weeks, to align with FMLA and Maine's PFML, which allow for up to 12 weeks.

34. Removal of entire paragraph regarding medical disqualification – This is a federal testing standard and does not apply to state testing rules.

§686. REVIEW OF WRITTEN POLICIES

35. Addition of language regarding the requirement for employers to notify MDOL when they are discontinuing their testing program – Supports the Bureau's effective management of the substance use testing policy program and responses to employee complaints by ensuring the agency knows whether and when an employer discontinues a previously approved substance use testing policy.

Additional notes:

Arbitrary testing has always been included with random testing, whether in the definition or within the procedures and it really should be its own category of testing. It is not actually a random test. It is based on some other employer-established criteria or event unrelated to substance use.

Cannabis (marijuana) is a significant complicating factor for workplace substance use testing. Title 22 Section 2430-C protects medical marijuana users and caregivers from discrimination, including employment discrimination. However, Title 22 Section 2426 expressly prohibits the operation of vehicles while under the influence of cannabis and provides that Title 22 Chapter 558-C cannot be construed to require "an employer to accommodate the ingestion of cannabis in any workplace or any employee working while under the influence of cannabis."

Employers can choose to test for cannabis or not, and they can choose how they respond to non-negative and confirmed positive tests for cannabis. Section 685(2)(A) requires an employer to give an employee the opportunity to attend a treatment program before taking adverse employment action. If the employer's policy is that employees must go to substance use treatment (rehabilitation) after a confirmed positive test for all substances, a conflict arises if the substance use treatment provider requires participants to discontinue the use of medical marijuana. This can place the employee in a position to have to choose whether to discontinue a lawful medical treatment in order to maintain their employment.