

LD 1384
PROPOSED COMMITTEE AMENDMENT

Offered by the Maine Department of Labor
March 7, 2016

Amend the bill by striking everything after the enacting clause and replacing it with the following.

Sec. 1. 26 MRSA §681, sub-§1, ¶E is enacted to read:

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

Sec. 2. 26 MRSA §681, sub-§8, as enacted by PL1989, c. 536, §§1 and 2 and affected by c. 604 §§2 and 3, is amended to read:

8. Nuclear power plants; federal law. Federally mandated drug and alcohol testing programs. The following limitations apply to the application of this subchapter.

A. This subchapter does not apply to nuclear electrical generating facilities and their employees, including independent contractors and employees of independent contractors who are working at nuclear electrical generating facilities. an employee, including an independent contractor and employee of an independent contractor who is working for or at the facilities of an employer who is subject to a federally mandated drug and alcohol testing program.

B. An employer with Maine employees subject to a federally mandated drug and alcohol testing program may either follow a Maine substance abuse testing policy in accordance with this subchapter; or may choose to not follow this subchapter for substance abuse testing of employees who are not subject to federal testing requirements, provided that:

1. The employer prepares a substance abuse testing plan for non-federally regulated employees and provides a copy of that plan to employees and the Bureau of Labor Standards prior to testing. The plan shall identify the kinds of testing to be administered, notification and administration procedures and how confirmed positive test results that may be allowable under state law but not federal law will be handled for the non-federally regulated employees. The plan must describe a process to assure, at a minimum, that provisions of 49 CFR Part 40, Subpart O will be followed to allow non-federally regulated employees who test positive the opportunity to contact and work with substance abuse professionals in evaluation, treatment and return-to-duty processes.
2. The employer otherwise follows corresponding federal notification provisions, and procedural protocols, for any non-federally regulated employees, and follows section

683 Subsection 8, Paragraph D. of this subchapter in reporting annually the results substance abuse testing of non-federally regulated employees.

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

Sec. 3. 26 MRSA §682, sub-§1-A is enacted to read:

1-A. Arbitrary. “Arbitrary” means that the frequency of testing and the selection of those being tested are based on a set event, such as an employment anniversary, promotion, etc. Arbitrary testing can only be conducted on employees whose job is of a nature which could pose a potential threat to the health or safety of the public or co-workers if the employee were under the influence of a substance of abuse. Arbitrary testing events also include client-required or site-specific: testing based on criteria unrelated to substance abuse such as when a client requires testing prior to work on a project or specific site.

Sec. 4. 26 MRSA §682, sub-§2, as enacted by PL1995, c. 324, §3, is amended to read:

2. Employee. "Employee" means a person who is permitted, required or directed by any employer to engage in any employment for consideration of direct gain or profit. A person separated from employment while receiving a mandated benefit, including but not limited to workers' compensation, unemployment compensation and family medical leave, is an employee for the period the person receives the benefit and for a minimum of 30 days beyond the termination of the benefit. A person separated from employment while receiving a non-mandated benefit is an employee for a minimum of 30 days beyond the separation.

A. A full-time employee is an employee who customarily works 30 hours or more each week.

B. For purposes of impairment detection and subsequent response to remove safety hazards under this subchapter, “employee” may include a temporary employee provided by an employment agency, in performance of a safety-sensitive job or task under the direct supervision of the employer who owns or operates the business.

Sec. 5. 26 MRSA §682, sub-§3, as enacted by PL1989, 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 under their direct supervision. ~~The term also includes an employment agency.~~

Sec. 6. 26 MRSA §682, sub-§13, is enacted to read:

13. Occupational Healthcare Provider. “Occupational Healthcare Provider:” means an occupational medicine specialist with a wide knowledge of clinical medicine and having competencies in areas such as employee work related injury management, periodic regulatory medical evaluations for specific job roles, fitness-for-duty evaluations of non-work related employee conditions and evaluation of other employment related medical concerns. An occupational healthcare provider may be a physician, physician extender, nurse practitioner or other similarly trained occupational medicine professional. Typically, an occupational healthcare provider has intimate knowledge of the specific nature of the employment functions performed by employees for the specific employer.

- A. The occupational healthcare provider must not be an employee or agent of or have any financial interest in a laboratory for which the occupational healthcare provider is reviewing drug test results, and
- B. B. The occupational healthcare provider must not derive any financial benefit by having an employer use a laboratory that may be construed as a potential conflict of interest.

Sec. 7. 26 MRSA §682, sub-§6, is repealed.

Sec. 8. 26 MRSA §682, sub-§6-A, is enacted to read:

6-A. Random. “Random” means a method of selecting those to be tested where all potential testees have an equal probability of selection by chance.

Sec. 9. 26 MRSA §682, sub-§6-B, is enacted to read:

6-B. Return to work agreement. “Return to work agreement” means a written document that sets forth the expectations that the employer and the employee assistance/medical professional have of an employee who has completed mandated treatment for alcohol and/or drug problems. It also sets forth the consequences if the expectations are not met. This agreement should be used if an employee has violated the drug-free workplace policy and has been provided the opportunity to participate in treatment as a condition of continued or re-employment.

Sec. 10. 26 MRSA §682, sub-§6-C, is enacted to read:

6-C. Safety-Sensitive task or occupation. “Safety-sensitive task or occupation” means a work task or an employee occupation that based on its nature, machinery, location, surroundings, or its influence upon other operations could potentially pose a threat to the safety of that worker, a co-worker, or others.

Sec. 11. 26 MRSA §682, sub-§6-D is enacted to read:

6-D. Sampling and screening organization. “Sampling and screening organization” means an entity that is hired by an employer to collect biological samples from employees and conduct initial screening tests for substances of abuse.

Sec. 12. 26 MRSA §682, sub-§7 C, as enacted by PL2009, c. 133, §1 is amended to read:

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

Sec. 13. 26 MRSA §682, sub-§9, is enacted to read:

9. Established Drug-Free Workplace Policy. For purposes of this chapter, an “established drug free workplace policy” is a drug free workplace policy adopted by an employer, for which the employer has certified to the Department of Labor that all affected employees have been notified of the policy and have had an opportunity to review the policy and its requirements.

Sec. 14. 26 MRSA §682, sub-§10, is enacted to read:

10. Fitness-for-duty. For purposes of this subchapter, “fitness-for-duty” means that an individual is in a physical, mental, and emotional state that enables the employee to perform the essential tasks of his or her work assignment in a manner which does not threaten the safety or health of oneself, co-workers, property, or the public at large.

Sec. 15. 26 MRSA §682, sub-§11, is enacted to read:

11. Impairment. For purposes of this chapter, “impairment” or “impaired” means any abnormality or change in an employee’s physical, psychological or physiological condition observed or causing an event in the workplace, regardless of source, which could reasonably lead to the conclusion that the employee could behave or perform tasks in a manner that threatens the safety of the employee, his/her coworkers, or any others, provided that an impairment detection may not be based exclusively on any of the following:

A. Information received from an anonymous informant; or

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

Sec. 16. 26 MRSA §682, sub-§13, is enacted to read:

13. 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, deviations of substance abuse testing specimens and causes of invalid testing 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. A medical review officer may be an employee or a contractor for an employer, including qualified personnel in the employer’s sampling and screening organization. A medical review officer may not be an employee, agent of, or have any financial interest in, a laboratory for which the medical review officer is reviewing drug test results, and may not derive any financial benefit from an employer using any laboratory that may be construed as a potential conflict of interest. The medical review officer may be, but is not required to be, qualified to serve as a medical review officer under federal drug testing laws.

Sec. 17. 26 MRSA §683, sub-§2, first ¶ as enacted by PL1989, c. 536, §§1 and 2 and affected by c. 604 §§2 and 3, is amended to read:

1. Employee assistance program required. Before establishing any substance abuse testing program for employees, an employer with over 2050 full-time employees must have a functioning employee assistance program.

2. ~~Written Model~~ Uniform Substance Abuse Testing Policy. On or before January 1, 2017, the Department shall promulgate a Uniform Substance Abuse Testing Policy for adoption by employers. Before establishing any new substance abuse testing program or reactivating an inactive substance abuse testing policy after January 1, 2017, an employer must notify the Maine Department of Labor that it has adopted the Uniform Substance Abuse Testing Policy as set forth in Department regulations and certify that it will carry out all non-federally regulated substance abuse testing activities in accordance with that policy. Any employer with active Maine substance abuse testing policies approved prior to January 1, 2017 must certify to the Department by no later than January 1, 2018 that it has adopted the Uniform Substance Abuse Testing Policy. The Uniform Substance Abuse Testing Policy shall provide ~~an employer must develop or, as required in section 684, subsection 3, paragraph C, must appoint an employee committee to develop a written policy in compliance with this subchapter providing for, at a minimum:~~

Sec. 18. 26 MRSA §683, sub-§2, ¶ C, sub-¶ 2, division (b), as enacted by PL1989, c. 536, §§1 and 2 and affected by c. 604 §§2 and 3 and amended by PL2001, c. 556, §2 is repealed.

Sec. 19. 26 MRSA §683, sub-§2, ¶ G as enacted by PL1989, c. 536, §§1 and 2 and affected by c. 604 §§2 and 3 and amended by PL2009, c. 133, §2 is amended to read:

G. The cutoff levels for ~~both screening and~~ confirmation tests at which the presence of a substance of abuse in a sample is considered a confirmed positive test result.

(1) Cutoff levels for confirmation tests for marijuana may not be lower than 15 nanograms of delta-9-tetrahydrocannabinol-9-carboxylic acid per milliliter for urine samples.

(2) The Department of Health and Human Services shall adopt rules under section 687 regulating ~~screening and~~ confirmation cutoff levels for other substances of abuse, including those substances tested for in blood samples under subsection 5, paragraph B, to ensure that levels are set within known tolerances of test methods and above mere trace amounts. An employer may request that the Department of Health and Human Services establish a cutoff level for any substance of abuse for which the Department has not established a cutoff level.

(3) Notwithstanding subparagraphs (1) and (2), if the Department of Health and Human Services does not have established cutoff levels or procedures for any specific federally recognized substance abuse test, the minimum cutoff levels and procedures that apply are those set forth in the Federal Register, Volume 69, No. 71, sections 3.4 to 3.7 on pages 19697 and 19698, or in mandated guidelines for federal workplace drug testing programs, or protocols and levels established by the Federal Department of Health and Human Services, Substance Abuse and Mental Health Services

Sec. 20. 26 MRSA §683, sub-§2, final ¶ as enacted by PL1989, c. 536, §§1 and 2 and affected by c. 604 §§2 and 3 and amended by PL2009, c. 133, §2 is repealed.

Sec. 21. 26 MRSA §683, sub-§3, as enacted by PL1995, c. 324, §5 is amended to read:

3. Copies to employees and applicants. The employer shall provide each employee with notice of, and an opportunity to review, a copy of the written policy approved by the Department of Labor under section 686 or the adopted Uniform Substance Abuse Testing Policy at least 30 days before any portion of the written policy applicable to employees takes effect. ~~The employer shall provide each employee with a copy of any change in a written policy approved by the Department of Labor under section 686 at least 60 days before any portion of the change applicable to employees takes effect. The Department of Labor may waive the 60-day notice for the implementation of an amendment covering employees if the amendment was necessary to comply with the law or if, in the judgment of the department, the amendment promotes the purpose of the law and does not lessen the protection of an individual employee.~~ If an employer intends to test an applicant, the employer shall provide the applicant with an opportunity to review a copy of the uniform or written policy ~~under subsection 2~~ before administering a substance abuse test to the applicant. The 30-day ~~and 60-day~~ notice periods provided for employees under this subsection does not apply to applicants.

Sec. 22. 26 MRSA §683, sub-§5, as enacted by PL1995, c. 324, §5 is amended to read:

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

Sec. 23. 26 MRSA §683, sub-§8, ¶E is enacted to read:

E. Medical review officer. No confirmed positive substance abuse test results shall be reported to the employer except by a medical review officer. The medical review officer may be directly or indirectly retained by the employer, but shall act independently in carrying out any testing reviews or recommendations. The medical review officer will contact the employee and, if necessary, the employee's physician to review each confirmed positive substance abuse test or any test found to be adulterated, substituted or otherwise invalid to determine whether or not

there is a legitimate medical explanation for the result. Any exchange between the employee and the medical review officer is not subject to doctor patient relationship although the medical review officer must protect the confidentiality of the drug testing information as otherwise provided in this chapter. The medical review officer shall not disclose the presence or absence of any physical or mental condition of the employee nor the presence or absence of any substances other than those allowed to be tested under Department of Human Services' laboratory testing rules.

Sec. 24. 26 MRSA §684, sub-§2, as enacted by PL1989 c.536 §§ 1,2, affected by PL1989 c 604, §§ 2,3 and amended by PL1989 c. 832 §10 is amended to read:

2. Probable-cause Impairment determination and testing of employees. An employer may require, request or suggest that an employee submit to a substance abuse test, or impairment determination by an occupational healthcare provider, if the employer ~~has probable cause to test~~ detects that the employee is impaired pursuant to this subsection.

A. ~~The employee's immediate supervisor, other supervisory personnel or a licensed physician or nurse, or the employer's security personnel shall make the determination of impairment probable cause.~~ Only an immediate supervisor, other supervisory personnel, human resources personnel or security personnel, if approved for impairment detection by the Maine Department of Labor, may make an impairment detection regarding an individual employee. A licensed physician or nurse may also make an impairment detection.

B. ~~The supervisor or other person must state, in writing, the facts upon which this determination is based and provide a copy of the statement to the employee. The person making the impairment detection must state in writing, on a form provided by the Department, the facts upon which the detection is based, and provide a copy of the completed form to the employee as soon as possible but no later than 24 hours from the time the detection is made. The impairment detection form must be provided to the employee prior to any substance abuse testing of that employee.~~

C. At least two weeks prior to conducting any impairment detection activities under this subsection, the employer must provide the Department with a list of all positions or employees subject to impairment detection activities, notify employees who are on the list and post that list in a location accessible to all employees. The employer may amend the list provided that, at least two weeks prior to any impairment detection activities, newly affected employees are notified of their inclusion on the list; the amended list is posted in a location accessed by employees; and the amended list is submitted to the Department.

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

Sec. 25. 26 MRSA §684, sub-§2-B, is enacted to read:

2-B. Temporary Removal and Medical Review following an Impairment Detection. If impairment detection is made, the employer may immediately remove the employee from the safety-sensitive task or location, or make changes as necessary to eliminate any safety or property damage risk caused by the impairment. The employer may temporarily assign the employee to other tasks or responsibilities that are not safety-sensitive while awaiting confirmation or cessation of the employee's impairment or the employer may require that the employee be sent home or to another location for testing or other purposes. The employer may also restore the employee's previous responsibilities and tasks upon cessation of the impairment condition with or without further investigation.

A. Any impairment detection must be confirmed through a medical review by a occupational healthcare provider prior to any further action by the employer. The occupational healthcare provider may require that the employee submit to testing for substances of abuse, including prescription medications, to assist in investigating and confirming the impairment detection.

B. Any impairment substance testing shall be done by an independent testing facility and all screening and confirmatory test results shall be delivered to the medical review officer for review according to Section 683, Subsection 8 E. The medical review officer will pass on the results to the occupational healthcare provider and not to the employer. Prescription medications may be tested only when impairment detection has been made, and only for the purpose of assisting the occupational healthcare provider in evaluating whether an employee is impaired and the cause of the impairment.

C. The occupational healthcare provider may direct the employee to obtain further medical evaluation either by the employee's physician or other licensed physician as acceptable to the occupational healthcare provider and the occupational healthcare provider may perform a fitness-for-duty evaluation of the employee. The occupational healthcare provider may also make further recommendations regarding the employee's ability to safely perform all assigned tasks, including any remedial measures, including but not limited to, return to work testing and agreements, written agreement by the employee to schedule any necessary medications in a manner that will not lead to impairment on the job.

D. The occupational healthcare provider will make the final determination on whether or not employee was or is impaired; identify the cause of any impairment; determine whether or not the employee can continue to perform any safety-sensitive tasks and, the impairment remediation program, if any, necessary to assure that the impairment will not recur or will not adversely affect the safety of the employee, coworkers and anyone else in the future.

E. If, the occupational healthcare provider finds that the employee was not impaired on the job or that any such impairment posed no safety risks and, if the employee did not violate the employer's drug-free workplace policy, the employee is entitled to full reinstatement to his/her position without any lost wages or benefits. Failure by the employer to reinstate those wages or benefits may be subject to the enforcement provisions of Section 689 of this subchapter.

F. If an impairment detection is made at a time when a occupational healthcare provider is not normally available for work, the employer may take any steps to remove the safety hazard, including taking the employee home, and, prior to the employee's next scheduled workday, the employer may determine whether or not to allow the employee return to work, or to request an impairment investigation or fit-for-duty evaluation by the occupational healthcare provider.

G. There shall be no cause of action against a occupational healthcare provider for making and acting upon an impairment determination in accordance with this section as long as the determination is based on the occupational healthcare provider's good faith, professional judgment.

Sec. 26. 26 MRSA §684, sub-§3, as enacted by PL2003, c. 547, §2 is amended to read:

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

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

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

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

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

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

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

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

A. An employee will be allowed to sign a waiver exempting them from testing when required for a contract and the employee acknowledges that they will not have an opportunity to work under the contract for which testing is required.

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

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

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

Sec. 27. 26 MRSA §684, sub-§4, ¶A as enacted by PL1989, c. 604, §§2, 3 and amended by PL 1089, c. 536 §§ 1, 2 is amended to read:

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

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

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

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

Sec. 28. 26 MRSA §684, sub-§5, ¶A as enacted by PL1989, c. 832, §11 is amended to read:

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

Sec. 29. 26 MRSA §685, sub-§2, as enacted by PL1989 c 536 §§ 1, 2 and amended by PL 1989 c. 604 §§ 2,3; PL1995, c. 324, §7, 8; PL1995, c. 344, §1; and PL 2003 c. 547 §3, is amended to read:

A. Subject to any limitation of the Maine Human Rights Act or any other state law or federal law, and to provisions in the paragraphs below, an employer may use a confirmed positive test result for a substance of abuse~~or~~, refusal to submit to a substance abuse test, a violation of an established drug-free workplace policy or an impairment confirmed by an occupational healthcare provider pursuant to section 684, subsection 2-B as ~~a~~-factors in any of the following decisions:

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

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

B. Before taking any action described in paragraph A in the case of an employee who receives an initial confirmed positive result, an employer shall provide the employee with an opportunity to participate for up to ~~6 months~~ 12 weeks in a ~~rehabilitation treatment~~ program designed to enable the employee to avoid future use of a substance of abuse and to participate in an employee assistance program, if the employer has such a program. An confirmed impairment under section 684, subsection 2-B caused by a substance of abuse is equivalent to an initial confirmed positive result for purposes of this paragraph with or without a substance abuse test result. A treatment program under this paragraph may be provided by an occupational healthcare provider. Participation by an employee in a treatment program must begin within 30 days of the employee receiving notice of the positive test result or confirmed impairment, unless otherwise agreed to by the employer. The employer may take any action described in paragraph A if the employee receives a subsequent confirmed positive result from a substance abuse test administered by the employer under this subchapter or the employee receives a subsequent confirmed impairment caused by a substance of abuse with or without a substance abuse test.

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

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

(a) Except to the extent that costs are covered by a group health insurance plan, the costs of the public or private ~~rehabilitation treatment~~ program not required or agreed upon by the employer must be paid by the employee. Costs that are not covered by a group health insurance plan and are required or agreed upon by the employer must be equally divided between the

employer and employee if the employer has more than ~~2050~~ full-time employees. This requirement does not apply to municipalities or other political subdivisions of the State or to any employer when the employee is tested because of the alcohol and controlled substance testing mandated by the federal Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143, and Title V. ~~If necessary, The employer shall~~ may assist in financing the cost share of the employee through a payroll deduction plan.

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

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

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

(3) Except as provided in divisions (a) and (b), upon successfully completing the ~~rehabilitation~~ treatment program, as determined by the ~~rehabilitation or~~ treatment provider after consultation with the employer, the employee is entitled to return to the employee's previous job with full pay and benefits unless conditions unrelated to the employee's previous confirmed positive result make the employee's return impossible. Reinstatement of the employee must not conflict with any provision of a collective bargaining agreement between the employer and a labor organization that is the collective bargaining representative of the unit of which the employee is or would be a part. If the ~~rehabilitation or~~ treatment provider determines that the employee has not successfully completed the ~~rehabilitation~~ treatment program within 6 months after starting the program, the employer may take any action described in paragraph A.

(a) If the employee who has completed ~~rehabilitation~~ treatment previously worked in an employment position subject to random or arbitrary testing under an employer's written policy, the employer may refuse to allow the employee to return to the previous job if the employer believes that the employee may pose an unreasonable safety hazard because of the nature of the position. The employer shall attempt to find suitable work for the employee immediately after refusing the employee's return to the previous position. No reduction may be made in the employee's previous benefits or rate of pay while awaiting reassignment to work or while working in a position other than the previous job. The employee shall be reinstated to the previous position or to another position with an equivalent rate of pay and benefits and with no loss of seniority within 6 months after returning to work in any capacity with the employer

unless the employee has received a subsequent confirmed positive result within that time from a test administered under this subchapter or unless conditions unrelated to the employee's previous confirmed positive test result make that reinstatement or reassignment impossible. Placement of the employee in suitable work and reinstatement may not conflict with any provision of a collective bargaining agreement between the employer and a labor organization that is the collective bargaining representative of the unit of which the employee is or would be a part.

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

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

Sec. 30. 26 MRSA §685, sub-§3, as enacted by PL1989, c. 536, §1 and 2 and amended by PL1989, c. 604, §2, 3 is amended to read:

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

A. Unless the employee or applicant consents, all information acquired by an employer in the testing process is confidential and may not be released to any person other than the employee or applicant who is tested, any necessary personnel of the employer and a provider of ~~rehabilitation treatment~~ or treatment services under subsection 2, paragraph C. This paragraph does not prevent:

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

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

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

Sec. 31. 26 MRSA §686, sub-§1, affected by c. 604 §§2 and 3, is amended to read:

§686. Review of ~~written policies~~ uniform substance abuse policy notifications

1. Review required. The Department of Labor shall review each ~~written policy or change to an approved policy~~ uniform policy notification submitted to the Department by an employer under section 683, subsection 2.

A. The Department shall determine if the employer's ~~written policy or change complies with this subchapter and shall immediately notify the employer who submitted the policy or change of that determination~~ uniform policy notification is complete. If the department finds that the ~~policy or change does not comply with this subchapter,~~ uniform policy notification is incomplete, the department shall also notify the employer of the specific ~~areas in which the policy or change is defective~~ defects. If the employer's notification is determined to be complete, the Department will approve the employer to conduct substance abuse testing in accordance with this subchapter and will notify the employer.

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

C. The Department shall allow for the use of any federally recognized substance abuse test.

Sec. 32. 26 MRSA §685, sub-§2, ¶D as enacted by PL 1997 c.49, §1 is amended to read:

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

Sec. 33. 26 MRSA §689, subsection 5 is enacted to read:

5. Civil violation. In addition to the other remedies provided in this section, an employer in noncompliance with this subchapter commits a civil violation for which the following fines may be adjudged.

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

B. For the second violation, not more than \$750;

C. For subsequent violations, not more than \$1,000 per violation.

SUMMARY

This amendment replaces the bill and makes changes to the laws governing employment practices concerning substance abuse testing, including the following:

1. It repeals a section of law that addresses nuclear power plants since there are no operating nuclear power plants in this State.

2. It authorizes an employer that has employees subject to a federally mandated substance abuse testing program to extend federal drug testing activities to its entire workforce in order to maintain a single testing program and specifies that the employer must maintain the privacy protections that Maine statute affords all other Maine employees.

3. It streamlines the current drug testing policy approval by requiring the Department of Labor to develop a uniform employer drug testing policy applicable to all employers. Employers must notify, and be approved by, the Department of Labor prior to conducting substance abuse testing.

4. It replaces the “probable cause” substance abuse testing model with an “impairment” detection and confirmation process. Under this process an employer or employee approved for impairment detection by the Department of Labor may take immediate action to temporarily remedy an employee impairment that could reasonably threaten the safety of the employee or other employees. Among other things, this detection may be based on a single work-related accident, unlike the “probable cause” standard under current law. Subject to limitations under the Maine Human Rights Act and any other state or federal law, an employer may discharge or discipline an employee after a confirmed impairment by an occupational healthcare provider. If the occupational healthcare provider finds that the employee was not impaired or that such impairment did not pose a safety risk, the employee is entitled to full reinstatement of the employee’s position and reimbursement for any lost wages or benefits.

5. It adds a violation of an established drug-free workplace policy as grounds for employment action;

6. It adds a first impairment confirmation to the requirement, applicable to an initial confirmed positive substance abuse test, that the employer must provide the employee with an opportunity to participate in a treatment program before discharging or disciplining the employee. The timeframe for completing the treatment program is reduced from 6 months to 12 weeks, and an employer with more than 20 full-time employees is no longer required to pay half of the costs of the treatment program unless the treatment program is required by the employer or the employer agrees to cover such costs beyond those covered by a group health insurance plan. An employer with more than 50 full-time employees must pay half of treatment costs not covered by a group health insurance plan when the treatment program is required of the employee.

7. It modifies the current requirement that, prior to establishing a substance abuse testing program, an employer with over 20 full-time employees have a functioning employee assistance program, instead requiring the program from employers with over 50 full-time employees.

8. It expands the number of establishments that can undertake companywide random substance abuse testing from those with 50 or more employees to those with 10 or more employees.

9. It adds a new civil violation for any employer noncompliance with the substance abuse testing laws for which a fine of not more than \$500 for the first violation, \$750 for the second violation and \$1,000 for subsequent violations may be adjudged.